TOWARDS LEGAL CERTAINTY IN UGANDA'S COMMERCIAL ADJUDICATION: MANAGING THE TENSION BETWEEN FORMALISM AND FLEXIBILITY

SUBMITTED BY FAISAL MUKASA TO THE UNIVERSITY OF EXETER AS A THESIS FOR THE DEGREE OF

DOCTOR OF PHILOSOPHY IN LAW

AUGUST 2019

VOLUME 1 OF 2

I certify that all material in this thesis which is not my own work has been identified and that any material that has previously been submitted and approved for the award of a degree by this or any other University has been acknowledged.

……

Faisal Mukasa

Acknowledgements

Throughout my life's journey, a number of people have played significant roles to both my academic and general success, for which am very grateful. For this study, I acknowledge and thank my lead supervisor, Professor Andrea Lista for the dedication, reviews and guidance. His belief in my ability and continuous motivation made me steer forward, at low moments of the study. I also thank my second supervisor Dr Tim Dodsworth for the encouragement and guidance. I also acknowledge and thank the management team at the University of Exeter School of Law and Postgraduate Studies, for facilitating my study. I especially thank Dr Catherine Dupre and Amy Turner, for helping to resolve huddles in the way.

Outside Exeter, I acknowledge and thank my senior colleagues at the Makerere University School of Law: Professor Joe Oloka Onyango, Professor Fredrick Jjuuko, Professor Sylivia Tamale, Professor David Bakibinga and Dr Damalie Nagitta. These encouraged me to pursue the study, and their tutoring helped in shaping my initial thoughts. In a very special way, I also thank Professor Joe Oloka Onyango, for sparing time to read through the initial draft chapters; and making very useful comments. I also thank my junior partner at Fides Legal Advocates-Diana Nassimbwa, for all the support and encouragement.

Finally, I acknowledge and express my heartfelt gratitude to my family. Firstly, I thank my late father-Hajji Asadu Lutale, my mother-Hajjati Sarah Lutale as well as my uncle-Sheikh Abdu Obeid Kamulegeya; for the love, understanding and support in all aspects of my life; and especially encouraging me to pursue the PhD, as well as persevere when the going got tough. Secondly, I thank my dear wife, Dr Hanifa Nabuuma, as well as my dear children: Zura Nakiwoga Mukasa; Obeid Thobait Lutale Mukasa; Nyla Nambi Mukasa; Shasmeen Nakaayi Mukasa; Sarah Naluzze Mukasa; and Faiz Sempa Mukasa; for enduring the lack of full attention from me and supporting me with love and encouragement throughout my study. Thirdly, I thank my brother-Dr Ashad Sentongo and my sister in law-Sophia Nampijja for all the support and encouragement.

Abstract

This study examines the possibility of managing the tension between formalism and flexibility in Uganda's commercial adjudication. Using content analysis of the country's commercial 'hard cases', the study reveals the tension as a reality in Uganda; its foundations, and how to manage it. The central argument is that the tension should and can be managed by creating coexistence between formalism and flexibility; such coexistence being not only theoretically justifiable, but practically viable.

The tension is revealed as a reality in Uganda, defined by judging based on two seemingly polarised views. One is the formalistic view of law as logic, a value free science, predictable, certain, clear, neutral, conceptually ordered, and determinate; with court's role limited to literal interpretation and mechanical application of law and contract. The other is the flexibility antithesis to formalism, following which, courts have authority to interfere with contracts, and make or change law to meet ends.

This study contributes to challenging the dominant view, that the two are irreconcilable. I make a case for coexistence, arguing that: there are more areas of theoretical convergence than admitted; justifications advanced for either approach can be served by the other; no single theory of adjudication or contract fully accounts for all judging; and in Uganda, coexistence is the ideal judging paradigm.

I review conceptual and normative prescriptive adjudicatory theories and find that none offers a convincing solution to the tension, the nearest being Eisenberg's conventionism and interests jurisprudence. However, the latter offers a more methodical mechanism to coexistence—one whose steps demonstrate its affinity with content analysis methodology. Using content analysis methodology, following which, the values underlying legal phenomena can be understood from an analysis of words, phrases and themes used in judicial opinions, as well as inferences, guided by hypotheses or presuppositions from relevant legal theory, I operationalise some of interests jurisprudence's views. These are that, underlying the tension is a competition of interests (values) to be discovered from judicial

opinions, guided by the context's jural postulates. The discovered values should then be weighed, and a balance of the dominant ones used to arrive at ultimate judging guidelines.

Accordingly, Uganda's competing values are identified, guided by presumptive values (value postulates) proposed by other scholars in contract theory—but challenging monist theories that advance single values as the ultimate goal of adjudication and contract law, as well as those restricting the search to doctrinal analysis. Instead, in line with coexistence theory; multiple values, internal and external to the judiciary, legal as well as extra-legal, are found to underlie the tension in Uganda's commercial adjudication. These values are elaborated, against the backdrop existing literature, and the relevant legal and other institutional contexts have surrounded judging.

The values found dominant are then used to draw the country's commercial adjudicatory scheme of values. As a way towards management of the tension, it is proposed that coexistence between formalism and flexibility can be achieved through constructing judging guidelines with clear coexistence oriented goals, and containing rules, principles and standards, informed by balancing such key values.

TABLE OF CONTENTS

List of Tables

List of Additional Materials Submitted

1. Annexure 1: Photocopies of Judicial Opinions Analysed in Appendix 1.

2. Annexure 2: Photocopies of Judicial Opinions Analysed in Appendix 2.

3. Annexure 3: Photocopies of Judicial Opinions Analysed in Appendix 3.

4. Annexure 4: Photocopies of Judicial Opinions Analysed in Appendix 4.

5. Annexure 5: Photocopies of Judicial Opinions Analysed in Appendix 5.

Table of Figures

Chapter 1: Introduction

This study examines the possibility of attaining legal certainty through a coexistence of formalism and flexibility, which are currently at tension in Uganda's commercial adjudication. It proposes that coexistence can be achieved by balancing competing values that underlie formalism and flexibility in contract adjudication, the law of contract being at the heart of commercial law.[1]Formalism is a judging approach that treats the law as a clear, complete, and certain; formal-logic and conceptually ordered; discoverable fact from the contract rulebook; a science that is value-free i.e. neutral and autonomous, with no room for creativity, extra-legal considerations or conceptual flexibilities; predictable and determinate, emitting a single right answer in all similar cases. The role of judges is perceived as the law's miners, mechanics and policing contract terms. It is motivated by many values that are uncovered and elaborated later, such as adherence to values like freedom and sanctity of contract.

On the other hand, in a growing number of cases, judges in jurisdictions like Uganda – a former British colony with a fundamentally common-law legal system – flexibly go beyond contract doctrine or terms to find what they deem fair in particular cases or to serve other values. They practice flexibility judging, the perception that law is not: a science; embedded absolute truths; determinate, conceptually ordered, certain (formalist certainty being an illusion), formal, predictable, or neutral. Instead, the law is action oriented with a social bend-

1 R Goode, *Commercial Law in the New Millennium,* the Hamlyn Lectures (Sweet & Maxwell 1998) 9, 31.

experimental; general propositions to be tested in real cases; a jumble of in influences to be rationalised; and a means to an end; that end being good society, or social welfare, contextually defined by public policy.

Under flexibility, the role of judges is to guarantee and keep the gates of justice; find solutions in and settle disputes; and make real living law. Therefore, they always have discretion, and life being too complex, are not bound by rules—beginning with answers to adjudication and relating back to justify them. The sources of normativity include both the legal order, and non-law normative orders like experience and practice.

The constant conflict between these differing approaches is the tension between formalism and flexibility respectively. From this point on, I shall refer to it simply as 'the tension'. The tension not only exists within all common-law legal systems, but is also a tension that is seen by some scholars as being core to,[2] inherent in,[3] constant to,[4] fundamental to[5] and lying at the heart of the law; [6] and in that sense, a tension that some scholars say cannot be managed, the interests it represents irreconcilable, [7] therefore will always be there.

---

2 JW Evans and AL Gabel, 'Legal Competitive Advantage and Legal Entrepreneurship: A Preliminary International Framework', (2014) 39 (2) North Carolina Journal of International Law 333, 349-50.
3 ibid 349.
4 A Phang, 'A Passion for Justice: The Natural Law Foundations of Lord Denning's Thoughts and Work' (2006) (2) Global Journal of Classical Theology.
5 WC Whitford, 'Faculty Perspectives: The Rule of Law', (2000) Special Issue, Wisconsin Law Review 723, 726.
6 Goode (n 1)16.
7 M Zuckert, 'Hobbes, Locke, and The Problem of The Rule of Law', in Shapira I (ed) *The Rule of Law* (New York University Press 1994) 1; Evans and Gabel (n 2); HMS Botoshi, 'Striking the Balance Between the Considerations of Certainty and Fairness in the Law Governing Letters of Credit' (PhD Thesis, University of Sheffield 2000) 100-01; M Kenny and J Devenney 'A

Using an investigation into judging during Uganda's commercial hard cases, the type in which the tension easily manifests, this study joins studies that have rejected such irreconcilable views. Instead, it supports propositions for a possibility and practical viability of coexistence between formalism and flexibility, as well as the tension's management. The main theses of the study are that formalism and flexibility can, and should coexist as a means of managing the tension and achieving legal certainty. I pursue the two theses by advancing two key propositions.

Firstly, is that theoretically, coexistence between formalism and flexibility is a possibility. The descriptive theory of formalism, flexibility and the tension is reviewed, demonstrating that there is more room for convergence than is traditionally acknowledged, as well as highlighting direct support for coexistence. The case for coexistence is further made by revisiting values proposed by other scholars as underlying both formalism and flexibility. It is demonstrated that no monist (single-value) theory of values underlying formalism, flexibility or the tension between them, doctrinal or otherwise, accounts for the wide variety of judging motivators.

Instead, the study contributes to advancing a coexistence oriented multivalued-based theory, that views the foundation to the tension as judges seeking to serve a cocktail of several formalism and flexibility engendering values that need to be balanced to achieve coexistence, thus legal certainty. Further, the study

---

Comparative Analysis of Bank Charges in Europe: OFT v. Abbey National Plc through the looking glass', in J Devenney and M Kenny (eds), *Consumer Credit, Debt, and Investment in Europe* (Cambridge University Press, 2012) 212-213; 222 (These scholars pause a question as to whether the two are reconcillable, or should just be distinguished, the latter implying the possibility of the two being irreconcillable).

demonstrates that hardly any of the values propounded by monist theories as prime motivators of either formalism or flexibility, cannot be served by the other judging approach. Furthermore, key proponents of both single-value and multivalued approaches demonstrate room for coexistence between formalism and flexibility as a possible way towards managing the tension.

In expanding the multivalued view, the study approaches the search for, elaboration and understanding of foundations to the tension not from the doctrinal, contract behavioural, or legal vis-à-vis extra-legal lens, but institutional ones; lens of what judges value as part of internal culture, their practice, tradition and personal choices and intuitions, on one hand; and the external legal and extra-legal judging environment, on the other. Therefore, it is not searching for what principles or doctrine judges relied on, or whether they were right in doing so; nor is it limited to finding the validity of theories proposed as underlying contract doctrine-theories like consent, promise, efficiency, fairness, predictability and certainty.

Secondly, the study makes a case for the practical viability of coexistence between formalism and flexibility, as a way towards managing the tension. In the first place, using the findings on judging trends and patterns revealed by the content analysis of actual judicial opinions, a concurrent practice of formalism and flexibility in the same periods and courts is illustrated as characterising the judging paradigm in Uganda.

Therefore, knowledge is expanded, by the tension being demonstrated as a practical problem as well, in Uganda's unique context, which requires studies like this one, on finding ways for coexistence. For instance, the study reveals that in Uganda's case, it is not true that the tension has always been there, but rather came as part of the transplant of the English legal system, was hardly an issue in colonial appellate courts; and manifests in different ways within different courts, as well as legal, and socio-political epochs/contexts. Further, the country has not swings between formalism and flexibility. Rather, the tension has been defined by the continuous concurrent practice of the two, in the same courts and periods. Notably, is also a growing trend of a third, mixed-approach, where in the same

opinion, a judge employs both approaches-demonstrating a net-to-net competition of values serving either philosophy.

Further, the existing prescriptive adjudicatory theory on management of the tension is reviewed, against the presumption that a viable theory of adjudication should be normative in nature, helping to provide judging guidelines, especially in hard cases.[8]This implies having clarity on the sources, nature, and means of constructing guidelines; on when and how to choose between the three ingredients: formalism; flexibility; and a mixture of the two. Against this yardstick, many adjudicatory theories are found inadequate, mostly because they are merely conceptual, or continue the prevailing trust in judges as the determinants of judging guidelines. At the same time, most of the normative theories have either not covered all three ingredients or done so in ways not convincing or appropriate for jurisdictions like Uganda; or indeed, not based their proposals on findings from real judicial decisions.

Accordingly, the jurisprudence of interests is chosen as the most logical guide for finding ways to manage the tension. However, its weaknesses are acknowledged and ways to cure them devised as a modification, and further contribution to knowledge. For instance, the theory's restrictive notion of interests is expanded to values; and the failure to articulate how to the interpret and elaborate values cured with aid of the institutional theory of law. Its lack of methodology on discovery, weighing values is also cured using content analysis methodology, demonstrating the affinity between their techniques. The failure to show how balancing of values can be done is also cured by the proposed balancing of values during construction of judging guidelines.

---

[8] R Dworkin, *Taking Rights Seriously* (Duckworth & Co. Ltd 1977) x.

Specifically, the study extends, supports and operationalises the view from jurisprudence of interests that the tension is caused by the competition of underlying values during adjudication. Guided by the relevant hypotheses (jural postulates), these values need to be discovered from actual court decisions, and weighed against each other; then, judging guidelines need to be derived from balancing the dominant values.[9]

In pursuit of this, the presumptive values proposed by other scholars as underlying the tension, which from now I will simply refer to as 'the presumptive values' or 'value postulates', are identified. The indicative or lower values making up or otherwise known to manifest these presumptive values will act as guides during the content analysis, in line with the research design, thereby helping to reveal the real competing values in Uganda's version of the tension.

Accordingly, the study expands the viability of content analysis of judicial opinions as a legal research methodology for mapping the judging landscape, as well as what underlies judicial decisions, besides doctrine. I however modify the methodology's notion of exclusive relevance of analytical units and variables, to suit the multiple implications from words and phrases used in a legal context.

A content analysis of Uganda's commercial hard cases is done, covering the period since colonial times up till today, uncovering the competing values that have motivated judges in both formalism and flexibility. The values directly observed, as

---

[9] HD Laube, 'Jurisprudence of Interests', (1949) 34 (1) Cornell Quarterly Law Review 291, 296; similar to, although goes beyond the marxist view, that the formalism-instrumentalism dichotomy should be transcended by realisation that, embedded in the legal imperatives, are interests of the dominant class, and the judicial approaches reflect the struggle between the proletariat and the bourgeoisie (see P Beirne and Beirneand SR Pashukanis, *Selected Writings on Marxism and Law* (Academic Press Inc. (London) Ltd 1980) 4.

well as higher ones from my wider inferences, guided by the presumptive values, the literature review and Uganda's general context, are presented, elaborated and used to arrive at the scheme of values for balancing.

Internally, on the formalism side the key values found include rule of law values, values of the judicial role, and responsiveness. Externally, they include legal values like conceptual formalism, the legal power value, and market-individualism; and extra-legal values like discreteness in contract. On the flexibility side, the key values include internal values from the flexibility perception of law and the judicial role, as well as responsiveness. Externally, they include legal values like conceptual flexibility, consumer welfarism, and commercialism. Also revealed are extra-legal values judicial absolutism and social support.

In line with interests' jurisprudence, the scheme of values represent the values to be balanced during the construction of judging guidelines, intended to balance the two sides as a way towards coexistence. Therefore, knowledge is augmented by identification of Uganda's scheme of values underpinning the tension. Further, guided by the need to balance those values, the study proposes the standards and goals for; as well as, the nature, source, way to formulate, and constituent principles of Uganda's commercial judging guidelines.

Sample principles are proposed, such as: responsiveness; a hierarchical ordering, not defined by existing singular monist or pluralist values, but sets of dominant values; and a contextual definition of indeterminate standards like reasonableness, fairness and substantive justice. Revisiting selected judicial opinions; I argue that if judging guidelines made up of such principles had been in force, the uncertainty produced by the tension could have been avoided.

Therefore, the study contributes to in filling the admitted gap of lack of clarity as to whether the two judging phenomena can coexist; the interests/values they serve reconciled or otherwise the tension managed; and if so, how that can be done. To elaborate the above theses, I begin with defining the key concepts that have informed the study.

1.1 Understanding the Key Concepts

To appreciate the tension, one needs firstly to understand the meanings of the five central concepts, namely 'legal certainty,' 'formalism', 'flexibility', 'hard cases', and 'values and interests'. This section provides the ways in which each of these is to be understood and used in this study.

1.1.1 Legal Certainty

There is no universally accepted meaning of legal certainty. For example, Zagler and Zanzottera[10] and Anthony D'Amato,[11] have all suggested differing understandings of this phenomenon, which are not going to be elaborated. For purposes of this study, Max Weber's definition, as expounded by Arthur L. Stinchcombe,[12] is instead found more accurate and adopted. The two scholars defined legal certainty as follows.

> A sufficient lawful control of the use of government (and other) coercion so that property and the value of money were secure, and…when necessary to enforce civil law…interpretation, and enforcement of contracts… that could be understood in advance of court decisions…legal certainty involves…predictable laws and it requires an apparatus to interpret private economic matters…so that the discourse that controlled state coercion and

[10] M Zagler and C Zanzottera, 'Corporate Income Taxation Uncertainty and Foreign Direct Investment' Wien University Taxation Research Paper Series, No. 2012-07, 3. The authors defined legal certainty as being made up of six ingredients, namely: (1) dynamic and efficient substantive laws clearly stating the rights, obligations and liabilities of all business parties. (2) Business transactions being rule-based. (3) Procedural law providing for prompt and inexpensive means to courts. ((4) Institutional framework that supports business development and sustainability. (5) Strict adherence to the principles of 'rule of law' and 'supremacy of the law'. (6) Efficient and independent judiciary.

[11] A D'Amato, 'Legal Uncertainty' (1983) 71 California Law Review 1, 1

[12] A Stinchcombe, 'Certainty of Law: Reason, Situation-Types, Analogy, and Equilibrium' (1999) 7(3) The Journal of Political Philosophy 209.

its use in private life could be understood and manipulated by firms and households.[13]

The essence of the Weberian definition is that a party to a contract should be able to predict how both the law and the legal system will treat his or her actions. It implies certainty not only in the sense of law being clear, determinate and predictable, but also that certainty can be satisfied by the existence of clear and coherent judging guidelines.

The notion of legal certainty has been the subject of two divergent perceptions, coextensive with the underlying tension between formalism and flexibility. On the one hand are proponents of absolute legal certainty as the criterion for a proper legal order, such as Wolff[14] and Truscott.[15] On the other hand are scholars such as the radical realist Jerome Frank,[16] who proposed that the law should be left uncertain, with flexibility as the sole judicial approach. To them, 'certainty is an illusion, and repose is not the destiny of man and judges must regularly weigh competing social interests'.[17]

Less often propounded than these two seemingly polar positions is the coexistence view that the ideal should be legal certainty whose zone is narrowed,[18]contextual

---

[13] ibid.
[14] Wolff LC, 'Law and Flexibility –Rule of Law Limits of Rhetorical Silver Bullet' (2011) 11 The Journal of Jurisprudence 549.
[15] K Turcotte, 'Why Legal Flexibility is not a Threat to Either the Common Law System of England and Australia or The Civil Law System of France in The Twenty-first Century', (2005) 1 (2) Hanse Law Review, I.S. 190-197
[16] Jerome Frank, *Law and the Modern Mind* (Stevens, 1949).
[17] ibid 65
[18]Tamanaha BZ, *Law as a Means to an End: Threat to the Rule of Law* (Cambridge University Press 2006) 64-65

and a question of degree.[19] Drake, [20] as well as Holmes and Tamanaha,[21] propounded the view that the efforts of the law should be to narrow the zone of uncertainty as far as possible, through the use of objective tests which would make the law more predictable. Llewellyn also reasoned that we need a manageable degree of certainty that is enough to get on with.[22] Drake offers more direct support to coexistence, arguing that the value of certainty can be secured, through the judges who try difficult cases realising that law is a means to an end; serving the purposes of a good society, satisfying our growing social needs, and allowing the *ought* of the law to be part of the law as well as the *is*. [23]

This study supports that coexistence conception of legal certainty, under the presumption that this moderate approach is more realistic and viable in contexts like Uganda's. Accordingly, this study is predicated on the belief that a realistic and contextual conception of legal certainty is indeed possible and should be the goal of any viable tension-management regime.

1.1.2 Formalism

Formalism refers to judging following the plain and ordinary meaning of the law or contract terms ; or the clearly ascertainable intentions of the drafters of the laws or the parties to the contracts; or as has over generations been defined by doctrines

---

[19] L Kalman, *Legal Realism at Yale 1927-1960* (University of North Carolina Press 1986) 8.

[20] Joseph H Drake 'Editorial Preface to This Volume', in Jhering V R, (ed), *Law as a Means to an End* (Boston Book Co. 1913), xxii-xxiv

[21] Tamanaha (n 18) 70; [22] In achives reported by Kalman (n 19) 8

[22] In achives reported by Kalman (n 19) 8

[23] Drake (n 20).

and precedents.[24] More aptly however, Atiyah defines formalism as an attitude of the mind of a judge who believes that: all law is based on legal doctrine and principles, which can be deduced from precedents; that there is only one correct way of deciding a case; that it is not the function of the judge to invoke policy considerations or the relative justice of the parties' claims; that the reasons behind principles and rules are irrelevant; that the role of the judge is purely passive and interpretative; and that law is a science of principles.[25]

Atiyah's definition is adopted for the purposes of this study, because it combines all the key theories that attempt to justify the nature of law as being logical, and the role of judges as simple discovery of the law and its mechanical application. Further, formalism is treated as including literalism, being the refusal to read anything into a contract, and an insistence that implications can only be made when absolutely necessary to make the contract workable.[26] In this sense, the terms of a contract take the form of rules because their enforcement is a potential source of norms.[27]

Formalism is of two types. The first one is 'conceptual formalism', which is a systematic view of the law's nature and content – namely that rules, concepts, and principles have predetermined content, implications, and logical interactions, forming a complex whole that must be discovered and worked out by the judges.[28]

---

[24] F Schauer, 'Formalism: Legal, Constitutional, Judicial', in Whittington K, R. Daniel Keleman and Gregory A. Caldeira, *The Oxford Hand Book of Law and Politics* (Oxford University Press 2008) 428.
[25] PS Atiyah, *The Rise and Fall of Freedom of Contract* (Clarendon Press 2008) 388.
[26] HJ Spaeth, 'Reflections about Judicial Politics', in Whittington K and others (eds), *The Oxford Hand Book of Law and Politics* (Oxford University Press 2008) 758-759; Atiyah (n 25) 389.
[27] J Veld and others, *Autopoiesis and Configuration Theory: New Approaches to Societal Steering* (The Hague Spinger Science and Business Media, B.V, (1999) 7(3)) 135.
[28] Tamanaha (n 18) 48, 66 & 70.

The second is ‘rule formalism’, which refers to judging by logical reasoning and mechanically applying the conceptual law, in order to arrive at the right answer in every case.[29] The judge should not consider the purpose, goal or possible ramifications of the law. It is this judging phenomenon, at tension with flexibility that this study investigates.

1.1.3 Flexibility

Flexibility is not an established legal concept and there is no commonly acknowledged definition, or manner in which it is used in legal theory.[30] However in practice, flexibility has been used to mean four things: an intrinsic feature of every legal rule; an attribute of the application of law; a distinguishing feature of the common law that enables the system to deliver justice in the face of changing circumstances; and the form some of the legal rules take, rules that create discretion, without guiding standards such as those that employ vague standards like reasonableness.[31]

Evans and Gabel have further clarified that legal flexibilities can be categorised as substantive flexibilities, enforcement flexibilities and systematic flexibilities.[32] Substantive flexibilities mean inherent and inevitable ambiguities and gaps in the substance of the law created by reason of the nature of the language of the law.[33] They are the reason every legal system has judges to interpret law and rules of procedure.[34]

---

[29] Tamanaha (n18)
[30] Wolff (n 14) 549.
[31] ibid 1.
[32] Evans and AL Gabel (n 2) 26-33
[33] ibid 27.
[34] ibid 29.

Enforcement flexibilities occur in situations when a judge or other authority could lawfully take a given course of action but instead legitimately takes an alternative one or none at all. It represents lack of uniformity between the law in theory and the law in practice.[35] Systematic flexibilities, on the other hand, are flexibilities that result from the rule of law's internal defining attributes and the dynamic inter-relationship between the legal system and extra-legal forces (both constituting part of the rule of law), excluding substantive and enforcement flexibilities. They include uncertainties caused by both the judging environment and the legal system.[36]

In this study, 'flexibility' has two basic meanings and perspectives. Firstly, flexibility in law refers to *conceptual flexibility* as an intrinsic feature of the form of rules that creates discretion with or without standards to guide its use. Secondly, flexibility refers to flexibility judging as an attribute of the application of law by the judges during adjudication. Judges do not restrict their role to enforcing contractual terms or logically deducing and mechanically applying black letter commercial law as stated in precedents and legislation. Rather, they stretch or modify the rules in the law, or their applicability, and intervene in contracts to find justice and fairness in particular cases or otherwise meet certain stated or unstated goals.

In some cases, the court becomes creative by sidetracking application of the rule's interpretation based on the language of its formulation. It reaches answers by invoking extraneous factors, such as the court's subjective views, or considerations of the rule's underlying purpose and consequences or moral, social, economic and policy frameworks and values. In other cases, the court makes law by sidestepping

---

[35] ibid 30.
[36] ibid 32.

the rule completely and making decisions that create new rules and doctrine without purporting to overrule or replace the existing rule.

1.1.4 Hard Cases

Unlike scholars who have viewed 'hard cases' as a term too vague to be capable of a precise meaning,[37] Dworkin aptly defined it as cases in which the result is not clearly dictated by statute or precedent.[38] They arise when any judge's threshold test does not discriminate between two or more interpretations of some statute or like cases, and he has to choose between them by asking which of them fits the community's structure of institutions, decisions and public standards as a whole.[39] Twining and Miers disagree with Dworkin's assertion that even in the hardest of cases there is one right answer, but widen his definition to include cases in which a judge has sufficient reservations about applying what he sees as the clear interpretation of a statute.[40]

For the purposes of this study, both understandings are adopted to determine the type of judicial decisions to be analysed. Therefore, hard cases include those in which no rule of law is applicable, or where multiple rules with varying answers are applicable; or where the rule applicable provides a clear answer, but the judge chose to stretch or sidestep it, and rely on other considerations to decide the case.

In a hard case, the conventional reference to the law, to answer issues before court, produces more than one answer as no rule is clearly applicable to resolve the dispute. In some cases, owing to the facts, the judge deems unfair or otherwise

---

[37] D. Galeza 'Hard Cases' (2013) 2 Manchester Student Law Review, 241, 242.
[38] R. Dworkin, 'Hard Cases' (1975) 88(6) Havard Law Review, 1057.
[39] R. Dworkin, *Law's Empire* (Fontana 1986) 255-256.
[40] W. Twinning & D. Miers *How to do Things with Rules,* (3rd Edn. Weidenfeld & Nicolson 1991; and 5th Cambridge University Press 2010) 98 & 367.

improper the plausible answer dictated by an application of the literal meaning of a rule or concept/principle of law. In either situation, the judge has a choice to make, between formalistically applying the law 'as is', and flexibly opting for sidestepping or sidetracking the rule or principle of law. In the latter case the decision will be based on extraneous matters like experience, practice, or the judge's personal intuitions and prejudices.

Relatedly, there are cases where a court has to enforce a contract in honour of the notions of freedom and sanctity of contract but deems as unjust the outcome based on literalism. The judge again has to choose between formalistic adherence to literalism and flexible interventionism through a re-writing of or writing into the contract. It may be necessary to invoke flexible and open-ended values like commercial sense or unconscionability, to attain fairness and justice in the particular case.

1.1.5 Values and Interests

Heck declared that interests jurisprudence is not a theory of substantive values, and while he admitted that judges could be aided by making them realise and evaluate competing interests, he sought to avoid a search for values.[41] Likewise, Isay was sceptical on the viability of a theory of values, claiming that it was beyond human achievement.[42] However, by way of critique to Isay's views and helping Heck complete his puzzle, Laube showed the umbilical link between values (or ideals) and interests, and showed how interest values can be ascertained.[43] He

---

[41] M.M. Schoch (translator and editor), *The Jurisprudence of Interests: Selected Writings of Max Rumelin, Philipp Heck, Paul Oertmann, Heinrich Stoll, Julius Binder & Hermann Isay (Havard University Press, 1948)* 315-317.
[42] ibid 315-317
[43] Laube (n 9) 296

declared that value is a function of a coherent organisation of the experiences of men, the content of our ideals and object of all our interests.

Therefore, the value of ideals will differ from context to context and determine the interests that will compete for recognition in adjudication.[44] By way of understanding the context, reference should be made to the concrete reality, informed by history as the supplier of facts and phases of the evolution of law, and its cultural antecedents and their consequences, from which law emerges.[45] This way, jurists would ultimately formulate decision-making rules to guide each type of dispute resolution.

However, Laube fails to realise that the linkage he clarified implies that ideals are a subset of interests, and values are both a subset of ideals and the object of interests, meaning that the search for values underlying adjudication encompasses competing interests in adjudication. Although Laube rightly argues that not all interests are valuable enough to be recognised, he fails to add that all values taken into account by a judge in making a decision will be interests that he or she will have found compelling. Further, no interest can move a judge to be flexible or formalistic unless he considers it valuable to do so.

Therefore, for the purposes of this study, the term ‘values’ is used in the sense proposed by Greenstein, to include interests, policies, principles, ideals and all that in Uganda as a collectivity, the judges have cared about, whether economic, moral,

---

[44] ibid 291, 296
[45] ibid 297.

political, aesthetic, religious or otherwise.[46] These are all taken into account when coding for possible values underlying formalism and flexibility in tension.

1.2 The Tension as the Problem

Throughout Uganda's judging history, commercial adjudication has been defined by a concurrent practice of both formalism and flexibility, without clear, certain and coherent guidelines as to what should determine such judicial choices, or the use of judicial authority each choice entails. As a result, the legal menu from which consumers of the country's commercial adjudication are served – such as litigants, prospective foreign and local investors, legal practitioners, legal academics, and even judges themselves – is very uncertain.

Cases where judges blatantly decide flexibly in ways that deviate from agreed contractual terms, express rules or established principles, and which have the effect of changing applicable law, are becoming the norm.[47] Such decisions are made against the backdrop of the 1995 constitution, which vested judges with authority to administer justice not only in accordance with a formalistic deduction of law, but also in adherence to substantive justice;[48] the norms, values and aspirations of the people.[49] Such authority has been perceived by some judges as

---

[46]R. Greenstein, 'Toward a Jurisprudence of Social Values' (2015) 8(1), Washington University Jurisprudence Review, 1, 4.

[47] In *John Nsamba v SDV Transami (U) Limited* (HCT-OO-CC-MA-0639-2013), contrary to the long celebrated rule on corporate personality, the judge (head of the commercial court at the time) ruled that directors of a company and their assets can be attached in execution of a decree awarding damages for breach of contract against a company, without lifting the veil of incorporation. The judge reached the decision by stretching the meaning of the words "legal representative" that are used in Civil Procedure Rules to provide for execution of decrees against legal representatives of judgement debtors. A meaning not as understood by lawyers to relate to succession, but as would be held by an ordinary businessman dealing with a company was preferred by the judge.

[48] Article 126 (2) (e)

[49] Article 126 (1)

power to make law itself.[50] This is exacerbated by the conceptual flexibility characterising Uganda's other primary sources of legal norms, such as the Judicature Act, and legislation regulating contracts, such as the Sale of Goods Act 1932, recently replaced by the Sale of Goods and Supply of Services Act, 2017.

On the other hand, formalism still plays a pivotal role in commercial justice; for instance, many disputes are disposed of on the basis of procedural or other formalities, and on technical grounds. Likewise, judges still treasure and practise the logical deduction of law as well as its mechanical application.[51] The resultant tension and legal uncertainty are realities that define Uganda's commercial justice system.

In judging flexibly, judges contribute to legal uncertainty; they not only leave the legal system without a certain legal rule applicable in similar cases, but also make law, as their decision will now constitute a new rule that never existed before.[52] The law loses the predictability that would be generated by formalism. As a result, investors and other players in the business community, as well as their lawyers, lack clear guidance on how to arrange their affairs or phrase terms of the contracts in order to avoid adverse court decisions. Law teachers, legal advisors and even

---

[50] Justice Patricia Basaza, a renowned judge of the High Court, recently openly remarked that 'The Constitution is clear on the powers of today's judge. We not only interpret laws, but under Article 126, have very wide powers that include making the law itself.' This was at a law school get together held at the researcher's home on the 9th of June 2017: Comments made in the presence of the Researcher during a debate of the legal uncertainty coming from the state and quality of Judging in Ugandan Courts.

[51] For instance, the Supreme Court adhered to both formalistic practices in Lubega v. Barclays Bank (U) Limited [1990-94] 1 EA 294, per Justice Manyindo DCJ.

[52] S Breyer, *Active Liberty: Interpreting Our Democratic Constitution* (Knopf 2005) 119, 129; David Campbell and James Devenney 'Damages at the Borders of Legal Reasoning', [2006] The Cambridge Law Journal, 208-209.

judges themselves cannot define with certainty the content and practical premises of Uganda's commercial doctrine.

The significance of legal certainty to underdeveloped African countries like Uganda cannot be over-emphasised. Firstly, it is at the heart of the rule of law,[53] and therefore a prerequisite for any properly functioning legal system, and the objective of drafters of statutes.[54] Secondly, it is an important requirement commercial practitioners will look at, in deciding to trade or invest;[55] and as such, it determines a country's competitiveness as an investment climate.[56] In this regard, legal certainty is a determinant of foreign direct investment, which all countries in Sub-Saharan Africa require, to foster economic growth.[57] Currently, Uganda's competitiveness as an investment destination, on account of lack of legal certainty, ranks in the bottom zone of the ladder.[58] Thirdly, as indicated by Goode,[59]

---

[53] Hayek F, *The Road to Serfdom,* (University of Chicago Press, 1994) 80.
[54] Denning LJ, *The Discipline of Law*, (Butterworth 1979).
[55] Atiyah (n 25).
[56] Schwab K and Sala-i-Martin X, 'Global Competitiveness Report 2014-2015' The World Economic Forum www. Weforum.org/doc/WEF_GlobalCompetitivenessReport_2014-2015, accessed on 30th September 2015.
[57] Anyanwu J and Erhijakpor A, *Trends and Determinants of Foreign Direct Investment in Africa*, (Research Gate 2004).
[58] The World Bank Group, 'Doing Business Index, June 2015' www.doingbusiness.org/ranking accessed on 30th September 2015: The World Bank annually ranks countries based on the "ease of doing business", which in turn determines the rate of foreign direct investment inflows. Amongst ten determinants for the ease of doing business that are weighed equally are "Enforcing of Contracts", "Protecting Minority Investors" and "Resolving Insolvency". These are all aspects of legal certainty because they reveal to what extent a foreign investor can foretell what a Ugandan court would decide when presented with a particular set of facts, so that he or she can make informed business decisions prior to contracting. In the June 2015 competitive index, out of 189 countries ranked, Sub-Saharan Africa featured amongst the worst performing regions. Uganda ranks at number 150, compared to the United Kingdom at number 8. In enforcing contracts, Uganda was ranked at number 80 compared to the United Kingdom at 36; Schwab and Sala-i-Martin (n 56): annually assesses the competitiveness of each country based on factors that determine the productivity and therefore the return on investment of the country. In the 2014-2015 WEP Global Competitiveness Report, all countries are ranked using "The Global Competitiveness Index", which employs twelve

Schauer,[60] and Atiyah,[61] in countries like Uganda with contexts like underdevelopment, judicial corruption and insufficient judicial systems, judges should not be readily entrusted with power to modify and make laws through flexibility.

On the other hand, through flexibility the court wants to fulfil its duty to dispense justice in every case, by having regard to the uniqueness of each case, as well as taking into account the changing social, economic and political circumstances of the time. As acknowledged by Odoki, in the case of countries like Uganda, where the common law is a transplant, the court also pays regard to local customs, values, needs and the habits of the people.[62]

However, although both formalism and flexibility are needed and have been concurrently been practised in Uganda, the legal system lacks a defined rational and coherent set of guidelines on why, when and how a judge should decide formalistically or flexibly during hard or other commercial cases. This study contributes to knowledge on how this problem can be managed, against the background of the general theoretical discourse on the subject, as well as Uganda's legal and extra-legal contexts.

---

pillars of competitiveness. Pillar No.1 is the Institutional Environment, which according to the WEF is determined by the legal and administrative framework within a country.

[59] Goode (n 1) 11, 31
[60] Schauer (n 24) 434
[61] Atiyah (n 25) 388.
[62] Odoki BJ, *An Introduction to Judicial Conduct and Practice* (Law Development Centre Printing Press 1984) 101; Article 126 of the Constitution.

1.3 Theoretical Background

Although the tension between formalism and flexibility is said to be ages-old, from the time of Aristotle, the legal theory on the subject has been dominated by descriptive discourse, acknowledging the tension as a problem facing common-law justice systems, [63] rather than by prescriptive theory aimed at searching for a way to manage it. The tension has stimulated legal discourse on the meaning, nature, and function of law, as well as adjudication. It has for instance been perceived as a tension between: instrumentalism and non-instrumentalism;[64] formalism and legal realism;[65] legal determinacy and legal indeterminacy;[66] consistency and integrity (determined by constructive interpretation) and reason and imagination;[67] rules and moral norms; experience and social policies;[68] form and substance; life and form; rigidity and flow; rules and experience;[69] strictness of contractual obligations (freedom and sanctity of contract) and the principles of equity, justice, conceptual purity and commercial reality;[70] procedural justice and substantive justice;[71] certainty and fairness; rules and principles;[72] form and function; legal concepts and legal policy; and law and economic efficiency.

---

[63] Evans and Gabel (n 2)
[64] Tamanaha (n 18) 1-2
[65] R Posner, Legal Formalism, Legal Realism, and the Interpretation of Statutes and the Constitution' (1986) 37 Case Western Reserve Law Review 179.
[66] Tamanaha (n 18)
[67] Dworkin, *Law's Empire* (n 39) 255-6.
[68] MA Eisenberg, *The Nature of the Common Law* (Harvard University Press 1988) 3-4.
[69] M Desmond, *Kangaroo Courts and the Rule of Law: The Legacy of Modernism*, (Routledge 2012).
[70] Adrian Chandler, James Devenney, and Jill Poole 'Common Mistake: Theoretical Justification and Remedial Inflexibility' (2004) 1, Journal of Business Law, 34; Goode (n 1) 16.
[71] R Dworkin, *Taking Rights Seriously* (n 8) x-xi and 22.
[72] ibid.

The descriptive discourse has been dominated by scholars elaborating attributes for, and supporting, either formalism or flexibility. Formalists seek to protect law's autonomy by minimising instability from cultural diversity and changes in the marketplace. Accordingly, to them, the law is determinate, objective, consistent, neutral, formal, clear, and certain; a value-free autonomous science that is discoverable from printed texts like statutes and precedents.[73] The role of judges is to logically deduce the law and mechanically apply it, or enforce contractual terms without intervention whatsoever, such that in every dispute, be it a hard case or otherwise, there is one correct answer.[74]

Flexibility is on the other hand, an antithesis to formalism,[75] as its proponents value and seek to protect law's autonomy by permitting it to adapt and change in accordance with societal circumstances. Flexibility theory includes anti-formalist schools of thought, such as: pragmatism; law and economics theory; critical legal theory, institutional theory; and legal realism.[76] It is traceable back to the declaration by Holmes[77] that the life of the law is not logic but experience, the moral and political theories, as well as the felt necessities of the time, public policy, avowed or unconscious, and judges' personal prejudices. The law is indeterminate,

---

[73] SJ Burton, *An Introduction to Law and Legal Reasoning*, (Little, Brown & Co. 1985) 3-4; TC Grey, 'Langdalle's Orthodoxy', (1983) 45 University of Pittsburgh Law Review 2-53; Gary Minda, *Postmodern Legal Movements: Law and Jurisprudence at Century's End* (New York University Press 1995) 13-14.

[74] JN Adams and R. Brownsword, *Understanding Contract Law* (Thomson Sweet & Maxwell, 2007) 189-190; JN Adams and R. Brownsword, 'Ideologies of Contract', (1987) 7:2 Legal Studies, 205, 215; Gary Minda, *Postmodern Legal Movements: Law and Jurisprudence at Century's End* (New York University Press 1995) 13-14; Atiyah (n 25) 404.

[75]Adams and Brownsword, *Understanding Contract Law* (n 74) 190; Adams and Brownsword, 'Ideologies of Contract' (n 74) 215.

[76] The realists include radical ones, who found scepticism in everything formalistic, with conceptual formalism being termed as nonsense by Felix Cohen, as well as progressive realists, who tried to build a realist theory that could resolve the tension with formalism (see Tamanaha (n 18) 65).

[77] OW Holmes, *The Common Law* (Little Brown and Company 1963) 5.

incomprehensive, not objective, and not certain or clear, not neutral, not consistent, and cannot produce determinate results during adjudication.[78]

Therefore, the law is dead letters, until acted upon in processes like adjudication, to satisfy particular goals; it is experimental, empirical, action-oriented, with a social aspect; and it is a means to an end.[79] Its sources include experience, and a broader social inquiry that speaks to extra-legal norms and values that justify decisions.[80] The role of judges includes law making[81] and weighing competing interests in each case, to find what best serves social policy, justice, fairness and reality.[82]

The above divergent positions make the two appear to be at two polar ends, and their balance a real challenge,[83]contributing to the view that the two judging phenomena cannot coexist, nor the values represented by them be reconciled.[84] Formalism has for instance been viewed by scholars like Wolff as a pillar of legal certainty; and flexibility as not compatible with the rule of law.[85] Other scholars

---

[78] Gary Minda, *Postmodern Legal Movements: Law and Jurisprudence at Century's End* (New York University Press 1995); Burton (n 73) 4, 7; 28; Tamanaha (n 18) 67.
[79] Tamanaha (n 18) 63
[80] Minda (n 78)18.
[81] Karl Llewellyn, *The Bramble Bush* (Oceana 1951) 3; Tamanaha (n 18) 66.
[82] Tamanaha (n 18) 65.
[83] M Zuckert, 'Hobbes, Locke, and The Problem of The Rule of Law', in Shapira I (ed) *The Rule of Law* (New York University Press 1994) 1; M Kenny and J Devenney 'A Comparative Analysis of Bank Charges in Europe: OFT v. Abbey National Plc through the looking glass', in J Devenney and M Kenny (eds), *Consumer Credit, Debt, and Investment in Europe* (Cambridge University Press, 2012) 212-213; 222.
[84] Lyons D, 'Legal Formalism and Instrumentalism-A Pathological Study', (1981) 66 Cornell Law Review, 946-967; Tamanaha (n 18) 66; Minda (n 78) 28-29; Wolff (n 14) 549; Kennedy D, 'Legal Formality', (1973) 2 Journal of Legal Studies, 351-364; Botoshi (n 7)100-01.
[84] Minda (n 78) 28-29.
[85] Wolff (n 18).

such as Burton[86] and Thomas[87] have advocated for the abandonment of formalism altogether as a requirement of the rule of law. They have argued that flexibility is sufficient to guide judicial behaviour and law generally.[88] Minda also argues that, the history of modern jurisprudence has been one of failed attempts to reconcile and synthesize formalism and flexibility.[89] He attributes the alleged failure to the two theoretical sides developing different and contradictory views about law and culture.

However, some scholars have advanced the proposition that the two phenomena can be balanced and coexist. These scholars include Olfer,[90] Burton,[91] Evans and Gabel,[92] Hart (to an extent, with regard to what he termed the 'penumbra' part of a rule),[93] Dworkin,[94] Zagler and Zanzottera[95] and Eisenberg.[96] Those compatibility scholars largely fall short of exhaustively investigating and constructing a coherent and universally applicable theory of adjudication detailing how the tension can be managed to achieve legal certainty. Tamanaha,[97] Evans and Gabel,[98] Zagler and

---

[86] Burton (n 73) 6.
[87] EW Thomas 'Fairness and Certainty in Adjudication: Formalism v Substantialism' (1999) 9 Otago Law Review 459
[88] Burton (n 73)11.
[89] Minda (n 78) 20-21
[90] O Raban, 'The Fallacy of Legal Certainty: Why Vague Legal Standards May Be Better for Capitalism and Liberalism', ((2010) 19, Boston University Public Interest Law Journal, 175-190.
[91] Burton, (n 73)15.
[92] Evans and Gabel (n 2) 7
[93] Schauer (n 24) 1109.
[94] Dworkin, *Law's Empire* (n 39).
[95] M Zagler and C Zanzottera (n 10)
[96] Eisenberg (n 68) 3-4.
[97] Tamanaha (n 18).
[98] Evans and Gabel (n 2) 7.

Zanzottera[99] and Eisenberg[100] concede to this lack of clarity as a gap in the literature.

In response to this gap, prescriptive studies like this one are more recent and follow Dworkin's challenge to legal positivism on account of its failure to appreciate the process of adjudication.[101] However, many have left unresolved the subject of whether (and if so, how) judges should be constrained to address the legal uncertainty arising out of the tension.[102] Nevertheless, some attempts have been made to address the problem. These scholarly efforts are of two types. Firstly there are the attempts of the conceptual prescriptive theorists, who sought to find a way, to manage the tension, in the conceptual framework available to judges during the exercise of discretion. They include the orthodox theorists like positivists and realists, progressive realists, and law and economics theorists. Secondly there are the attempts of the normative prescriptive theorists, within which category the current study is located; they, propose the construction of norms independent of judicial discretion to guide judging. These include legal process theorists like Burton[103] and Cardozo,[104] critical legal scholars like Dworkin[105] and Hart,[106] as well as conventionists like Eisenberg[107] and the interests jurisprudence, which is adopted to guide this study. In these attempts however, the problem of managing

[99] Zagler and Zanzottera (n 10).
[100] Eisenberg (n 68) 4-5.
[101] Dworkin, *Taking Rights Seriously* (n 8) xi, 22.
[102] Such include: Tamanaha (n 18); Atiyah (n 25); Goode (n 1); as well as Campbell and Devenney (n 52); Campbell and Devenney calling for judges who dare leave the shelter of precedent (formalism) to identify the 'right policy' to be guided with.
[103] Burton (n 73) 95-98, 136, 138-43 & 205-08.
[104] BN Cardozo, 'The Nature of the Judicial Process' (Yale University Press 1921)141.
[105] Dworkin, *Taking Rights Seriously* (n 8) 81-130; R. Dworkin, *A Matter of Principle*, (Harvard University Press 1985) 119-180; and Dworkin, *Law's Empire* (n 39).
[106] A Vermeule, *Judging Under Uncertainty: An Institutional Theory of Legal Interpretation*, (Harvard University Press 2006).
[107] Eisenberg (n 68)

the tension has not been tackled exhaustively; in particular, the problem has been approached without regard to the peculiar circumstances pertaining to underdeveloped former British colonies like Uganda, leaving a gap in knowledge that this study helps to fill.

The legal realists like Posner were of the view that the tension is not a real problem, since the judges have discretion, which they can exercise on the basis of underlying social policies.[108] On the other hand, the legal process theorists such as Hart propose that legal indeterminacy can be resolved on the basis of underlying principles and purposes.[109] Another proposal is from law and economic theory – that economic efficiency and wealth maximisation are the guiding factors a judge should use,[110]whereas Dworkin also propounded a theory based on the existence of two classifications of judicial discretion – *strong* and *weak*.[111] Using the metaphor of a hole in a doughnut, he argued that discretion does not exist except as an area left open by a surrounding belt of restrictions. Discretion exists only to the extent permitted by legal rules, and because of that, judges enjoy weak but not strong discretion. Therefore, judges should use the principles of justice, fairness and due process as guides to the best constructive interpretation of legal practice,

---

[108] RA Posner, *Economic Analysis of Law* (3d ed.) (Little, Brown & Co. 1986); and Tamanaha (n 18).
[109] A Vermeule, *Judging Under Uncertainty: An Institutional Theory of Legal Interpretation*, (Harvard University Press 2006).
[110] T Zywicki and E P Stringham, 'Common Law and Economic Efficiency' in Paris F and Posner R (eds), *Encyclopaedia of Law & Economics*, (Mason University Law and Economics Research Paper Series 2010); Posner (n 108).
[111] SJ Shapiro, 'The Hart Dworkin Debate: A Short Guide for the Perplexed' (2007) 77 Public Law and Legal Theory Working paper series, University of Michigan.

with the end goal and blueprint for judges being law 'integrity' (speaking with one voice).[112]

Other proposals include the legal Institutionalists' notion of general clauses as the utmost guiding tools for judicial decision making;[113] and Eisenberg's view[114] that the tension can be managed by a judges' convention driven by four fundamental principles – objectivity, social support, replicability and responsiveness. All of these four are rooted in the social functions of courts and the considerations of fairness, structure and function.

The inadequacies of such existing attempts to find ways of managing the tension have been acknowledged by a number of scholars in the field, such as Tamanaha,[115] Evans and Gabel,[116] Zagler and Zanzottera[117] and Eisenberg.[118] In this regard, Evans and Gabel argue that even though balancing formalism and flexibility is difficult and has been a problem since Aristotle's time, the two approaches need to coexist, as they are both needed at the same time.[119] In this respect, these scholars raise the red flag without offering a solution. Likewise, Roscoe Pound,[120] one of the most celebrated legal realists, regretted pure realism and recognised the need for a balance and framework to control the excesses of instrumentalism.

---

[112] R Dworkin, *Taking Rights Seriously* (n 8).
[113] M Croce, 'Does Legal Institutionalism Rule Out Legal Pluralism? Schmitt's Institutional Theory and The Problem of The Concrete Order' (2011) 7(2) Utrecht Law Review, 48.
51.
[114] Eisenberg (n 68)
[115] Tamanaha (n 18) 232-233.
[116] Evans and Gabel (n 2).
[117] Zagler and Zanzottera (n 10).
[118] Eisenberg (n 68) 3-4.
[119] Evans and Gabel (n 2) 7, 26-33.
[120] R Pound, *The Formative Era of American Law* (Little Brown 1938).

Tamanaha[121] has also acknowledged the need to find ways of managing the tension.[122] However, he emphatically admits to the gap in the knowledge of how this can be done[123] when he says that the result of the tension is to leave a system of judging suspended in uncertain and shifting space; with no clear rule for judges to follow; and that it is not clear that such a rule can be formulated. Tamanaha then goes further and attributes the existence of this gap to the lack of enough information about judicial reasoning and its consequences; [124] which gap this study contributes to filling.

In chapter five, the study revisits the existing literature on how to manage the tension, highlighting the limitations of the various approaches and the necessity for further studies like this one. For instance, many of the scholars make the mistake of entrusting the very judges causing the problem with finding ways to manage the tension. Further, scholars like Eisenberg who propose judging guidelines, [125] fall short of clearly articulating how these guidelines can be arrived at; their proposals are theoretical, and not the result of an investigation into what motivates judges in reality, as is done in this study.

This study contributes to filling this gap by departing from the irreconcilable view. It demonstrates that coexistence between formalism and flexibility is manageable, using judging guidelines, consciously derived from the desire to balance the competing values underlying the two.[126]Accordingly, the study validates and

---

[121] Tamanaha (n 18) 74.
[122] ibid 232.
[123] ibid 233.
[124] ibid
[125] Eisenberg (n 68) 3-4
[126] Laube (n 9); Schauer 'Formalism' (n 24) 509, 510; and D. Lyons 'Legal Formalism and Instrumentalism: A Pathological Study' (1981) 46 Cornell Law Review, 946, 967.

operationalises the jurisprudence of interests propounded by scholars like Pound,[127] Powers,[128] Laube,[129] and others;[130] especially the view that underlying the tension are competing interests (in this case widened to values), whose balancing should inform judging guidelines. The values are observed from a content analysis of judicial decisions; weighed against each other; and the dominant ones should used to create a scheme of interests for balancing.

The content analysis is guided by presumptive values advanced by other scholars as underlying the tension, which are revisited and elaborated in chapters six (for formalism values) and eight (for flexibility values). In these chapters, their relevance to the coexistence debate is analysed; they are coded; and then used during the content analysis to guide the search for actual competing values underlying the tension in Uganda.

The weaknesses of the jurisprudence of interests are however acknowledged, and to that extent departure is made from the theory. These weaknesses include placing too much trust in the person and office of the judge, and the failure by Heck, Isay and others properly to articulate a theory that both evidentially and contextually ascertains the competing interests; and articulating a theory of values underlying adjudication, beyond the judges' own evaluation and balance of competing interests.[131]

---

[127] R. Pound 'A Survey of social Interests' (1943) 57 Harvard Law Review 1; R. Pound, *Outline of Lectures on Jurisprudence* (Harvard University Press, 1943) 97-112
[128] F. Powers 'Some Reflections on Pound's Jurisprudence of Interests' (1953) 3:1 Catholic University Law Review 10, 15.
[129] ibid.
[130] Schoch (n 41*)*.
[131] ibid 315-317.

Accordingly, the jurisprudence of interests is employed in combination with the institutional theory of law, thus allowing further analysis of observed values underlying adjudication, using Uganda's particular contextual concrete order. This presents a chance to understand the tension, its foundations, and possible ways to manage it, based on realities and pre-law cultural and social realities (institutions), such as a country's history and the body politic.[132] The institutional theory is therefore employed to help elaborate and understand the values observed from content analysis of the words, phrases and themes in the judicial opinions. The results of values observed during the content analysis, and their wider theoretical and contextual inferences, are discussed in chapters seven (for formalism) and nine (for flexibility). The contextual inferences are made against Uganda's unique legal, as well as historical, social, political and economic background. This way, the study contributes to knowledge by differing from existing scholarly works that are mainly based on judicial practice in the developed and Western world. This is especially vital because hardly any studies have been done on adjudicatory theory, and specifically the tension in commercial adjudication, within underdeveloped and heterogeneous African common-law-based countries like Uganda.

1.4 Uganda: The Research Context

By way of background to this study, it is important to highlight the key elements of Uganda's general legal and extra-legal context. This forms the basis for a better understanding of the values that are revealed, by the content analysis, to underlie the tension, and how that tension can realistically be managed.

---

[132] Croce (n 113) 48.

1.4.1 Uganda's Non-Legal Context

The country has undergone a long period of political and constitutional instability; this has included dictatorship, abrogation of the constitution, and moves towards socialism, civil wars, military coups, and recently, populism. Militaristic authoritarianism has been the dominant political culture, and its influence has extended to interference with the justice system.[133] This has been the case especially during the 1971-79 Idi Amin military dictatorship;[134] and the current NRM era, leading to the abuse of due process;[135] and to unprincipled flexibility in courts.[136]

Judges presiding over cases, as well as litigating counsel, have faced intimidation and coercion, as the state intervened to influence against adherence to the formalistic rule of law.[137] The armed struggle that brought the current government to power in 1986 formally introduced flexibility as the leading political and judicial philosophy, with a new constitution that obliged judges to adhere to substantive justice – the values, aspirations and norms of the people – and generally to administer justice in the name of the people, which connotes public interest as a leading judging motivator. Informal and populist courts, initially called 'Resistance Courts', and now 'Local Council Courts' were also introduced at village and parish levels, presided over by ordinary people's representatives. The local courts have since exercised concurrent jurisdiction with regular courts in contract disputes, but

---

[133] ABK Kasozi, *The Origins of Violence in Uganda* (Fountain Publishers Ltd 1994) 86-87, 114-115; EM Aseka, *Transformational Leadership in East Africa: Politics, Ideology and Community* (Fountain Publishers 2005) 323-325.
[134] Kasozi (n 133) 88-97.
[135] EM Aseka, *Transformational Leadership in East Africa: Politics, Ideology and Community* (Fountain Publishers 2005) 324; and Kasozi (n 133) 114.
[136] Aseka (n 135) 324
[137] Kasozi (n 133) 114-115.

are not bound to follow black letter law.[138] The practice in these courts has spread to encompass judicial practice in the regular common-law-based court system, resembling the American realist revolution of the 1920s and 30s that succeeded in the rejection of pure formalism and the popularisation of flexibility.[139] However, formalism remains a judicial approach available under Uganda's legal system that remains fundamentally based on common law.

In economic terms, Uganda remains one of the poorest countries globally, ranking as number 25 out of the 30 poorest,[140] and one of the most corrupt in the world, currently ranked as number 151 out of 176 countries;[141] yet it has immense natural resources that include oil, minerals, and arable land and tourist attractions.[142] The country also survives under a mixed-market economy that government has publicly declared as a free market economy. The state occasionally interferes to remove predictability/transparency and to attract and promote the interests of selected foreign investors;[143] otherwise, parties freely enter contracts and carry on business under the free market economy model.

Socially, as indicated in the preamble to the country's constitution, the population is a highly heterogeneous community, divided into several tribes that speak different

---

[138] The Local Council Courts Act 2006, s 16(2) and s 23. This Act provides that the Local Council Courts shall regulate their procedure; bars the application of technical Rules of Procedure and Evidence; and bars the appearance of lawyers on behalf of clients.
[139] Tamanaha (n 18) 60-61; Mark A Hall and Ronald F Wright, 'Systematic Content Analysis of Judicial Opinions', 96 CAL. L. Rev. 63 (2008) 63-124, 77.
[140] The Business Insider, www.businessinsider.com/the-25-poorest-countries-in-the-world-2017-3?IR=T/30-Senegal-gdp-per-capita, accessed on September 6, 2017.
[141] Transparency International, 2016 Report (http://www.transparency.org/country/UGA.), accessed on September 6, 2017,
[142] The Business Insider, www.businessinsider.com/the-25-poorest-countries-in-the-world-2017-3?IR=T/30-Senegal-gdp-per-capita, accessed on September 6, 2017
[143] https://www.export.gov/apex/article2?Id=Uganda.Market-review, accessed on 6, September 2017.

languages and pay habitual obedience to different customary norms.[144] This, coupled with other developments and factors, explains the unique social, political and economic adjudicatory environment. Knowing all this helps in understanding the values underlying the prevalence of both formalism and flexibility, their being at tension, and how this tension can be managed.

1.4.2 Uganda's Legal Ordering

Uganda has undergone four historical phases: pre-colonial; colonial (1894-1962); early post-colonial (1962-1986); and late post-colonial (1986 to date). These periods have seen significant changes in the country's legal ordering and are used during the content analysis to analyse the manifestations as well as foundations of the tension. The results of this content analysis are discussed in chapters four, seven and nine. However from the onset, it is clear that, contrary to claims that the tension is as old as the law – in Uganda, adjudication in the pre-colonial era was solely flexible and neither formalism nor the tension existed. The factors behind this are discussed in chapter four, but only as a point of reference for later discussions on why flexibility has prevailed since. Because the tension came with colonialism, for the purpose of understanding the general legal ordering of the country as a research context, the following section divides the country's legal history and state into two: firstly, the colonial era; and secondly the contemporary post-colonial era, during which the judicial opinions analysed were made.

1.4.3 The Tension in the Transplanted Oak

By 1902 – when Uganda received English contract law – commercial justice in England was already faced with the tension, as a result of developments during the

[144] 2017 World Population Review, www. worldpopulationreview/countries/Uganda-population/, accessed on September 6, 2017.

classical era (1770-1870). However, it did not translate into a crisis of normativity, as formalism had grown to dominate judicial practice.[145] Following Allott's metaphor of the transplanted law being an oak, the English context reveals that the soils in which the transplanted oak was successfully grown were made of nutrients feeding both formalism and flexibility, although formalism dominated.[146] Atiyah relates that,[147] mainly owing to the demands of the marketplace, there was: a shift in emphasis from property rights to contract; a shift from particular relationships or types of contract to general principles; and a shift from executed to executory contracts. Certainty of the law was viewed as superior to equity, normativity recognition being dependent on fixed and certain principles.[148]

Certain predictable, abstract, and general principles, such as contractual liability being dependent on the parties' intentions, applied to all people, subject matter and types of contract.[149] This was as opposed to more flexible but unpredictable discretionary justice, substantive justice or fairness.[150] The court's business was restricted to that of an umpire; procedural fair play would be ensured, but the court took no interest in how fair the bargain was, and could not flexibly impose obligations on parties from a substantive perspective or using its own sense of

---

[145] Atiyah (n 25) 388-89, 398-400.
[146] AN Allott, *The Limits of Law* (Butterworths 1980) 3; HR Hone, 'The Native of Uganda and the Criminal Law', The Journal of Comparative Legislation and international Law, 3rd Series, Vol. 21. No.4 (1939) 116.
[147]Atiyah (n 25) 399.
[148] ibid 398.
[149] ibid 399-400.
[150] ibid 402-403.

justice.[151] The judges saw the law as a set of inexorable deductions drawn from abstract neutral principles.[152]

Likewise, by 1902, Uganda's reception date, the English Judicature Acts of 1873-5 had merged common law and equity, taking away equity's independence as a source of legal standards in England.[153] Accordingly, by the 1890s when Uganda was colonised, equity was subject to freedom of contract,[154] as was held in *Barrow v. Isaac & Sons.*[155] Under contract doctrine, non-interventionism – defined by freedom of contract – ruled, with considerations of fairness and reasonableness only relevant if agreed upon.[156]

With regard to statutory interpretation, courts generally had no power to fill gaps in legislation,[157] as such statutes were drafted in the fullest detail possible.[158] Further, courts were against giving effect to the equity of statutes and instead abided by their plain words, the literal rule of statutory interpretation.[159] The English court system also had written rules of procedure, codes of ethics and conduct of judges, constitutional provisions on separation of powers and impartiality of courts, the rules of natural justice and the duty to promote and adhere to the rule of law which engendered formalism.[160]

---

[151] ibid 404.
[152] ibid 389.
[153] ibid 669-670.
[154] ibid 674.
[155] [1891] 1 QB 417, where a lessee who had subleased land without the consent of the landlord was denied relief against forfeiture reasoning that he could not avail himself the equitable remedy for mistake and technically interpreting his conduct as a result of forgetfulness instead.
[156] Atiyah (n 25) 674-75.
[157] M Freeman, *Lloyd's Introduction to Jurisprudence* (Sweet & Maxwell 2014) 1576.
[158] ibid 1572.
[159] ibid 1573.
[160] RB Seidman, *The State, Law and Development* (St. Martin's Press, 1978) 199

A number of values and interests underpinned the predominantly formalistic judging paradigm, including market conformism,[161] expediency[162] and equalitarianism.[163] Some saw the rule of law value as a necessary reaction to the high levels of disorder and indiscipline amongst the new commercial and industrial classes, as today exists in most of Africa,[164] and predictability and certainty as 'an important requirement of the rational, calculating world of commercial men'.[165] Accordingly, Parke J (later Baron Parke) in *Mirehouse v. Rennell*,[166] declared that 'for the sake of attaining uniformity, consistency and certainty, rules derived from precedents must, unless plainly unreasonable and inconvenient, be applied to all cases that arise'. These values, together with others advanced by scholars as underlying formalism, are elaborated in chapter six, and their relevance to Uganda tested by the content analysis of commercial judicial opinions.

On the other hand, flexibility survived the classical era, and indeed grew after 1870, implying that by 1902, although formalism still defined the oak, the effects of neo-classical flexibility were already part of the brew that defined the jurisprudence. For instance, such flexibility included interventionism, by invoking equity, substantive justice and fairness where judges felt that the facts of a case so demanded.[167] Besides market conformism, defined as the desire to align the law with changes in the marketplace, the other values behind such flexibility included

---

[161] Atiyah (n 25) 389.
[162] ibid 390.
[163] ibid 397
[164] ibid 395-96.
[165] ibid.
[166] (1833) 1 Cl & Fin 537, 546.
[167] Atiyah (n 25) 405.

the decline of principle as a social value,[168] as well as that of sanctity of promise, and also the growth of consumer and social welfarism.[169]

Therefore, at the heart of the common law was its ability to be flexibly moulded and extended to cater for the changing economic circumstances and to serve the interests of justice and fairness in individual cases. As such, by means of the 1902 Uganda Order in Council making English law the superior legal order,[170] not only was formalism introduced, but also judicial flexibility; and so was the tension between the two, underpinned by England's context-specific values. Uganda got independence from Britain in 1962, but this did not end the tension. The post-independence legal ordering in which the tension has prevailed is summarised in the following sub-section; it contributes to fully understanding the tension's contemporary (post-colonial) manifestations and motivations, as well as possible ways to manage it.

1.4.4 Uganda's Contemporary Legal Ordering

In Uganda, the constitution not only recognises non-state normative systems, but elevates them to the same status as law; thus obliging courts to adhere to them, without calling them law itself or otherwise incorporating them into the content of the law.[171] Uganda is therefore an illustration of legal pluralism theory; the thesis of which is that law cannot be imprisoned in a code, or in law books There is 'law beyond law', otherwise called 'living law' which is should guide judges, for their decisions to be effective; and judges should observe these themselves from the

---

[168] ibid 649-650.
[169] Ibid 649-655
[170] Article 20.
[171] The Constitution of the Republic of Uganda 1995 (The 1995 Constitution), art. 126 and the National Objective/Directives of State Policy.

citizens social interactions and activities, not codes or legal documents.[172] Therefore, there are normative rules outside the traditional boundaries of 'law' as it is conventionally understood, and particularly not as it is found in statutes and cases.[173] In this respect there can be contradictory and inconsistent rules arising out of contradictory legal mechanisms that apply to the same factual situations.[174] Further, the constitution obliges judges to uphold the values, norms and aspirations of the people,[175] which tallies with legal pluralism's requirement of taking into account the role of society in generating and shaping judicial decisions, as the latter seek to influence social life.[176]

Therefore, scholars seeking to understand Uganda's judging phenomena, of which the tension is one, should be concerned not only with what is logically necessary to the concept of law but also what prevails in concrete cases.[177] Adjudication in such a legally pluralist society cannot be purely formalistic or flexible, as neither approach fully accounts for the reality. Both approaches have therefore been concurrently practised in Uganda, by judges during commercial contracts adjudication; albeit not as part of a coherent system, and thereby contributing to the tension and its attendant legal uncertainty.

---

[172] E Ehrlich, 'Living Law and Plural Legalities', (2008) 9 Theoretical Inquiries in Law, 447; E Ehrlich Fundamental Principles of the Sociology of Law (Arno Press, 1975) 498.
[173] NW Barber, 'Legal Pluralism and the European Union', (2006) 12 (3) European Law Journal, 306.
[174] ibid 308.

[175] Article 126 (1) of the 1995 Constitution.

[176] Ehrlich (n 172) 447.
[177] Croce (n 113) 54.

The growth of flexibility in general has culminated in substantive flexibility as a constitutional directive, making adherence to it mandatory to all courts.[178] The country is a constitutional democracy meant to be governed by the rule of law.[179] The rule of law requires judges to use only their powers when applying the law,[180] and upholding the law is within this context the first principle of adjudication.[181] However, a judge who upholds the rule of law can only decide formalistically where the nature of law is capable of being so applied; that is to say, where it is determinate, consistent, neutral and clear.

The nature of Uganda's commercial contracts law, and the legal framework on adjudication, instead provide fertile ground for both approaches to be practised by judges, with no restraint or guidance as to the choice. This fertile ground contains substantive flexibilities, such as primary rules found in a number of legislations, common law and local case law, together with secondary rules found in procedural laws or laws of interpretation. The principal legislations include the Contract Act,[182] the Sale of Goods Act,[183] The Sale of Goods and Supply of Services Act, 2017, and the Hire Purchase Act.[184] The rules in such laws are in many cases intrinsically flexible. This substantive flexibility is born out of primary rules commanding the use of vague standards like reasonableness, substantiality of justice, fairness and the interests of commerce.

---

[178] The 1995 Constitution, art 126 and Objective and Policy Directive No.1.
[179] ibid. The Preamble commits the country to democracy and, Duty XXIX of The Duties of Citizens obliges all citizens to promote democracy and the rule of law.
[180] Burton (n 73) 15.
[181] ibid 7.
[182] The Contracts Act of Uganda 2010, No 5 (Contracts Act 2010).
[183] The Sale of Goods Act 1932, Chapter 82, Laws of Uganda (SOGA 1932).
[184] The Hire Purchase Act of Uganda 2009, No.3 (HPA 2009).

Similarly, the Ugandan legal system is awash with systematic flexibilities, such as legal pluralism, as constitutional rules of recognition require courts to adhere to open-textured and indeterminate norm sources like morals, social values and people's aspirations.[185] Unless there are rational, clear and consistent rules, principles and concepts to guide judicial choices in applying this pluralism; the inevitable result is the breeding of substantive and enforcement flexibility.

With regard to the legal framework on adjudication, the country's constitution is based on the doctrine of separation of powers, with the judiciary as an independent arm that should adjudicate cases, while upholding the law.[186] In playing this role, commercial judging in Uganda is mainly governed by adjudicatory rules contained in the constitution,[187] the Uganda Code of Judicial Conduct 2003,[188] the Judicature Act[189] and the Local Council Courts Act 2006.[190] The constitutional provisions on

---

[185]The 1995 Constitution, art. 126(1).

[186] The 1995 Constitution, art. 126. It provides for principles judges are required to follow while adjudicating disputes, but says that such are "…subject to the law": art 128 also makes the Judiciary independent of any other organ of the state.

[187] For instance: The 1995 Constitution, article 126(1) stipulates that 'Judicial power shall be exercised by the courts in the name of the people and in conformity with the law and with the values, norms and aspirations of the people'; Article 126 (2)(e) stipulates that 'substantive justice shall be administered without undue regard to technicalities'; Article 132 (4) stipulates that the Supreme Court may depart from a previous decision when it appears to it right to do so; etc.

[188] The Uganda Code of Judicial Conduct 2003, s 1. It directs judicial officers to reach judicial decisions following their '...conscientious understanding of the law, free of any direct or indirect extraneous influences, inducements, pressures, threats or interference, from any quarter or for any reason'.

[189] The Judicature Act of Uganda (Laws of Uganda, 2000, V. 1), 14(2)(c). It provides that where no express law or rule is applicable to any matter, the courts are to follow principles of justice, equity and good conscience; Section 14(3) provides that the applied law, the common law, and the doctrines of equity shall be in force only in so far as the circumstances of Uganda and its people permit and subject to such qualifications as circumstances may render necessary; Section 33 provides that in exercise of jurisdiction vested in it, the High Court shall grant remedies as it thinks just to ensure complete resolution of disputes. Section 39 (2) provides that where no express procedure or known practice of the court is applicable to any matter, the High Court shall in its discretion adopt such procedure as is justifiable in the circumstances, etc.

judging include the National Objectives and Directives of State Policy. These directives provide, among other things, that when applying or interpreting the constitution or any other law, the courts shall apply the law instrumentally and therefore flexibly,[191] by recognising Uganda's pluralistic society, legal pluralism (the legal validity and force of non-legal norms and values), aspirations for an independent jurisprudence, distributive justice, the country's experiences, social, political and economic contexts, plus the aspirations of libertarianism (democracy, freedom and justice).

These national objectives are an attempt at creating the *grundnorm* that Hans Kelsen claimed could guide judges as the criterion for the validity of the constitution and all other laws subordinate to the constitution.[192] To Kelsen, law will always eliminate apparent inconsistencies through the ranking of rules and norms, and if this elimination failed, the maxim *lex posterior derogate priori* (a later law repeals an earlier law) would ensure that valid legal norms could not be set in inconsistency.[193]

However, Uganda's intended *grundnorm* directs courts to apply open-ended, indefinable and largely indeterminate norms that would not ordinarily have normative value. Social and political diversity and justice; customary values and practices; culture; equality; and independence from foreign decisions, are all

---

[190] This law creates the community -based court system that was first used during the NRM war. This law created and allowed the informal courts to operate and ran alongside the traditional common law -based system in adjudicating commercial disputes.
[191] The 1995 Constitution, Objective and Directive No.1; Objective and Directive III (ii); Objective & Directive IV (ii); Objective & Directive XI (iii) & XIV; and Objective & Directive XXIV.
[192] H Kelsen, *General Theory of Law and State*, (Harvard University Press 1949) 115; This was according to Chief Justice (emeritus) Benjamin Odoki,[192] the Chairman of the Constitutional Review Commission that made the recommendations on the basis of which the 1995 Ugandan Constitution was drafted, the directives were intended to be a Kelsenian type of basic law. .
[193] H Kelsen, *The Pure Theory of Law*, (University of California Press 1967) 206.

values without any set and determinate rule content or universal understanding. Such indeterminacy is of a nature that cannot be resolved without further laws being formulated to guide judges; thus there is a need to find ways towards a framework to guide them, which this study contributes to.

As indicated earlier, the Ugandan constitution also commands flexibility adjudication,[194] such as conforming to the values and wishes of the people. What reflects the values, norms and aspirations of the people is not written anywhere and has never been clearly defined by parliament, the courts or any other governmental organ. Further, such norms are not even capable of clear determination, because their content is bound to change from time to time, from place to place and from one community to the next.

The drafters of the Uganda constitution seem to have shied away from using the word 'morals', but in reality, they fused the law and morals in constituting what should determine judicial decisions. This study is therefore based on the premise that what in many jurisdictions are regarded as extra-legal factors, matters outside the law, policy considerations and morality, are actually part of the law in Uganda, having been commanded by the supreme law,[195] the national constitution. The legalisation of policy considerations, and the pursuit of morality in judicial decision-making, calls for a critical re-examination of studies and theories that have looked at flexible judges who adhere to policy considerations as engendering legal uncertainty and the rule of men, as opposed to the rule of law.[196]

---

[194] The 1995 Constitution article 126 (1) and art 126 (2) (e).
[195] The 1995 Constitution, art. 2.
[196] Tamanaha (n18) 228-229.

In reality, flexibility is being practised by Ugandan judges, in place of the formalist conception that the role of the court is interpretation and application of the law or of a term of a contract 'as it is' (as opposed to 'as it ought to be'). When called upon to adjudicate commercial contract disputes, courts have replaced the law with what particular judges consider to be just, fair or commercially reasonable decisions in individual cases. The substantive and systematic flexibilities have contributed to the inability of commercial contracts law to dictate particular results in all cases; and this inability runs contrary to the formalistic understanding of the law propounded by Langdalle and his followers,[197] and clarified by Dworkin.[198] Instead, in Uganda these flexible rules have created legal indeterminacy and uncertainty,[199] validating Holmes's[200] declaration that 'the prophecies of what the courts do in fact and nothing more pretentious are what I mean by law'.

A case in point is *SDV Transami (U) Limited v Agrimag Limited & Jubilee Insurance Co. of Uganda*.[201] In this case, a contract of carriage between the parties provided that goods were carried at owner's risk and no liability was to arise save in cases of gross negligence. The arbitrator's decision was that no negligence had been proved but he invoked the doctrine of res ipsa loquitor and inferred gross negligence. On an application to set aside the award, the judge upheld it, reasoning that in such cases, the 'apt' question is whether the award 'conformed to the considerations of justice and fairness'. Without judging guidelines that would

---

[197] Langdell CC, *A Selection of Cases on the Law of Contract with References and Citations* (Little, Brown & Company, 1871) Preface; Burton (n 73) 5. Burton (n 73) 5.
[198] R Dworkin, 'No Right Answer?' in Hacker PMS and Raz J (eds), *Law, Morality and Society* (Oxford University Press 1978).
[199] Burton (n 73) 7.
[200] Holmes (n 83) 5.
[201] HCT-00-CC-AB-002-2006 (2008) UG COMM. C33.

help in defining what justice and fairness mean, such decisions have made the commercial law uncertain to its users.

Ugandan courts have also shown flexibility by practicing interventionism in contracts, to serve state policy and other extra-legal considerations. This was the case in *Traces SA v. Attorney General*,[202] where a foreign investor was contracted by the government to collect TV Licence fees as required by law, but during contract performance the President, at a political rally, abolished the fees. The judge found for the foreign investor but declined to grant the remedies in the contract or declare specific performance, citing the President's pronouncement as having changed government 'policy', and therefore having rendered the fees no longer collectable as per the law.

Faced with such flexibility decisions on the one hand, and formalistic ones on the other, commercial law users cannot define and predict with certainty the law relating to the full range of possibilities from commercial transactions. Most importantly, it is not clear when and how a judge will strictly abide by the rules or terms of a contract, or interfere to serve flexible values like substantive justice and fairness, leaving the tension as a problem this study contributes to managing.

1.5 Research Question

Debates addressing the tension between formalism and flexibility have largely limited themselves to investigating the theoretical foundations and other justifications for both judging approaches.[203] An investigation into such foundations is relevant to this study, but only in order to answer to the question of why, if at all,

---

[202] HCCS No 525 of 2006 (Unreported).
[203] This gap in literature is admitted by amongst others Tamanaha (n 18) and Goode (n 1).

there is need for the two phenomena to coexist. Against the background of making a case for coexistence as the appropriate judging paradigm for Uganda, a further contribution to knowledge is made by attempting to construct Uganda's context-specific solution to the tension.

Therefore, the main question answered by the study is 'How can the tension between formalism and flexibility in Uganda's commercial adjudication be managed?' Answering this question requires answers to the following three sub-questions:

(a) What is the nature of Uganda's commercial judging paradigm?

(b) Why has the tension between formalism and flexibility prevailed in Uganda's commercial adjudication?

(c) How can the competing values underlying formalism and flexibility coexist?

1.6 Research Objectives and Motivations

This study is motivated by the desire to achieve a number of objectives. They include verifying the tension as a problem in Uganda, making a case for the coexistence of formalism and flexibility, searching for the foundations of the tension, and searching for ways to manage it with regard to Uganda. The following part of the thesis elaborates the objectives and offers a glimpse into what the study has done to achieve each one.

1.6.1 Understanding the Judging Landscape: Uncovering the tension

As the first step, the study aims at finding out the manifestations of formalism, flexibility, and the tension between them, in Uganda's commercial judging paradigm. The judging practices indicative of both phenomena are identified, together with their frequencies, trends and patterns. This is intended to demonstrate the tension as a reality and as a problem in Uganda's commercial adjudication; and one that this study contributes to solving. In pursuance of this objective, chapter four demonstrates that the tension has dominated the country's commercial judging paradigm since colonial times.

Using the results of content analysis of judicial opinions, the chapter explains the tension's manifestations from all three dimensions revealed by the data. These dimensions are: Uganda's legal history; Uganda's political history; and the frequencies, patterns and trends of both formalism and flexibility within the different courts in Uganda. Also explained and evaluated are the minimal efforts by individual judges, and the ineffective international treaties, intended to manage the tension. Both of these mechanisms are found inadequate, incoherent, and inconsistent; which creates uncertainty as to the likely results, and therefore the real law, in Uganda's commercial hard cases.

1.6.2 Making a Case for a Coexistence Judging Paradigm

The study aims, from a theoretical standpoint, to make a case for a coexistence-judging paradigm, as the appropriate path to legal certainty in contexts like Uganda's; a task pursued throughout the thesis, but with particular attention in chapters three, five, six and eight. The study seeks a departure from the 'irreconcilable' view discussed above,[204] and searches for a way to reconcile the competing values behind each judicial approach, as a way to manage coexistence between the two. Claims like Minda's,[205] that efforts at finding reconciliation result in enduring failure, amount at best to conceding defeat before the boxer enters the ring. These claims fail to recognise the substantial number of concessions scholars on either side of the divide have made towards the middle line. Chapter three illustrates that there is greater room than might be immediately apparent for a reconciliation of formalism and flexibility. This indicates the possibility of a meeting point, in the form of a coexistence paradigm, especially in contexts like Uganda's,

[204] See text to section 1.3.
[205] Minda (n 78) 20-21.

as long as the interests and other values the tension represents are identified and understood.

1.6.3 Searching for Foundations of the Tension

The dimensions the Ugandan context brings to the table are distinct from those arrived at by studies else where, such as about American judicial history, which is said to have systematically alternated between formalist and flexibility instrumentalist periods;[206] or English judicial history, which has not experienced a realist (and therefore flexibility) revolution.[207] Spiller and Gely[208] have confirmed the lack of studies of the factors underlying judging in other jurisdictions, especially the poorest ones; [209] which gap this study contributes to filling. This is done by the content analysis of judicial opinions in actual hard cases, from colonial times to date, to uncover the competing values motivating both formalism and flexibility, and therefore underlying the tension in Uganda.

Besides mere identification, the study aims to bring understanding to such values, including the way they have manifested in Uganda; and the higher values or wider implications they represent. In turn, this is expected to inform the construction of judging guidelines intended to balance formalism and flexibility, as a proposed approach to manage the tension. The cornerstone of interests jurisprudence is judges acting as social engineers, whereby they should ensure the balancing and satisfaction of such competing values, defined by the desires and claims before

---

[206] Tamanaha (n 18) 35.
[207] Atiyah (n 25).
[208] TP Spiller and R Gely, 'Strategic Judicial Decision-Making', in Whittington KR and others (eds), The Oxford Hand Book of Law and Politics (Oxford University Press 2008) 34.
[209] Spiller and Gely 208) 34; Goode (n 1).

them.[210] The solution to this problem of balancing should therefore be informed by the foundations to the problem. Therefore, the ultimate objective of this study is to contribute to the search for ways to manage the tension, informed by its foundations.

1.6.4 Management of the Tension

This study is in line with the work of scholars who reject the view propounded by orthodox jurisprudence; namely, that the problem of resolving the tension should be left to the judges, either by allowing unfettered discretion, or by allowing judges to be the finders, formulators and emitters of their own guidelines. At the same time, the source, nature and process of the formulation of the ultimate judicial guidelines that are proposed by other scholars, such as legal process theorists, are found either inadequate or inappropriate for contexts like Uganda's.

The way to manage the tension is therefore sought through a study of its causes, as defined by Uganda's reality at the different historical times during which both formalism and flexibility have been practised in the courts. To this end, the study aims to support and validate Holmes's claims, which should be understood as calling for coexistence and not unprincipled realism; especially the claim that 'the law represents the stories of a nation's development, its life's experience and the environment of judging as opposed to logic'.[211] Related to this is Holmes's explanation that:

---

[210] T. di Fillipo 'Pragmatism, Interest Theory and Legal Philosophy: The Relation of James and Dewey to Roscoe Pound' (1988) 24:4, Transactions of Charles S. Peirce Society, 487, 489, 500-501.
[211] Burton (n 73) 15.

> No one will ever have a truly philosophical mastery over the law, who does not habitually consider the forces outside of, which have made it what it is … the law finds its philosophy not in itself consistently, but … in history and the nature of human needs…[212]

Institutionalists MacCormick and Weinberger have rightly conceded to the truthfulness of the above claims by Holmes, and proposed that such experience does not defeat logic or rationality, but instead gives us the rational grounds of choice beyond the limits of what is prescribed by formalism.[213] This implies that, the rules that should guide judges, who wish to apply formalism or flexibility in reaching their decisions, should be informed by the experiences and history, Uganda and its legal system have gone through.

By analysing the identified tension engendering values using their relationships to the body politic in Uganda, its history and judicial approach, this study uses the institutional theory mentioned above in order to contribute to the construction of an appropriate theory of adjudication for the country. Croce further elaborates that constructing any such appropriate theory of law requires scholars to understand the sources of the social arrangements of a particular collectivity (in this case Uganda), and the social and symbolic struggles at hand.[214]

Further, an examination is made of existing scholarly propositions on what should guide judges in the choice between formalism and flexibility. The study analyses

---

[212] OW Holmes, in a letter to Fredrick Pollok on C Langdalle's Case book on the Law of Contract, extract reproduced in B Kozolchyk, *Comparative Commercial Contracts: Law, Culture, and Economic Development* (West Academic Publishing 2014) 4.
[213] N MacCormick & O Weinberger, *An Institutional Theory of Law: New Approaches to Legal Positivism* (Springer – Science + Business Media, B.V 1986) 200.
[214]Croce (n 113) 59.

the adequacy and appropriateness of each of the existing theories, propositions and efforts towards the management of the tension, using the lens of the Ugandan legal system and the general Ugandan context. The thesis advanced is that none of the propositions so far advanced for restraining judges is fully appropriate to act as a single source of guidance for Uganda's commercial contracts adjudication. Therefore, the study aims to come up with recommendations for legal reforms that can achieve management of the tension, and legal certainty that is realistic within the country's context.

1.7 Structure of Chapters

The study is presented in ten chapters. Chapter one creates a sense in which the rest of the thesis should be understood, by providing the background information and explaining the problem under investigation, the research question, the objectives the study intends to achieve, and the gap in knowledge it contributes to filling. It also lays out the theoretical and contextual background of the study. Chapter two explains the methodology employed. It discusses and justifies content analysis as the methodology used in conducting the study, propounding the view that neither doctrinal analysis nor the orthodox purely qualitative/quantitative approaches are appropriate for investigating the subject at hand. Accordingly, the research steps proposed by interests jurisprudence are operationalised using a content analysis methodology to guide the study.

Chapter three provides the theoretical elements that have guided the content analysis of legal opinions, to arrive at the landscape of Uganda's judging paradigm, and to make inferences that have revealed the values that underlie both formalism and flexibility and that are in competition in Uganda. Further, the chapter offers a general review of the literature on the foundations of the tension, demonstrating that none of the literature fully accounts for the general prevalence of the tension, let alone its particular prevalence in Uganda. Finally, the chapter reviews existing theory in order to make a case for coexistence between formalism and flexibility.

Chapter four presents and discusses the research findings of the content analysis on the nature of Uganda's commercial judging paradigm, demonstrating the

tension as a practical problem, that calls for studies like this one. The chapter helps to understand the way the tension has manifested in Uganda and is thereby important in analysing its foundations and possible solutions. To enable the research on such foundations, chapter six revisits the views of other scholars on the values motivating judges to decide formalistically. The chapter demonstrates the viability of coexistence, and especially the need for a multivalued approach that balances competing values. In line with interests jurisprudence, the study treats the values elaborated in the chapter as the *jural postulates,* in this case termed *value postulates,* that guide the coding and content analysis for the values underlying formalism in Uganda.

Accordingly, chapter five reviews the literature on existing attempts at finding ways to achieve the coexistence of formalism and flexibility, and on the management of the tension. The major prescriptive theories and proposals are synthesised and analysed in the light of the Ugandan context and adjudicatory reality, making a case for the jurisprudence of interests as the guiding theory of the study, subject to its limitations being addressed using guidance from the institutional theory of law. This theory is employed, in combination with the theoretical review in chapter three, in order to make wider inferences from the findings of the content analysis.

In chapter seven, the findings of the content analysis with regard to the values underlying formalism in Uganda's commercial adjudication are presented and discussed. The observed indicative values or sub-values are weighed, and inferences made from them to reveal higher values underlying formalism, which are then elaborated in order to understand their wider theoretical and practical implications. The chapter demonstrates that the formalism in the tension has been motivated by Uganda's judging culture, made up of values that constitute the internal judging criteria, as well as legal and extra-legal values that constitute the external criteria. The dominant values are identified as possible candidates for the value balancing that should inform the principles, standards or rules that can guide judges, as a means to promote coexistence and therefore management of the tension.

On the other hand, chapter eight revisits the views of other scholars on the values motivating judges to decide flexibly. It also demonstrates the viability of coexistence and the need for a multivalued approach that balances competing values. Again, the key values proposed by other scholars are earmarked to act as *value postulates* (*jural postulates*) and guide the content analysis of the values behind flexibility in Uganda. In chapter nine, the findings are weighed, presented and discussed. Likewise, indicative values or sub-values are weighed, and inferences made from them to reveal higher values that are then elaborated, using the theoretical background in chapter three and eight, as well as Uganda's reality. The values revealed and discussed include those that are internal to the judicial institution as well as external ones—legal and extra-legal external ones. Amongst all these values, the dominant ones are also identified for balancing with formalistic ones, to arrive at coexistence and management of the tension.

Chapter ten recaps and concludes the entire study. It specifically helps to answer the question of how to manage the tension, by making recommendations for a legal framework that can achieve a coexistence of formalism and flexibility within the Ugandan context, based on the findings in chapters seven and nine. The proposals do not include rules, principles or standards that can be used to arrive at a coexistence of the two, as this task could not be achieved in the time and space available to the study. They are proposals on the type of guidelines that can be formulated, together with their normative premises, and not the exact content or exhaustive list of judging guidelines, as that is beyond the scope of the stud.

Chapter 2: Research Methodology

2.1 Introduction

This chapter explains and justifies the strategy, technique and methods used in answering the research question, within the study's theoretical and general context. Content analysis of judicial opinions as a legal research methodology and design is explained and evaluated, covering the key issues of reliability, replicability and validity. The methodology's strength, limitations, and the solutions to the limitations are also revealed, to the extent that they relate to the research context.

Content Analysis is the systematic and objective analysis of manifest and latent content of texts like judicial opinions, and make inferences therefrom; to identify their key characteristics, such as symbols, discourses and themes; in order to uncover consistencies, differences, and deeper meanings, relative to the context. The 'context' is the conceptual and theoretical environment in which the judicial opinions are analysed, and the whole world in which they can be related to the research question.[1] In any content analysis, the context is relevant because it defines the analyst's hypothesis of what the text means; and in the course of the analysis, embraces the knowledge the analyst applies to the text, such as theories, propositions or intuitions.[2]Therefore, before explaining and evaluating the

---

[1] Krippendorff K, *Content Analysis: An Introduction to its Methodology,* (Sage Publications Inc., 2004) Xvii, 33; PA Tylor and M Renner, *Analysing Qualitative Data: Program Development and Evaluation.* (University of Wisconsin Press 2003); S Stemler, An Overview of Content Analysis (2001) 7 (17), http://PAREonline.net/getvn.asp?v=7&n=17 (Accessed on 23/3/2018).
[2] ibid.

methodology, it is vital to have an overview of the theoretical context in which this study is located, which is later elaborated in chapters three and five.

2.2 The Theoretical Context

This study departs from the scholars who view the coexistence between formalism and flexibility, or the balancing of their interests, as impossible,[3] by proceeding on the presumption that an adjudicatory theory that achieves such goals is necessary and possible. From this perspective, the research is exploratory, as well as prescriptive. The study first uncovers and explains the values that motivate judges to both formalism and flexibility. In the final chapter, balancing the competing values is then used to inform the identification or construction of possible ultimate judging guidelines, as a way towards coexistence and therefore management of the tension.

The study contributes to extending the knowledge of the validity of the jurisprudence of interests as an approach to answering the research question, by illustrating its applicability and viability in the Ugandan context. As will be elaborated in chapter five, the theory has some limitations that potentially affect its reliability. However, to the extent that the theory proposes that judging guidelines should arise out of and reflect a balance of the competing values in the tension between flexibility and formalism,[4] operationalising it is a viable approach to finding

---

[3] BS Tamanaha BZ, *Law as a Means to an End: Threat to the Rule of Law* (Cambridge University Press 2006) 66; Gary Minda, *Postmodern Legal Movements: Law and Jurisprudence at Century's End* (New York University Press 1995) 28-29; Wolff LC, 'Law and Flexibility –Rule of Law Limits of Rhetorical Silver Bullet' (2011) 11 The Journal of Jurisprudence, 549; HMS Botoshi, 'Striking the Balance Between the Considerations of Certainty and Fairness in the Law Governing Letters of Credit' (PhD Thesis, University of Sheffield 2000) 100-01.

[4] Gary Minda, *Postmodern Legal Movements: Law and Jurisprudence at Century's End* (New York University Press 1995) 33.

a way to manage the tension. Accordingly, the study adopts it, while making exceptions with regard to the theory's key weaknesses. For example, interests jurisprudence leaves to the judges the tasks of identifying and balancing competing values; the study departs from this. The institutional theory of law is also used, to guide in understanding the values identified through the lens of Uganda's reality during the time of the judicial opinions. This helps to overcome another weakness in the jurisprudence of interests, namely that it does not provide a detailed guide on how the values recognised as competing should be elaborated and their practical implications fully articulated.

The main motivation behind the adoption of the jurisprudence of interests is that constructing a management mechanism from the values underlying the tension would be a rational and source-based way of searching for a solution to the problem. The competing values will be identified by a content analysis of judicial opinions in Uganda's commercial hard cases as the source of primary data. The findings are further analysed to understand the wider and more abstract values that individual lower values or categories of values imply, in order to further understand the competing interests and values that need to be balanced. Through this, the study proposes to provide a responsive mechanism, made up of objective and balanced judging guidelines, to guide judicial choice in the use of flexibility or formalism, as a way to manage the tension and thereby contribute to realistic legal certainty.

Accordingly, the jurisprudence of interests is guiding the answer to the questions of why the tension has prevailed, and how it can be managed, using data from a content analysis of judicial opinions, reported or unreported, made by Uganda's High Court, Court of Appeal and Supreme Court, across the country's different historical periods. The question that arises then is why content analysis, which is neither qualitative nor quantitative, but having attributes of both, is the study's methodology of choice.

2.3 Justification for Content Analysis

Content Analysis, being a methodology that by definition seeks direct observation of elements from texts, as well as concealed ones that may require discovery using inferences and interpretations, as well as enabling quantification of variables to get trends and patterns; [5] is suitable for this research, and therefore employed for a number of reasons.

In the first instance, an approach that is neither purely qualitative nor quantitative is suitable for conducting an investigation into the consciousness and foundations for judicial reasoning and perception.[6] For example, the existence and frequency of flexibility, formalism and the tension between them, as realities in Uganda, are ascertainable, using quantitative methodology, from the language of judges. Yet, as declared by Holmes, behind the logical language and form used by judges there often lay unarticulated and unconscious competing values, which are at the very root and nerve of the opinion, but which are incapable of quantification.[7] This study requires the uncovering of such competing values, while at the same time noting the frequency with which they have appeared, so as to qualify for balancing in line with interests jurisprudence.[8] In these circumstances, a suitable research technique should go beyond the limits of the conventional quantitative/qualitative methodological divide; and, content analysis does this.

No consensus exists amongst scholars as to whether content analysis can be defined as a qualitative or strictly quantitative technique. It was born as a

---

[5] PA Tylor and M Renner, *Analysing Qualitative Data: Program Development and Evaluation.* (University of Wisconsin Press 2003); S Stemler, An Overview of Content Analysis (2001) 7 (17), http://PAREonline.net/getvn.asp?v=7&n=17 (Accessed on 23/3/2018).
[6] E Ehrlich, 'Living Law and Plural Legalities', (2008) 9 Theoretical Inquiries in Law, 447.
[7] OW Holmes, OW Jnr, 'The Path of Law' 10(8) Harvard Law Review (1897) 457, 465-466
[8] F Powers 'Some Reflections on Pound's Jurisprudence of Interests' (1953) 3:1 Catholic University Law Review 15-16.

quantitative technique, as it was used mainly for counting frequencies during the 1930s and 40s.[9] Neuendorf[10] argues that it can only be quantitative since it involves scientific methods and design *priori* and aims at an exact and precise numerically based summary of a chosen message without detailed descriptions.[11]

On the other hand, substantial support exists for qualitative content analysis, otherwise called interpretive approaches;[12] a fact also acknowledged by its sceptics.[13] Unlike other interpretive analysis however, in content analysis, the standards of scientific methods are met; for example in terms of, objectivity, inter-subjectivity, reliability, validity, generalisability, replicability and hypothesis testing.[14] The difference between quantitative and qualitative content analysis is said to be that in the latter, there is no separation between the data collection and data analysis phases, but rather the two move in parallel and simultaneously in interaction with the text.[15]

The extreme view for qualitative content analysis is represented by Krippendorff's declaration that there is no distinction between qualitative and quantitative content analysis and all reading of text is qualitative.[16] This remains the case even when the analysis involves certain characteristics of a text that are later converted to numbers, as is the case in this study.[17]

---

[9] R Franzosi 'Content Analysis: Objective, Systematic, and Quantitative Description of Content', 1 Content Analysis (2008) xxii.
[10] KA Neuendorf, *The Content Analysis Guidebook,* (Sage Publications Inc., 2002) 4, 10 & 14.
[11] ibid; HD Lasswell, *Language of Politics: Studies in Quantitative Semantics* (The MIT Press, 1949) 47.
[12] Krippendorff (n 1) 17.
[13] Neuendorf (n 11) 4-11, 14.
[14] ibid 10-13.
[15] Franzosi (n 10) xxvii-xxviii
[16] Krippendorff (n 1) 16.
[17] ibid.

A similar view is held by Duncan & Hutchinson, who indicate that content analysis can be used to quantify the use of words before examining the meaning, to identify patterns. However, they also talk of a qualitative content analysis frequently used by lawyers, and clarifying by distinguishing it from doctrinal analysis; for, content analysis is used by critical legal scholars to deconstruct text, rather than reading and synthesising it, as is done in doctrinal analysis.[18] For instance, critical legal scholars use the technique to identify meaning behind words, not only in legislative but also in judicial text,[19] just as in the subject of this study.

The position taken by this study is the view articulated by Franzosi, that whenever possible one should try to mix qualitative with quantitative content analysis.[20] This is because firstly, as is the case with survey research, the numbers in content analysis were once words, themes and concepts in judicial opinions that are capable of a qualitative investigation, only turned into numbers representing frequencies by counting the number of times they appear.[21] Further, the mixed approach view to content analysis has been used and recommended as suitable for studies like this one, which is looking for both the existence of phenomena in judicial opinions – answerable using quantitative descriptions – and why they exist, to which qualitative content analysis is more suited.[22]

Secondly, content analysis is a suitable approach because its roots are in legal realism, which rejected legal formalism's search for independent doctrines of law

---

[18] HJ Duncan & T Hutchinson Defining and Describing What We Do: Doctrinal Legal Research, 17 (1) Deakin Law Review (2012), 83-119, 118.
[19] ibid.
[20] Franzosi (n 10) xli.
[21] R Franzosi, 'From Words to Numbers: Narrative, Data and Social Science' (Cambridge University Press, 2004), 287-297; Franzosi, Content Analysis: Objective, Systematic, and Quantitative Description of Content' (n 10) xli.
[22] MA Hall and RF Wright, 'Systematic Content Analysis of Judicial Opinions', (2008) 96 Califonia Law Review 63, 83-84.

that constrain legal actors.[23] Content analysis is appropriate for theoretically influenced studies in major branches of jurisprudence.[24] The technique is however applicable and usable in all theoretical contexts.[25] Such contexts include the one in this study, that looks at judges and the law as predictably responsive to various social, political and market conditions; these are, empirical claims that researchers can test,[26] although legal certainty can and should exist alongside such flexibility.

Thirdly, content analysis is also typically used in descriptive and exploratory studies, especially those examining a body of case law, legal doctrines or aspects of opinion writing that help to explain the background of legal doctrines, case subject matter or case outcomes.[27] The answer to why flexibility and formalism have prevailed in Uganda is in this case sought from a better understanding of the background to case outcomes as explicitly or implicitly revealed by judicial opinions, making content analysis a useful technique.

Fourthly, the suitability of content analysis is validated by other scholars tackling similar or related research questions having successfully used it. Hall and Wright brought it to the fore of legal research, proposing that although it was originally a social science methodology, it could form the basis for a uniquely legal empirical methodology.[28] This is because it naturally resembles the traditional legal scholarly exercise of reading cases, while at the same time bringing the rigour of social sciences to our understanding of case law, creating a distinctive form of legal

[23] ibid 76.
[24] ibid 77
[25] Neuendorf (n 11) 17.
[26] Hall and Wright (n 23) 77.
[27] ibid 90.
[28] ibid 63-64.

empiricism.[29] However, long before this, although most of them did so crudely, a number of famous scholars employed content analysis, including Karl Llewellyn and Richard Posner, with Llewellyn using it to study judicial rhetoric and decision-making,[30] answering similar questions to the ones in this study.[31] For instance, it was found suitable for looking at the motivations and social concepts used in judicial opinions,[32] and in research on how judges explain their decisions; as well as the connection between law (and judges' decisions) and social, political and economic conditions,[33] such as the influence of social policy in the formalistic doctrinal reasoning of judges.[34]

In contract adjudication and theory, most notable was the work by Hillman[35] and Johnson,[36] who studied the relationship between contract law and business norms. Hillman studied how successful promissory estoppel was in courts of law, finding that decisions show that scholars' theoretical assumptions of its importance were false.[37] On his part, Johnson examined how reported contract disputes could help tell what business practices the Commercial Code commanded judges to be guided by during adjudication.[38] Such studies act as evidence that the methodology can be a useful approach to investigating the existence of the tension in Uganda, and the values that underlie it, as in this study.

---

[29] ibid 64
[30] ibid 69-76.
[31] ibid 70, 72.
[32] ibid 93.
[33] ibid77.
[34] ibid 93.
[35] RA Hillman, 'Questioning the New Consensus on Promissory Estoppel: An Empirical and Theoretical Study', 98 Columbia Law Review (1998) 580; (1998) Cornell Law Faculty Publications. Paper 1068.
[36] JS Johnson, 'The Statute of Frauds and Business Norms: A Testable Game-Theoretic Model', 144 University of Pennsylvania Law Review (1996) 1859.
[37] Hillman (n 36) 581-2.
[38] Johnson (n 37) 1863.

Fifthly, the use of content analysis brings the benefit of creating order and logic in what appears, by use of mere conventional legal analysis, to be a chaotic or haphazard body of case law.[39] In Uganda, an attempt at conventional legal analysis of judicial practice and behaviour would lead to a body of cases that is largely unreported, inconsistent in judicial approach, and having no guidance on a judge's choice to be flexible or formalistic. By using content analysis, this study contributes to bringing order and logic, when it identifies the themes, trends and patterns that flow through Uganda's body of commercial hard cases. From these themes, trends and patterns, using direct explication and inference, the study uncovers the values underlying both flexible and formalistic adjudication, whose balance should held construct rules, principles and standards to act as Uganda's ultimate commercial judging guidelines.

Sixthly, content analysis is known to guarantee against contamination by the text's sources, by focusing on the textual features of which the sources are unconscious, through the use of coding categories the sources are not able to control.[40] In this case the judges, as sources of the judicial opinion as text, used the words and language from which themes can be extrapolated, without knowledge that they would form the units of analysis in this study. Therefore, the units of analysis are pure and free of judges' manipulation. If this were not the case, then it would affect the reliability of the themes identified as denoting flexibility or formalism; or indeed the validity of the conclusions in the form of observed and inferred values.

---

[39] Hall and Wright (n 23) 92.
[40] Krippendorff (n 1) 31.

2.4 Limitations of Content Analysis

Content analysis has been criticised for failing to go deep enough to reveal complex issues of legal interpretation, like procedural patterns and legal techniques, and further that the landscape of case law cannot be restricted to judicial opinions;[41] all of which criticisms are relevant to the search for values underlying the tension. Moreover, in the range of values in judicial practice, 'the judge's art when greatly practised is said to be far too subtle to be measured by any existing behavioural technique'.[42] Therefore, without a contextual articulation of the values revealed by the judicial opinions, any wider interpretations beyond their observance, trends, patterns and documentation will leave validity as an issue. The question would then be, whether there is independent validation of the values identified as being responsible for the judges' formalistic or flexible decisions; or whether they simply formed cover-ups for other reasons unarticulated in the given opinions.

Accordingly, a full understanding of the foundations for flexibility, formalism and the tension between them requires further articulation of the values identified from analysis of the wording in judicial opinions, by testing them against the relevant body politic and discourses. Otherwise, considered as its most significant limitation,[43] the exclusive dependence of content analysis on the contents of

---

[41] Hall and Wright (n 23) 92
[42] ibid 82.
[43] CM Oldfather, JP Bockhorst & BP Dimmer, 'Triangulating Judicial Responsiveness: Automated Content Analysis, Judicial Opinions, and the Methodology of Legal Scholarship (2012) 64(2) Florida Law Review, 1189, 1200.

judicial opinions would be a mere mapping exercise,[44] and generate a potentially incomplete and misleading picture.[45]

The reasons given by Oldfather, Bockhorst & Dimmer for the lack of consistency in the degree to which statements of judicial opinion correspond with the actual reasons for deciding the case are: cognitive limitations, where a judge may be unaware of or unable fully to articulate all components of his decisional process; insincerity or deceit, where the judge knows that the reasons he/she has given in the opinion are not the true factors motivating or explaining the decision; and the natural tendency to want to provide a strong reason for a decision reached, so that the opinion will highlight only the reasons that support the decision.[46]

These three reasons are human weaknesses to which any decision makers in any jurisdiction, judges in Uganda not being an exception can be party.[47] In addition, the Ugandan context presents more reasons that could potentially create doubt as to whether the values reflected by the judicial opinions correspond to the true reasons for the flexible or formalistic decision-making. For instance, judicial reasoning is often influenced by corruption, with almost 50% of Ugandans perceiving the judiciary as corrupt, and nearly 50% of those who had come into contact with courts between 2014 and 2015 admitting to have given a bribe.[48] The Chief Justice Katureebe has also admitted to the infection being widespread, to the

---

[44] Hall and Wright (n 23) 90.
[45] Oldfather, Bockhorst & Dimmer (n 44) 1201.
[46] ibid.
[47] ibid.
[48] GAN Business Anti-Corruption Portal, Uganda Corruption Report, https:// www.business-anti-corruption.com/country-profile/uganda (Accessed on the 23/3/2018).

extent that at times litigants choose their preferred judicial officer,[49] and at least one high court judge (Justice Joseph Murangira) is currently facing charges of taking a bribe.[50]

The defence by its proponents has been that content analysis does enough to create the best basis for understanding legal opinions, which are at the core of every legal system and its functioning.[51] Therefore it is adequate to use in a study like this one, where no attempts appear to have been made to investigate why the tension has prevailed. Any deeper research into the causation and institutional background for the competing values identified would call for a social-legal investigation into the linkage between the values revealed in the judicial opinions as underlying the tension, and Uganda's historical, social, political and economic context. However, this can only be reliably done following the results of studies like this one, in the first place identifying and analysing some of the competing values to provoke further research.

Therefore, in this study, as part of the content analysis methodology, the researcher makes 'abductive inferences',[52] supported by secondary information from reviewed literature sources, such as textbooks, journals and newspapers about the research context, and particularly Uganda. Unlike deductive or inductive inferences, abductive inferences involve inferring contextual phenomena like formalism, flexibility, market conformism, consumer welfarism, commercialism, and other phenomena that theoretically have a bearing on the tension. This points to

---

[49] The New Vision Daily of 6/12/16, https://www.newvision.co.ug/new_vision/news/1441480/judicial-officials-warned-corruption; and the Monitor News Daily of 2/5/2015, https://www.Monitor.co.ug/news/national/katureebe-list-corrupt-judges/688334-270334

[50] The Monitor News Daily of 19/1/17, https://www.Monitor.co.ug/news/National/Judge-under-probe-over-bribe/688334-3619466.

[51] ibid

[52] Krippendorff (n 1) 85.

unobserved phenomena of interest, takes the analysis outside the data and bridges the gap between descriptive accounts of texts and what they mean, refer to, entail, provoke or cause.[53] The evidence required to back the inferences is in the form of analytical constructs and everything known about the context, such as would be derived from secondary data the institutional theory helps to uncover.[54] The analytical constructs include the key attributes of formalism and flexibility analysed in chapter three, as well as their corresponding value postulates reviewed and elaborated in chapters six and eight respectively.

2.5 Secondary Data and the Institutional Theory of Law

In seeking a validation and better understanding of the values revealed, therefore, the institutional theory of law guides the use of secondary information relating to the judging environment, contained in textbooks, journals, newspapers, policy documents, and similar publications, which – just like the literature reviewed – has been studied using the library research technique. The institutional theory of law as propounded by Schmitt[55] is chosen because it reverberates with Holmes's declaration that, the law embodies stories of a nation's development, and its life is experience informed by the necessities of the time, the moral and political theories, intuitions about public policy and the prejudices judges share with their fellow men.[56] It provides that that every legal norm and phenomenon is anchored in reality and the product of attempts to preserve and promote some widespread social practice.[57]

---

[53] ibid.
[54] ibid
[55] M Croce, 'Does Legal Institutionalism Rule Out Legal Pluralism? Schmitt's Institutional Theory and the Problem of The Concrete Order', (2011) 7(2) Utrecht Law Review).
[56] ibid
[57] ibid 46.

A contextual analysis and elaboration of the values ascertained as underlying commercial hard cases adjudication satisfies both MacCormick's[58] and Durkheim & Schmitt's definitions of institutions.[59] The proposition from institutional theory,[60]that norms arise from previous social practices which the concrete order must preserve and promote, leads one to make inferences and arrive at understanding the higher values indicated by the identified lower values or manifestations, by relating them to the judging environment and practices of the times when the relevant decisions were made. This contextual analysis then produces a better understanding of what actually motivated the judges to be either flexible or formalistic, especially if, as proponents of the theory claim, both phenomena are needed at the same time.[61]

But first and foremost, the study has analysed content of the judges' opinions to generate primary data on indicative values or manifestations of higher values, before such inferences can be drawn. This analysis has systematically and objectively followed a network of steps and procedures that are replicable, collectively called the 'Content Analysis Research Design'.[62]

2.6 Content Analysis Design

The study employs a content analysis design that is meant to generate findings for all the research sub-questions. In seeking findings answering the sub-question of what Uganda's commercial judging paradigm is vis-à-vis the tension, the design is exploratory, seeking to generate data for mapping the judging landscape. Beyond this, generating findings for values that form the tension's foundations requires a

[58] ibid 48.
[59] Ibid 48
[60] ibid.
[61] N MacCormick, *Institutions of Law: An Essay in Legal Theory,* (Oxford University Press, 2007) 29; Croce (n 56) 48.
[62] Krippendorff (n 1) 81

more elaborate content analysis than the mere exploration, mapping and quantification of trends and patterns necessary to answer the first sub-question. The third sub-question of how formalism and flexibility can coexist is a theoretical one, answerable by way of making proposals, based on analysing existing mechanisms and the findings in answer to sub-questions (a) and (b).

The approach to answering the research question has to rest on the bedrock of the study's theoretical framework. Accordingly, with regard to sub-question one, the coding for search units to observe during the reading of cases is informed by the formalism and flexibility attributes identified in chapter three.[63] The data from this analysis are then used to map the prevalence of both judging phenomena and the tension between them. In the case of sub-questions two and three, the content analysis is guided not only by the coding of indicative values proposed by other scholars,[64] but also operationalises the proposed mechanism of the jurisprudence of interests to find both such competing values underlying the tension, and a way to manage it. This mechanism needs elaboration before one can appreciate the research design adapted to its operationalisation.

2.6.1 Interests Jurisprudence's Mechanics for Coexistence

Pound[65] proposed a four-step mechanism, which Powers[66] christened 'the mechanics of interests jurisprudence', that judges (in this case widened to the legal system) can use to balance competing interests, to achieve coexistence and the task of law. The first step is for judges to observe and record the totality of

---

[63] See text to Sections 3.2 and 3.3.
[64] See text to Sections 3.5 and 3.6; as well as chapters six and eight.
[65] R. Pound 'A Survey of social Interests' (1943) 57 Harvard Law Review 1; R. Pound, *Outline of Lectures on Jurisprudence* (Harvard University Press, 1943), 97-112
[66] Powers (n 8) 10, 15.

competing de facto values. These are ascertainable from the claims, demands, assertions and interests that human beings are pushing for recognition, and satisfaction by the law.[67] Despite the obvious unease about this task being left to the judges, this preliminary step is adopted in this study, as underlying values are observed from the interests, demands and claims that appear to have competed in Uganda's commercial adjudication. Because the study is not a live evaluation of interests in active disputes, such values are identified by analysing the contents of judicial opinions as texts, especially looking at what motivated judicial choice; the results are shown in Appendices 1-8.

The second step is to derive, from the competing values, a list of fundamental principles of human conduct. These are the presuppositions of the legal order of a particular society, that appear from an abstraction, translation, and synthesis of the greatest mass of the identified values/interests, otherwise called the *jural postulates* of that society.[68] These jural postulates have been otherwise explained, by Powers,[69] to be working hypotheses of what people in a particular society want the law to accomplish. In this case, there is hardly any focused study to earmark Uganda's jural postulates, and the task could not be accomplished in the space and time allowed for this study. In place of such a study, Uganda being part of the global commercial village, and therefore the community of users of its commercial law coming from multiple jurisdictions, this study adapts what it considers to be universal jural postulates. These are ascertainable by reviewing, and synthesising existing international literature on values underlying formalism and flexibility; presenting the competing values the community of commercial law users in

[67] ibid 14.
[68] R. Pound, *New Paths of The Law* (University of Nebraska Press, 1950) 32; Powers (n 9) 14; J. Stone, 'A Critique of Pound's Theory of Justice', (1935) 20:3 Iowa Law Review 537.
[69] Powers (n 9) 14.

different jurisdictions desire adjudication to serve−especially common law countries. These presumptive value postulates advanced by other scholars will be discussed in chapters six and eight. Viewed in relation to Uganda's body politic and other contextual pre-law institutions, they are representative of what should be expected from Uganda's commercial adjudication, the legal system in Uganda being common law based. As such, in reference to them as hypotheses of what the Ugandan commercial law community expect, I adopt the phrase *value postulates* or *presumptive values*, both of which I use interchangeably, as the occasion demands.

This step has been used to guide the coding for, analysis, and synthesis, of lower values, which are the manifestations to the value postulates. Further, the value postulates have guided the use of inferences and interpretations in the derivation of principles, concepts and themes that speak to the different dominant categories of higher values, and therefore the identification of such higher values as underlying both formalism and flexibility, and their competition resulting in the tension. The results are reflected in Appendices 1 to 8.

The search for such values is guided by the jural postulates of the society at a particular time, in this case the presumptive values articulated in chapters six and eight. As indicated above, the presumptive values or their manifestations are coded, and the codes used as the campus informing the search for Uganda's context-specific values underlying formalism and flexibility, as well as their underpinning lower values or manifestations, the results for which are presented in Appendices 1-5. From such lower values, higher values or value categories are identified and reported in Appendices 7 and 8. The latter results are the results of

my inferences, guided by the literature review, the theoretical framework and my background legal and adjudication knowledge and experience.

The third step is the formulation of a scheme of interests or values, being an inventory and catalogue or arrangement of values underlying adjudication. Pound proposed that the value catalogue should be made up of individual, public and social interests;[70]which categorisation this study finds inadequate to account for all the value types identified during the content analysis. Nonetheless, the findings from this stage are presented in tables appearing as Appendices 7 and 8. These findings are then used to make an evaluation and appraisal of competing values within different categories. Values are only compared and evaluated with others in the same category using their rate of prevalence, as all categories are deemed of equal value. This third step is what is used to identify the key underlying values and themes they represent, as explained in chapters seven and nine, and the final scheme of values indicated in chapter ten.

That Pound's 'scheme of values' technique is not found entirely applicable in Uganda, and thus its modifications justifiable. Firstly, the manifestations of these values are not strictly exclusive, as a single judicial practice, tradition or sub-value may indicate more than one higher value. For instance, the rejection of extra-legal considerations, like purposes and effect of the contract or rule, speaks to judicial objectivity and rationality; as well as 'justice as legality'. Likewise, deriving contract law from a few fundamental, general and abstract principles indicates rationality and objectivity, as well as legal certainty.

---

[70] R. Pound, *Outline of Lectures on Jurisprudence* (Harvard University Press, 1943) 97-112; Pound 'A Survey of social Interests' (n 65) 1.

Secondly, in actual judging practice, Pound's three categories of interests have been fused, and also invoked interchangeably, by judges. For instance in *National Social Security Fund & Sentoogo v. Alcon International Ltd*,[71] a contract deemed by judges to be unconscionable, ordinarily a matter of injury to private interests of equity; as well as prejudicial to the rights of the workers that saved money in the Appellant fund; unconstitutional; and contrary to the national interest; was interfered with for being contrary to public policy.

Therefore, the scheme of values adopted by this study follows the practical provinces of judging, being the internal to the judiciary vs. external criteria, as well as legal vs. extra-legal within the external judging criteria. This systematic – as opposed to substantive – categorisation helps to move the focus beyond the claims and assertions of the parties, to suits and society generally; to how certainty in judging can be achieved using a balance of such values.

The fourth and final step relates to how the tension can be managed. It involves deciding which of the competing interests prevails over others, to act as a judging criterion in similar cases. Interests jurisprudence proposes that it should be the one, which permits the satisfaction of the widest range of claims, with minimum friction and waste to the entire scheme of interests as a whole.[72] However, as Powers explains,[73] the jurisprudence of interests is based on a relativity of value or interests, as their values depend on acceptability and recognition by a particular society, reflected by its current civilisation.

---

[71] Supreme Court Civil Appeal (SCCA) 15/2009, (decision of 8/2/2013, Case 23, Appendix 5.)
[72] Powers (n 9) 15-16.
[73] ibid.

As such, only those that are strong enough by appearing more acceptable, without regard to their intrinsic worth, can make it to the table for balancing as part of the formulation of guidelines to coexistence. However, if the social conditions change in a way that reflects changes in the jural postulates, the minor interests may later get recognition and be given value to guide judging, just as the dominant one can become minor and be removed from judging guidelines.

Accordingly, in this study the frequency of a value at a particular time of Uganda's history is used to determine its merit, with those appearing in fewer than 10% of the cases analysed treated as minor and therefore not worth immediate consideration in the formulation of judging guidelines. As per interests jurisprudence, such minor values are meant to be eliminated from further consideration, in the process of formulating the jural postulates, for at this time it is principles and themes supported by the greatest number of values/interests that are considered fundamental and worth balancing.[74] In this study, this is when determining which of the values identified in step two should be analysed in the third and fourth steps.

The *mechanics* of interests jurisprudence and the generally recommended steps of content analysis during legal research blend well, and therefore combine to guide in answering the research question. Each of them calls for a rational and objective step-by-step analysis of adjudication texts, like judicial opinions, to ascertain competing values and thereafter make deeper and further analysis of findings to arrive at wider themes, concepts and discourses to use in answering the research question. Accordingly, the content analysis design employed comprises the following key steps.

---

[74] ibid.

2.6.2 Key steps of the Content Analysis:

a) Unitising of text, which involves
   (i) selecting cases to be analysed and
   (ii) defining and coding analytical constructs and themes;
b) Reading the judicial opinions;
c) Deducing the essentials of judicial opinions and summarising them;
d) Extrapolating, from the judicial opinions, themes representing flexibility and formalism;
e) Recording the descriptive and exploratory search results by tabulation;
f) Extrapolating and inductively inferring explicit values underlying flexibility and formalism from the observed themes;
g) Abductively inferring implicit values underlying flexibility and formalism;
h) Recording the inference outcomes by tabulation, alongside the descriptive and exploratory results;
i) Deriving patterns, trends and other frequencies of flexibility and formalism from the tabulated data;
j) Writing out the final analysis, including an articulation of the identified values within the wider theoretical and general context.

2.7 Selection and Collection of Cases for Analysis

With the process of reduction that content analysis uses to unitise text, the general body of commercial case law was looked at, to isolate commercial contract hard cases as the focus of this study. This was done by perusing hard and soft copies of indices of reported cases in the High Court from 1902 to 2018; in the Court of Appeal, including the defunct East African Court of Appeal, from 1902 to 2018; in the Privy Council, from 1902 to 1964; and in the Supreme Court, from 1974 to 2018. These periods represent the lives of the corresponding courts that have exercised powers of judicature in Uganda.

Reported cases in the indices are arranged in alphabetical order, which helped in identifying relevant cases, using such key words and phrases as ‘commercial law’ and ‘contract’ – which represented the general areas of law under which the majority of cases fell. To ensure exhaustiveness of the study however, the search

was continuously repeated using key words and phrases reflecting the specific commercial contract subject headings used in the law reports' subject matter indices. There are mainly: Banking; Sale of Goods; Insurance; Negotiable Instruments; Employment; Hire Purchase and Securitisation; and Debentures and Instruments by Way of Security (Bills of Sales).

Commercial contract cases were then accessed in the respective law reports and read. However, the law reports available at the time of the study did not contain all of the cases decided by the courts. Law reporting had long died, with the breakdown of the state in Uganda over the decade beginning in 1971, when the renowned Idi Amin took power in a military coup and abrogated the constitution, triggering years of military authoritarianism. At the time of the study, the Uganda Law Reports had last been published in 1973; the East Africa Law Reports in 1975; with a 1990s revival focusing on reporting mainly Kenyan cases; and the High Court Bulletin and Commercial Law Reports being published irregularly.[75]

Accordingly, the researcher has accessed judicial opinions of the past, from the scanty publications available, as these represent the only reliable sources of such data. This is not to say that fewer than necessary opinions were available. To the contrary, having scanned judicial practice over the course of the entire life of the country (since the transplant of English law) has provided over 300 judicial opinions, with each historical epoch represented, as indicated in Appendices 1 to 5. This number of cases is presumed to represent, fairly, the population of Uganda's commercial hard cases across judging history. In any case, the size of sample is immaterial, because as Krippendorff notes, with regard to content analysis of texts to uncover data like values that form the foundations to the

[75] https://www.ulii.org/content/about-ulii; judiciary.go.ug/data/smenu/25/law reporting.htm/.

tension, it is not about statistically drawing samples, but presenting quotes and examples in support of a general point, as representative of similar if not absent cases.[76]

The physical law reports on which the research was based were found in the High Court Library at the Main High Court Building, at City Square, in Kampala, Uganda; the Court of Appeal Library within the Court of Appeal Complex at Twid Plaza, in Kampala, Uganda; the Supreme Court Library at Upper Kololo Terrace, Kololo, in Kampala, Uganda; and the researcher's law firm, Fides Legal Advocates Library, at Plot 1-3 Coral Crescent, Kololo, , in Kampala, Uganda.

Online reporting is a very recent phenomenon, the only reliable resource being the Uganda Legal Information Institute (ulii) website, https://www.ulii.org At ulii, the Law Reporting Department of the Uganda Judiciary reports decisions of the Commercial Court (part of the High Court), the Court of Appeal and the Supreme Court; which decisions are the focus of this study. However, https://www.ulii.org was only fully constructed recently, intended among other things to revive, modernise, make regular and streamline law reporting, the past state of law reporting having been dubbed disastrous.[77] The website covers cases from 1999; however, cases decided during later years, after 2010, are more reported, with 1999 for instance having only one case, 2000 seven cases, and 2001 five cases, as compared to 2011 where the *monthly* average was over 10 cases reported.

To overcome the shortfall in law reporting, the researcher read through each one of the tables of contents of law reports published in Uganda so far, and used his position as an advocate in Uganda's courts of Judicature to gain access to the

[76] Krippendorff (n 1) 84.
[77] https://www.ulii.org/content/about-ulii

court files, in the registries of the different courts, of a number of unreported cases. A search was made of the courts' computerised lists of filed cases. The courts' computerised lists, however, mainly cover cases filed from 2001 when computerisation of the courts' registries began.[78] In each court registry's general computer can now be found titles to cases that by 2001 were pending completion, together with cases filed post-2001. Alongside each case title is also indicated the branch of law and a brief description of the cause of action or remedies sought.

There are also judicial opinions accessed from full decisions that were uploaded online by the judges themselves, but not yet captured by www.ulii.org. A number of decisions were also accessed from the law firm files of Fides Legal Advocates, especially decisions in cases I had argued in court. All those cases accessed otherwise than from publications were photocopied and are available for verification together with all others analysed.

Accordingly, contract cases from both the pre- and post-computerisation periods have been analysed, together with unreported decisions on the court files post the 2001 computerisation of court registries. Decisions found to be hard cases, within the context of this study, were then chosen for further reading, documentation and analysis.

As earlier elaborated,[79] what is meant by 'hard cases' here, is those in which the result is not clearly dictated by statute or precedent[80] or those in which a judge has sufficient reservations about applying what he sees as the clear interpretation of a

---

[78] Information about the computerisation was given to the researcher by Charles Okuni, one of the longest serving court clerks at the Commercial Court, formerly a clerk for the entire High Court.
[79] See text to section 1.1.5.
[80] R. Dworkin, 'Hard Cases' (1975) 88(6) Havard Law Review, 1057.

statute,[81]or contract terms. The judge then has to choose between more than one possible answer, by asking which of the possible answers fits the community's structure of institutions, decisions and public standards as a whole,[82]or otherwise serve the values at hand.

To identify a hard case was however not possible from the beginning of that case's documentation, since some of the elements that would qualify a case as such appeared in the middle or even at the end of the judicial opinion. The researcher therefore had first to do a quick and general reading of the commercial contract cases, to determine which ones fit the definition of a hard case. Following this, substantially the entire universe of hard commercial cases was then photocopied and collected to form units of text for further reading and content analysis.

Another criterion for choice of cases to analyse was the presence or absence of a record for the judge's reasoning. Specifically, cases where a judge appeared to reason in justification of his flexible or formalistic approach were chosen as the core texts for analysis. Besides selection of the cases to be analysed, as an integral part of the content analysis methodology,[83] a coding scheme was developed to guide the reading and analysis of their corresponding judicial opinions.

2.8 Coding Scheme

Coding involves constructing a pre-defined set of concepts/categories under which the specific segments of the content of a text relevant to the research question, in

---

[81] W. Twinning & D. Miers, *How to do Things with Rules,* (3rd Edn. Weidenfeld & Nicolson 1991; and 5TH Cambridge University Press 2010) 98 & 367.
[82] R. Dworkin, *Law's Empire* (Fontana 1986) 255-256.
[83] M Hall, 'Coding Case Law for Public Health Law Evaluation: A Methods Monograph', (2011) Public Health Law Research, 18; Hall and Wright (n 23) 80-81.

this case themes and values, are characterised by placing them in a given category.[84] The term 'category' is used here to mean a group of words with similar meanings or connotations.[85] The categories are derived from the manifestations and sub-values that define higher values, proposed to be at play by existing literature, on values underlying both formalism and flexibility during adjudication. The codes then guided the researcher in reading and analysing the text as he looked for information that was a good fit for the predefined codes, to create data from which inferences could be drawn. Before describing the codes used and how they were applied, one needs to appreciate why and how coding was done.

2.8.1 The Value of Coding to the Study

According to Hall and Wright, the value of a coding scheme in analysing judicial opinions is to ensure an objective and consistent reading of the selected cases, with greater focus on the research question.[86] It helps to avoid bias, in the sense of the researcher merely looking for confirmation of a predetermined position. Therefore, all decisions on variables (in this case the value postulates), their measurements and the coding rules must be made a priori, before the reading and observations from the texts begin, to ensure that bias is avoided (objectivity or intersubjectivity).[87] Intersubjectivity is what scholars who view objectivity as an illusion and all human inquiries as subjective, take as a state of being consistent during an inquiry (not asking "if it is true" but rather if we agree it is true.").[88]Further, coding helps to create reproducibility,[89] such that other researchers are able to

---

[84] Krippendorff (n 1) 100.
[85] Weber, RP *Basic Content Analysis,* (Sage Publications Inc, 1990) 37.
[86] Hall and Wright (n 23) 80-81.
[87] Neuendorf (n 11) 11.
[88] Ibid.
[89] Hall and Wright (n 23) 80.

apply the scheme to their own research, in line with the methodology used in this study.[90]

2.8.2 Presumption of Equality amongst Opinions

Coding and the resultant counting of cases assumes that the judicial opinions are equal in value, such that the information from one is as relevant as that from others. As such, there is in the methodology a presumption of equality of all cases, courts and judges.[91] In this study, the judicial opinions analysed cut across courts of different weights in terms of precedence, with the Court of Appeal superior to and its decisions binding on the High Court, and the Supreme Court superior and its decisions binding on both the Court of Appeal and High Court.

Although on the face of it this creates an imbalance between the opinions analysed, revisiting the research problem and question dispels the possibility of such inequality. The issue at hand is not the doctrinal outcomes of the opinions, but the landscape, and whatever else motivated judges to arrive at such outcomes. In the search for the values underlying the opinions, the level of the court in the hierarchy is immaterial. What matters is the set of reasons a judge assigned to his decision, that explain the flexibility or formalism he or she employed. This presumption of equality has helped to reveal that the values uncovered cut across the different levels of courts, with High Court judges sometimes appearing bolder in their expression.

---

[90] Hall and Wright (n 23) 80.
[91] ibid 83-84.

2.8.3 The Coding Process

As is the case with content analysis, the theoretical framework of the study guided formulation of the coding units.[92] The coding units used are referential in nature, indicating the way each unit is represented in legal theory and practice.[93] For instance, the judicial reasoning that seeks to strictly construe the terms of contract by their literal meaning, without regard to considerations like fairness, is a coding unit named Pacta Sunt Servanda, coded as 'PACTA'. From observations of PACTA tendencies, is inferred the value of freedom of contract, unitised as 'Freedom of Contract' and coded 'FOC'. Such referential unitising has been preferred because it will be easy for other researchers, knowledgeable in the theory and practice of commercial law, to replicate. It is also the recommended type of coding units for studies like this one, that are interested in making inferences about attitudes, values and preferences.[94]

Accordingly, both manifest and latent variables, as attributes of the phenomena, have been coded and used. The manifest content in this case refers to clearly visible judicial practices that fit the description of formalism or flexibility. It also includes statements made by judges giving reasons for their decisions, which are descriptive of value judgements and pronouncements. On the other hand, as defined by Neuendorf, latent content consists of the unobservable concepts that cannot be measured directly but can be represented or measured by one or more attributes.[95] It speaks to the deeper meaning behind the words and phrases used by judges, that can be arrived at using variables extracted from a variety of

---

[92] S Stemler, An Overview of Content Analysis (2001) 7 (17), http://PAREonline.net/getvn.asp?v=7&n=17 (Accessed on 23/3/2018) 2.
[93] ibid
[94] Stemler (n 93) 2 ibid.
[95] Neuendorf (n 11) 23.

theoretical works, like the attributes and value postulates given in chapters three, six and eight.

Two types of coding units have therefore been developed. The first category is in the form of the flexibility and formalism attributes in appendices 1 to 5, containing the derived data. They are correlations assumed to explain how available texts (in this case judicial opinions) are connected to the possible answers to the research question. The coding units are therefore extracted from and seek to operationalise the research context in analysing the texts, acting as rules of inference that guide the analyst from the texts to answering the research question. These analytical constructs have added to the reliability of the coding scheme, since they act as testable mini-theories of the context, making the knowledge of context like this study's theoretical framework portable, codable and reproducible by other researchers.[96] They also ensure that the content analysis models the context of use. In this case, the context is the proposition that in Uganda courts have practised both formalism and flexibility at the same time; and that the coexistence of the two can be achieved through the pursuit of ultimate guidelines; and that formulation of the guidelines should be informed by the jurisprudence of interests, in combination with the institutional theory of law. Three aspects of the theoretical framework have informed the coding units to guide answers to the research question.

Firstly, there is the imperative to ascertain whether and why both flexibility and formalism have prevailed in Uganda at the same time. This led to a baseline testable proposition, that as opposed to the 'either/or' non-reconcilable claim by proponents of the absolute formalism or absolute flexibility judging paradigms, both

[96] ibid 35.

flexibility and formalism have been practised by the same courts and judges at the same time. To achieve this descriptive aspect of the study, the theoretical attributes of both flexibility and formalism (or a combination of them) expounded by scholars, such as Chen-Wishart,[97] were translated into coding categories to guide the reading and analysis of the judicial opinions in ascertaining the prevalence of the two judging approaches.

Secondly, the guided coding emerging from the jurisprudence of interests aimed at answering why both formalism and flexibility were actually practised by commercial judges at different epochs of Uganda's history. This would uncover competing interests and other values underlying flexibility and formalism, to inform the creation of ultimate judging guidelines that would in turn produce a coexistence between flexibility and formalism, and thus manage the tension.[98] These values are supposed to be ascertained from the judicial opinions themselves, guided by the coding of sub-values of value postulates, and in turn using these to analyse the reasoning of the judges to find their equal or substitutes in Uganda. This stands for what would be taken as best in promoting the ultimate goal of social welfare in interests jurisprudence.

Thirdly, because the jurisprudence of interests does not have an exhaustive theory on what social welfare actually means, and how it is linked to law and commercial adjudication in particular, the study also employs aspects of the institutional theory of law to explain observed values. This has also helped in formulating the second category of coding units, used to unmask judicial reasoning, and reveal what Holmes termed the inarticulate and unconscious competing value judgements,

---

[97] M Chen-Wishart, *Contract Law* (Oxford University Press, 2010) 12-18.
[98] Minda (n 4) 33.

legislative grounds that are the very root and nerve of the whole proceeding.[99]Therefore, to achieve more reliability and validity of findings, social welfare has not been presumed or used as the ultimate goal of law or adjudication in Uganda.

2.8.4 Coding Units, Codes and Instructions

Content analysis usually involves preparing Coding Forms and Coding Books that together include particulars of the codes used and detailed explanations of their application. For this study however, the essence of the two documents has been captured in Appendix 9, titled The Coding Table. The codes were developed in the light of the need to be guided in reading the judicial opinions, for the purposes of: validating the presumption of prevalence of flexibility, formalism and the tension between them in Uganda's commercial hard cases adjudication; finding, by observation and inference, the values that form the foundations to the phenomena under study; and thereby creating data for wider and exhaustive articulation of such values as a way towards finding a source for reliable and responsive ultimate commercial judging guidelines.

The coding has therefore been used to tabulate the data derived from the content analysis, with the source and value of each component clearly indicated. For each epoch of Uganda's commercial judging life, the same coding scheme has been used. However, the results are tabulated and reported separately using Appendices 1-8. The separation is for ease of particularised analysis, and in order to help answer the research question with attention to Uganda's historical context and general body politic as the institutions forming the judging environment.

---

[99] Holmes (n 8).

2.8.5 Testing Coding Reliability

Because the intention of coding in content analysis is to ensure reproducibility, and the nature of the variables coded can be subjectively construed, it was vital for me to test coding reliability.[100] Adopting Neuendorf's definition, reliability means the extent to which the procedure for ascertaining the practices of formalism and flexibility, and their underlying values, would yield the same results in repeated trials.[101] This can be established either by subjecting the coding to another scholar, to get comparisons and work on the differences of opinion; or by using the researcher's own knowledge and expertise.[102]

In this case, my knowledge of the guiding theories of the study and my over 20 years experience in litigation was used to improve the reliability of the coding throughout the course of analysis. Further, the above detailed description of the methodology and coding scheme in this study achieves the standard regarded by Hall and Wright as constituting adequate reliability, i.e. being sufficient for others to replicate.[103] The initial set of categories was after all not treated as cast in stone, as more categories revealed by the reading of judicial opinions were added, to allow a more exhaustive coding scheme that could capture all relevant data from the judicial opinions. Finally, as part of ensuring reliability, the initial list was refined by generalising the reach of some categories, thereby avoiding repetition and overlaps. Categories that could be combined and defined under a single concept or terminology were joined and redefined as such, and more particular categories were dropped for more inclusive ones.

---

[100] Hall and White (n 23) 23.
[101] Neuendorf (n 11) 141.
[102] ibid 26.
[103] Hall and Wright (n 23) 112.

2.9 Presentation, Analysis and Validity of Results

For the findings to be analysed, the first step is the development of analytical constructs.[104] According to Krippendorff, analytical constructs are 'if then', acting as rules of inference, that have guided the researcher to connect the observed explicit values, manifestations of flexibility and formalism, trends and patterns, to answering the research question.[105]They arise from revisiting the theoretical framework of the study, deriving guiding mini-theories therefrom, and using them to interpret and analyse the data. Accordingly, the theoretical justifications and explanations for both flexible and formalistic commercial judging are tested against the manifest and latent values behind Uganda's commercial adjudication.

2.9.1 Validity of Findings

With a revisit to the theoretical underpinnings of the study, therefore, inferences are drawn and their probability and validity strengthened by the researcher's knowledge of the context of study.[106] As defined by Weber, validity is the extent to which the variable derived (in this case the stated underlying values) corresponds to the construct the researcher intends it to measure.[107] A variable is therefore valid if it matches the abstract concept it represents, the strongest form of validity being validity due to external criteria, such as being consistent with the theoretical arguments relating to the topic or field of study.

Therefore, correlation between the theoretical framework and research findings, and using the framework as a guide in drawing inferences, proves validity of the

---

[104] Krippendorff (n 1) 34-35.
[105] ibid 35
[106] ibid 36.
[107] Weber (n 86) 16, 19, 20.

values derived as foundations to flexibility and formalism; and as valid sources of Uganda's ultimate judging guidelines. It also creates the study's internal consistency. To Weber, this consistency is another source of validity, because the textual evidence being consistent with the interpretations is what validates the findings.[108] In this study, the context includes the relevant legal theory, doctrine, practice, and the institutional background to Uganda's commercial judging, which have all been taken into account in understanding the values observed and inferred from the analysed case law.

2.9.2 Drawing Inferences and Reporting Findings

The criteria used to arrive at the inferences include: the ordinary – and, where applicable, technical – meanings of the words and phrases judges used when justifying or laying ground for the practice of either formalism or flexibility; the wider conceptual connotations of the meaning of such statements or words used; and the significance of such concepts in the wider Ugandan context, i.e. the nature of the country's legal and commercial justice system, history, and general body politic. Accordingly, the final data and analysis include direct reporting of observations, and extrapolations of trends, patterns, and latent values underlying both formalism and flexibility in Uganda's commercial judging. Extrapolations are inferences of unobserved instances within or beyond the observed data.[109]

For reporting purposes, the cases are summarised to elucidate the relevant parts of the opinions, and tabulation made of the research results. Tabulation was done because it is the most recommended and most commonly used technique of

---

[108] ibid 47.
[109] Krippendorff (n 1) 47.

making large amounts of data, resulting from content analysis, comprehensible.[110] The findings are presented in Appendices 1-5. The tables have columns for: the court that decided the case; the judge; the official citation; the summary of the case; the attributes of either flexibility or formalism; the judicial approach; and the derived/inferred values underlying each judicial approach.

The judicial opinions are summarised, as opposed to laying them out in entirety, as part of the content analysis methodology. Rearticulating and summarising of large volumes of data are done to reduce the diversity of text down to what matters.[111] The summaries therefore targeted the actual parts of each opinion where the judge can be seen to have decided flexibly or formalistically, or where he or she expressed or alluded to the underlying values to such a judicial approach.

The codes used to navigate and interpret the judicial opinions and arrive at both the attributes and underlying values are also indicated in the table, making it easy to construct clear graphs and make other extrapolations from the tables. These tables are therefore the springboards for the analysis of findings done in chapters five, seven and nine.

2.9.3 Mode of the Final Analysis

The final analysis does not follow statistical models, for as indicated by Hall, the final analysis of results derived from content analysis need not involve any statistics.[112] It is proper to make such analysis in a rigorous, purely qualitative way, focusing on themes and patterns that are better understood through conceptual descriptions and narrative illustrations than numbers. Guided by the categories as

[110] ibid 192.
[111] ibid 84-85.
[112] Hall and Wright (n 23) 27.

determinants of both flexibility and formalism, judgements are read as text. From the reading are identified words, phrases or themes, their inferences, and the patterns and trends relating to the analytical units, which are then recorded and tabulated – a defining feature of quantitative content analysis. [113]

Coding has enabled the search for, and the quantification and eventual presentation of, attributes – and therefore occurrences of flexibility and formalism, and their underlying values – during the different judging periods across history. This quantitative aspect of the analysis is used to answer the question of what Uganda's judging paradigm is. The results are presented and discussed in chapter four, and demonstrate the tension as a real problem in Uganda's commercial adjudication. Further, to an extent the frequencies play a role in selecting values to analyse, while answering questions of why the tension has prevailed, and how it can be managed. This follows the view of interests jurisprudence, that every society should have a system and hierarchy of values to guide courts and legislators on its basic interests, and that the law should give effect to this system at a particular time. [114] The system should include the means of ranking interests and identifying those to be adjusted and balanced by courts in cases of a tension.

In this regard, the study adopts the quantitatively-oriented proposition by Pound[115] and Powers,[116] that the strong values are the ones to be balanced, not because of

---

[113] Franzosi (n 22) xxii

[114] J. Antieau 'The Jurisprudence of Interests as a Method of Constitutional Adjudication', (1977) 27:4 Case Western Reserve Law Review, 823, 843-44; J. Stone, 'A Critique of Pound's Theory of Justice', (1935) 20:3 Iowa Law Review, 531, 541.

[115] R. Pound 'A Survey of Social Interests' (n 66).

[116] Powers (n 9)10, 15-16.

their intrinsic worth or validity, the level of influence they appear to have in society;[117]subject to having minimum adverse effects on the general scheme of interests. [118]In this study, the criterion is the frequency with which they have appeared in judicial opinions.

Meanwhile, consideration of the weak ones – those that have appeared with low frequencies – is suspended, when making the list to be analysed further, for not being fundamental enough in society to be protected by the law, until and unless circumstances change to require otherwise.[119] Powers[120] notes that this relativity of values and interests, that depends on the frequency with which a value has been claimed, is an integral component of the jurisprudence of interests. Under this relativity, values that hitherto had dominance are dropped to the suspension zone upon losing favour in society, while those that were previously minor will make it to the balancing table, for having attained dominance, and therefore gained favour.

The Pound-Powers proposition above informs this study's discussion on values in chapters seven and nine. The competing values are identified from output one of the content analysis, the results of which are presented in Appendices 1 to 5. Further analysis is made, and by use of inferences the higher values – those that values in output one imply – are presented in Appendices 7 and 8. The frequencies of values in output two are then determined, and the results presented in Appendix 6 and Figures 1 to 12. As indicated above, two final levels of analysis are then

---

[117] ibid 16.

[118] Pound, *A Survey of Social Interests*, (n 66) 15.

[119] Powers (n 9) 16

[120] ibid

made, to determine research outputs three and four; which define the discussion of values and their categorisation in chapters seven and nine. The results are suggested to be the focus of balancing to arrive at judging guidelines that could achieve coexistence of formalism and flexibility.

Besides the exploration of the tension as a reality in Uganda and determining a system and ordering of values to be balanced, the actual content and implications of values that explain the foundations to the tension are derived by direct extrapolation from the content of the judicial opinions. Themes and concepts that point to the values underlying both formalism and flexibility are observed or inferred from the words used by judges, expressly or by implication. Where values are not directly evident from the language used by the judge, inferences and interpretations have been made from the observed analytical units. This is guided by the list of indicative values advanced by both formalism and flexibility theory, as underlying either phenomenon in contract adjudication, as discussed in chapters six and eight. That list is however a basic checklist and not the ultimate one, as allowance exists for identifying and articulating values the judicial opinions may reveal, besides those identified in chapters six and eight.

To help illustrate the patterns and trends, however, counting was done, and frequencies of given features reported, as this could help answer the research question, thereby challenging the conventional wisdom or provoking further research.[121] The trends and patterns are represented in graphs, with each image representing a different aspect of the analysis. This is done for each different epoch, with the observations and inferred values regarded as providing a summary of the foundations to flexibility, formalism and the tension between them in

---

[121] ibid 28.

Uganda's commercial judging. As such, the final analysis depends less on what happened in particular cases, and more on the content analysis approach of arriving at generalised conclusions.[122]

A systematic and objective discovery of viable and theoretically plausible ways towards the coexistence of flexibility and formalism is achieved, by constructing possible ultimate concepts and standards to inform the formulation of commercial judging guidelines applicable to all manner of commercial contract disputes. It is therefore important, as is done in chapters three and five, to review the theoretical discourse surrounding the tension and assess the logicality and viability of coexistence between formalism and flexibility, and therefore the management of the tension. Therefore, the study first brings understanding to the tension as the problem and makes a theoretical case for coexistence; identifies the units of analysis for coding and research; and sets the theoretical context within which the findings are to be elaborated and analysed.

[122] Neuendorf (n 11) 15.

Chapter 3: Theoretical Foundations to the Tension

3.1 Introduction

This chapter reviews the literature on the formalism-flexibility divide, for the purpose of bringing understanding to the theoretical foundations to the tension, as a first step to finding ways to manage it. The chapter revisits key propositions on both sides, indicating the norms and judicial practices through which formalism and flexibility manifest, and the jurisprudential perceptions underlying them. It does not review literature on specific values proposed by scholars as competing on either side of the tension, but rather their theoretical foundations. Literature on such specific values is revisited in chapters six and eight, with regard to formalism and flexibility respectively.

Common-law-based commercial law practised in countries like Uganda mainly grew out of judicial reasoning, with hardly any significant legislative intervention.[1] Therefore, as suggested by Macneil,[2] as well as Adams and Brownsword,[3] there is a linkage between the formalism and flexibility judging ideologies on the one hand, and specific contract ideologies, plus the values that inform them, on the other. Macneil[4] maintains that values like rationality, arising out of the view of contract as promise, promote formalism.[5] However, Adams and Brownsword fail to articulate

---

[1] R Goode, *Commercial Law in the New Millennium,* the Hamlyn Lectures (Sweet & Maxwell 1998) 6, 8-9.
[2] IR Macneil, 'Values in Contract: Internal and External', (1983-84) 78 Newyork University Law Review, 340, 396.
[3] JN Adams and R. Brownsword, *Understanding Contract Law* (Thomson Sweet & Maxwell, 2007) 189, 203-207; JN Adams and R. Brownsword, 'Ideologies of Contract', (1987) 7:2 Legal Studies, 205, 217-223.
[4] Macneil (n 2) 396.
[5] ibid 396.

the causal relationships amongst judging approaches, contractual ideologies and underlying values. This study proceeds on the assumptions that doctrinal values like market individualism are amongst those that motivate judges to decide formalistically; and that doctrinal values like consumer welfarism are amongst those that motivate judges to decide flexibly. Adams and Brownsword's claim, that there is a natural affinity between the judicial and contractual ideologies, is opposed.[6]

This chapter therefore first reveals the key attributes of formalism and flexibility, which will act as a lens through which to observe these two approaches during the content analysis. A general evaluation of the literature is also made, on specific competing values underlying the two judicial approaches. The chapter further revisits the formalism-flexibility discourse, to make a theoretical case for the viability of a coexistence-judging paradigm; where instead of searching for a winning side, a balance in the service of both formalism and flexibility values can be attained.

3.2 Key Attributes of Formalism in Adjudication

By building a scientific legal system, Pound notes that the formalism legal theory has influenced a culture of scientific and artificial societal attitudes, and a corresponding approach to law.[7] There is, an even more relevant, subtle, and far-reaching influence on judging practice. The same would be true with flexibility legal theory; but, Pound wrote when formalism ruled, and his efforts were part of the revolt that promoted flexibility as a saviour from the injustice of legality and the

---

[6] Adams and Brownsword, *Understanding Contract Law* (n 3) 206-7; Adams and Brownsword, 'Ideologies of Contract' (n 3) 221-2.
[7] R Pound, 'Mechanical Jurisprudence', (8 Columbia Law Review, 1908) 605-606.

ghosts of past judicial intellect.[8] His focus was therefore, understandably, on what the formalism legal theory had brought, and on what was wrong with that contribution. Similar analysis about flexibility would be mainly speculative, and not anchored in court disputes; which in this case are the reality he so valued.

The extent to which the two judging ideologies have had influence in Uganda, and what values have motivated their prevalence, are revealed in chapters six to nine. However, to do that, one needs to understand the theoretical attributes that define both formalism and flexibility in adjudication. The attributes are perceptions of judges as will be tested in real cases, and not necessarily those of the general public, about the key topics jurisprudence in the field has addressed. On the side of formalism legal theory, from the point of view of its most influential scholar, Langdalle, and his followers, key attributes of formalism in adjudication are ascertainable.[9] They are categorisable as relating to the nature of law, the sources of normativity and the role of the judge in a dispute.

3.2.1 The Nature of Contract Law

The first attribute relating to the nature of the law is what Burton[10] referred to as 'determinate formalism'; the perception of the nature of the law as a clear, complete, certain, predictable and determinate body of dogmatic rules that commanded a single right result in all possible cases.[11] This explains Adams and Brownsword's observation that in contract adjudication, the formalistic view's fundamental judicial practice is that the contract rulebook governs all reasoning

---

[8] ibid 606, 609, 613.
[9] G. Minda, *Postmodern Legal Movements: Law and Jurisprudence at Century's End* (New York University Press 1995) 17.
[10] SJ Burton, *An Introduction to Law and Legal Reasoning*, (Little, Brown & Co. 1985) 4; .
[11] Minda (n 9) 6, 13

and decisions.[12]

Secondly, law is a formal and conceptually ordered system that satisfies the legal norms of objectivity and consistency.[13] This points to the rules being coherently derived from a small number of abstract principles and concepts that contribute to a holistic framework and system within which persons transact with each other; thus the view that law is logic.[14] This is as opposed to being derived from legal policy or standards.[15] The concepts and principles are fundamental because, by logical deduction, judges identify a few concepts which they see as self-evident and used as the premises for all reasoning, reaching conclusions without involving or invoking any values, morality or social policy. They are also general because they are applicable to all types of contracts.

Atiyah gives examples of such operative principles and concepts that defined the classical formalistic contract theory: no man was his brother's keeper; it was up to the parties to bargain and agree over the price and terms; offers are made and can be rejected, accepted or met with counter-offers; neither party owes the other any duty before the deal is struck and each party relies on his own judgment and information, the only exception being that there must be no misrepresentation or fraud, which were construed narrowly; and the deal is finally struck when parties agree, and mistakes are irrelevant unless they affect the free will and voluntary consent to make an agreement, for, parties should agree freely and with no

---

[12] Adams and Brownsword, *Understanding Contract Law* (n 3) 189; Adams and Brownsword, 'Ideologies of Contract' (n 3) 214.
[13] Minda (n 9)13-16.
[14] Grey T.C, *Formalism and Pragmatism in American Law*, (Koninklijke Brill, NV, 2014) 54; PS Atiyah, *The Rise and Fall of Freedom of Contract* (Clarendon Press 2008) 399-400, 402-403; Minda (n 9) 13-14.
[15] Goode (n 1) 17, 25-26.

abnormal pressures.[16]

Further, such general abstract concepts are operative concepts, but law as conceptually ordered also includes the legal system relying on classificatory categories.[17] For instance, certain aspects of behaviour being regulated by the law of negligence and other torts, distinct from the subject of contract law. Formalism theory takes such strictness as extending to all sources, from which judges are authorised to look for normativity.

3.2.2 The Sources of Normativity

Formalism legal theory views the law as a value-free science,[18] whose materials are all contained in printed books, and therefore should be applied free of morality and other extra-legal norms. Therefore, law is formal and autonomous, as well as neutral, because it is separate from the contingent empirical context and can be invoked by persons with different opportunities in the enjoyment of rights or performance of duties.[19] In contract terms, the law is neutral because rules from general concepts and principles apply to all persons and subject matter alike, following the contract rulebook – the rules in statutes and settled case law.[20]

Further, contract law is autonomous and formal because the contract rulebook has its own logic, in the sense that there is a logical construction and consistency from offer and acceptance to determination of contracts. Such logic is closed, and the contract concepts are characterised by purity, integrity and doctrinal conservatism,

---

[16] PS Atiyah, *The Rise and Fall of Freedom of Contract* (Clarendon Press 2008) 402-3.
[17] Grey (n 14) 55.
[18] Minda (n 9) 13-14
[19] TC Grey, 'Langdalle's Orthodoxy', (1983) 45 University of Pittsburgh Law Review 2-53; Burton (n 10) 3-4.
[20] Atiyah (n 16) 402

where grounds for decisions ought to be well established and not products of creativity and innovation.[21] As such, the individual or institutional values of judges, as well as the social, political or economic values that at times motivate judges in hard cases, are irrelevant during commercial adjudication unless otherwise declared by law.[22] Therefore, there is no room for extra-legal considerations like: policy; fairness; worthlessness; subjective judging, such as the use of personal intuitions; and preferences, or other forms of judicial flexibility.

There is also no room for conceptual flexibilities like the notions of reasonableness or unconscionability. Where they seem to appear, the judges have to structure the discretion in such notions in terms of general rules of thumb for applicability and legal validity.[23] In support of this view, Joseph Raz[24] argues that there is a distinction between a judge's decision and the existence of reasons that inform the judge's decision; an observation Freeman cites as justification for a new line of research focusing on adjudication.[25] Therefore, as explained below, the role and authority of judges in contract disputes is also viewed as very restricted.

3.2.3 The Role of Judges in Contract Disputes

The role of judges is to recognise that the law is defined by the attributes, explained above, of the law's nature and sources of normativity. Judges should limit themselves to a logical deduction or discovery of the law from fixed principles,

---

[21] Adams and Brownsword, *Understanding Contract Law* (n 3)189; Adams and Brownsword, 'Ideologies of Contract' (n 3) 214: Such is the essence of formalism characteristics two, three, four and five listed by the two scholars.
[22] ibid; Characteristics five.
[23] Adams and Brownsword, *Understanding Contract Law* (n 3)189-190; Adams and Brownsword, 'Ideologies of Contract' (n 3) 215.
[24] M Freeman, *Lloyd's Introduction to Jurisprudence* (Sweet & Maxwell 2014) 1-027.
[25] ibid 312-313.

concepts and rules. Thereafter, they have to objectively and mechanically apply the law to cases before them, to arrive at answers dictated by the law and only the law.[26] Accordingly, in contract disputes, the judge's function is limited to ensuring procedural and not substantive fairness.[27] Procedural justice, defined by a party's compliance with the legal procedures and formalities of contract formation and performance, defines the court's province during adjudication. In the same vein, concepts like freedom and sanctity of contract are invoked notwithstanding their purposes, or the context surrounding the contract or dispute. Relatedly, law making, or the revisiting of the decisions of lower courts on the grounds of the propriety of the results, are beyond the province of the courts. Appellate courts are only concerned with ensuring that such lower courts mechanically applied well-established rules.[28] Therefore, formalistic judges will not reopen the contract on grounds of substantive fairness, worthlessness, or policy considerations. Any pleas based on the purposes or results of the contract and dispute will be rejected, and decisions will be based on the extent to which the operative concepts, principles and rules were adhered to.

The above formalistic propositions are in reality reflective of values both of a judging culture and legal nature – those produced by the legal system, such as the laws on judging. Their relevance as being part of the values responsible for the formalism in the tension is tested in this study. Further, the formalism legal theory has had a direct influence in contract adjudicatory theory, which on the other hand has had scholars attempt to understand values that have motivated formalism, flexibility and the tension between them. Such perceived formalism values are

[26] Minda (n 9) 13-14.
[27] Atiyah (n 16) 404.
[28] Adams and Brownsword, *Understanding Contract Law* (n 3) 189-190; Adams and Brownsword, 'Ideologies of Contract' (n 3) 215: Characteristics six and eight.

reviewed in chapter six, as they inform the coding for units of analysis during the content analysis to identify and analyse the values that underlie formalism in Uganda, thereby contributing to the tension.

3.3 Key Attributes of Flexibility in Adjudication

The foundations of the flexibility theory of adjudication can be traced to the views of its founder,[29] Holmes, who declared that[30] the life of the law had not been logic but experience; the felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, and even the prejudices judges share with their fellow–men. Further, law is not neutral and value-free but reflects the stories of a nation's development through many centuries and cannot be dealt with as if it were a book of mathematics.

These ideas formed the basis of the flexibility schools of jurisprudence, that view the attributes of law, the sources of normativity, and the role of judges in ways that oppose the claims of formalism theory. Examples of these schools of flexibility are: pragmatism; law and economics theory; critical legal theory; institutional theory; and legal realism.[31] Their common thread is scepticism, and their views being the antithesis to formalism,[32] especially to the view that law is logic, abstract and a matter of truths to be discovered by deduction.[33] This study reviews the flexibility

---

[29] Burton (n 10) 3.
[30] OW Holmes, *The Common Law* (Little Brown and Company 1963) 5.
[31] The realists include radical ones, who found scepticism in everything formalistic, with conceptual formalism being termed as nonsense by Felix Cohen, as well as progressive realists, who tried to build a realist theory that could resolve the tension with formalism (see BS Tamanaha BZ, *Law as a Means to an End: Threat to the Rule of Law* (Cambridge University Press 2006) 65).
[32]Adams and Brownsword, *Understanding Contract Law* (n 3)190; Adams and Brownsword, 'Ideologies of Contract' (n 3) 215.
[33] BS Tamanaha BZ, *Law as a Means to an End: Threat to the Rule of Law* (Cambridge University Press 2006) 61.

schools' main propositions, to reveal the key attributes that manifest flexibility in adjudication, which then guide the study in uncovering and understanding it as part of the tension, as well as its motivations.

3.3.1 The Nature of Contract Law

Regarding the law's nature, a number of propositions have been advanced by flexibility legal theory. Firstly, is the view that law is not a science, and as such cannot be understood using logical deductions the way science is. Minda[34] notes a reconciliatory view with formalists amongst pragmatists, and states that the law is a science; however, this conclusion is negated by Pound's[35] explicit disclaimer that law is not a science. Rather, he only called it so because it was so perceived by others, but the idea of science as a system of deductions had become obsolete. In the same way, James[36] argues that although truth exists, in no way can there be absolute truths, as scientists would have it. Instead, for anything to be true or determinate, including laws or any morality underpinning them, one must be capable of testing it in reality, and verifying its workings and application using social experiences.[37] Accordingly, truths should be created in the course of goal-oriented activities, and only considered provable as reliable and successful when tested in real life, and acted upon.[38]

Secondly, law is indeterminate, not objective; is not neutral and cannot produce determinate results during adjudication – a position termed by Burton as the

---

[34] Minda (n 9) 17.
[35] Pound (n 7) 608.
[36] W. James, *The Meaning of Truth: A Sequel to Pragmatiusm* (Longmans, Green and Company 1909) viii-x.
[37] ibid 218.
[38] Tamanaha (n 33) 63

'determinate critique'.[39] Under this conception of law, it is experimental, empirical and action-oriented, with a social aspect.[40] For instance, enduring morality, settled concepts, principles and rules are not sources of law. Instead, they should be stated as general propositions, whose meaning, implications and value will depend on the results they produce in a given context, following a judge weighing them as part of the competing values.[41] Because of this, legal principles and doctrine should be adjusted to the human conditions they govern, not the other way around. Accordingly, principles attain life only by producing workable and just results during adjudication.[42]

Further, law is indeterminate because it is not so clear, certain or complete as to constrain judges to a single result in all similar cases; judges always have discretion.[43] This type of determinate critique looks at situations such as rules that are vague, or open-textured, such that one cannot with certainty point to a particular way a judge will decide when applying them in similar cases.

In contract theory, such indeterminacy is defined by what Adams and Brownsword call the realism rulebook, being replete with discretionary normative standards such as reasonableness, fairness, conscionability and good faith.[44] These standards have grown in the common law of contract since 1870s England saw the

---

[39] Burton (n 10) 4.
[40] Tamanaha (n 33) 63.
[41] ibid
[42] Pound (n 3) 609, 621.
[43] ibid 7.
[44] Adams and Brownsword, *Understanding Contract Law* (n 3)191-192; Adams and Brownsword, 'Ideologies of Contract' (n 3) 217.

arrival of neo-classicism, to replace a number of rigid principles and concepts like *laissez-faire* or freedom of contract that defined formalistic classical contract law.[45]

Thirdly, although it is a whole unit, the law is not conceptually ordered, as it is not logically consistent,[46] comprehensive[47] or objective.[48] Many of its doctrines are not coherent, and should be seen as a jumble of many influences that are yet to be entirely rationalised.[49] Therefore, contract laws are not rules derived from a coherent system, or a small number of general, fundamental, and abstract principles and concepts. Adams and Brownsword therefore indicate, as one of the attributes of realist judging ideology, the lack of recognition of logic in the contract rulebook, as judges will override orderly concepts like offer and acceptance to find remedies.[50] Further, there should be transcendence of the orthodox categorisation and classification of law, such as 'tort' v. 'contract', which according to Grey, are symbols of the formalistic conceptual ordering of law.[51] Negligence can for instance be invoked in allocation of rights and obligations within contract. As such, there is no conceptual purity, as judges can fill gaps in law whenever practical justice so demands.

Fourthly, the law is not certain in the way the formalists understand it, although legal certainty is vital as the state of a rational and civilised body of laws. The formalistic view of law as predictable and certain is viewed as an unrealistic 'state

---

[45] Atiyah (n 16) 649-50, 655, 671-72, 678.
[46] Tamanaha (n 33) 67.
[47] ibid.
[48] Minda (n 9) 28.
[49] ibid.
[50] Adams and Brownsword, *Understanding Contract Law* (n 3) 190-191; Adams and Brownsword, 'Ideologies of Contract' (n 3) 216
[51] Grey (n 14) 54.

of formal and static perfection'; [52] an illusion and state of repose humans long for; and a form of flattery and a fantasy of judges' minds, informed by their longing for security; yet such cannot be the destiny of man.[53] In its place, pragmatists propose that certainty has been achieved when every rule can be articulated definitely to an end it serves and the grounds for the end have been or can be clearly stated.[54] Accordingly, as noted by Adams and Brownsword, flexible judges are free to indulge in doctrinal and conceptual innovations; this has resulted in doctrines like promissory estoppel, unconscionability and economic duress.[55] This way, contract is not only indeterminate in the sense that judges keep making new law; but also, businesspersons cannot predict with certainty whether there is any law worthy of the label 'contract law', in the sense that they can be certain the premises of that law are applicable to their transactions.

Fifthly, the law is a means to an end, judged by its practical utility and the results it achieves (the *jurisprudence of results*), and therefore should not be based upon deduction from assumed concepts (the *jurisprudence of conception*).[56] The end goal of the law is a good society, a standard represented by public policy and established adaptation to human needs. Public policy would in this case be informed by the history, culture and experience of the people in the community.[57] The realists also supported such claims by pragmatists that we need to understand

---

[52] Joseph H Drake 'Editorial Preface to This Volume', in Ihering V R, (ed), *Law as a Means to an End* (Boston Book Co. 1913), xxii-xxiv.
[53] Tamanaha (n 33) 65.
[54] Drake (n 52).
[55] Adams and Brownsword, *Understanding Contract Law* (n 3) 191; Adams and Brownsword, 'Ideologies of Contract' (n 3) 216.
[56] Tamanaha (n 33) 67; Minda (n 9) 28. .
[57] Minda (n 9)7, 28.
[57] Minda (n 9)7, 28.

law contextually, as an instrument, and a means to an end, so that purpose will determine interpretation, even of the plain meaning of words.[58]

Therefore, in contract adjudication, judges are expected to decide purposely, not only with regard to the purposes of the rulebook, but generally, to bring the law in line with changing social and economic contexts.[59] Their function is to achieve a just solution in the circumstances of each case,[60] as opposed to upholding fixed principles of contract law.

3.3.2 Sources of Normativity

Holmes's use of the words 'experience', 'the stories of a nation's development' and 'the prejudices judges share with their fellow–men' point to the nature of the sources of law under flexibility theory in adjudication. The law and its meaning are to be created by judges through a medium of culture and defined by experiences and facts, with the judge using induction as opposed to deduction.[61] Logic is therefore subordinate to experience, which is a broader cultural inquiry of history, economics, politics, and general reality, as defined by the felt necessities of the time.[62]

In practical terms, while adjudicating commercial contracts disputes, community- and individual-driven non-law normative orders – like ordinary course of dealings, usage of trade and custom – become superior to written law and precedents in

---

[58] ibid 25.
[59] Adams and Brownsword, *Understanding Contract Law* (n 3) 191; Adams and Brownsword, 'Ideologies of Contract' (n 3) 216-7.
[60] Atiyah (n 16) 678.
[61] Tamanaha (n 33) 67.
[62] Minda (n 9) 18.

guiding courts to the right answer, since the former will reflect experience more than positive law. The law must be understood theoretically and not mathematically,[63] as normativity will be recognised by judges not only from the rulebook, but more compellingly, from the law's foundations and those of judicial decisions. Goode explains these to imply the social, economic, political and historical forces outside the corpus of rules that surround their genesis and functioning, as well as the judging environment.[64]

Therefore, normativity is always contextual in nature, rooted in custom and the shared expectations of a particular community,[65] derivable from human experiences and practices. Decisions from hard cases are therefore good law, as judges should always consider the merits of each case, and bring to bear on the facts the competing values at hand, such as fairness and convenience (politics), as well as judicial sympathy.[66] Judges are taken to be the custodians of practical justice and convenience, not mere gatekeepers of the code.[67] This perception has been confirmed as ruling in Uganda's Court of Appeal, by Byamugisha, J.A in *Belex Tours & Travel v. Crane Bank Ltd & Another,*[68] making judicial sympathy, expressed by the judicial hunch – judges' subjective personal intuitions and preferences – a vital source of normativity.

---

[63] ibid.
[64] Goode (n 1).
[65] Minda (n 9) 17, 25.
[66] Adams and Brownsword, *Understanding Contract Law* (n 3) 191; Adams and Brownsword, 'Ideologies of Contract' (n 3) 216.
[67] ibid.
[68] [2013] CACA 13 (24/10/2013)

3.3.3 Judges' Role in Contract Disputes

Because the law is a means to an end, commercial adjudication has to be fundamental, legislative, purposeful and result-oriented.[69] Such ends were seen as achievable by changing the crystallised and inelastic theory and practice of law,[70] otherwise becoming flexible and stretching the meaning and understanding of law in adjudication. This possibility is viewed by a group of realists as the norm and not a mere exception, creating what has been termed *the nightmare view* of scholars like Frank.[71] This is the view that judges never decide cases according to the law; as opposed to *the noble dreamers* like Lon Fuller,[72] whose view is that judges always decide, although flexibly, according to the law even if the applicable rules are not clear. According to Frank, the problem of the law is what he termed the *basic myth*, which is the belief that the law is clear, exact and certain.[73] This belief is false and the failure to know its falsehood leads to judges making the wrong decisions, thus creating the actual problem of the law.

Two grounds that are later tested in the study have been advanced to support the radical realists' scepticism about rule-based judging. Firstly – that life is too complex to be governed by rules, and that therefore there is relevance in including non-technical and extra-legal considerations in judicial decision-making.[74] Secondly – that conceptual formalism had a political agenda; for instance, judicial decisions upholding the freedom of contract ignored realities like social and

---

[69] Minda (n 9) 17, 25; Adams and Brownsword, *Understanding Contract Law* (n 3) 192; Adams and Brownsword, 'Ideologies of Contract' (n 3) 217
[70] Minda (n 9) 17, 25
[71] CL Barzun, 'J. Frank, Lon Fuller and a Romantic Pragmatism', (University of Virginia School of Law; Public Law and Legal Theory Research Paper Series, 2016-6, Jan. 2016) 1.
[72] ibid.
[73] ibid 5.
[74] ibid 29.

economic inequality, and instead served political agendas represented by the ideological beliefs of the judges.[75]

Therefore, legal relation-back is an attribute of flexibility theory in adjudication, in that rules, concepts and principles are not predetermined before disputes are decided, but rather they are built from the social choices judges make in a dispute. Pound indicated that rules should fit cases rather than cases fitting rules – a judge should not start with the law to apply in a case, but from the result he works backwards and determines the concepts or rules to support the end.[76] Further, that principles of law exist, but they are not fixed.[77] They are only derivable by grouping together a number of cases to obtain a generalisation that is usable, subject to changes when new cases appear with varying facts.[78] The main role of judges is to weigh competing interests in search of what best serves social policy and reality. According to Holmes, this should be done openly and not subconsciously, as the latter would leave the actual grounds and foundations of the judgement inarticulate.[79] The judge will have to look for normativity, even from non-legal systems like the values, community norms and aspirations of Ugandans, mentioned as ultimate in Article 126 of the country's constitution.

One of the issues such flexibility brings is whether judges can make law. Although Pound[80] was sceptical about it, both strands of realism saw judges as playing the central role in the making of the law, maintaining that legal rules and doctrine are simply dead letters as long as they are not enforced, or as long as the public does

---

[75] ibid.
[76] Pound (n 7) 613.
[77] Tamanaha (n 33) 67.
[78] ibid.
[79] ibid 65.
[80] Pound (n 7) 625

not comply with them.[81] Llewellyn[82] took this position to the extreme, by claiming that what legal officials like judges do about disputes is the law itself. Accordingly, as argued by Tamanaha,[83] law as a means to an end must be understood not by looking at rules, concepts or principles but from the manner in which it functions through the conduct of legal officials and the way society reacts to such legal actions. The key question that follows then is, what those ends are; the values that actually underlie the tension between formalism and flexibility.

3.4 Foundations to the Tension: A General Review

The following four sub-sections make a general evaluation of key contributions and limitations to understanding why the tension prevails, to demonstrate the knowledge gap in question. The study is not concerned with why formalism and flexibility have not yet been reconciled, but rather investigates the first question, as to why the two phenomena have prevailed. Understanding the lack of effective reconciliation mechanisms speaks to a policy and social inquiry, which is not viable in the time and space available to the study, and in any case, should be based on the findings of studies like this one. A review of the existing literature on why formalism and flexibility have prevailed in courts reveals trends in thought, notable contributions and limitations that partly define the knowledge gap in question.

3.4.1 The Tension as a Competition of Values

Scholarly efforts that have attempted to explain the foundations to the tension in commercial and indeed other types of adjudication include the view that the tension is a result of competing values. This study extends that view, otherwise held by a

[81] Tamanaha (n 33) 66.
[82] K Llewellyn, *The Bramble Bush* (Oceana 1951) 3.
[83] Tamanaha (n 33) 66.

few scholars, notably McDougal and Scholars of interests jurisprudence. According to McDougal,[84]adjudication can be explained by a contextually determinable set of value categories representing culture, and procedures for their clarification. These include: power, manifested by coercion that shapes other values; wealth; respect; and freedom, implying a free society; all capable of intellectual clarification through a social inquiry. Besides this study's findings not supporting the values of freedom and respect, in an attempt to show originality, McDougal harshly and unfairly criticises earlier scholars. For instance, he does so against major legal positivism theorists like Hart, as well as the realists and sociologists like Pound, for concentrating on factual choices in decisions, while ignoring factors such as perceptions and rules.[85] Further, for failing to articulate a set of value categories, or a comprehensive systematic approach to their articulation as a way to guide the understanding of adjudication.

Contrary to those claims by McDougal, several other scholarly work before and after his have consciously or otherwise suggested a number of values or value categories responsible for formalism and flexibility in adjudication. Some have also viewed such values as systematically ordered, or capable of systematic elaboration towards formulating judicial guidelines. Pound,[86] for instance, viewed competing interests in adjudication as falling into three categories – individual, public and social interests, with social welfare as the ultimate value that the other values help to realise.

---

[84] M.S. McDougal, 'Jurisprudence for a Free Society' (1966) 1 Georgia Law Review, 1, 12, 15-17.
[85] ibid 11-13.
[86] R. Pound 'A Survey of Social Interests', (1943) 57 Harvard Law Review 1; R. Pound, *Outline of Lectures on Jurisprudence* (Harvard University Press, 1943, reprint 2014) 97-112.

Further, regarding the systematic elaboration – one may differ with the evaluation in Hart's *rules of recognition theory*,[87] but saying that it is not a systematic way of arriving at judicial guidelines, is misconceived. The rules of recognition proposed by Hart[88] are not only systematic but encompass the *rule of change* to cater for uncertainty and legal adaptability to change,[89] and also *the rule of adjudication*, providing a method by which judges can recognise normativity and its applicability.[90] Further, the theory is contextual, as it provides that rules about rules ought to be identified using a pre-law hypothesis, informed by custom—social and cultural norms; an argument Kenny and Devenney also advance with regard to all judicial choices.[91] According to Freeman, such pre-law hypotheses are observable from practice and incorporate substantive values.[92]

Furthermore, like McDougal,[93] the jurisprudence of interests school[94] (and later the law and economics school)[95] views adjudication as underpinned by competing values that are hierarchically ordered. The sociologists' interests jurisprudence that

---

[87] HLA Hart, *The Concept of Law (Clarendon Law Series),* (Oxford University Press 1994) 54-6, 86-88, 91-97.
[88] ibid 54-6, 86-88, 91-97.
[89] ibid 92-93, 95.
[90] ibid 97.
[91] ibid 91; M Kenny and J Devenney 'A Comparative Analysis of Bank Charges in Europe: OFT v. Abbey National Plc through the looking glass', in J Devenney and M Kenney (eds), *Consumer Credit, Debt, and Investment in Europe* (Cambridge University Press, 2012) 212, 217..
[92] Freeman (n 24) 316, 325.
[93] McDougal (n 85) 15, 17.
[94] Pound 'A Survey of Social Interests', (n 87) 1; Pound, *Outline of Lectures on Jurisprudence* (n 87) 97-112; F. Powers 'Some Reflections on Pound's Jurisprudence of Interests' (1953) 3:1 Catholic University Law Review 10, 15.
[95] D. Brion 'Norms and Values in Law and Economics', (1999) Encyclopedia of Law and Economics, 1044-47; R. Posner 'Utilitarianism, Economics and Legal Theory', (1979) 8 Journal of Legal Studies 103-140; R. Posner 'Wealth Maximisation and Judicial Decision Making', (1984) 4 International Review of Law and Economics, 131-135.

McDougal[96] blames for not being elaborate, also propose a contextual step-by-step systematic analysis,[97] similar to McDougal's own proposal,[98] for identifying, elaborating and balancing competing values to guide adjudication.[99]

However, there is no consensus on the ranking of values in the hierarchy, as scholars differ on what the judges' ultimate value is,[100] to which all other values are subordinate, and which adjudication ought to satisfy. This study takes the view, that value hierarchy is not only necessary but also logically possible. The hierarchy should be arrived at using the influence and frequency of each value or its indicative lower values during the content analysis, which should determine whether its weight qualifies it for being amongst the dominant ones to be balanced, as part of the effort towards coexistence.

More significantly, this study supports the view that underlying the tension is a context-specific systematic ordering of value categories. In this case, the content analysis shows an ordering based on four output levels, which have guided the search for, presentation and elaboration of the values in Uganda's context. The first output level is the set of sub-values of the higher values, in the form of indicative values. These are directly observable motivations of judges' decisions that imply higher values. The second output level is the set of higher values that underlie and combine to form more abstract general values. For example, freedom

---

[96] McDougal (n 85) 12.
[97] Powers F. Powers 'Some Reflections on Pound's Jurisprudence of Interests' (1953) 3:1 Catholic University Law Review 15; Pound 'A Survey of Social Interests', (n 87) 1; Pound, *Outline of Lectures on Jurisprudence* (n 87) 97-112.
[98] McDougal (n 85) 14-15.
[99] McDougal (n 85) 14-15.
[100] Brion (n 96) 1044-46 reveals the values proposed by different schools of thought as the ultimate, to include private property, individualism, wealth maximisation, and social welfare; Pound, A survey of Social Values (n 87), in the case of social welfare being the ultimate value.

and sanctity of contract as implying a general value of market individualism. The third output level is the general categorisation of values, such as values of the law's perceptions, values of the judicial role, doctrinal vis-à-vis pluralist or systematic values, and legal vis-à-vis extra-legal values. Fourthly is the institutionally based divide of internal v. external judging criteria, relating to values that are internal as opposed to external to the judiciary.

3.4.2 Doctrinal versus Pluralist Value Perceptions

The search for foundations has taken two theoretical dimensions. Some studies[101] have explained phenomena like formalism in the tension solely by reference to contract doctrinal values; while others[102] are *pluralists* in the sense that they have viewed the foundations as including externalities to doctrine. Such externalities include values of a systematic nature exhibited by a country's legal system, as well as wider societal values. In line with this study's coexistence thesis, both are relevant to the search for foundations to the tension in Uganda. The study proceeds on the presumption that in hard cases, neither formalism nor flexibility can be explained by doctrinal values alone, although such values are a key ingredient in the brew that motivates judicial approach. Even the noble dreamer

---

[101] This version includes: JN Adams and R. Brownsword, *Understanding Contract Law* (n 3)192-207; JN Adams and R. Brownsword, 'Ideologies of Contract', (n 3) 206-222; A. Hutchinson, 'Reciprocity in Contract' (2013) 24 Stellenbosch law Review, 3; M Chen-Wishart, *Contract Law* (Oxford University Press, 2010) 11, 16-17; C. Fried, *Contract as Promise: A Theory of Contractual Obligations* (Oxford University Press, 2015) 1-8; CJ Goetz & RE Scott, 'Enforcing Promise: An Examination of the Basis of Contract' (1980) 89:7 Yale Law Journal 1261, 1264-65; R. Barnett, 'A Consent Theory of Contract', (1986) 86 Columbia Law Review 269; A. Schwartz, 'The Case for Specific Performance' (1979) 89 Yale Law Journal 271, 284.

[102] These include: Kenny and Devenney (n 92) 212-213, 217, 222, 232-233; McDougal (n 85) 15,16; I.R. Macneil, 'Values in Contract: Internal and External' (n 2) 340; Atiyah (n 16) 390-391, 650-652; Goode (n 1) 12-14, 23-24, 26-29, 31-32; Grey (n 14) 51-56; Denning LJ, *The Discipline of Law* (Butterworth 1979); LM Friedman 'Contract Law and Contract Research' (Part 1) (1968) 20 Journal of Legal Education, 452.

realists Llewellyn[103] and Fuller,[104] who put up a big fight for flexibility judging, acknowledged this by declaring that concepts are indispensable because they bring the categorisation and ordering that forms the basis for judicial reasoning. At the same time, other factors like policy, efficiency, fairness and practical justice are at play in such cases, as judges are confronted with the practical implications of their decisions.

But even then, although the list of underlying values identified by this study is also far from exhaustive, many of the pluralists cover limited scopes that leave major categories of underlying values unarticulated. Significant amongst these is MacNeil,[105] who in a similar manner to this study views such values to be categorisable as internal and external, with both sovereign and non-sovereign normative sources being part of the external.[106] Further, his view is that with flexibility-oriented relational contracting such a division cannot be strictly adhered to.[107]

However, the nature of contract and its doctrine, as opposite to contract adjudication, form the focus of MacNeil's analysis, and his internal-external divide. Internal values are considered as those exemplified by the discrete or relational nature of contracting, as opposed to their being internal to the institution and the culture of judging as is perceived in this study. The result is that although some values may seem similar, the way they have manifested and influenced judging will differ when tested on the basis of real judicial opinions. An example is what

---

[103] KN Llewellyn, *Jurisprudence: Realism in Theory and Practice* (Chicago University Press, 1962), 27.
[104] L. Fuller, *Legal Fictions* (Stanford University Press, 1967) 136.
[105] Macneil (n 2)
[106] ibid 367-390
[107] ibid 367

MacNeil calls the power norm, that relates to the sovereign's use of law to enforce contracts and liberty, as well as restraining the adversary from enjoying rights or breaching contracts.[108] In this study the power value relates to judicial absolutism in the case of flexibility and judicial restraint in the formalism sense, where judges are authorised or restrained by laws such as the constitution and other laws on judging, from being formalistic or flexible.

Furthermore, studies like McDougal's[109] are rare, as key pluralists Atiyah,[110] Tamanaha,[111] Goode[112] and Friedman[113] have identified the set of values underlying formalism or flexibility as an ancillary element in studies on wider subjects, and therefore do not devote enough space to fully articulate them. As a result, the values articulated are, as is the case with doctrinal theorists, a result of conceptualism and general theorisation about wording, in random cases and statutes. Both fall short of applying more extensive research using rigorous methodology as is done in this study; that would reveal value patterns, trends and practical influences during judging. It seems to be the reason Tamanaha gives very little attention to doctrinal values, as he extensively articulates those manifested by the judging institution and environment from historical materials. Key doctrines like freedom of contract make their way into the discussion as proof of instrumentalism;

---

[108] ibid, 375.
[109] McDougal (n 85) 15-17.
[110] Atiyah (n 16) 390-391, 650-652.
[111] Tamanaha (n 33) 28-31, 37and 61, for flexibility foundations and 34, 38-40 foundations to formalism in the US.
[112] Goode, (n 1) 12-14, 23-24, 26-29, 31-32.
[113] LM Friedman 'Contract Law and Contract Research' (Part 1) (1968) 20 Journal of Legal Education, 452.

formalistic values like judicial objectivity as proof of the causal, relationship between them and the tension.[114]

At the same time, even McDougal's work was, admittedly, restricted to general values of human nature,[115] which he termed the basic values of human dignity. Further, as is the case with this study, McDougal's value categories and specific values were not comprehensive; like the bulk of the literature on the subject, his work was not backed by a social inquiry, which he admitted would provide a more adequate inquiry and analysis.[116] In this case, a further social inquiry into the values identified would help validate their influence in adjudication.

Relatedly, the doctrinal value theorists have generally been more concerned with articulating values underlying contract doctrine, as Adams and Brownsword admit.[117] They have aimed at understanding rules and standards in statutes as well as precedents, rather than what motivates the judging phenomena of formalism and flexibility. Further, apart from rare and half-hearted attempts like Adams and Brownsword's,[118] most of the research has not been towards finding ways for reconciliation or any other form of coexistence between the competing values. The attempts in question are half-hearted because they do not boldly contribute towards the possibility of constructing autonomous, objective and rational judging guidelines informed by a reconciliation of competing interests they identify; rather, they provide a few principles judges could use to manage the tension. The perception that the two phenomena cannot be reconciled persists in these

---

[114] Tamanaha (n 33) 234-241.
[115] McDougal (n 85) 15.
[116] ibid 16.
[117] Adams and Brownsword, 'Ideologies of Contract' (n 3) 213.
[118] ibid 217-222.

works,[119] which could explain why so little effort is made to go beyond understanding the implications of such values underlying doctrine to adjudicatory theory, and how the tension they cause can be managed. The other general trend underpinning the literature on the values underlying formalism, flexibility, and therefore the tension is the dominance of monist jurisprudence over multivalued theories.

3.4.3 Dominance of Monist Jurisprudence

Literature on why the tension has prevailed is dominated by monist value theories, which advance a single value as being the prime one, standing at the apex of the hierarchy.[120] They seek to understand contract law and adjudication as if they were intended to satisfy that prime value, making it the one that transcends all other values, the latter being articulable only through the prime value.[121] Examples of these values are parties' will,[122] efficiency,[123] consent,[124] contract as promise,[125] certainty as prime value,[126] market individualism[127] and conceptual formalism.[128]

---

[119] CJ Goetz & RE Scott, 'Enforcing Promise: An Examination of the Basis of Contract' (1980) 89:7 Yale Law Journal 1264, who argue that doctrines like the efficient based 'promissory estoppel' and freedom of contract based 'consideration' cannot be reconcilled, although both in the Restatement of Contract and Uniform Commercial Code (UCC) in the US.

[120] LTrakman, 'Pluralism in Contract Law', (2010) 58 Buffalo Law Review, 1031, 1032-1034; and the marxists's propounding of class struggle as underlying judges' use of devices/values like fairness, public policy and reasonableness (S Ratnapala, *Jurisprudence* (Cambridge University Press, 2017) 110.

[121] ibid 1032.

[122] A Schwartz and R Scott 'Contract Theory and The Limits of Contract Law', (2003) John M. Olin Center for Studies in Law, Economics and Public Policy Working Papers. Paper 273, 2; CJ Goetz and RE Scott, (n 119) 1261, 1261-65 Trakman (n 120), 1031-1032;

[123] A Schwartz, 'Karl Llewellyn and The Origins of Contract Theory', in JS Kraus & SD Walt (eds), *The Jurisprudential Foundations of Corporate and Commercial Law* (Cambridge University Press, 2000), 12-53

[124] RE Barnette, 'Contract is not Promise: Contract is Consent', (2012) 45 Suffolk University Law Review, 647, 649.

On the other hand is a rare but growing view, propounded by Posner,[129] Llewellyn,[130] Farber,[131] Eisenberg,[132] MacNeil,[133] Trebilcock[134] and Trakman,[135] as well as Schwartz and Scott, that monist theories do not fully account for judicial choice.[136] Instead, there is a need to develop a multivalued understanding of why judges make the choices they make, and find a way to give due regard to, and balance, the several values competing during adjudication; in other words, work towards the coexistence of the values engendering formalism and flexibility.

This study contributes to expanding this latter, multivalued, school of thought by demonstrating that in the Ugandan context, the tension is underpinned by a multiplicity of values motivating both sides of the formalism-flexibility divide. No single value can claim superiority or dominance over others, to qualify for being treated as the ultimate guide during adjudication. Rather, several values contribute

---

[125] C Fried *Contract as Promise: A Theory of Contractual Obligations* (Oxford University Press, 2015) 1-8.
[126] Wolff LC, 'Law and Flexibility –Rule of Law Limits of Rhetorical Silver Bullet' (2011) 11 The Journal of Jurisprudence 549, 553.
[127] JN Adams and R Brownsword, *Understanding Contract Law* (n 3) 194-197; JN adams and R Brownsword, 'Ideologies of Contract', (n 3) 205-208.
[128] Tamanaha (n 33) 71.
[129] RA Posner, *Economic Analysis of Law* (3d ed.) (Little, Brown & Co. 1986); T Zywicki and EP Stringham, 'Common Law and Economic Efficiency' in Paris F and Posner R (eds), *Encyclopaedia of Law & Economics*, (Mason University Law and Economics Research Paper Series 2010).
[130] Schwartz, (n 123) 12, 16.
[131] DA Farber, "Efficiency and The Ex Ante Perspective", in J.S. Kraus & S.D. Walt (eds), *The Jurisprudential Foundations of Corporate and Commercial Law,* (Cambridge University Press, 2000), 54, 59.
[132] M Eisenberg 'The Theory of Contract', in P. Benson, ed. *The Theory of Contract Law*: *New Essays* (Cambridge University Press 2001), 243-244.
[133] Macneil, 'Values in Contract: Internal and External' (n 2) 340-418; IR Macneil, 'Relational Contract: What we do and do not know', (1985) Wisconsin Law Review, 483-525; and IR Macneil, 'Relational Contract Theory: Challenges and Queries' (2000) 94, Northwestern University Law Review, 877-907.
[134] MJ Trebilcock, *The Limits of Freedom of Contract*, (Havard University Press, 1993), 248.
[135] L Trakman (n 120) 1031, 1031-1041.
[136] Schwartz and R. E. Scott (n 122) 2-3.

to the tension in different measures, combining to compete on each side of the tension; which calls for studies like this one, into ways to manage their balance and coexistence. This is against the backdrop of the existing literature, especially the monist theories having focused on jurisdictions other than Uganda.

3.4.4 Relevance to Uganda

Finally, none of the studies found and reviewed relate to commercial adjudication in Uganda. Most of the studies were performed in the Western world, and therefore relate to values of doctrines, and non-doctrinal values, in different contexts. Referring to the period before and after President Idi Amin's regime (1971-1979), Macneil[137] simply points to Uganda as the best example of understanding how the political and economic collapse of a country can affect contractual behaviour, thereby affecting contract law and adjudication. Although a starting point for the study in the sense that the presumptive values identified are coded to guide the content analysis, unless supported by the findings, they cannot be relied on to make conclusions about the tension in Uganda. This study for instance pursues the possibility of coexistence between formalism and flexibility in Uganda's commercial adjudication. This is because, in Uganda's context, coexistence is the call of legal and practical reality. Further, as the following section demonstrates, there are more points of agreement between theorists on both sides of the divide than might appear on the surface.

---

[137] Macneil, 'Values in Contract: Internal and External' (n 2) 409.

3.5 The Case for a Coexistence Judging Paradigm in Uganda

In the face of a number of scholars claiming that formalism and flexibility cannot coexist – such as Tamanaha,[138] Botoshi,[139] Minda[140] and Wolff[141] – have been led to question whether this claim is logical, and therefore revisit the views of other scholars on the subject. In addition to legal and contextual foundations for its proposed adoption in Uganda, which will be analysed in chapters six to nine, the following part reveals legal theoretical support for a coexistence paradigm of judging, appearing from as far back as the days of Austinian legal positivism. This follows unconvincing arguments advanced by orthodox – and in some cases contemporary – legal theorists, for a purely formalistic judging paradigm on the one hand; and on the other hand, the limitations of the attempts by other scholars like the realists to construct an alternative flexible paradigm.

3.5.1 Coexistence Support in Formalistic Legal Theory

The orthodox legal positivists had in their theory the realisation that in some cases, courts will meet situations where positive law offers no clear answer and the judge will have to look for an answer outside the expressions of black-letter law. This is contrary to criticism from scholars like Dworkin[142] and Morison, [143] namely that the positivists like Austin lacked a theory of adjudication and failed to take into account the social context within which the legal decision-making is made. Austin for example, claimed that customary laws were rules set by mere opinions of the

[138] Tamanaha (n 33)
[139] HMS Botoshi, 'Striking the Balance Between the Considerations of Certainty and Fairness in the Law Governing Letters of Credit' (PhD Thesis, University of Sheffield 2000) 100-01.
[140] Minda (n 9) 28-29.
[141] Wolff (n 126) 549, 553.
[142] R Dworkin, *Taking Rights Seriously* (Duckworth & Co. Ltd 1977) xi & 22.
[143] WL Morison, *John Austin* (Stanford University Press 1982) 183.

governed, and only became positive law after being relied on as grounds in judicial decisions.[144] Further, that after becoming grounds for the judicial opinions, the customary rules acquire a dual character of being both positive law and positive morality.

Austin also supported coexistence as the ideal paradigm through his sovereign theory on habitual obedience.[145] For a sovereign to pass commands that would have the force of law, he or she had to enjoy habitual obedience from the community. According to Freeman, in doing so, Austin recognised that the law cannot itself be based on the law but must be based on something outside the law.[146] He therefore sought to base it upon fact, as the habitual obedience of the mass of the population. This acknowledgement of the relationship between the legal norms and their non-legal sources is no different from the claim by Holmes, that the law reflects the history of a country and the experiences of the legal players.[147] A point of convergence between flexibility theory and positivist formalism therefore exists with regard to the source of law being outside the law, at least in the case of customary norms.

Further, there is convergence regarding the judges' role in the making of law. Austin's view that it is the invocation and application of customary norms by judges that make them law is similar to the claim by the flexibility-oriented realists that rules remain dead letters until actively applied and acted upon by judges.[148] Furthermore, by claiming that customary law acquires a dual character of positive

---

[144] J Austin, *The Province of Jurisprudence Determined* and *the Uses of the study of Jurisprudence,* (Weidenfeld & Nicolson, 1954); also reproduced in Freeman (n 24) 237-248, at 244-245.
[145] Freeman (n 24) 206.
[146] ibid 208.
[147] Holmes (n 30).
[148] Freeman (n 24) 208

law and morality, Austin was clearly speaking about the paradigm of coexistence of the formalistic positive law and the flexible morality. It is these common grounds that point to the necessity for a paradigm that allows for the coexistence of formalism and flexibility becoming a matter of consensus in legal theory.

Following Austin, later positivists Kelsen and Hart provided more direct support for the coexistence judicial paradigm. Hart rejected Austin's strictly formalistic theory and sought to put forward an improved version of legal positivism.[149] He claimed that the legal system was a union of rules, constituting both primary and secondary rules that made up one whole. Primary rules are the rules providing substantive law that describe legal obligations, while secondary ones relate to matters like judicial procedure and the law of evidence.[150]

Hart supported the coexistence of formalism and flexibility and further claimed that each primary rule has two components, the core and penumbra.[151] There is more to a legal system than a union of rules, in that moral principles and substantive values should be taken into account by a judge in resolving a case, using the penumbra of a rule.[152] In this case, the rule is always determinate and certain at the core, in which case formalism should be used in its application, but can be uncertain and require flexibility in adjudication at the penumbra.[153]

Therefore, understanding the core of a rule will require strict interpretation, discovery and logical deduction. On the other hand, the penumbra of the rule should be understood and applied using the purpose, reality and general context of

[149] Hart (n 88) Chapter 5.
[150] ibid 82-88, 285.
[151] Hart (n 88) ibid 250-51.
[152] ibid 326.
[153] ibid 252.

the contract or adjudication, thereby attaining a framework for coexistence, at least in the sense of both judicial approaches having clear provinces.

Hart[154] was more emphatic when it came to the nature and source of what he called 'rules of recognition'.[155] These are the rules that would guide a judge in determining the validity and applicability of the primary rules to apply in particular circumstances, as opposed to Austin's theory of habitual obedience. These rules of recognition are not static and determinate but must incorporate substantive values. Rules of recognition are meant to arise out of mere practice, not law, and the level of flexibility a judge is to use in invoking these rules should be an empirical question dependent on the moment.[156] Hart's strand of positivism therefore supported a formalistic definition of the core of rules, and flexibility as the default approach to adopt in hard cases. In such cases, the judge would be allowed to weigh between several answers that can be correct using substantive values, thereby supporting a form of guideline that can lead to coexistence.

Kelsen, who wrote around the same time, is known for his 'pure theory of law'.[157] Under the pure theory, the legal process is a hierarchy of norms, each norm getting its validity from a higher norm, until one reaches the basic norm as the ultimate law and guide to adjudication. Kelsen[158] specifically supported the coexistence paradigm when he claimed that as long as there is discretion or a choice as to applicable rules, the norm creating function takes a political character, but the function is still a legal one because it is within the framework of norms. By this,

---

[154] Freeman (n 24) 322-26.
[155] ibid 316
[156] ibid 325.
[157] H Kelsen, *The Pure Theory of Law*, (University of California Press 1967) 206.
[158] ibid.

Kelsen was admitting the role of non-legal values in determining the legal rules that judges are to use in adjudication. Calling it a political function connotes extra-legal considerations judges are to take into account when deciding hard cases and is an endorsement of flexibility as the default approach to use.

Accordingly, Freeman has argued that Kelsen, although a positivist, was not a formalist because he did not believe that the interpretation and application of norms should be mechanical. To the contrary, those higher norms determine the creation and content of norms only to an extent. However, a formalistic agenda can be equally highlighted in Kelsen's theory by his clothing of judicial decisions, politically reached, with legality. If he did not mean to uphold the value of formalism, there would be no reason to confer legality on a role politically played by a judge. The better way of interpreting Kelsen's 'political legality view' is that he was supporting a coexistence paradigm. However, what he failed to do was to suggest what would guide judges in their political function, in order to retain the framework of norms.

Further, Kelsen claims that at the top of his proposed hierarchy of norms, the basic norm is not created by any particular procedure but is a mere presumption.[159] The factors informing this presumption are not well articulated, but one can only conclude that this was another admission of the ultimate source of law not being law itself, contrary to the formalists' claims of the determinacy, autonomy and neutrality of positive law. Such space given to extra-legal factors implies a judge's authority to invoke substantive values in hard cases, and thereby create rules to fill gaps left by legislation. At the same time, the claim that all legal norms have a legal source reasserts the value of formalistically engendered legalism, thereby

[159] Kelsen (n 157).

supporting a case for a mechanism to attain the coexistence of formalism and flexibility.

This support for a coexistence paradigm is further illustrated by Kelsen's reasoning, that a legal or normative order is only valid if it corresponds with reality and has efficacy.[160] That relationship between validity and efficacy is the tension between the 'is' and the 'ought', which can be resolved by looking at 'the agreement' as a yardstick. Here, he was clearly promoting a coexistence paradigm that would be pegged on formalistic laws being balanced with contextual reality. Further, as supported by the findings in this study, the notion of contract was declared as an arena where such balancing can be done successfully.

Therefore, revisiting formalistic legal theory reveals that what appears to be the irreconcilable division between formalism and flexibility-divide is simply mystical. Several major proponents of formalism admit room and offer support for a coexistence of formalism and flexibility in adjudication. This compromise proves the necessity and viability of coexistence, as pursued by this study.

3.5.2 Co-existence Support in Flexibility Legal Theory.

Proponents of the flexibility-judging paradigm have also provided support for caution and the need for a middle line defined by coexistence. This support is based mainly on the acknowledgment that legal certainty is necessary, at the very least as a matter of degree, and the need to restrain judges to avoid misuse of process, and excesses.

---

[160] ibid 120.

The legal realists, whose main mission was to challenge certainty-oriented formalism, did not challenge the proposition that the law should be certain.[161] To the contrary, Holmes called for objective tests to make the law more predictable, and advocated for efforts to narrow the zone of uncertainty as far as possible.[162] Having led the theory that law is indeterminate, and adjudication should be flexibly approached, this call from Holmes for legal certainty and objective rules is probably the strongest support for a coexistence paradigm.

Further, the proposition that – even if only to an extent – legal certainty should exist was shared by another key proponent of the flexibility adjudicatory theory: Llewellyn.[163] Goode notes that realists like Llewellyn and Fuller, who advocated for judges to decide cases in accordance with policy, concede that concepts are vital and should not be changed lightly.[164] This goes further to render support to coexistence as a judging paradigm. Certainty, even if to a small degree, will bring determinate and objectively applied rules, standards and principles, thereby balancing the spirit behind formalism with flexibility.

Fuller takes the blame in the adjudication puzzle away from conceptualism; instead he finds the main error to be a misapplication and worship of concepts.[165] The alternative to worship of concepts would in this case be a selective application of concepts, which is in line with a co-existence between formalism – as represented by concepts – and flexibility, as represented by policy considerations.

---

[161] Tamanaha (n 33) 70.
[162] ibid.
[163] ibid.
[164] Goode (n 1) 26-27.
[165] ibid.

For his part, Goode proposed that viewing both legal and extra-legal norms hierarchically was the principle that should govern when a concept can be changed by a judge;[166] in other words, a judicial guideline to coexistence. He argued that since concepts are instruments of long-term value, they should only rarely be changed, to maintain their underlying purposes. Therefore, the more fundamental the concept, the greater the care should be before changing or circumventing it. On the other hand, important policy considerations should not be subordinated to business expediency. This means that even amongst non-legal considerations, there should be ranks of importance in the application of norms.

Besides the realists, the pragmatists, as a less radical strand of flexibility legal theory, provided more direct support for a coexistence-judging paradigm. Tamanaha notes that Pound's last search was for what he termed the *ideal element in law,* which was meant to be a technique that the law can apply to control instrumentalism and achieve its balance with formalism.[167] The rationale was his acknowledgement that the excesses of instrumentalism needed to be controlled using a canon of values.

Another group of flexibility-leaning theorists who support a coexistence paradigm are the analytical legal theorists; this grouping, grew out of critiquing orthodox legal theory. Amongst these, Dworkin[168] reasoned that rules in legislation and case law should coexist with moral considerations, not because judges use rules due to their morality, but because moral considerations justify the rules. As such, there is a need for a theory of adjudication that will determine what guides judges when they

---

[166] ibid 27.
[167] Tamanaha (n 33) 76.
[168] Dworkin (n 142).

'run out of rules' and have to resort to such moral principles. The reference to judges running out of rules is when the judge is faced with a hard case. Therefore, Dworkin was promoting moral values as the source of normativity where the law is inadequate; in other words, judges can flexibly fill gaps in the law.

Such viability of coexistence is also recognised by relational contract theory acknowledging the necessity of formalism in contract doctrine. MacNeil, for instance, argues that an interaction between the positive law of the sovereign and the behavioural dimensions of relational contract theory reveals that positive law supports both relational contract and discrete exchange.[169] The law commonly allows discrete exchange with its corresponding notions of freedom of contract and property.[170] At the same time, relational contract was aided by, among others, the law of principal agency, employment, corporations, and the state intervention in contract by regulation.[171]

Therefore, although the tension between formalism and flexibility appears to involve two conflicting blocks of legal theory at polar ends, revisiting the thoughts of particular scholars proves that there is a silent consensus towards a coexistence-judging paradigm as the ideal. The key issue therefore becomes the continued search for Pound's 'ideal element', being the gap in legal literature that this study contributes to filling, as a way towards establishing the appropriate management regime to achieve the coexistence between formalism and flexibility.

---

[169] I. R. Macneil, 'Relational Contract: What we do and do not know', (1985) Wisconsin Law Review, 483, 491-492.
[170] ibid 492.
[171] ibid.

3.5.3 Coexistence as the Ideal Paradigm under Legal Pluralist Uganda

Besides coexistence having received support and admission from proponents of both formalism and flexibility, the paradigm is inevitable in legally pluralist societies like Uganda. Pluralism theory helps to understand the nature and source of contract law applicable in Uganda and the role of judges in the country's legal system. The claim by pluralists in this case is as put by Griffiths[172], that advocates of legal centralism (which includes top-down proponents such as Austin and Hobbes, as well as bottom-up theorists like Kelsen and Hart) provide, only an ideal and illusory account of the law as being an exclusive, systematic and unified hierarchical ordering of normative propositions. To the contrary, legal pluralism in fact exists, either where the state recognises different bodies of law for different groups in the population, as is the case in Uganda, or where pluralism is the empirical state of affairs.[173]

Legal pluralism has, since colonialism, characterised Uganda's legal system, with the English law of contract and institutions functioning alongside indigenous and locally grown normative systems. This has always produced a mixture of different normative systems functioning within one legal order. Uganda's legal pluralism is however different from the type commonly observed by legal pluralism scholars, where state law stands independent of non-state normative orders within the same legal system. In Uganda, the constitution not only recognises such non-state normative systems, but gives them legal force by obliging courts to adhere to them,

---

172 J. Griffiths, 'What is Legal Pluralism', (1986) 24 Journal of Legal Pluralism, 3.
173 ibid 4; also, such legal pluralism being the effect of Article 126 (2) (e) of the Uganda Constitution.

although not calling them law itself or otherwise incorporating them into the content of the law.[174]

Although sceptical about the possibility of a coexistence paradigm, Minda observes that post-modern jurisprudence reflects a course of thinking where a more pluralist, contextual and non-essential explanation of law and legal decision-making is developed for multicultural societies.[175] There is a movement away from the 'rule of law' thinking based on universal truths, the belief in one rule of law; one fixed pattern, set of patterns or generalised theory of jurisprudence. Instead the trend is to use interpretation in some cases to arrive at new thinking about the law.

A number of other theories contain elements of the legal pluralism line of reasoning; that there is law beyond law, and a multiplicity of rules of law; while exploring the practical implementation of laws in judicial decisions. These are, mainly: critical legal theory, relational theory; legal realism; pragmatism; instrumentalism; institutionalism; and the economic analysis of law. However, this pluralist movement does not reject formalism; nor does it embrace unprincipled or uncontrolled flexibility. To the contrary, it stands for recognition of the normativity of positive and formalistic law while at the same time removing the shadow surrounding non-state normative sources; the shadow that allows judges to invoke and ignore them at will.

In the next chapter, the tension as a reality resulting from the multiple sources of legal norms, as well as other foundations, as will be discussed in chapters six to nine; is brought to the fore, and what remains is for lawyers to find means of

---

[174] The 1995 Constitution, art. 126 and the National Objectives/Directives and Principles of State Policy.
[175] Minda (n 9)

coexistence between the flexibility that such norms bring, and the formalism at the centre of positive law and legalism. Accordingly, following the content analysis of judicial opinions, guided by a coding of the key attributes of both formalism and flexibility as revealed in this chapter. Following this, the next chapter illustrates that it is logical to search for coexistence, by presenting and discussing the study's findings regarding the tension as a reality in Uganda; its manifestations, competition of values as its foundation, and the inadequacy and incoherency of existing attempts to manage it.

Therefore, the next chapter will bring understanding to the problem under study, thereby forming a practical context and basis for the discussion on the possibility and viability of its management in subsequent chapters. In the same way, the chapter lays the basis for the references in subsequent chapters to Uganda's practical realities.

Chapter 4: The Tension in Uganda's Commercial Judging Paradigm

4.1 Introduction

This chapter examines the nature of the tension in Uganda's judging paradigm, laying the basis for investigating why the tension has prevailed, and how its underlying competing values can be reconciled, as a way towards managing it. The judging paradigm is explained against the backdrop of absolute judicial flexibility having defined judging in pre-colonial Uganda. This was followed by the concurrent practice of formalism and flexibility from the colonial era to date. The two judging approaches are shown as having been continuously, concurrently and incoherently practised, thus the tension between them; with hardly any rational efforts to create coexistence.

The chapter therefore begins by examining the background to the commercial judicial approach in the country, revealing that the tension begun with the transplant of English law to Uganda, and was given a new dimension when the colonial government allowed the pre-colonial flexibility-dominated judicial system to continue alongside the tension-ridden English judicial system. Since then, postcolonial- judging has been defined by a continuous decline in formalism, and apparent dominance of flexibility over formalism. However, mixed-approach judging is becoming the third and fastest-growing trend.

The chapter ends by identifying and evaluating the existing mechanisms to manage the tension, demonstrating that most of the relevant legal instruments are paper tigers; they not only get watered down by their own provisions, but also are also redundant in the arena of judicial practice. Further, that throughout history, individual judges have made reference to being guided by criteria that are incomprehensive, incoherent, inconsistent and uncertain in content, source and methodology. However, their presence highlights the viability and need for commercial judging guidelines as a way towards coexistence.

4.2 Pre-Colonial Uganda: An Era of Absolute Flexibility

By way of a historical background to understanding colonial and post-colonial judicial approaches, this section supports Holmes in saying that the life of the law is made up of the stories of a nation's development.[1] Besides the content analysis of judicial opinions, values that have underpinned the tension can be inferred from such historical occurrences and institutions that surrounded Uganda's commercial judging.

The British colonised Uganda in 1894,[2] and created the country Uganda as a social and political collectivity, followed by the transplant of the English law and system of commercial justice already characterised by the tension. Prior to colonialism, contrary to scholarly claims that the tension is as old as Aristotle;[3] amongst the Ugandan native communities it was not part of the justice system. Allot confirms that there was a developed concept of law and judicial system that grew organically and resolved commercial disputes with flexibility, meaning that formalism was completely alien.[4] No written law existed, although a concept of law and legal system existed as a social reality, with norms, institutions and processes

---

[1] SJ Burton, *Judging in Good Faith* (Cambridge University Press 1992) 15.
[2] PM Mutibwa, *A History of Uganda: The First 100 Years 1894-1995* (Fountain Publishers 2016) 1, 18-19.
[3] JW Evans and AL Gabel, 'Legal Competitive Advantage and Legal Entrepreneurship: A Preliminary International Framework', (2014) 39 (2) North Carolina Journal of International Law. 2-3.
[4] AN Allott, 'The Future of African Law', in H Kuper & L Kuper (eds) *African Law: Adaptation and Development* (University of California Press 1965) 216-40; In Uganda flexibility and uncertainty were confirmed as defining adjudication by a 1926 report from an investigation of the pre-colonial civil laws and judicial system revealed that in the case of *Buganda.* For example*Gombolola* (Sub-County) courts used to make inconsistent judgments because the *Miluka* (Parishes) chiefs who sat as assessors and sat with the *Gombolola* Chief to constitute the court were often men of little or no social standing, some being minors, permanent absentees and otherwise unsuitable persons; the composition of the *Gombolola* Court was also irregular, often changing and having little knowledge of correct procedures and the principles for the administration of justice.

that included adjudication and contract.[5] Such processes defined the norms and institutions in action,[6] not the formalistic other way round. The key issue then is, what values and interests underlay such flexibility.

4.2.1 Foundations to Pre-colonial Flexibility

A number of values help to explain this judging paradigm and the absence of the tension in pre-colonial Uganda. The values identified are all external; they can be inferred from the market and the general body politic of the time, as no exhaustive records of contract doctrine or judging culture seem to exist. They include conformism to the nature of the marketplace and the habits of its players; judicial absolutism; social support; the conceptions of the judicial role; and the 'Ubuntu' conception of justice and fairness.

4.2.1.1 *Market Conformism*

Commercial contract law is a people natured law, in that it addresses ways in which merchants relate with one another and third parties in a marketplace;[7] the institutions in place to regulate contracts will reflect the commercial persons' best practices.[8] In pre-colonial Ugandan communities, the informal and flexible pre-law institutions that included the economic practices, attitudes and the social-political environments constituted the reality that gave rise to community values and interests, mainly of a public and social nature, underlying flexibility judging. For

---

[5] AN Allott, *The Limits of Law* (Butterworths 1980) 3; HR Hone, 'The Native of Uganda and the Criminal Law', The Journal of Comparative Legislation and international Law, 3rd Series, Vol. 21. No.4 (1939) 180.
[6] Allot, *The Limits of Law* (n 5) 7.
[7] B Kozolchyk, *Comparative Commercial Contracts: Law, Culture, and Economic Development* (West Academic Publishing 2014) 3.
[8] ibid.

instance, by 1894 in the kingdom states of Nkore, Toro and Bunyoro as well as Buganda, classification existed, with some communities agrarian while others were aristocrats, and there emerged a feudal system with private property and contract defining the marketplace.[9]

The rulers, who doubled as judges, monopolised some sectors, such as the international trade in slaves and ivory, in exchange for goods like cotton products and guns.[10] This meant that adjudication had to be flexible, to allow them to continue protecting their own interests. Further, there was no concept of money – which is the medium through which accuracy in transactions, formalistic doctrine and adjudication are realised today[11] – as trade was on barter terms.[12] The indeterminacy of such considerations could not be facilitated with static rules or formalistic judging, making flexibility inevitable. As indicated by Allott, conformism to a market defined by such informal and flexible transactions led to flexibility judging, with unpredictability of dispute settlement and the norms to be used.[13]

4.2.1.2 *Judicial Absolutism*

Pre-colonial flexibility judging was also motivated by absolutism, a value of political culture which extends to the courts, where the rulers are deemed to have final authority on all matters including the law, and are not answerable to anyone, not even the subjects.[14] As illustrated by French political history, it is responsible for

---

[9] R. Mukherjee, *Uganda: A Historical Accident? Class, Nation and State Formation* (Berlin 1956) 61.
[10] ibid 5, 61, 96 and, 99.
[11] For instance, section 2 of the Sale of Goods and Supply of Services Act, provides that sale of goods contracts are only valid if supported by a money consideration called the price.
[12] Mukherjee (n 9) 5, 61, 96 and, 99.
[13] Allott *The Limits of Law* (n 5) 10.
[14] M Wells 'French and American Judicial Opinion' (1994) 19 (1) (3) Yale Journal of International Law 81, 106-107.

authoritarianism becoming part of a country's political culture, and in turn part of the flexible judicial culture. In medieval France, flexibility thrived, as judges – having been appointed by the Kings– saw no obligation to justify themselves when making decisions.[15] Even to date, the 800 years of absolutism in French political culture continue to explain the continuation of flexible adjudication in France's High Court.[16] Likewise, in Uganda, absolutism has consistently survived the numerous changes in the country. In pre-colonial Uganda, the highest political office came with the highest judicial authority, as the two were fused, and lower political offices came with judicial authority given by the absolute rulers.[17] In many respects, absolutism can be illustrated as part of the political-social reality, which underlay flexible adjudication.

Firstly, political culture was defined by the concept of a sovereign with absolute authority to rule over all matters, including law and judging.[18] Such rulers had the final word on the content of law and justice – almost akin to the positivist sovereign proposed by Austin[19] – whose command was law, backed by sanctions and enjoying habitual obedience, but in this case having judicial powers as well. Secondly, the highest rulers, such as the *Kabaka* (King) in the *Buganda* kingdom, were the final courts of appeal, to which disputes decided by subordinate ministers and chiefs could be referred.[20]

---

[15] ibid 107-108.
[16] ibid.
[17] Allot, *The Limits of Law* (n 5) 53.
[18] ibid
[19] J Austin, *The Province of Jurisprudence Determined* and *the Uses of the study of Jurisprudence,* (Weidenfeld & Nicolson, 1954); also reproduced in M Freeman, *Lloyd's Introduction to Jurisprudence* (Sweet & Maxwell 2014) 237-248, at 244-245.
[20] HF Morris, 'Two Early Surveys of Native Courts in Uganda', (1967, J.A.L, Vol.11.No.3) 170-72.

Therefore, each community had an absolute ruler as the person who adjudicated disputes, enjoying unrestrained discretion; which to Allot, led to flexibility in determining the understanding of legal norms and their implementation.[21] The only institution that would have curtailed the rulers' appetite for flexibility was the public, which enjoyed a central role in adjudication as a primary source of law and determinant of the acceptability of judicial decisions. However, the public mechanisms of social support and public opinion were themselves an additional recipe for judicial flexibility.

4.2.1.3 *Social Support*

Flexibility in Uganda's pre-colonial adjudication is also attributable to social support being the basis of the acceptability and validity of legal norms. Eisenberg explained that social support is a value underpinning judicial decisions, as it requires that rules established or applied by the courts should be supported by the general standards of society or special standards in the legal system.[22] Such standards include all moral norms, policies and experiences that have public support. In pre-colonial Uganda, the role of social support in making adjudication flexible can be appreciated from the structure and composition of courts, and the concept of law at the time.

In much of pre-colonial Uganda, normativity and judicial decisions were dictated by public opinion, as the courts of first instance and in some cases reference or appeal, were the elders in a community, with the public represented or directly participating. The function of a judge was to collect and express public opinion from the people at the hearing, a type of judicial practice similar to the role of judges as

[21] Allott *The Limits of Law* (n 5) 52.
[22] MA Eisenberg, *The Nature of the Common Law,* (Harvard University Press, 1988).

defined by institutional theorists.[23] In line with this, Hone noted that, during civil disputes like contract, the side that adduced most witnesses carried the day, and litigants would hire partisans to applaud every point made by their employers, and loudly jeer the adversary's witnesses.[24]

Regarding the nature of the sources of law in pre-colonial systems like Uganda's, Hart, relates that 'every legal system operated on the basis of authoritative sources of law'.[25] The sources of law derived such authority from social support, making them indeterminate, diverse and inherently flexible, with social convenience, and not certainty, the measure of social welfare.[26] These sources of law were indeterminate and flexible in a number of ways.

Firstly, the law was never codified or otherwise written down in any form,[27] but always-verified using social facts observed by the population.[28] The rule of the recognition of law was support from the indeterminate ideals, practices and opinions of the public. Secondly, there were no secondary rules or norms, such as the civil procedure or judging rules, to resolve doubts; which of course led to uncertainty and flexibility in judging.[29]

The value of social support can also be traced in the process of law making. There was no lawmaker whose word would be looked out for to define the law, making it

[23] M Croce, 'Does Legal Institutionalism Rule Out Legal Pluralism? Schmitt's Institutional Theory and the Problem of The Concrete Order', (2011) 7(2) (Utrecht Law Review).
[24] HR Hone, 'The Native of Uganda and the Criminal Law', The Journal of Comparative Legislation and international Law, 3rd Series, Vol. 21. No.4 (1939) 186.
[25] HLA Hart, *The Concept of Law (Clarendon Law Series),* (Oxford University Press 1994) 100
[26] D Brown, 'The Award of Compensation in Criminal Cases in East Africa' (1966 J.A.L.) 33
[27] J Oloka-Onyango, Minneh Kane & Abdul Tejan-Cole, 'Reassessing Customary Law Systems as a Vehicle for Proving Equitable Access to Justice for the Poor' (Arusha Conference: New Frontiers of Social Policy, December 12-15, 2005) 21.
[28] Allott, *The Limits of Law* (n 5) 50.
[29] ibid.

everybody's role to observe It.[30] Public opinion confirmed and standardised a custom or practice as law,[31] and the courts merely expressed, developed or reinforced the law already made by the people organically through practice.[32] The growth of law was natural, evolutionary, unplanned, unconscious and spontaneous; it changed easily, irrationally and organically following a change in the circumstances in which the law had to operate.[33] This mode of law making could only breed flexibility, as norms were applied to suit the context of the time.

Accordingly, commercial contract law was flexibly grown from practice, as happened in other jurisdictions, contract being 'an empty vessel into which the contracting parties can pour practically any legal mixture they choose'.[34] As trade grew, contract law and adjudication were bound to follow its course; the course of informality, with no fixed rules. In such a system, the perceptions of the judicial role had to be flexibility-oriented as well.

4.2.1.4 *Conceptions of the Judicial Role*

The judicial system did not have a rational system following a particular theory of jurisprudence. However, the only concept of justice pursued by courts was substantive justice, which connotes flexible judging. The 1926 report of the Provincial Commissioners, recommended the continuation of the flexible pre-colonial judicial system, on the ground that it gave substantive justice to the

---

[30] Allott, *Limits of the Law* (n 5) 50.
[31] AN Allott, 'The People as Law-Makers: Custom, Practice, and Public Opinion as Sources of Law in Africa and England' (21 J. Afr. L. 1 1977) 2.
[32] ibid 10.
[33] Oloka-Onyango, Kane and Tejan-Cole (n 27) 20-21 and Allott, *Limits of the Law* (n 5) 50-51.
[34] Allott, 'The People as Law-Makers' (n 31) 16-18.

people.[35] The report further detailed the basis for this value, thus: it was quick, understandable by the people, in accordance with people's hereditary customs and unfettered by procedure. The customary values the report alluded to as underlying flexibility included the declaration of rights and duties, as well as remedies available for breach of contract, the rationale for which speaks to the *Ubuntu* concept of justice.

4.2.1.5 *The Ubuntu Concept of Justice*

During much of pre-colonial Uganda, especially areas inhabited by the *abantu* ethnic group, one of the main motivators of flexibility was *Ubuntu,* a traditional ideal of justice and fairness prevalent in many African cultures,[36] including Uganda.[37] It is a value connoting compassion, reciprocity, dignity, harmony, simple humanity, humanity in the sense of being interconnected, and the common good.[38] These ingredients manifested by the remedies for breach of contract being restitution,[39] bargaining[40] and settlement.[41] There were no compensatory, punitive or exemplary reliefs. Instead, remedies akin to specific performance and restitution were

---

[35] Morris (n 20) 169
[36] Gade CBN, 'The Historical Development of the Written Discourse on Ubuntu' (2011) South African Journal of Philosophy, 303, 303-329; TW, 'Ubuntu: An African Unity' (2011) 14(4) Potchefstroom Electronic Law Journal, 4.
[37] Gade (n 36) ibid 303-329; Nassbaum B, 'African Culture and Ubuntu: Reflections of a South African in America' (2003) 17 (1) World Business Academy; www.ugandatravelguide.com/bantu-people.html/, accessed on the 16TH September 16, 2018.
[38] Nassbaum B, 'African Culture and Ubuntu: Reflections of a South African in America' (2003) 17 (1) World Business Academy; www.ugandatravelguide.com/bantu-people.html/, accessed on the September 16, 2018.
[39] HR Hone, 'The Native of Uganda and the Criminal Law', The Journal of Comparative Legislation and international Law, 3rd Series, Vol. 21. No.4 (1939) 181.
[40] Allott, *The Limits of Law* (n 5) 58.
[41] ibid.

common. For instance, Hone reports that if one's claim was a goat, the court ordered that one be given a goat and nothing more.[42]

Further, the compliance to remedial judicial decisions was voluntary, with no compulsion except the fear of public opinion;[43] otherwise, no court awards enforcement machinery existed.[44] This is because the key goal of adjudication was restorational, not just of a party's position, but of social welfare, represented by the need to keep balanced the state of things within society.[45] The competing interests were mainly of a public nature, as all wrongs were deemed wrongs against society; thus the lack of a distinction between civil and criminal wrongs.[46] The corresponding judicial flexibility resonates with social welfare having been advanced by legal process theorists as the key goal for flexibility in adjudication.[47]

The other manifestation of Ubuntu was that the key role of a judge was to be the chief bargainer and settler of cases, as opposed to the formalistic judge's role of finding the right answers.[48] Such adjudication connotes judicial flexibility, as no single answers are expected, but rather what is contextually just or fair; although in this case the result was open to manipulation not only by means of bribing the public, but also the courts.[49] This implies that bribery was not seen as a vice, but rather a means to empower the courts to reach a decision flexibly in order to meet certain goals.

---

[42] Hone (n 39) 181.
[43] Allott, *The Limits of Law* (n 5) 10.
[44] ibid 184 and 186
[45] ibid.
[46] Morris (n 20) 161.
[47] BN Cardozo, *The Nature of the Judicial Process,* (Yale University Press 1921) 65-67; HD Laube 'Jurisprudence of Interests', (1949) 34 (1) Cornell Quarterly Law Review 297.
[48] Allott, *The Limits of Law* (n 5) 58.
[49] ibid.

Therefore, flexibility judging in pre-colonial Uganda was underpinned by flexibility-oriented pre-law institutions, such as cultural values. The adjudicatory landscape was to drastically change, as colonialism brought Uganda into the world commercial justice arena, with the introduction of English law and the English system of adjudication, which was already experiencing the tension. At the same time, the pre-colonial flexibility was not thereby replaced, but given new vehicles and shapes, setting the stage for the tension in contemporary Uganda, without any significant efforts to manage it.

4.3 The Tension in Contemporary Uganda

Contemporary commercial judging represents adjudicatory patterns and trends, from the colonial introduction of the English legal system to present day Uganda. This is the judging period when formalism and its tension with flexibility become the new reality, in place of the pre-colonial flexibility-judging paradigm.

4.3.1 The Tension's Cradle: English Legal System Transplant

Both formalism and flexibility were permissible under the transplanted English legal system, because common law represented both immemorial custom and principle and was kept up to date through on-going application and conformity to society. As such, it stayed principled, rational and based on reason (formalistic) while at the same time capable of being moulded to adapt and conform to changes in society.[50] Alongside this dualistic common law, the pre-colonial flexible indigenous commercial justice system was left to run, without clear judicial guidelines for managing the resultant tension between the two, let alone the one inherent in the common law, especially when it came to hard cases. This marked the beginning of

[50] BZ Tamanaha, *Law as a Means to an End: Threat to the Rule of Law* (Cambridge University Press 2006) 32-33.

the tension in Ugandan courts, as the trend duplicated that in other parts of British Africa where the indigenous judicial system had been maintained alongside the translocated English system. Commenting on the decision in *Dyson Holdings Ltd v Fox*,[51] which interpreted the word family'' in a statute with regard to the social context, Allott[52]correctly defined the situation in such courts as an agony that

> springs from the clash between rigid rules or canons of construction on one hand, which cannot be abandoned without throwing the certainty of the law and the authority of judicial precedents into doubt, and the desire to give effect to major changes in social institutions and attitudes on the other.[53]

The agony that Allott speaks of in this case is the very tension this study is concerned with; in Uganda, both the certainty provided by formalism, and the responsiveness of flexibility, are needed at the same time. As illustrated in Figure 1 below, is the agony that has defined commercial judging throughout post-colonial Uganda, manifested by practices that are indicative of both formalism and flexibility, and a lack of significant efforts towards attaining coexistence between them.

That the colonial courts faced the agony described by Allott,[54] and that they responded by judging flexibly, is best illustrated by Abraham C.J in *Tota Ram v Mistry Waryam Singh.*[55] In this case, the Chief Justice declared that common sense was vital in interpreting the law such that where an enactment stated that

---

[51] [1976] QB 503
[52] Allott, *The Limits of Law* (n 5) 108.
[53] Allott, *The Future of African Law* (n 4) 108
[54] Allott *The Future of African Law* (n 4), Allott, *The Limits of Law* (n 5) 108.
[55] (1932-35) UPLR Vol. 5 76, 78

'where the principal though disclosed cannot be sued,' it meant 'where the principal cannot be sued at the time the contract is made'.

In this case, the court was clearly not guided by the literal meaning of the words in the statute, or by canons like the doctrine of precedent, but applied the law with regard to what made sense at the moment, as dictated by the political, economic and social circumstances. This charge is supported by the following concluding words of the Chief Justice in the decision: 'After all, as a certain distinguished jurist once said, our law is rapidly degenerating into common sense'.[56] These words by Chief Justice Abraham point to the tension having become the norm in colonial commercial justice.

A content analysis of the legal opinions in commercial hard cases illustrates that since this colonial era, the tension has defined Uganda's commercial justice system. The analysis has produced the data in appendices 1-5, from which variables have been extrapolated, counted and plotted on charts, to reveal the frequencies, patterns and trends of judging approaches that prove the tension as defining Uganda's commercial judging paradigm. The results are presented using appendices 1-8, and Figures 1-12, which form the basis for the explanations and discussions that follow in this chapter. The major finding in this sense is that formalism and flexibility have been concurrently but incoherently and illogically practised across Uganda's post-colonial judging history, and the tension has always existed as the by-product of such a judging paradigm.

Manifestations and prevalence of tension have been found to present in three dimensions, which in the following sections are used to guide further discussions

---

[56] ibid.

about findings about the nature of Uganda's commercial judging paradigm. The first dimension is the type of judicial approach adopted in the different judicial opinions, i.e. whether formalistic, flexible or mixed-approach, and how frequently each approach has been observed during the analysis. The second dimension is the concurrent prevalence of formalism and flexibility during the same legal and political historical epochs Uganda has experienced. In this case, the analysis has been made following the country's political epochs, which besides the pre-colonial era (already handled above), are the colonial era (1894-1962), the early post-colonial era (1962-1986), and the late post-colonial era (1986-2018).

On the other hand the legal historical epochs are constituted by the different constitutional regimes the country has had, the constitution being the supreme law in Uganda and the source of judicial authority. The regimes used are the colonial regime; the independence federal constitution regime (1962-1966); the first republican constitution regime (1967-1995), during which military governments suspended some of the constitutional provisions; and the second republican constitution era (1995-2018).

The third dimension is the concurrent prevalence of formalism and flexibility within the different courts of judicature that made the judicial opinions. Prevalence of the different judging approaches has been shown in the High Court, the Court of Appeal, the East African Court of Appeal, the Privy Council and the Supreme Court. Data relating to the Court of Appeal and the East African Court of Appeal are however treated together, as one replaced the other. The findings below are therefore presented using the three dimensions.

4.3.2 The Judging Paradigm under Uganda's Political History

Appendices 1-5 indicate that the commercial adjudication tradition in Uganda has been made up of three models of judicial opinions; formalistic opinions, flexible opinions and mixed-approach opinions. A comparison of the frequency of formalistic and flexible opinions reveals that the tension has existed and prevailed in Uganda since the colonial transplant of English law, with neither side winning.

Klabbers claims that winning should not be the measure of where we are in the contest between formalism and flexibility, or in any legal theory.[57] However, in a study like this one, investigating the possibility of their coexistence, one cannot help but start analysing the tension by asking if there has ever been a winner in the particular jurisdiction; and if not, what the defining elements of the resultant tension are. Winning in this case is not to be understood as winning a baseball match, as Klabbers understood it.[58] Rather, it should mean one approach gaining a level of dominance that would qualify it as the major or default choice of judging, and a defining characteristic of judging culture. The answers in Uganda's commercial judging are derivable from the research findings presented in the tables appended and the figures below.

Table 1 in Appendix 6 reflects the number of cases that were observed as falling in each category of judicial opinion, out of the 300 cases analysed. The numbers are used to come up with the percentages in Table 2 in Appendix 6, and the percentages then used to construct the chart in Figure 1 below.

[57] Klabbers J, 'Towards A Culture of Formalism? Martti Koskenniemi and The Virtues', (2013) 27:2, Temple International & Comparative Law Journal, 415,
[58] ibid

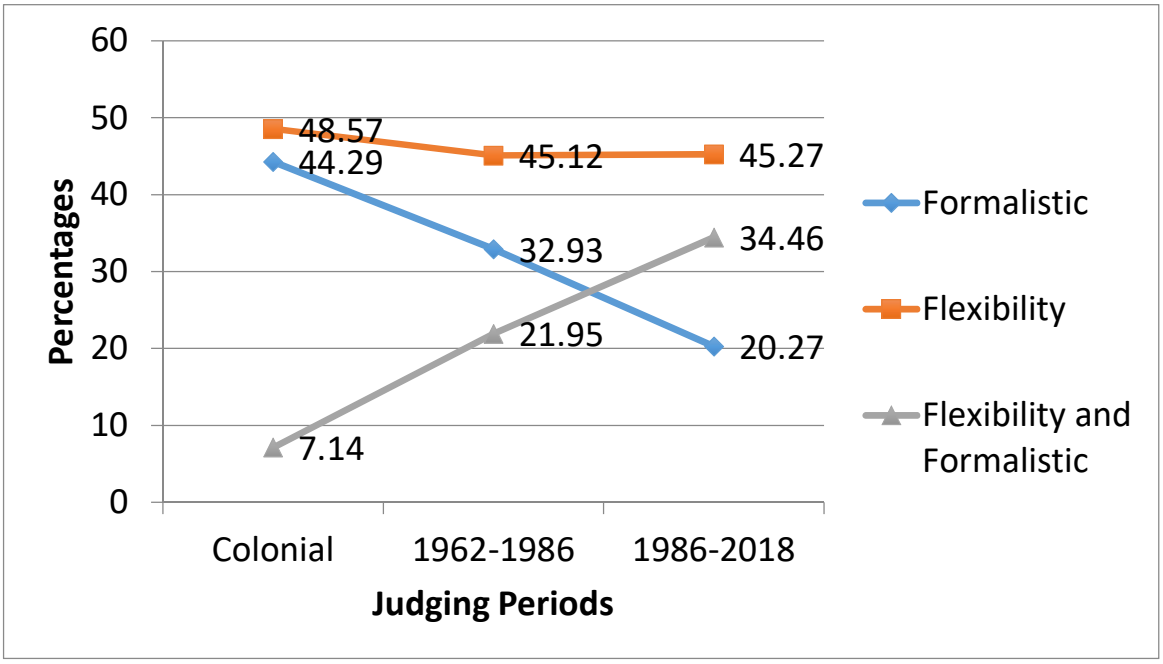

Figure 1: Judging Approaches during Uganda's Political History

The results reveal that the tension has manifested in a number of ways. Firstly, the tension can be observed by looking at the frequencies, patterns and trends reflected by analysing the judicial approaches employed in the total population of legal opinions across the political history of the period under study. There is evidence of a concurrent practice of both formalism and flexibility, from the colonial period to date, with neither of the two approaches becoming significantly dominant.

Figure 1 reveals that during the colonial era the prevalence of the two judging approaches was almost at par, with cases in which the two were simultaneously used constituting less than 10% of the hard cases analysed. After Uganda attained independence in 1962, in the early post-independence period leading to 1986 when the current regime forcefully took power, a slight reduction in flexibility is observed, accompanied by a more significant reduction in formalism. This trend of formalism losing favour has continued in late post-independence, and appears to be on going, but alongside this trend, flexibility has stayed almost at the early post-independence levels.

The above would ordinarily point to the dominance of flexibility, implying a move towards a flexibility judging paradigm, and the tension having been resolved by the

judicial system itself. However, such hopes are quashed by the constantly increasing frequency of both formalism and flexibility being practised at the same time, and in the same judicial opinion, which this study refers to as the *mixed approach*. Figure 1 indicates that such judicial opinions have been on the increase from colonial times to date, and currently far outweigh formalistic opinions.

The place for formalistic opinions is continuously being occupied by the mixed-approach cases, confirming Evans and Gabel's proposition, that although balancing formalism and flexibility is difficult, it has to be done as they are both needed at the same time.[59] However, to arrive at a more comprehensive understanding of Uganda's commercial judging paradigm, the above findings, arrived at through the lens of the country's political history, have been followed by analysis of the same data, but seen in terms of Uganda's legal and judging historical epochs.

4.3.3 The Judging Paradigm under Uganda's Legal History

The tension has also been found to manifest in the analysis of frequencies, patterns and trends relating to the particular constitutional regimes to which the country's judicial system has been subjected. These regimes are: the colonial rule, during which judging was commanded by the colonising agreements and by the adopted British unwritten constitution; the 1962-66 era, during which the independence federal constitution ruled; the 1967-95 era, during which the 1967 republic constitution commanded formalism judging but was regularly interfered with by military proclamations; and the post-1995 era, during which the current

[59] Evans & Gabel (n 3).

constitution has commanded both formalism and flexibility judging. The results of this categorisation are presented in Figure 2 below.

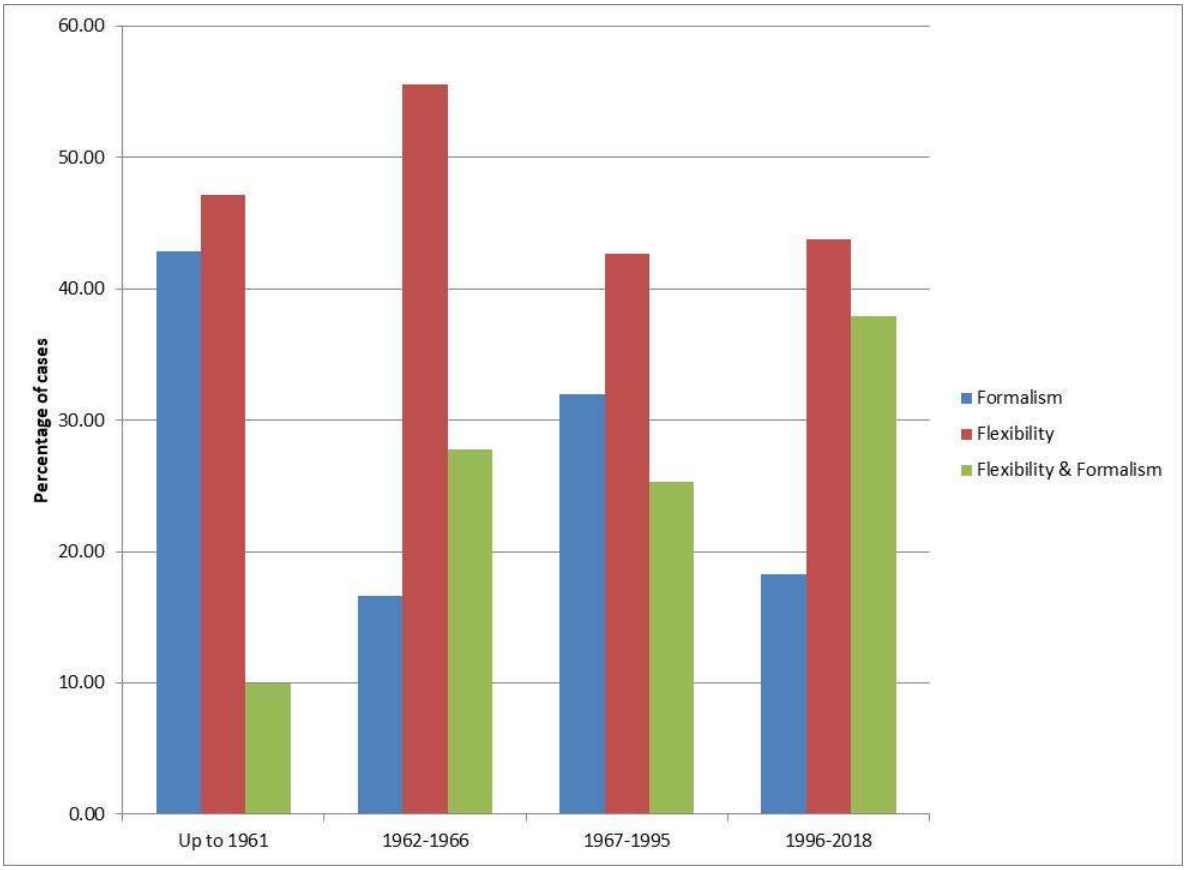

Figure 2: Judging Approaches under Uganda's Legal (Constitutional) Regimes

The trends and patterns in Figure 2 reveal that the tension has manifested differently during each of the various constitutional regimes. The values underlying such trends and patterns are discussed in chapters seven and nine. However from the onset, it is clear that the tension has been underpinned by the prevalence of formalism, flexibility and mixed judging fluctuating in response to the changing contexts of Uganda's legal history.

During the colonial era, when judging derived its authority from the colonising agreements with native rulers, like the Buganda Agreement of 1900, subject to the unwritten British constitution, formalism and flexibility were practised in almost equal measure, flexibility having a slight edge. Formalism having been part of the

colonially-imposed legal culture and jurisprudence, the 1962 independence constitution brought a new legal order which came with a sharp decline in formalism. This points to the influence of the value of self-determination. Flexibility, which defined pre-colonial adjudication, grew to its highest level of prevalence in the country's entire legal history. Analogeously to the decline of formalism and growth of flexibility in the 1920s-30s US judicial system, this trend was the result of a new national pride and rejection of everything British, as a symbol of liberation.[60]

Although Figure 1 indicates a consistent decline in formalism, from independence to date, Figure 2 reveals that actually this decline was interupted by an increase in formalism, against a decline in flexibility, from 1967 to 1995. This period saw the legal and judicial order officially derived from the 1967 constitition, but regularly interrupted by military dictatorships, suspending parts of its provisions, and being the actual source of judical authority and legally acceptable judging approach.

This presents the Ugandan context as unique, as military dictatorships and other authoritarian governments have been associated with judicial absolutism and other values that yield flexibility at the expense of formalism.[61] The answer could be in the significance of other underlying values of the judicial approach during this time; as will be discussed in chapters seven and nine.

In the meantime, one has also to note that as formalism and flexibility competed in dominance, cases where judges employed a mixed approach significantly gained in frequency just after independence, signalling increased discretion, authority and/or boldness by judges. This trend was reversed in the 1967-95 period, during the first republican constitutional regime, which could account for the unusual

[60] Tamanaha (n 50) 30
[61] Wells (n 14) 81, 106-108.

trends in the prevalence of purely formalistic or purely flexible judging approaches during authoritarian governments.

Finally, formalism was again to decline, almost to its lowest levels from the time of early independent Uganda, and flexibility, together with mixed-approach judging,was to grow to maintain dominance and attain the highest levels, during the 1995-2018 second republican constitutional order. In terms of the tension between formalism and flexibility, the trend in this period indicates an increased dominance of flexibility over formalism amongst single-approach cases, alongside unprecedented tension between the two appraoches reflected in the surge of mixed-approach cases.

The post-1995 period is the era of constitutionally-permissible judicial legislation, under which although the common-law formalism is still part of the law on judging, courts are obliged to decide flexibly, taking into account the country's historical, social, political and economic contexts and the values, norms and aspirations of the people.[62] The impact of the legal ordering is analysed, alongside other motivating values underlying judicial approach, in chapters seven and nine. However, in terms of understanding the judging paradigm, one would want to go beyond the periodical manifestation of the tension to how particular courts have collectively approached hard cases, and what their role is in the tension.

4.3.4 Manifestation of the Tension across the Different Courts

Although each judicial opinion was made by a single judge, the opinions have been analysed using the lens of the courts to which a collection of judges belonged

[62] The National Objectives and Directives and Article 126 of the 1995 Constitution.

during a particular time. In this regard, the court, and not the individual judge, is seen as the promoter of flexibility or formalism, which is further proved as characterising the tension, when one looks at judicial approach across the entire court structure, as opposed to looking at single courts.

As presented in Figures 3-5, patterns have been observed and trends derived to understand the institutional behaviour and judging paradigm, vis-à-vis the tension, of the courts at all three levels of courts of record. These are the High Court, the Court of Appeal (East African Court of Appeal for the period up to 1974), and the Supreme Court (during colonial times, the Privy Council).

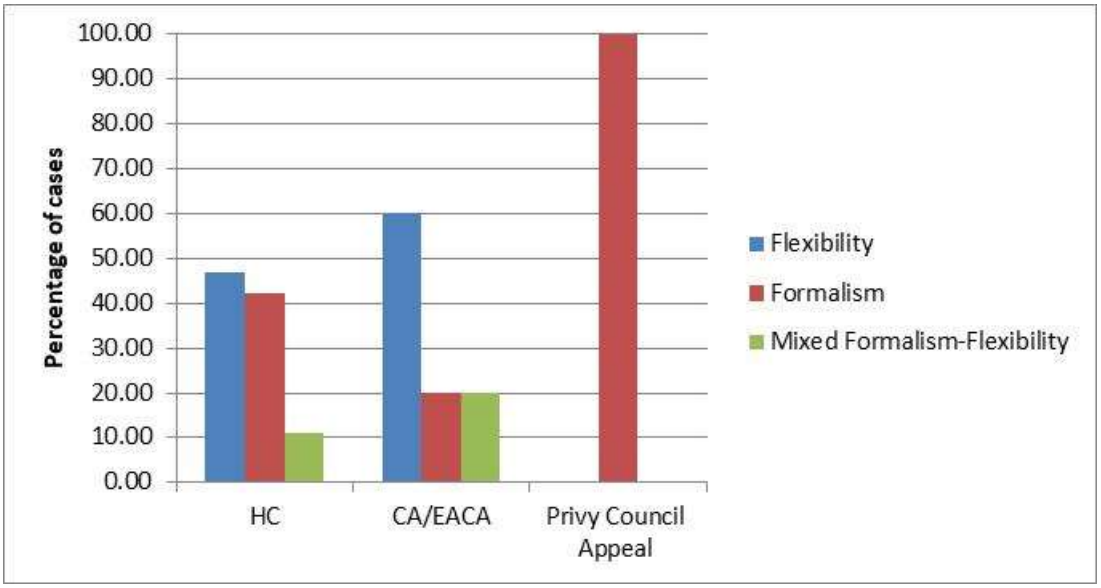

Figure 3: Judicial Approaches amongst Colonial Courts

Figure 3 reveals that during the colonial era the tension was concentrated in the High Court, which was the highest court resident within Uganda. The frequency of judicial opinions across the colonial political period, reflected in Figure 1, is mirrored in how the approaches appeared in the High Court. The exception is that flexibility slightly outnumbered formalism, as opposed to the general trend in which it is the other way around. As cases went on appeal however, the tension seems to have consistently reduced till it disappeared at the apex, the Privy Council. As such, in the East African Court of Appeal, flexibility reigned over formalism and the

mixed judicial approach, while in the Privy Council formalism was the default judicial approach.

The above results imply that the tension was prevalent, but not in every court; it was limited to the High Court, with the appellant courts facing no problem of choice between competing values in hard cases. At first appeal, the judging norm seems to have been choosing experience over logic, while at final appeal logic was chosen over experience; either way, leaving no room for the tension between formalism and flexibility. These findings on colonial judging cast further doubt on the claims that the tension is inherent and will always be there; giving more credence to the thesis of this study, that it can and should be managed. After independence, however, the judging paradigm shifted, as is demonstrated in Figures 4 and 5 below.

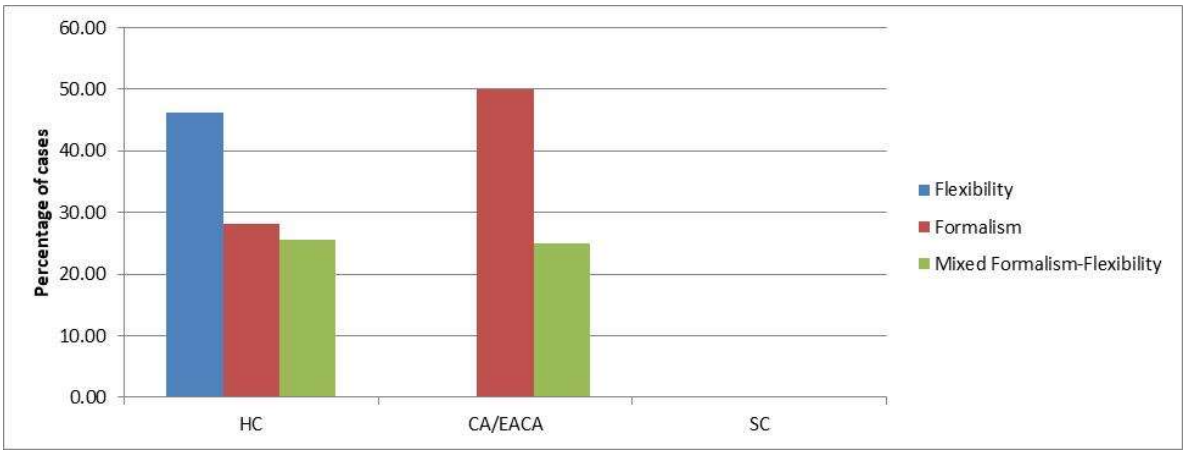

Figure 4: Judicial Approaches in Different Courts (1962-1986)

Figure 4 reveals that in early post-independence, from 1962-1986, flexibility in the High Court stayed at the same level of prevalence as there was during colonial times, but formalism reduced, while there was a more than twofold increase of mixed-approach judging. Beyond the court, the high level of formalism hitherto observed in the Privy Council shifted to the East African Court of Appeal; and later, with the collapse of the East African Community, the Court of Appeal. No judicial opinion based on absolute flexibility was found; while cases based on absolute

formalism were the majority. At the same time, a mixed-approach judging remained at almost the same level between the High Court and the higher appellate courts.

Therefore, during this early post-independence era, the tension mainly manifested by way of reasonably high levels of mixed-approach judging, and the fact that in cases where the judges chose either formalism or flexibility, flexibility reigned in the High Court; while formalism did so in appeals from the High Court. Finally, as illustrated in Figure 5, in late post-colonial Uganda, with the introduction of the Uganda Court of Appeal as the middle appellate court, and making the Supreme Court the ultimate one, the configuration of the tension changed again.

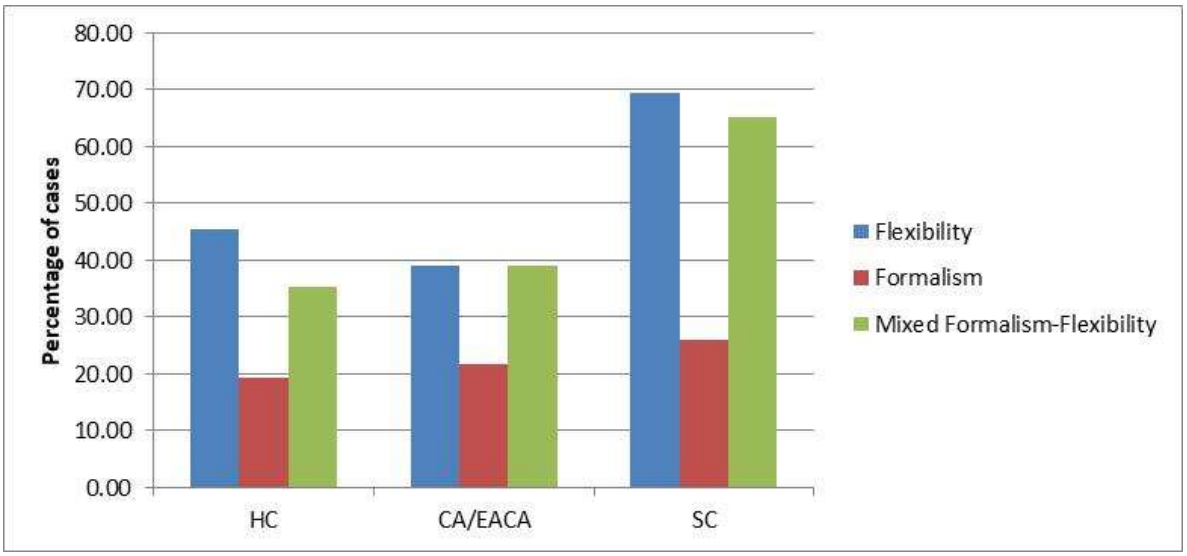

Figure 5: Judicial Approaches in Different Courts (1986-2018)

The key changes in this era are that formalism in the High Court has stayed at almost the early post-independence levels, but flexibility has reduced further and mixed-approach judging increased above 30%. These trends have been maintained by the Court of Appeal; judging in the Supreme Court, however, reflects formalism staying at almost the same levels as in the lower courts, but with a drastic increase of flexibility to almost 70%. Mixed-approach judging in the Supreme Court has also surged to over 60%, the highest any court has attained in the history of the country.

The net effect of the above trends is that the judging paradigm continues to be defined by an ongoing—concurrent use of both flexibility and formalism. Rarely have courts opted to have one approach dominate the other. Even where such normalcy has been observed, it is cancelled out by the character of the judicial approach across the general court structure; or, the judicial approach in higher courts is at odds with the normalcy, and leans more to the opposite side of the flexibility-formalism divide. In view of the ever-increasing frequency of mixed-approach judging, alongside the sharp increase in flexibility in recent times, the conclusion is that the nature of Uganda's commercial judging paradigm is one defined by both formalism and flexibility, the two being forever in tension.

Therefore, Uganda's judging paradigm does not conform to the common understanding of a judging paradigm in the western world; the West's history having been a movement from formalism to flexibility, then back to formalism and later back to flexibility.[63] For instance, Horwitz[64] describes the American experience as a story in which formalism ruled the 18thcentury, with flexibility taking over in the early 19thcentury, and formalism returning in the late 19thcentury (although he claims that this was opportunistic formalism), only for it all to swing back to flexibility in the early 20thcentury. The findings in the Ugandan case show that not only are the swings in western judicial approach inapplicable to Uganda's story, but also that no swings took place, in the sense of one judging approach having such dominance that it could be seen as ruling a particular judging era.

---

[63] Tamanaha (n 50) 26-7.
[64] Horwitz M, *The Transformation of American Law, 1780-1860* (Harvard University Press, 1977) 1-2, 253-255.

Instead, the paradigm in Uganda appears to be in line with Duxbury's view, that the description of jurisprudence's history as a constant pundulume swing of contrasting schools of thought is exaggerated.[65] Rather it is the case that each school existed at all times, and it was just a question of which one of the two dominated at a given time. However, Duxbury's subsequent claim that the mere dominance of one judging approach at a time amounted to coexistence, and solved the tension,[66] is simplistic to say the least. The Ugandan experience has shown that this dominance is not only temporary, but often neutralised by mixed-approach judging.

A mere concurrent practice of both formalims and flexibility would probably not result in the tension; or if it did, the same could be managed to arrive at legal certainty if there were mechanisms to guide judges on which approach to take, or the limitations of each approach, in searching for answers to hard cases. The data in appendices 1-5 reveal that judges faced with such choices have very rarely appeared to gain benefit from this form of guideline, and in those few cases, almost each judge construed the source and content of such guidance differently. To fully understand the judging paradigm as being defined by the tension, one needs to understand this management phenomenon, whose findings are presented in Figures 6 and 7 below.

Figures 6 and 7 present findings in mixed-approach cases, being the ones in which both formalism and flexibility were applied in one opinion. This mixture demonstrates the competition between the values underlying each of the two approaches, and fact that there are hardly any reconciliatory mechanisms judges

---

[65] Duxbury N, *Patterns of American Jurisprudence* (Clarendon Press, 1997), 2.
[66] ibid.

could apply. This has left the judicial decisions a ground for the clash between formalism and flexibility, and the judging paradigm being defined by that tension.

4.3.5 The Tension as a Competition Amongst Values in Adjudication

The tension is probably most visible when one gets a front view of the sub-values that have underpinned higher values behind both formalism and flexibility, and how they have competed for dominance, especially in mixed-approach judging. In this part, comparing and analysing the frequencies of values found to have motivated mixed-approach judging are used to demonstrate such competition. The frequencies are presented in Figures 6 and 7, which reveal a neck-and-neck competition between the values influencing each of the judging approaches in the tension. The findings therefore support the claim of the jurisprudence of interests' claim, that the tension results from competing interests and values during adjudication, that need to be discovered and balanced as a way to certainty.[67] Figure 6 indicates the prevalence of the different judging cultural values as the internal judging criteria behind mixed-approach opinions.

[67] R Pound, *Interpretation of History* (Harvard University Press, 1946) 142-151; R. Pound, *New Paths of the Law* (University of Nebraska Press, 1950) 24-27; M.M Schoch, (translator and editor), *The Jurisprudence of Interests: Selected Writings of Max Rumelin, Philipp Heck, Paul Oertmann, Heinrich Stoll, Julius Binder & Hermann Isay (Harvard University Press, 1948)* 31.

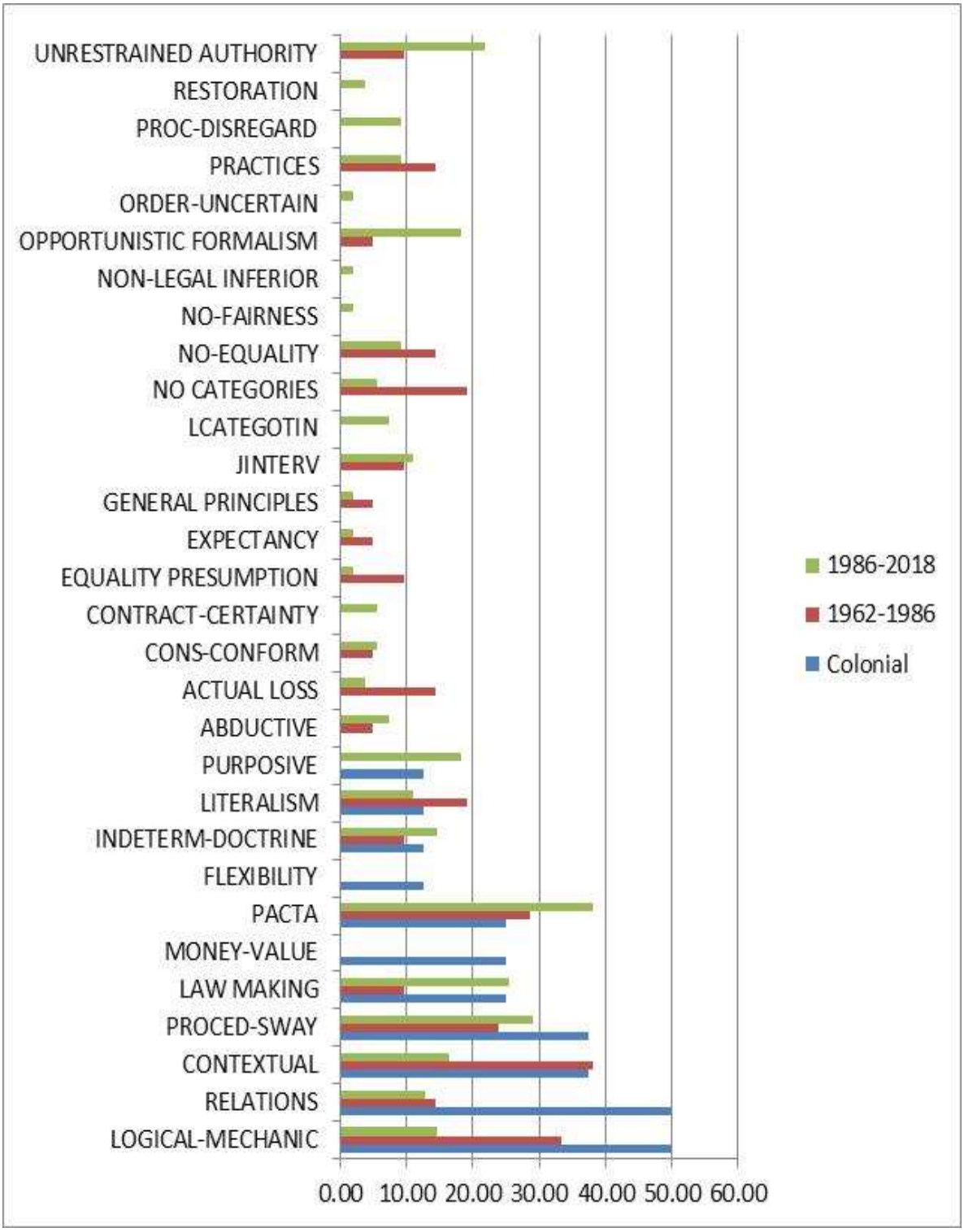

Figure 6: Judging Cultural Values in Mixed-Approach Judicial Opinions

The findings in Figure 6 indicate that during colonial judging, a number of formalistic values tied with flexibility ones, there by demonstrating the competion between them, that calls for balancing as a way towards coexistence. Firstly, the formalistic logical deduction and mechanical application of law, and therefore its implied values of the rule of law and the judge's role as a mechanic, appeared in 50% of cases; the same frequency as the flexible value of relational contracting. Secondly, is the tie between the formalistic procedural justice holding sway, and contextual interpretaion and application of rules and contract terms; each at 37%. Thirdly, is the tie between the formalistic values of accuracy, represented by treatment of value as money and market individualism observed through the upholding of *pacta sunt servanda*, against the flexible perception of lawmaking as a judge's role; all at 25%. Fourthly, there is a tie between the formalistic value of literalism in contract interpretation, and the flexible sub-values of open recognition of the need for flexibility, reliance on indeterminate doctrine and purposive judging; each at about 13%.

In early postcolonial-judging, the judging paradigm still included a competition between formalistic and flexible values, although with less of a tie as observed in colonial cases. The competition appeared in two ways. Firstly, although there appeared to be fewer formalistic values, this was far from implying an absolute flexibility paradigm. The few that appeared were in significantly higher percentages than most flexibility values, the net effect of which being that there was still a stiff competition of values in adjudication. Out of the opinions analysed, logical deduction and mechanical application of law, for instance, appeared in 33%, procedural justice holding sway in 24%, upholding *pacta sunt servanda* in 29% and literalism in contract interpretation at 19%. These frequences were in contrast to those of flexibility values; although these were greater in number, only contextual interpretation and application of rules and contractual terms appeared most often, at 38%, the next being the recognition of law's adaptability and elasticity, as well as categorisation and classfication of law, at 19%, while the rest were below 15%.

Secondly, as was the case with colonial judging, the early post-colonial tension as a competition of values still included a competition between some formalistic and

flexibility values. Notably, the flexibility values of utilitarianism and commercialism, manifested by recognition of commercial practices and usage and the non-recognition of equality of contracting parties, tied at 14% with the formalistic value of accuracy, manifested by construing actual loss as the only measure of damages in contract. Similarly, the flexibility sub-values of exercising judicial absolutism, judicial interventionism in contract and reliance on indeterminate doctrines tied with the formalistic value of presumption of equalitariansim, at approximatelly 10%.

Amongst late postcoloinial-opinions, the tension as a competition of values has continued, although again taking a different dimension. There appear not to be many ties or significant dominance between formalistic and flexibility values. Instead, Figure 6 reveals the emergence of opportunistic formalism as part of the internal judging culture, which is evidence of the tension existing as a result of judges' failure to choose between competing values. Further, the figure reveals an internal but even competition between formalistic and flexibility values, in the sense that there is a lack of dominance; each side has been well represented in the high, middle and low prevalence of values.

The tension as a competition of values defining Uganda's commercial judging paradigm is also demonstrated by an overview of the prevalence of values external to the judiciary, but motivating judicial choice. The results from an analysis of mixed-approach judging, presented in Figure 7, provide the basis for this conclusion.

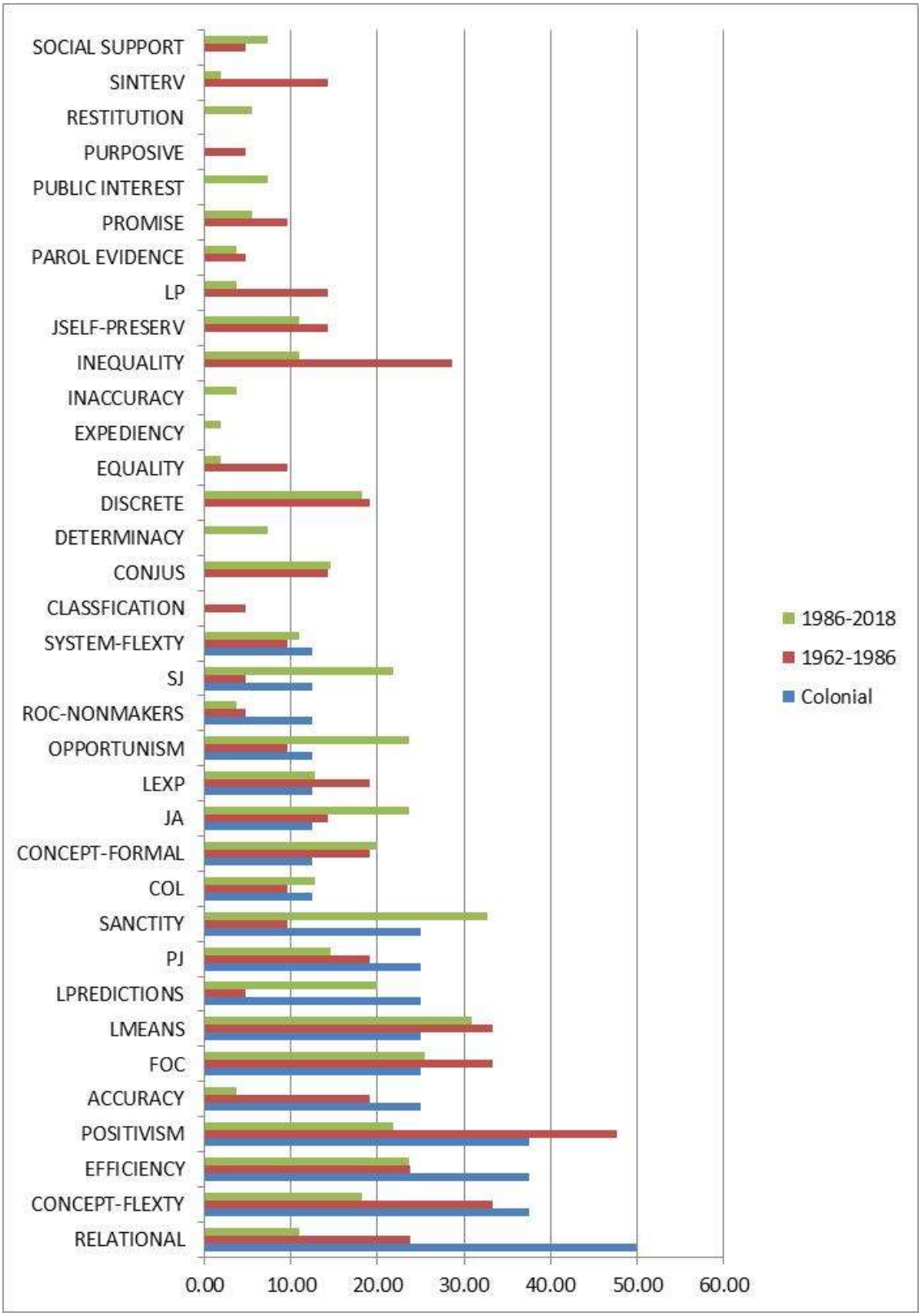

Figure 7: External Values behind the Mixed Approach in the Various Periods

The findings in Figure 7 indicate that during colonial judging, besides relational contracting that was observed in 50% of the cases analysed, the external judging criteria is defined by a neck and-neck competition between formalistic and flexible values. In approximately 38% of cases analysed, judges percieved the meaning and nature of law in formalistic-positivist terms, the same frequency as cases in which judges were guided by the flexibility-engendering economic efficiency as a normative criterion. Another set of formalistic values – freedom of contract, accuracy in adjudication, procedural justice and sanctity of contract –appeared in 25% of colonial judging, the same frequency as the flexibility values of perceiving law as the predictions of judges, and as a means to an end. Further, appearing at appproximately 13%, were the formalistic values of certainty of law, the judges's lack of role in lawmaking, and conceptual formalism on the one hand; and on the other, the flexibility values of judicial absolutism, conception of law as experience, efficiency and a means to ends; substantive justice; and other systematic flexibilities.

In early postcolonial-judging, the neck and-neck type of competition continued to define the tension as the judging paradigm, with a number of formalistic values appearing with the same frequence as flexibility ones. Although some can not be said to be the reverse side of those they tied with, the reality of the existence of both judging approaches, as a result of underlying values competing for influence in judicial choice, is demonstrated.

The other exception to the sub-value competition as a neck-and-neck contest between opposing values was with regard to the perception of law's nature and meaning. In this case, legal positivism appeared dominant, at approximately 48%. This dominance is however watered down by the prevalence of flexibility preceptions of law; law as a means to an end at 33% and economic efficiency as the normative criterion at 24%. These flexibility perceptions, individually, appeared less frequently, but when added together accounted for a much bigger value than positivism, pointing to a the reality of a competition of values and the resultant tension between formalism and flexibility.

During late postcolonial-judging, the results with regard to the external criteria portray a picture similar to that of the internal criteria, with the tension defined by a generally even formalistic-flexible values competition. In this case, formalistic sub-values appeared with significantly high frequency; conceptual formalism at 20%, legal positivism at 22%, freedom of contract at 25%, sanctity at 33% and contracts as discrete at 18%. On the other hand, flexibility values were found present in comparably high frequencies, especially given that they were greater in number. For instance, of the cases analysed, the conception of law as a means to an end appeared in 31%, economic efficiency in 24%, opportunism and judicial absolutism in 24%, substantive justice in 21%, law as the predictions or of what judges will do and conceptual flexibilities in 18%.

The above results reveal that throughout judging history, Uganda's judging paradigm has been defined by the tension between formalism and flexibility, which has resulted from a competition between underlying values. What these values mean and stand for, and the way they have presented in actual court cases, so as to be part of the competition and influence the tension, are further discussed in chapters seven and nine. What is important at this stage is to note the value competition as a reality underlying the tension, that calls for a study like this one, that seeks to understand these values and explore the possibility of balancing them, as a way to manage the tension. This is not to say that such attempts at managing the tension in Uganda do not exist.

4.4 Existing Tension-management Mechanisms

This section illustrates that in very few of the opinions analysed have judges referred to some form of principles as a guidence for judging, either flexibly or formalistically. The results reflect the state of the tension-management regime as generally inarticulate, inadequate, incoherent and inconsistent. The tension-management mechanisms found are of two broad categories. The first category consists of domestic attempts, such as attempts individual judges have made to define principles that should guide decisionmaking in hard cases.

The second, are the international instruments such as treaties, under which Uganda bound itself to ensure legal certainty during adjudication, although these have hardly ever been invoked by judges in real disputes. The way guiding principles have been arrived at, is by way of lone judges venturing into trying to find an ultimate norm to use as a guide, rather than through Uganda having a conscious, coherent, theoretically-sound and well-researched framework for management of the tension. I proceed to elaborate these efforts.

4.4.1 Domestic Attempts to Manage the Tension

The results presented in Figure 8 below, and in appendices 1-5, indicate the absence of significant mechanisms for, and patterns of, management of the tension. This is in the form of judging having been done with reference to some form of guidelines, a phenomenon represented by the red bar in Figure 8. The blue one refers to the frequency with which judges acknowledged, or otherwise subjected their decision to, what can be defined as a mechanism to manage the tension. The two were observed during the content analysis following the codes 'JUDGING GUIDE' and 'MGT' respectively. During the colonial era, both were observed in less than 3% of the cases analysed, while cases from early post-independence revealed none. On the other hand, late post-independence has seen increased attempts at judges making reference to guidelines and embracing management mechanisms; but still with both appearing in less than 9% of the cases.

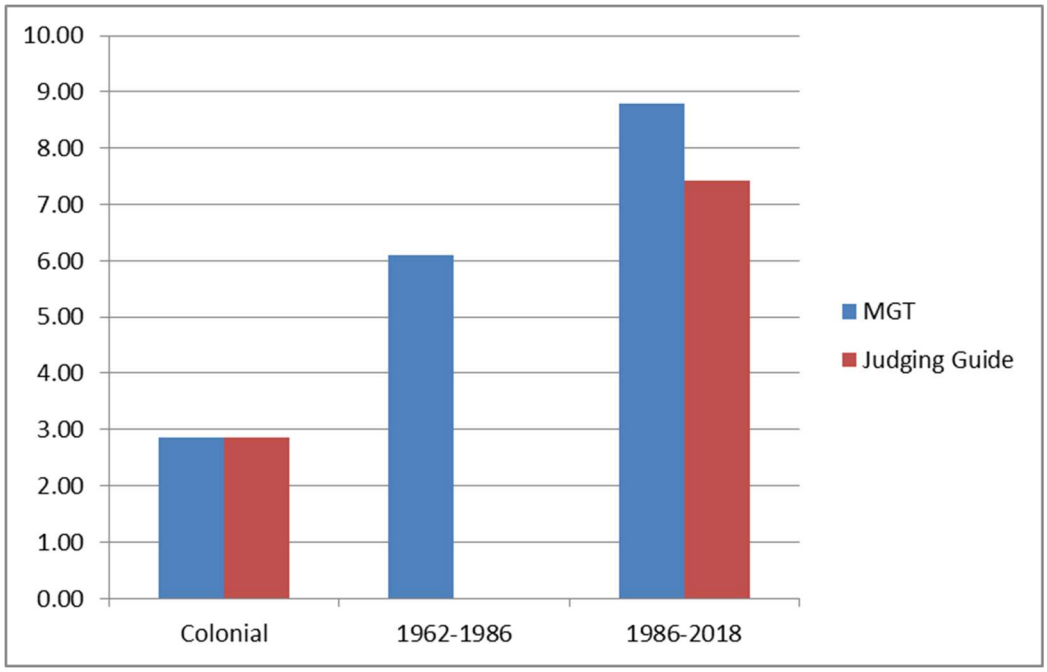

Figure 8: Judging with Reference to Judging Guidelines

Overall, Figure 8 demonstrates that judges were found to have referred to some form of guidelines, or other tension-management mechanisms generally, in less than 9% of the opinions analysed. This implies that there have been minimal efforts to manage the tension, as would create legal certainty. But even then, the few norms judges have, although very rarely, recognised as guidelines need to be understood. This, added to the absence of studies like this one, on how a comprehensive framework to manage the tension in Uganda can be achieved, confirm the study's contribution to the knowledge gap.

4.4.1.1 *Judging Criteria in Colonial Uganda*

As demonstrated in Figure 8, before independence judges attempted to pay attention to some form of guidelines or other management mechanism in only two cases, representing less than 3% of cases analysed. Therefore, management of the tension, and the legal uncertainty caused by the nature of the colonial legal system, hardly received any attention from judges.

In *Mwenge v Migadde,*[68] the hierarchy of norms guided the court under colonial law, which placed flexible norms below and subject to formalistic ones. If this were still the principle to guide judges, it would mean that the validity and acceptability of flexibility was determinable by its conformity or consistency with formalism and legalism. However, Article 126 (1) and 126 (2) (e) of the constitution bind judges to be guided by the values, norms and aspirations of Ugandans, and to hold substantive justice superior to technicalities. This changes the colonial hierarchy of norms and makes the rule in *Migadde's case* unconstitutional and therefore void today.[69]

Another case where judging guidelines appeared was *Bhimjani v Patel,* in which the judge openly decided flexibly and made new law.[70] While justifying the presumption that the reasonableness clause was part of the then Uganda's Rent Restriction Ordinance, although it actually was not expressly provided for, the judge indicated that the court's discretion had to be guided by the principles in statutes. These included special conditions present, all relevant circumstances at the hearing date, the general scheme and purpose of a statute and broad common

---

[68] (1932-35) UPLR Vol. 5, 98 (Appendix 1: Case 3).
[69] ibid
[70] (1956-57) 8 UPLR 164 (Appendix 1: Case 36)

sense viewed from the perspective of a man of the world. These principles are subsets of, and can be looked at as representing, responsiveness to the context of a case, and social acceptability determinable by relevance to general common sense.

The above references to judging guidelines were, however, isolated cases, as the general trend was non-existence of any form of guidelines or tension-management mechanisms. However, there appears to have been no normativity crisis, a phenomena explained by a number of factors.

Firstly, in line with the English ideals of legal certainty, the colonial government placed limits on the growth of customary law by taking away some of the tools that gave it flexibility. One of the tools removed in this manner was the ease of amendment and modification of law. Organic growth meant ease of amendment, which in turn meant ease of adaptability and growth whenever circumstances so demanded.

However in the celebrated case of *Kajubi v Kabali,*[71] Chief Justice Gray in the East African Court of Appeal declared the rule that applied to stateless communities before colonialism as governing all modification or amendment of customary law in Uganda. The court thus held that traditionally, in *Buganda*, no individual or group of individuals could modify the original customs of a native community, not even the court, without the assent of the native community.[72] This had the effect of modifying Buganda's customary law through judicial flexibility.

---

[71] (1944) 11 EACA 37.
[72] ibid.

The removal by *Kajubi's* case of the *Kabaka's* jurisdiction to amend and modify law reduced the flexibility with which custom could be changed. The impracticality of obtaining the entire community's consent to amend or modify a law meant that the customary norms already in existence had become fixed, made determinate and more certain in line with the English ideals about law. By this fixation, customary law had also been robbed of its inherent mechanism for growth and ensuring that it kept relevant to changing circumstances in the way the common law did.

Secondly, flexibility was limited through the conditions imposed for its applicability under both the Colonising Agreements and Article 20 of the Uganda Order in Council (the repugnancy clause). Customary and native law could only apply if it was not repugnant to justice, morality, any Order in Council or laws made under the Order in Council. The caveat embedded in the repugnant clause could however not help in managing the tension. The subjection of African law to the colonial English law meant imposing formalistic legislation as the fence over which flexibility would not help the law to cross, as demonstrated in *Migadde's case*.[73] In 1939, Attorney General Hone[74] conceded that the repugnancy clause was a limitation to the growth of customary law, although he argued that new customary law could be made.[75] The flexible and indeterminate standards of justice and morality were an imposition of traits of the non-instrumentalism of the natural law jurisprudence that again favoured formalism over flexible instrumentalism, as used in pre-colonial days.

Thirdly, the tension was managed by default, through segregative legal pluralism; that made the largely flexible traditional legal norms apply in the African courts, and

[73] (1932-35) UPLR Vol. 5, 98 (Appendix 1: Case 3)
[74] Hone (n 39) 187-88.
[75] ibid 188, 190-91.

the predominantly formalistic English laws apply in the non-African protectorate courts. Although this policy left the tension to prevail in the protectorate courts – owing to, among other things, the dualistic nature of the common law – the fact that the proportion of the population subject to the jurisdiction of such courts was just about 2%,[76] meant that the uncertainty arising out of the problem would not be experienced by the majority of Ugandans.

Fourthly, there was at least one certain rule of recognition of valid law, as substantively flexible laws were subject to conformity with the 1902 Order in Council and other formal laws made by Her Majesty the Queen of England, and to English precedents.[77] The native laws being made by the native supreme ruling council (*Lukiiko)* were also subject to approval by the British Governor, and this safeguarded the capitalist interests that English law formalism stood to protect.[78] These caveats meant that flexibility could only be exercised within discoverable legal limits, as was confirmed by the court in *Migadde's case*.[79]

Fifthly, the lawyers and judges in the country received British training that, according to Chief Justice (emeritus) Wako-Wambuzi, involved not only the British legal system but also its culture, such as etiquette, plus personal and community values.[80] Further, selection to the position of a judge also depended on a detailed investigation of one's life history, including the family background. This training and background check no doubt ensured that judges were equipped not only to

---

[76] RW Cannon, 'Law, Bench and Bar in the Protectorate of Uganda' (International and Comparative Law Quarterly, (1961) Vol. 10) 877.
[77] The Uganda in Council 1902, Article 20.
[78] The Uganda Agreement 1900, Article 11.
[79] (1933-35) UPLR, V, 98.
[80] In a meeting with the researcher on the 6th of August, 2016, at the home of the Chief Justice (Emeritus), in Ntinda-Minister's Village, Kampala.

understand the substance and philosophy behind common-law doctrine, but also to make judicial choices in a way that upheld the coexistence of formalism and flexibility due to the dualism of the common law at the time.[81]

The mechanisms to manage the tension could not last beyond the colonial state, as none of them suited an independent and sovereign Uganda, governed by African Ugandans, with a nationalistic outlook to policy. Further, by the time of independence, no deliberate efforts had been made to build a single coherent legal system that would apply to the whole of Uganda and all Ugandans; it would not be until the country was a few years to self-government that it integrated the traditional flexible-oriented legal system with the dominantly formalistic English one.

The only traces of effort to tackle legal uncertainty were the amendments to relevant legislation, which only dealt with curing substantive flexibilities. Consolidation Agreements were for example followed by other agreements ('Corrective Agreements') amending or clarifying terms that were presumed to have caused legal uncertainty. Such corrective agreements included the Laws Agreements of 1910 and 1937, both of which clarified the subordination of the Kabaka to the English sovereign, and that the laws made by the *Kabaka* applied not only to the *Baganda* in *Buganda* but also to all natives in *Buganda*. Corrective Agreements occupied the place of constitutional amending statutes. This implies that legal uncertainty, arising from the formalistic interpretation of the terms of the agreements and the practical realities that had seen the *Kabaka* being seen as the sovereign in the eyes of the natives, had been managed using legislation.

---

[81] Tamanaha (n 50) 32.

However, in areas where legal uncertainty arose as a result of enforcement flexibility (such as from judicial activity) or systematic flexibility (especially due to the pluralist nature of the legal system) no attempts were made at solving the problem. The colonialists therefore handed over a legal system comprising highly indeterminate and uncertain laws, and courts that were legally permitted to, and did, make decisions at will, formalistically or flexibly; with no clear doctrinal, contextual or statutory guidelines. Therefore, by the time Uganda became independent, the tension prevailed in commercial adjudication, with its management occurring only as a matter of accident rather than conscious effort. During postcolonial-judging, the trend has changed significantly, with more cases observed in which judges referred to guidelines or other management mechanisms.

4.4.1.2 *Judging Criteria in Early Postcolonial-Uganda*

Early postcolonial-judging showed an increase in reference to management mechanisms, to 6% as shown in Figure 8, but a total absence of judging guidelines as part of such mechanisms. The main tool used to manage the tension was limiting judicial absolutism and making formalism the default apparoach; judges had no discretion to override the law according to personal preferences, prejudices or attributes.

This was the era of successive militarism and outright dictatorships defining political culture; but instead of such authoritatrianism increasing judicial absolutism, judges' wigs were trimmed and their province limited by rules. An example is provided by the numerous decrees passed during Amin's dictatorship (1970-79), to regulate commercial rights and obligations; judges had to be strictly guided by

these, as was the case in *Samuel Hawaga v Christopher Bisutu,*[82] *and Uganda v Stephen Kafeero*.[83]

The other mode of limiting judicial absolutism was by the courts insisting on strictly enforcing the terms of a contract as a way of avoiding judges substituting their wishes for the intentions of the parties. In Dr *Syedna Mohamed Burhannudin Saheb & 2 others v Jamil Din & Others,*[84] the judge recognised the tension and decided that the best way was to be guided by such a need to avoid substitution of intentions, and thus had to decide formalistically.[85] Further, again as can be discerned from the Dr *Syedna case,* the judge required proof of vitiating factors as a basis for considering judging flexibly.[86] Such requirement for proof would then become the control to unguided flexibility, and thereby manage the tension.

Besides limiting judicial absolutism, in one early postcolonial-case, *Edmund Schluter & Co. (Uganda) Ltd v Patel,* the judge continued to give adherence to contextual responsiveness as a guide to choosing flexibility.[87] This one case is, however, far from what one can call a significant effort to manage the tension using a consistent and comprehensive framework. This is especially true given that the case is the only one, out of 85 analysed in the period, which does not point to its being a general guideline.

Further, as was the case with colonial Uganda, the methods of determining when, to what extent, and in what form to be guided by the context, were all left

---

[82] HCCS No. 839 of 1973.
[83] Criminal Revision No. 106 of 1974.
[84] [1973] 1 EA 254.
[85] [1973] 1 EA 254
[86] ibid
[87] [1969] EA 239

inarticulate. This study contributes to knowledge by proposing that responsiveness be recognised as a value that cuts across formalism and flexibility, and whose exhaustive articulation can help in formulating an ultimate judging guideline. This is against the backdrop of the presence of judging guidelines being invoked in hard cases having increased in late postcolonial-Uganda; but still reflecting incoherence, inadequacy and the need for studies like this one, focused on the question of how the tension can be managed.

4.4.1.3 *Judging Criteria in Late Postcolonial-Uganda*

Although the findings for late postcolonial-judging reveal more reference to tension-management mechanisms, and specifically judging guidelines, rarely was a guiding principle referred to by more than one judge, the most frequent appearing in only two opinions. This implies that, the tension-management efforts observed have been lone efforts by the respective judges, and to the lack of a rational and coherent set of guidelines that engender legal certainty. However, these judicial efforts need to be understood, as they should form the beginning of any final thoughts on the formulation and construction of ultimate commercial judging guidelines to manage the tension.

Firstly, there is the notion of treating competing norms and values in a hierarchical manner, the formalism-engendering ones being the default and proof-based flexibility ones the exception. This was declared by *Byamugisha, J.A* while refusing to fill gaps in contracts by implying terms in *Kibalama v Alfasan Belgie CVB.*[88] Therefore, judges will only resort to flexibility if its motivating values are backed by support from the business community, evidenced by being adapted as implied

[88] [2004] 2 EA 146.

terms. So, as a default rule, the formalistic value of *pacta sunt servanda* held sway, and was only flexibly interfered with if such interference-enjoyed public support, the public being the business community, which would speak through practices. This would call for proof, that the business community subscribed to certain terms as being implied in particular types of contracts, as a precondition to flexibility adjudication seeking to incorporate them. The judge's declaration can help to attain coexistence, as it serves adherence not only to freedom and sanctity of contract, but also to the rule of law, while at the same time providing a source for validity of the practices that, according to Murray, might not otherwise be acceptable to individual merchants – the business community being the source of any implied terms.[89]

Justice Byamugisha's approach is in line with an earlier proposition by America's Justice Scalia,[90] that realism is unavoidable, and in the totality of circumstances test, and balancing, as modes of judicial analysis, will always be there. However, wherever possible the rule of law should be preferred, and if the point of impossibility is reached, then in the context judges should act as fact finders not expositors of law. This line of judicial reasoning will be revisited as part of the recommendations, but for now it suffices to note that it has been wrongly baptised as either formalism or flexibility, instead of acknowledging it as a part of the effort to build a framework for coexistence.

---

[89] EJ Murray, 'Contract Theories and the Rise of Neo-Formalism', 71(3), Fordham law Review (2002), 869, 871, 891-895.
[90] A Scalia, 'The Rule of Law as the Law of Rules', (1989) 56 University of Chicago law Review, 1175, 1186-87.

Tamanaha, calls this approach the new formalism in contract law, because it partakes of aspects of both rule formalism and pragmatism.[91] Murray also argues a case for a neo-formalism, different from the classical type by not being as rigid, but also insisting on the terms of the contract being the only contract the courts recognise and enforce. [92] The trade usage, course of dealings and custom allowed by the Uniform Commercial Code of the US are in this case only looked at as modifying the terms in the event that the parties so agreed, expressly or by implication. Such neo-formalism notions are misconceived. Instead, Justices Scalia and Byamugisha's proposition goes beyond the formalism-flexibility divide and presents a possible rule for reconciliation, giving both formalism and flexibility room to coherently and predictably prevail.

Secondly, there has been the notion that formalism should hold sway in procedural questions, as opposed to substantive ones where the court needed to be ready to decide flexibly. This was declared in *Tobacco and Commodity Traders International Inc. v Mastermind Tobacco (U) Ltd.*[93] However, a guideline in the opposite direction was used in *Gitway Investments Ltd v Tajmal Ltd & Others,* where the judge declared that when modernising law to rid it of technicalities (flexibility), the court should not fundamentally change the nature and scope of the cause of action.[94]This implies that flexibility should be limited to procedural and other technical aspects of the law and judges should guard against making substantive law in the process. The appearance of tory positions in the same judging period confirms that the existing efforts to manage the tension are uncoordinated, incoherent, inconsistent and uncertain themselves, and therefore

[91] Tamanaha (n 50) 232.
[92] Murray (n 89).
[93] HCCC 18/2002(9/5/2003).
[94] [2006] 2 EA 76

cannot serve the quest for legal certainty by providing the framework to manage the tension.

Thirdly is the reference to the Uganda Judicial Code of Conduct as a yardstick to tame judicial absolutism as a value underlying flexibility. This code sets out the professional conduct judges should adhere to, and in two cases these guidelines have been used as the boundaries for flexibility. In *Muwema & Mugerwa Advocates v Shell (U) Ltd,*[95] civility, good manners, professionalism and decorum were cited as attributes of judicial professional conduct that the judge should have adhered to while refraining from judging in the flexible way she did. Likewise, in *Highland & Agriculture Export Ltd & Another v Alpha Global 21st Joint Venture & 5 others,*[96] prudence was invoked by the judge as his guidance to flexibility. These are standards stated by the code of conduct formulated by the judges themselves as expected of their office. However, they cannot be relied on as the guidelines to judicial approach, for they cannot help in determining choice by judges conducting themselves professionally. Beyond professionalism, judicial choice is about how a judge should choose between competing answers. Further, even the judicial absolutism the code helps to control is the type that will be expressly based on misconduct, which was only found in the *Muwema case*.[97] This is not to say that in other cases judges were not motivated by unprofessional conduct, but where such are not articulated, as should ordinarily be expected, the code becomes redundant.

Fourthly, there are guidelines highlighted by judges, in the form of standards to determine the recognition of normativity and validity in non-legal orders; and therefore legal pluralism in hard cases. The first of these standards is the

[95] CA 18/2011 (Appendix 5: Case 30).
[96] [2017] UGCOMMC 113(18/8/2017) (Appendix 5: Case 70).
[97] CA 18/2011 (Appendix 5: Case 30).

assumption theory proposed in *Edmund Schluter & Co. (Uganda) Ltd v Patel* that judges should always assume that the general principles fitting the circumstances of a case are applicable.[98] The judge declared that, in a hard case, where no clear rules of law are applicable, general principles should be used. Further, that such general principles are derivable by way of assumptions from the circumstances surrounding a case –otherwise referred to as 'experiences' in this study. This case, coming long before the 1995 constitution, demonstrates that legal pluralism has long been part of the values underlying flexible adjudication, and it should be given attention when one is looking for the source of ultimate judging guidelines. The assumption theory raised by the judge needs further scrutiny, alongside other proposals, on how to arrive at such guidelines.

The second standard is the notion of legitimacy proposed in *Magezi & Another v Ruparelia,*[99] in which the court declared that the surrounding circumstances of a contract are the criteria courts will use to determine what is legitimate. By the use of the word legitimate'', and by using it in the context of judicial criteria, the court was clearly mindful of the fact that extra-legal norms as may be produced by experience may not tally with what is legal. However, they could be legitimate, meaning that the community sees them as acceptable to regulate behaviour. The judge therefore indicated his having been motivated by legal pluralism in reaching the flexible decision.

The third standard is the evidential rule requiring courts to take judicial notice of notorious facts, which was used in *Mbale United Transporters Ltd v Town Clerk,*

---

[98] [1969] EA 239 (Appendix 3: Case 20).
[99] [2005] 2 EA 156 (Appendix 5: Case 15).

Mbale Municipal Local Government Council & Others.[100] While justifying a flexible decision, the court declared that a dispute could not be determined by the mere fact that illegality, even unconstitutionality, has been raised. The court has also to take judicial notice of and give adherence to the non-legal norms that render procurement valuable, such as transparency, public accountability, and best practices.

A number of other judging guidelines were observed as having been used in single cases. They include looking at the end as justifying the means (utilitarianism). Firstly, there was the example of *Atom Outdoor Ltd v Arrow Centre (U) Ltd,* where the effect of the contract was taken as the ultimate guide to judicial choice.[101] Secondly in this list of single-case guidelines was the principle that the law should be viewed as unified and consistent. This can be deduced from *Karangwa v Kulanju,*[102] where the judge declared that in interpretation of statutes, he had to be guided by the need to harmonise conflicting statutes, rather than opting to go with one over the other. It is a principle that can guide judges facing a crisis of choice in a hard case, the crisis having been brought about by ambiguity, inconsistency or other uncertainty caused by the language of a statute.

Thirdly there was the principle of judicial consensus as the guide to the acceptability of a decision, and the rule of recognition of legal validity. In *Belex Tours & Travel v Crane Bank Ltd & Another,* judicial consensus was cited by the Court of Appeal as the basis for interfering with contracts whenever fraud or illegality had been noticed by the court.[103] This implies that consensus,

---

[100] HCCS 267/2004(30/9/2005), Appendix 5: Case 55.
[101] HCCS 448/2003 (17/12/2004) (Appendix 5: Case 46).
[102] HCCA 3/2016 [2017] UGCOMMC 91(24/8/2017)
[103] [2013] CACA 13 (24/10/2013) (Appendix 5: Case 5).

indeterminate as it is, was not only treated as a way of founding ultimate-judging guidelines, but also as a guideline in itself. What is not clear is how consensus can be observed and confirmed to exist so as to crystallise into a norm. The judge was looking at precedents as reflecting consensus in this case, but the word connotes that a single or few precedents cannot suffice. It has to be a continuous recognition of a rule or principle by judges; but it is not clear how long or how many times a position should be repeated for there to be a consensus.

Finally, international best practices were declared as a guide to judging, by the Court of Appeal in *Commodity Export International Ltd & Another v MKM Trading Co. Ltd.*[104] Computer-generated evidence was declared admissible, relying on common-law positions and practices from England, Canada and the US. Probably unsurprisingly, in today's world, where due to technological advancement and increased international trade the world is becoming one big market, the judges of the court of appeal allowed room for guidelines from other jurisdictions. Although it is an isolated case so far, the fact that it was the court of appeal making the declaration gives international best practices a valuable part of the existing tension-management regime. However, such practices were not exhaustively articulated with regard to commercial judging generally, as this study contributes to knowledge by doing. Instead, a single practice was used to resolve a particular problem.

Therefore, the tension that defines Uganda's commercial judging paradigm has not been countered by judges preferring mechanisms for its management, judging guidelines or otherwise, in a significant way. No evidence of a coherent mechanism on how to manage the tension appears from the judicial opinions analysed. This makes relevant the question answered in this study, of how the tension can be

[104] [2015] CACA 81(6/10/2015) (Appendix 5: Case 80).

managed. However, efforts have been made by Uganda's international trading partners to create safeguards against the legal uncertainty that could arise from the country's judicial flexibility, .The adequacy of these efforts is analysed below.

4.4.2 International Mechanisms for Management of the Tension

International treaties, and conventions of trade and commerce, to which Uganda is a party, provide another form of management of the tension. These include the Bilateral Trade Agreements (BITS); the Trade Related aspects of Intellectual Property Rights (TRIPS) Agreement (1994); and the UNCITRAL Model Law on Cross-Border Insolvency (1997). These international instruments are intended to manage the tension by safeguarding against uncontrolled judicial flexibility in trade and commercial disputes, while ensuring legal certainty.[105]

Uganda has so far signed fifteen BITs, of which only eight are in force. The provisions of these BITs are substantially the same. Therefore, the study of one is adequate for evaluation of the treaties in general as a tool for management of the tension. In this case, the Uganda-Netherlands BIT is the example used. The treaty guarantees that the contracting state will provide equal, fair and equitable treatment of foreign investors.[106] Some rights under contract doctrine are also guaranteed; such as subrogation rights, which are to be recognised by the contracting party.[107] Further, removing jurisdiction from Ugandan courts is used to

---

[105] The Preamble to the TRIPS agreement mentions as one of its objectives, reduction of the tension through multilateral procedures of dispute resolution; Ensuring legal predictability is one of the goals listed in the Preamble to the 2013 Guide to Enactment and Interpretation of the UNCITRAL Model Law on Cross-Border Insolvency (1997); and Article 2 of the Bilateral Investment Treaty between Ugandan and the Netherlands, as well as others mentions as the object of the treaty, the protection of investors' investments within the framework of each country's laws and regulations, which implies legal certainty.

[106] Article 3 (1) & (2).

[107] Article 8.

control judicial flexibility and the uncertainty of the Ugandan justice system. The settlement of disputes between a contracting party and an investor are to be referred for arbitration or conciliation, under the settlement of Investment Disputes between states and nationals of other states, opened for signature at Washington on 18Th March 1965.[108] However, the BITs do not go far enough, as they only offer direct guidance on judicial choice by way of the recognition of subrogation rights. Such rights, automatically arising by virtue of an insurance contract, are only one of the very many subjects of allocation of the varying rights and obligations arising from the insurance contract; let alone other types of commercial contract. Further, the treaties offer no guarantees on legal certainty in disputes between private parties of the member states. Besides that, even the private-public disputes they cover are limited to those involving investors from signing states. This is not an all-encompassing tool for tension management.

With regard to the TRIPs Agreement, the intention is to limit the scope for flexible national judicial approaches in World Trade Organisation member states.[109] Further, Articles 41-50 set judging guidelines that could ensure certainty even in a flexibility-judging paradigm. They include the requirements that judicial decisions are written,[110] that they include the reasoning behind them,[111]that they are based on evidence before the courts that parties have been given an opportunity to be

---

[108] Article 9.
[109]www.WIPO.Int/ip-development/en/legislativeassistance/advise_trips.html (Accessed on the December 12/12/, 2015.
[110] Article 41 (3).
[111] ibid.

heard,[112] and that there has been an opportunity for judicial review of decisions on points of law.[113]

However, TRIPs as a tool for management of the tension is limited and inadequate in three ways. Firstly, there is the agreement's narrow relevance, of intellectual property related contracts. The bulk of commercial contract disputes cannot be decided with the guidance of the principles agreed upon in TRIPS, unless adopted through an independent instrument.

Secondly, TRIPs allows developing and least-developed countries to use TRIPs-compatible norms, in a manner that allows them to pursue their own public policies to support economic development.[114] This opens a window for developing countries like Uganda to maintain flexible systems of commercial justice, and justify them as necessary for economic development.

Thirdly, the gates for eroding all manner of formalism and its attendant certainty are opened by the respect accorded to differences in the national legal systems of member states.[115]Relatedly to this is the principle that it is up to each member state to determine the appropriate methods of implementation of the agreement within its existing legal system.[116] By allowing such room for maintenance of Uganda's local commercial justice system, the tension is left unmanaged, as it forms a defining character of the country's judging paradigm.

---

[112] ibid.
[113] Article 41 (4).
[114] Preamble.
[115] ibid.
[116] Article 1 and 41 (5).

4.5 Conclusion

In conclusion, since the English legal system was transplanted to Uganda, the tension has been a reality that has defined this commercial judging paradigm; manifesting by the concurrent practice of formalism and flexibility during the same period, in the same courts, and sometimes in the same cases. One of its characteristics has been the competition between the values motivating formalism and flexibility, defined by joint and substantially common frequencies.

At the same time, the tension-management regime has been incomprehensive, incoherent and disjointed, leaving the tension untamed. Constructing a viable management mechanism requires weighing, understanding and balancing such competing values as are revealed to underlie the tension, by the content analysis of Uganda's judicial opinions. Therefore, the next chapter contributes to making a case for the viability of coexistence, by reviewing the literature on how the tension can be managed. It analyses the weaknesses and strengths of existing theoretical propositions and identifies and justifies the theories guiding the study in the search for how the tension can be managed in Uganda.

Chapter 5: Towards a Coexistence Theory of Adjudication

5.1 Introduction

In this chapter, a construct is made of the theoretical framework to guide this study, after reviewing the existing literature and theories of adjudication on how to manage the tension between formalism and flexibility. The chapter reviews the literature on prescriptive theories of adjudication, both conceptual and normative, that have proposed ways to achieve legal certainty by managing the coexistence between formalism and flexibility in adjudication. The prescriptive discourse is concerned with the search for ways to guide judicial choice by empowering, while at the same time restraining, the commercial judge, in order to balance the interests served by flexibility and formalism. The key elements of debate in this prescriptive discourse are the answers to four questions, namely: the nature that judicial guidelines should take; who should be their emitter from what sources should they be formulated; and how should they be formulated.

Legal scholars have debated for centuries the subject of meaning and nature of law; however, less attention has been given to the theory of adjudication, and more particularly its contextual application. Studies and writings on the theory of adjudication are recent developments and follow Dworkin's challenge to legal positivism on account of its failure to appreciate the process of adjudication.[1] According to Dworkin, theories of law should contain a theory of adjudication that deal with controversy, and particularly the standards judges must use in deciding hard cases.[2] Dworkin therefore reacted to the inadequacies of positivism by

---

[1] R Dworkin, *Taking Rights Seriously* (Duckworth & Co. Ltd 1977) xi, 22.
[2] ibid, x.

constructing a theory of adjudication, proposing that judges use and must use moral considerations in addition to the rules found in statutes and cases.[3] After Dworkin's theory of adjudication, which will be analysed in further detail later in this chapter, there has been a growing recognition that adjudication is actually central to legal theory.[4]

This chapter therefore reviews and analyses the literature in this growing field of adjudicatory theory, reaching the conclusion that an exhaustive theory to guide the search for coexistence and therefore legal certainty is yet to be constructed. Even if this gap in theory did not exist in general, it certainly exists for a context like the Ugandan one. Accordingly, a combination of aspects from the jurisprudence of interests, and institutional theory, is proposed and justified as the most appropriate theoretical framework to guide this study.

5.2 Conceptual Prescriptive Theories of Adjudication

In this study, 'conceptual theories of adjudication' means theories that are judge-centred, whereby concepts empower judges to manage the tension without restraint from autonomous rules, principles or standards. These concepts include the trust in the power of discretion, as well as the view from progressive realism and economic determinism that social science concepts can guide judges.

5.2.1 Trust in Judicial Discretion and Self Regulation

Orthodox legal theory, represented by both positivists and radical realists on different sides of the formalism-flexibility divide, acknowledges the tension, but puts

---

[3] M Freeman, *Lloyd's Introduction to Jurisprudence* (Sweet & Maxwell 2014) 313.
[4] ibid 1564.

all its trust in judicial discretion and self regulation, as providing judges with enough of an armoury for judicial choice in hard cases. The legal positivist Austin's view was that judges had to use their discretion to fill gaps left by the negligence and incapacity of members of the legislature.[5] This implies that in hard cases, the tension would be managed by giving judges personal freedom to determine why they should decide formalistically or flexibly. After Austin, even Hart, who claimed to present a softer strand of positivism, was of the view that in every legal system a large and important field should be left open for the exercise of discretion by judges and other officers, to render vague standards determinate, guided by practice of the legal system.[6]

Hart's[7] reasoning was that, contrary to Austinian positivism's claim that law was determinate by nature, rules would always become indeterminate at some point, for three reasons. Firstly, that language is by nature indeterminate, with words containing both a core meaning and a penumbra of doubt, which gives judges a choice to make, within the constraints of the law. Secondly, rules are by nature open-textured because they use general standards, such as reasonableness, equity and equitability. Thirdly, that there is indeterminacy inherent in the common law system of precedent.

At the core of the rule, where the law is determinate, the judges' role would simply be discovering the applicable rule and mechanically applying it. However, at the penumbra, the legal uncertainty produced by indeterminacy would have to be

---

[5] J Austin, *Lectures on Jurisprudence or The Philosophy of Positive Law* (R. Campbell, ed) Vol.11 (Clark, N.J: Law Book Exchange, 2005) 219.
[6] HLA Hart, *The Concept of Law (Clarendon Law Series),* (Oxford University Press 1994) Chapter 5.
[7] ibid 127.

resolved by judges filling gaps in law using judicial discretion. In the exercise of such discretion, judges had to take into account substantive values and moral principles.[8] The trust in discretion was maintained by the radical legal realists, who otherwise expressed a lot of scepticism about positivism, arguing that many legal doctrines are not coherent.[9] Further, that judicial decisions on freedom of contract were always based on a political agenda.

As such, the radical realists called for courts always to go outside the law and fish for answers from raw social power and economic realities.[10] By this means, the judge was to use his discretion in determining how such social forces informed the right answer in any case. Frank, for instance, encouraged judges to take cognisance of rules and concepts, but only as fictions meant to serve as tools for particular purposes.[11] In that case, legal certainty can only exist in a real or deeper sense if judges are more enlightened, so as to have self-control over their own prejudices, and know that rules and precedents are not their masters but mere tools for use in the interests of doing justice.[12]

By way of a solution to the tension, Frank, proposed that substantive and procedural laws should be made even more flexible, to allow judges to make individualised decisions more honestly and openly, without the fear of justification.[13] Frank emphasised Holmes's thesis of law being the prophecies of

---

[8] Freeman (n 3) 325-27.
[9] G Minda, *Postmodern Legal Movements: Law and Jurisprudence at Century's End* (New York University Press 1995) 6.
[10] ibid.
[11] J Frank, *Law and the Modern Mind* (Stevens, 1949) 133-4.
[12] ibid 134.
[13] J Frank, 'Say it With Music' (1948) 61 Harvard Law Review 952 at 953.

courts, and the trust in judicial discretion being the best management tool.[14] He therefore believed that there is no need for regimes to manage the tension; but rather that judges should be given the trust to manage it, and lawyers should focus on the realities of court practice, and not their wishes about what that practice could be.

The radical realist view continues to influence the choices of modern judges who look at law as a means to an end. Thomas makes the case for substantialism, or autonomous judicial choice, arguing that although formalism continues to be alive and influential, it is the cause of uncertainty.[15] This is because beyond the fixed meaning of rules, judges are left to grapple with how to achieve justice in individual cases. On the other hand, although certainty is elusive, it can be achieved by accepting the reality of judicial choice in legal reasoning, which should be informed by fairness and relevance, as the ends of law.[16] Fairness is the reference external to law that should guide judicial choice. What constitutes fairness is a readily identifiable bundle of values and being obvious makes fairness predictable in particular cases. Relevance, on the other hand, is the ability of the law to take into account changing circumstances and the expectations of the community. Thomas therefore claims that practice is superior to law, and what constitutes law is ultimately the judge's personal perception of what is relevant, appropriate and just.[17]

---

[14] ibid.
[15] EW Thomas 'Fairness and Certainty in Adjudication: Formalism v Substantialism' (1999) 9 Otago Law Review 459.
[16] ibid 460.
[17] ibid 461.

Thomas's thesis still fails to provide clear criteria to guide judges in choosing between competing values that are bound to inform perceptions of fairness as a value of adjudication. To call fairness readily identifiable is to be blind to contexts like Uganda, made up of numerous ethnicities and religious beliefs, with wide gaps between economic classes. Such diversity makes it difficult to have uniform values that one would call self-evident. Further, the identification speaks to a detailed analysis of judicial opinions, like this study, to ascertain which bundle of values judges in a specific jurisdiction have taken to constitute fairness; making the value far from obvious. Thomas also contradicts himself when he says that ultimately, legality should depend on the judge's personal perception; having claimed that the judges should be guided by community ideas of fairness.

In reality, Thomas's thesis is an attempt to provide normativity to the excessive conceptual trust placed in discretion by orthodox legal theory. This attempt is made more unfeasible by Thomas's claim that judges should not be restrained by any rules.[18] In this regard, Tamanaha rightly argued that placing faith in the judges is not a solution, and the question of what limits should be placed on judges remains a dilemma.[19] Self-regulation would for instance imply that judges are free to change and make law from their personal will, for the whole essence of discretion is the exercise of individual preference and prejudice, from competing interests and values. This would not only amount to usurping the will of the people, expressed through the election of members of the legislature, but also contract law would be deprived of even the slightest degree of certainty. One would not know under what circumstances the law would stay as written or known in precedents, or what the

[18] ibid 459-63.
[19] Tamanaha BZ, *Law as a Means to an End: Threat to the Rule of Law* (Cambridge University Press 2006) 66.

legal meaning of a rule is, for no one can foretell another person's present or future preferences, motivations, views or prejudices.

Some critical legal theorists also see judicial discretion as adequate to manage the tension. This has influenced the way precedents are used as a source of normativity, even in hard cases within common-law countries. Freeman notes that due to the infinite variability of facts in life, it is impossible to apply past rules in a purely mechanical way.[20] Instead, judges have to mould the rules to meet changing situations, in which case the judges will not be too strict on rules, to allow an interplay between them and social forces. In performing this moulding, judges use their reason and discretion to ensure that common law remains rational, principled and rooted in British custom, while at the same time adaptable and relevant to social and economic circumstances.[21] Tamanaha notes that through the use of judicial moulding, the common law has always managed the change, calling for reasoning and flexibility, while retaining the stability formalism and principles call for.[22] Such a conclusion by Tamanaha is an admission of common law itself having embraced the idea that coexistence as the ideal paradigm.

In the Good Faith thesis, Burton proposed another judge-centred approach to managing the tension.[23] The theory proposes that both legal determinacy and indeterminacy are insignificant. Instead Burton argues that the tension between flexibility/indeterminacy and formalism/determinacy can be resolved by a third

---

[20] Freeman (n 3) 1554.
[21] Tamanaha (n 19) 33-34.
[22] ibid 32.
[23] SJ Burton, *Judging in Good Faith* (Cambridge University Press 1992) 15.

alternative of judges acting in good faith, while performing their duty to uphold the law,[24] thereby ruling out abuse of discretion.

Although Burton presents the good faith thesis as an alternative to all other theories on the management of the tension between flexibility and formalism, he actually simply puts more trust in judges even than the legal realists when he seeks to rely on their rationality, objectivity, credibility and moral righteousness. 'Good faith' is a very subjective phrase that speaks to one's moral standing and humanity.

The judge-centred theories are limited in a number of ways, especially with regard to their applicability in the Ugandan context. Firstly, the theories all assume that judges will always act rationally; which is a fallacy in very poor countries like Uganda, with high levels of corruption, and differing sources of morality, social norms and values. In this regard, Minda's criticism of the idea of neutral principles of adjudication and legal process theory, [25] applies to the theories that put too much trust in judges. Minda argues that the theories wrongly assume that judges are genuine and conscientious and can control themselves in choosing between competing principles and interpretations.[26]

Secondly, there is a lack of clear and objective guidance on when and how a judge can apply discretion. The common-law principle of *stare decisis* is meant to establish rules to guide decision-making. However, in cases where there is uncertainty as to which rule to apply or where there is a gap in the rules, the sphere of discretion is unregulated. What common-law judicial systems normally

[24] ibid
[25] Minda (n 9) 41.
[26] ibid.

have as the nearest thing to guidelines are practice directions, such as Uganda's Judicial Code of Conduct.[27] According to Freeman however, such practice directions are mere rules of practice and not rules of law, and as such are not binding on the courts.[28]

In Uganda's case, the wording of the directions confirms their lack of normativity. In particular, Section 1 of the Judicial Code of Conduct directs judicial officers to reach judicial decisions following their 'conscientious understanding of the law, free of any direct or indirect extraneous influences, inducements, pressures, threats or interference, from any quarter or for any reason'. This very open-textured language leaves the discretion given to judges unregulated, and in effect leaves adjudication to be guided by rules of men and not rules of law.

Thirdly, the trust in discretion presupposes a society in which the judiciary can be trusted to make choices objectively, uninfluenced by considerations that should not be judiciously relevant, such as personal preferences, religious, social or political prejudices, political interference and the like. Uganda's life has involved colonialism, military dictatorships, authoritarian regimes, the militarisation of the judiciary, a chief justice killed by the state, judicial appointments being made on account of one being a political cadre, widespread corruption amongst judicial officers, and other vices in the judicial system. In such a context, it is highly debatable whether judicial discretion should be trusted that much. All these vices are illustrated, and their significance elaborated, in chapters six to ten of the study.

---

[27] Uganda Code of Judicial Conduct, 2003.
[28] Freeman (n 3) 1556.

Judge-centred conceptual theories, such as the belief in judicial discretion, and Burton's good faith thesis, are therefore not the solution to managing the tension between flexibility and formalism in Uganda. This leads one to a review of other propositions, such as some scholars' conceptual proposition that judges should not only take into account social sciences but also look to them for guidance.

5.2.2 The Use of Social Sciences as Judicial Guidelines

The social sciences, and social science methods, have been suggested as the proper basis for judges seeking guidance during adjudication. The progressive realists set the foundation for the place of social sciences in adjudication, and the economic theory of law built the superstructure, articulating Llewellyn's theory of efficiency in more detail.

5.2.2.1 *The Progressive Realists' View*

Progressive realists, including Holmes, Pound and Llewellyn, proposed that social science approaches should be used to develop a new objective policy analysis of the law.[29] These were approaches such as are found in subjects like economics, which would represent the realities of the commercial world and public interest. Llewellyn, for instance, proposed that human behaviour had to be studied in order to free the law from its past.[30] Through such studies a coherent concept of public interest, reflecting commercial reality, would be articulated to guide judges.

In general, the progressive realists' guiding theory on how judges can benefit from social science was the judicial observance of practice as the best evidence of

---

[29] Minda (n 9) 30.
[30] ibid 33.

efficiency. Llewellyn therefore proposed that judges have to use their own experience, whether derived from having interest in commerce, by trying many commercial cases, or through reliance on trade custom or trade association rules.[31]

However, Minda rightly criticises the progressive realists for believing that social sciences like economics are neutral, universal and fundamental, saying that they are no better than the formalists.[32] They have only substituted a non-legal and apolitical form of conceptualism for the legal conceptualism. This criticism is valid because social sciences are bound to be even more non-neutral than law; they are formulated by a limited number of groups of people, that are more likely to be moved by subjectivity than would be the case for large houses of legislators making law.

Further, the limitations of trust in discretion apply also to the progressive realist antidote. This is especially because judges would have to make interpretations, and assess the applicability of social sciences, based on personal experiences; which is no different from trusting judicial discretion. One cannot separate personal prejudices and emotions from the factors judges would consider in using discretion. The interpretation and applicability of such social sciences, unless limited by normative guidelines, could easily be influenced by a particular judge's personal background, social or political prejudices, human experiences and beliefs outside the law or social sciences. This conceptual antidote therefore would leave unprincipled flexibility untamed and would fail to create more legal certainty.

---

[31] A Schwartz, 'Karl Llewellyn and The Origins of Contract Theory', in JS Kraus & SD Walt (eds), *The Jurisprudential Foundations of Corporate and Commercial Law* (Cambridge University Press, 2000), 12-53 at 13.
[32] Minda (n 9) 30.

Llewellyn's views and efforts are nonetheless credited for the development of America's Uniform Commercial Code (UCC), which was an attempt at creating neutral law; a type of management tool that would balance flexibility with formalism.[33] The UCC embraces flexibility by allowing generous recognition of waiver and modification of contracts, and giving legal effect and force of law to the course of dealings, course of performance and customary trade usages.

According to Shahar, such provisions as are in the UCC allow reality of a situation dictated by commercial forces to override rigid allocation of rights and duties, which means that courts have to look for the substance of the parties' agreement rather than a formal historical manifestation thereof.[34]At the same time, the UCC balances the needs of both flexibility and doctrinal certainty, by giving effect to the text and formalism of the contract, as well as providing flexibility in their interpretation to give commercial reality effect.[35]

The development of a uniform normative code containing management tools for the tension, as in the American case, appears to have been an exceptional by-product of Llewellyn's views. The UCC is the type of normative prescriptive framework that a country like Uganda needs, to guide commercial adjudication. The exception is that the rules, principles and standards making up its content would be arrived at after investigating the interests and values underlying Uganda's commercial justice system, especially the decisions made by judges.

---

[33] ibid
[34] OB Shahar 'Formalism in Commercial Law: The Tentative Case against Flexibility in Commercial Law', (1999) 66 (3) University of Michigan Law Review 781-820 at 781-82.
[35] ibid 784.

5.2.2.2 *The Economic Analysis View*

The views of the progressive realists are in tandem with the economic analysis school of thought, which proposed that economic efficiency should constitute the ultimate goal of the law and the guiding principle to adjudication. 'Economic efficiency' here means allocating resources in the optimal way to achieve maximisation of social wealth and minimisation of costs. The pursuit of efficiency was proposed as an alternative both to formalism and to the classical utilitarian view of flexibility,[36] as an attempt to create certainty without adhering to either phenomenon in the traditional sense.

Farber, explained that the principal traditional role of courts is seen as dispute resolution, and not making law, with a backward-looking perspective that centred on fairness (the *post ante* perspective).[37] However, economic analysis theory requires courts to look instead at the future consequences of a decision, called the *ex-ante* perspective. Decisions should not be guided by formalist concepts like freedom of contract, or flexibility-driven considerations like unconscionability of bargains, or other matters of fairness and morality. In a typical contract dispute, *William v. Walker-Thomas Furniture Company*,[38] Farber illustrates that the effect of a decision, on the buyers as a group continuing to benefit from credit sales without collateral, would outweigh the fairness in a single case where a buyer could otherwise win on grounds of unconscionable credit terms.[39]

---

[36] Freeman (n 3) 518.
[37] DA Farber, "Efficiency and The Ex Ante Perspective", in J.S. Kraus & S.D. Walt (eds), *The Jurisprudential Foundations of Corporate and Commercial Law,* (Cambridge University Press, 2000), 54-86, at 54.
[38] 350 F.2d, 445 (D.C Cir, 1965),
[39] Farber (n 37) 58-59.

Therefore, courts should use economic determinism to maintain legal certainty, predictability and consistency, as judicial choices will not be unprincipled, in the radical realist (fairness) or positivist (certainty) senses, or even subjective. In effect, what is proposed is a substitution of the parties' intentions in a contract, or its fairness, with the notion of public good. If judges were to be guided by *ex-ante* economic efficiency considerations, the rights and intentions of parties to contracts would always be arbitrarily sacrificed, in the service of the common good.

Posner tried to deal with this absurdity by proposing that the court should presume that at the time of contracting, when the costs of the transaction are at zero, parties to contracts consented to having their disputes resolved on the basis of economic efficiency.[40] However, this hypothetical or imposed consent would not be a logical way to serve certainty, for the condition presupposes parties who are literate and know the complexity of adjudication in advance of disputes. This does not represent the commercial community of Uganda. In fact, hardly any country can claim to have such a sophisticated commercial community, let alone a poor and largely illiterate country like Uganda.

Dworkin[41] also rightly criticises Posner's alleged consent, saying that besides raising a moral judgement of the parties to the contract, it does not tally with the fact that individuals do not always give consent for rules to apply in a legal system. This criticism cannot be truer than in the Ugandan context, where even indirect consent to law, which is given through elections of legislators, has sometimes been absent; but laws are nevertheless made. This happened when English contract law

---

[40] RA Posner, 'The Ethical and Political Basis of the Efficiency Norm in Common Law Adjudication', (1980) 8 Hofstra Law Review 487, 492-93.
[41] R Dworkin 'Why Efficiency: A Response to Professor Caalabresi and Posner' (1981) 8 Hofstra Law Review 563 at 577-78.

was imposed on the country under the 1902 Uganda Order in Council, and during 1971-1980, when laws were made by way of the decrees of the Military Head of State.

On the question of how judges can arrive at economic efficiency, Schwartz, explains that courts must make independent inquiry into a contract's normative suitability when one party's consent was not conscionably obtained, using Llewellyn's practice as the best evidence of efficiency.[42] Llewellyn, as the pioneer of the economic efficiency theory of adjudication, elaborated practice in the sense that since they had freedom to contract, parties to contracts pursued self-interests and therefore, their consent to a deal would be the best evidence of efficiency.[43] These practices will therefore appear in the form of custom, usage of trade, course of dealings and other habits of businessmen.

Efficiency is also considered measurable by using a cost-benefit analysis standard, which the economic analysts call *Kaldor-Hicks efficiency*. This means a situation where a judicial decision leaves some people worse off, but the gains it brings to society far outweigh the losses, such that the losers can be fully compensated.[44] This is what Farber termed the cost-benefit analysis that should be used by judges to determine how efficient their decisions would be in maximising social wealth.[45]

Dworkin[46] and Farber,[47] have debated the issue of taking wealth as a social value, with Dworkin on the 'no' and Farber on the 'yes' side. Dworkin was clearly looking

---

[42] Schwartz (n 31) 16.
[43] ibid.
[44] ibid.
[45] Farber (n 37) 59.
[46] R Dworkin 'Is Wealth a Value?' (1980) 9 J. Legal Studies 191.
[47] Farber (n 37) 64.

at Western societies, as Farber rightly points out; but Farber, by looking at Bangladesh as the yardstick of values in poor countries, also went off tangent. As was demonstrated in chapter four, social values in African countries like Uganda are grown in a garden very rich in culture and heritage that has persisted for hundreds of years. The legal system, represented by the constitution as epitome, has held on to the normativity of cultural values and local custom, the history of which predates monetisation of the economy. Further, in chapter nine, economic efficiency and wealth maximisation is also demonstrated as underlying flexibility in Ugandan courts, and is therefore part of the reality to be considered when searching for prescriptions for the tension.

However, it remains to be investigated whether post-independence Uganda can be rightly defined as conforming to Dworkinean or Faberian views on wealth as a social value. That cannot be exhaustively done in this study; however, it suffices to note that the country's history indicates the continued influence of wealth maximisation in adjudication, although it is doubtful whether it carries the same sense, and if economic analysis is the right guide to managing the tension.

As pointed out by Farber, the other limitation of the applicability to Uganda of the economic analysis of law is the lack of institutional competence.[48] Judges are not competent to use – and do not have the authority to use – a private dispute that represent the litigants' interests as an opportunity to promote desired social policies. In Uganda, there will also be a problem of judges having the capacity to define what economic consequences (ex-ante perspective) their decisions are likely to have. An ordinary Ugandan judge will require expert evidence of such

[48] ibid 77.

effects, from economists, which will increase the costs of litigation rather than reducing them as the theory suggests.

Farber[49] suggests that a hybrid – of the ex-ante perspective from law and economics theory, and Rawls's theory of justice – would solve the shortcomings of law and economics theory. Both theories rely on a person having made a hypothetical bargain, and having agreed that in the event of a dispute certain criteria will be used by judges to do justice. This leads one to look at the school of thought Rawls belonged to, which believed in normative prescriptive theories of adjudication that propose guidelines beyond the conceptualism.

5.3 Normative Prescriptive Theories of Adjudication

The normative theories propose judging norms, in the form of ultimate standards, concepts, principles and rules to guide judging. The common idea is that such judicial guidelines ought to be clear, express, consistent and determinate, while at the same time permitting flexibility in a principled way. Further, the normative theories propose that judging guidelines should be consciously formulated by a deliberate law-making process – as opposed to being a matter of self-control by judges. The most prominent normative prescriptive theories are the interpretive and procedural morality views of legal process theory, and theories advocating for ultimate judging principles, rules and standards.

---

[49] ibid 67, 73-75.

5.3.1 Procedural Values as Criteria for Adjudication

Amongst the normative prescriptive theories is the school of thought that believes in the legal process itself generating normative criteria that can then guide judges in resolving disputes. Scholars in this camp included Fuller, Fiss, Dworkin and Rawls. Fuller and Rawls believed in the discovery and use of procedural morality, while Dworkin and Fiss saw adjudication as a matter of interpretation.

5.3.1.1 *Procedural Morality in Legal Process*

Rawls's view was based on an attempt at defining a moral discourse based on the social contract, to establish minimum standards or rights that would be essential for a just society.[50] The first standard was that a legitimate procedure for rendering a fair decision had to be based on the community's values of fairness. Secondly, that the institutional process for decision-making had to be based on free individuals. Rawls saw free individuals as those that had no position, or did not know their position, in society; otherwise called 'the veil of ignorance'.[51] Under this veil of ignorance, all individuals would agree to certain principles of justice, and such principles would be neutral, for no ulterior motives would be at play; thus Rawls's reference to it as 'the original position'. These neutral principles are the ones that judges would then be guided by in all cases where they sought to do justice, and that would translate into the community's standards of fairness.

Other legal process theorists, however, proposed a way of balancing flexibility and formalism without morality guiding normativity, but looking at the law and procedure for guidance, even to the purposes and values of the law itself. Fuller,

[50] Minda (n 9) 54.
[51] ibid.

for instance, observed that legal certainty is better served by attending more carefully to judges' non-technical considerations during adjudication.[52] Judges follow precedents through an articulation of shared purposes that reveal what earlier judges were up to, making such purposes worth discovering as being part of the law itself.[53]

In contract theory, for instance, Fuller proposed that courts more often allow plaintiffs, who have relied on the defendant's promise, to succeed; [54] more than the formal law seem to allow. Contract doctrine would be improved if such reliance were recognised as a legitimate basis for recovery in courts. Fuller also called for discovering the values in procedural laws, arguing that there was an internal set of normative values to guide purposive judges.[55] Such procedural values had to be discovered to restrain subjective judges; otherwise judges had to decide in accordance with the rules in fulfilment of the social contract, and the notion of process.

The internal criteria stance of legal process theorists fails to show how the judges would, on a case-by-case basis, engage in finding the values underlying procedures and laws, so as to have guidelines that provide certainty. It helps however to acknowledge that a scrutiny of the law and its procedure will reveal values that have competed in adjudication to cause both the flexibility and the tension.

---

[52] L Fuller, 'American Legal Realism' (1934) 82, University of Pennsylvania Law Review 429, 434.
[53] L Fuller, 'Human Purpose and Natural Law' (1958) 3 Natural Law Forum 68.
[54] L Fuller & W Perdue, 'The Reliance Interest in Contract Damages' (1936) 46 Yale Law Journal 52.
[55] ibid

This study contributes to knowledge by discovering such values with regard to Uganda's commercial adjudication, not only underlying flexibility but even widening the search to discover those values responsible for the formalism in the tension. How these values should be unearthed, and the fact that they are what should be reconciled as a way towards constructing ultimate and autonomous judging guidelines to manage the tension, are also contributions made by this study. Next, I analyse the theory that adjudication is and should be about interpretation.

5.3.1.2 *Adjudication as a Process of Interpretation*

The interpretive strand of legal process theorists includes Fiss[56] and Dworkin.[57] They promote the view that adjudication is a process of interpretation, and that through interpretation judges can understand and express the meaning of texts and discover the values embedded in them. According to Fiss the community of the legal system could formulate *disciplinary rules* that would guide judges to make rational normative choices about sharply contested issues.[58] By nature, disciplinary rules would comprise established rules, customs and conventions of the legal culture, reflected in the language of the constitution, case law and the prevailing cultural heritage of society.

Fiss's theory sought to define a normative process for enabling judges to engage in legal interpretation – not only to discover the meanings of statutes and contracts, but also their underlying values – while at the same time restraining them from crossing the red line.[59] Without looking outside the legal system, rules would be

---

[56] OM Fiss, 'Objectivity and Interpretation' (1982) 34 Stanford Law Review 739-63.
[57] Dworkin, *Taking Rights Seriously* (n 1).
[58] Fiss (n 56).
[59] Dworkin, *Taking Rights Seriously* (n 1).

established to regulate adjudication in a manner that balanced flexibility and formalism. Fiss however omits vital sources of values and interests that should inform any formulation of the ultimate principles or rules for adjudication. For instance, his list does not cover plain policy as could be declared by a government or generally agreed to by a community. This is neither custom nor heritage but will practically influence a judge's decision in some cases, for example *Traces SA v Attorney General*[60], where the Ugandan High Court chose to decline awarding remedies agreed in a contract, citing a change in government policy.

Further, commercial practices and developments in industry, commerce and technology are not covered by Fiss's list, yet these contribute to the context under which contracting takes place, and they should therefore be understood. Taking these developments into consideration would also help to highlight values necessary for a judge to arrive at a workable and realistic decision.

Finally, by opting for rules, Fiss reverses his gain towards coexistence and falls in the formalism ditch. Rules by nature connote an attitude that favours adherence to written letters and would certainly be regarded as removing judicial flexibility as opposed to managing its use. While the guidelines should be normative in character, they ought to be flexible enough to allow the resolution of deadlocks in hard cases, while containing rules as well as standards, and principles.

Dworkin also believed in the suitability of an objective interpretation regime as the best way to filter and discover community values that would in the end inform adjudication in both clear and hard cases.[61] Dworkin's theory, however, went

---

[60] HCCS No 525 of 2006 (Unreported).
[61] Dworkin, *Taking Rights Seriously*, (n 1).

beyond Fiss in the sense that it covered non-rule standards and principles. He is well known for attacking legal positivism on the ground of looking at law as only being made up of rules, ignoring other standards made up of principles and policies.[62] Principles should be the ones to unlock (as he called it) the tie in adjudication.

Regarding the content, nature and source of the ultimate principles, Dworkin proposed the theories of law to be integrity, and constructive interpretation of legal practice.[63] 'Law as integrity' means that the law should speak with one voice, therefore it should be based on coherent principles of due process, fairness and justice. Judges have to enforce these principles in all fresh cases so that decisions are based on the same standard. Dworkin recommended law as integrity to be the blue print for adjudication by which judges have to be guided.[64]

Under the theory of constructive interpretation of legal practice, Dworkin proposed that adjudication should follow three steps.[65] The first step is called the pre-interpretation stage; judges have to identify rules and standards that constitute practice. The second step, called the interpretive stage, involves judges settling for general justifications for the elements in step one. In the third step, the post-interpretive stage, the judge has to adjust his senses of what the rules identified as practice require, so as to serve the justification he identified at step two.

At the centre of Dworkin's proposed steps, therefore, is the judge's ability to perceive, elucidate and reason out what practice is and its moral or contextual

---

[62] ibid.
[63] ibid 597-602.
[64] ibid.
[65] Freeman (n 3) 597-602.

justification, so as to guide his decision in a case. This does not pass for restrained judicial activity; rather, it shows how a judge can exercise personal preference and prejudice in an organised and controlled way. The justification judges have to come up with is not guided by any criteria, and is left to his or her personal beliefs, experiences and views. Dworkin's views are therefore no better than those of scholars like Holmes[66] and Thomas, who openly crowned judges as the kings of the law; [67] this still leaves a gap in how judges can actually be restrained by the principles, besides the content and nature of such principles, which is equally critical. Relatedly, I proceed to review the claim that adjudication should be guided by what is acceptable.

5.3.1.3 *Acceptability*

The coexistence school of thought does not look at adjudication as providing a decision that should be seen as true or false. This is because that would imply deductive judicial reasoning, which does not apply where a judge has to choose between alternatives.[68] Instead, as Freeman argues, judicial decisions are either right or wrong, or good or bad, in the sense that they either are or are not based upon cumulative reasons that are acceptable – hence the *notion of acceptability*.[69] The notion of acceptability, therefore, refers to the ultimate validity criteria that have been agreed upon in a community, for judges to use in decision-making. Freeman looks at the ultimate criteria as existing in every legal system, with the source of those criteria being not ethics but practical experience, custom and tradition. The variety of criteria courts employ therefore, reflects the varying

---

[66] OW Holmes, *The Common Law* (Little Brown and Company 1963) 5.
[67] Thomas (n 15)
[68] Freeman (n 3) 1569.
[69] ibid.

attitudes towards the solution of problems with which they are called upon to deal.[70]

The acceptance notion therefore demands that a proper search for a regime to manage the tension between flexibility and formalism would require an examination of the particular context of the country concerned, to uncover the unique judging criteria agreeable to its people. Freeman's view is that the ultimate criteria should not be seen as absolutes in the natural law sense, but justifiable as ultimate depending on the particular purpose or community.[71]Beyond specific communities however, other scholars have proposed the development of universal ultimate principles and standards that would guide judicial reasoning in hard cases. There are however variances about their nature, content and sources, as can be discerned from the interpretive theory, the conventionists school, the neutral principles theory and the jurisprudence of interests.

5.3.1.4 *The Neutral Principles Theory*

Under the neutral principles theory, judicial discretion is acknowledged but considered limited, in the sense that judges should not be allowed to employ subjective values in adjudication. Instead, legitimate judging should follow procedural values that provide the objective process through which the law can achieve its goals. These legal policy considerations judges engage in should be principled, rational and objective. This purist view further proposed that in the end judges would develop *neutral principles*. Reasoned elaboration is one such

---

[70] ibid 1570.
[71] ibid

principle by which judges are to be restrained.[72] The idea here is that judges should be obliged to give elaborate reasons – which would in turn limit their leverage to indulge in unprincipled subjectivity – and stick to the law and a clear analysis of the policies embedded in the law itself. Consistency is another one, which entails treating similar cases alike, and this would restrain judges seeking to invoke subjectivity in decision-making.

The key elements in the neutral principles theory are ability to come up with principles that are actually neutral, and the viability of judges having to regulate themselves. Minda argues that it is impossible to find neutral theories whenever two principles are in conflict.[73] Although this attack was based on constitutional disputes, it is relevant to contract hard cases as well, for the essence of a dispute in such a case is the conflict of inherent interests.

Further, its reliance on the ability and willingness of judges to self-regulate is unrealistic in countries like Uganda, where the credibility of some judicial officers, and the independence of the judiciary, are on the low side. The scepticism about schools of thought that put all the trust in judicial discretion apply to the neutral principles theory, to the extent that judges are expected to define and enforce the neutral principles. But could judge made conventions be the solution? Some have inquired.

---

[72] Minda (n 9) 37-48.
[73] ibid 40.

5.3.1.5 *Judges' Conventions as a Source of Ultimate Principles*

One of the strands of the ultimate principles theory proposes that judging in civil matters like contract should be done in conformity with principles and standards set out in autonomous judicial conventions. This view is preferred to suggestions that the path to the formulation of guiding principles and standards should begin and end with judges themselves. Scholars like Atiyah[74] and Dworkin[75] have suggested plausible principles and standards that can guide flexible and formalistic judges, but without a definite source to which judges should make reference. Judicial restraint is in the end left to be defined and limited by the judges themselves. Such scholars travel on the right path but disembark before reaching the final destination – legal certainty.

Llewellyn realised this shortcoming and proposed that adjudication should be guided by rules in form of commercial codes, but that courts should not be their originators.[76] Instead, he proposed administrative agencies or specialised law reform organisations, like the Uganda Law Reform Commission. Along this line of thought, conventionist scholars have proposed judicial conventions similar to Uganda's criminal sentencing guidelines,[77] and the 'guide to interpretation' clauses of the Multilateral Vienna Convention on the Law of Treaties.[78] The Vienna Convention regulates international contracts, some of which have commercial aspects, and the formalism versus flexibility dichotomy has been at play in the

---

[74] PS Atiyah, *The Rise and Fall of Freedom of Contract* (Clarendon Press 2008) 388.
[75] Dworkin, *Taking Rights Seriously* (n 1)
[76] Schwartz (n 31) 17.
[77] The Constitution (Sentencing Guidelines For Courts of Judicature) (Practice) Directions, 2013, made under Article 133 (1)(b) of the Constitution that empowers the Chief Justice to issue orders and directions to the courts necessary for the proper and efficient administration of justice.
[78] Concluded on the 23/5/1969.

International Court of Justice trying such disputes.[79] Therefore, the judicial convention is a relevant piece of literature and can be a point of reference in searching for a way to manage the tension.

Similarly to what is proposed in this study, the Convention provided for judging guidelines in Article 31-33, mainly formalising and standardising the interpretation and application of contracts as a mechanism to manage the tension by balancing formalism with flexibility.[80] For instance, when determining the content of treaties, the International Court of Justice (ICJ) judges are required to use subsequent practice of the parties, and other relevant rules of international law.[81] This helps to create a balance between maintaining conceptual ordering and consistency in law, and adaptability to changing circumstances and experience. Two contract interpretation techniques are also provided to judges to manage the tension. Firstly, there is the reinterpretation of a treaty on the basis of its evolutive character, which will take into account the formalistic will theory, defined by the parties' intentions.[82] Secondly, there is reinterpretation based on the current and subsequent practice of the parties,[83] which caters for economic efficiency and other realistic considerations demanded by the contract's utility.

Jean d'Aspremont criticises the tension-management mechanism described above; regarding it as ineffective on the ground that it simply created formalism, while flexibility continues to exist in the ICJ decisions.[84] This view however exhibits a

---

[79] J d'Sspremont, 'Formalism versus Flexibility in The Law of Treaties', in C. J. Tams, A.T. Poulos, A Zimmerman & A E. Richford, Research Handbook on The Law of Treaties (2014), 257, 279.
[80] d'Sspremont, (n 79) 276-9.
[81] Article 31 (3).
[82] Article 31 (1) and).
[83] Articles 31 (3) (b).
[84] d'Sspremont, (n 85) 279.

misconception of what the process of balancing formalism and flexibility should achieve. The legal certainty intended does not mean flexibility-free adjudication, but rather both flexibility and formalism being practised coherently and rationally, following a certain and predictable course. Further, the fact that the learned scholar acknowledges that the ICJ has, since 1969, used this mechanism to reach decisions, and the fact that he does not provide evidence of this having resulted in a legal crisis, is evidence of the mechanism's viability; making its adaptability in private commercial law adjudication pertinent. Finally, Jean d'Aspremont's[85] support of the view that elaborating formal standards of interpretation to balance formalism and flexibility in the Vienna Convention was not easy, but a miracle, betrays his non-conformity claims as based on a defeatist mind-set.[86] In that regard, it is not different from other claims that formalism and flexibility cannot coexist, or that the tension between them cannot be managed; and all such claims, are rejected in this study.[87]

Therefore, the conventionist school that includes Eisenberg,[88] Fiss[89] and Burton,[90]provides a more viable way to manage the tension. Eisenberg in particular developed a detailed theory and framework for ultimate judging principles.[91] However, his proposals are not based on a deliberate effort to balance values observed as competing in real cases, as is done in this study; this makes his proposals largely theoretical, and their applicability to Uganda needs testing through studies like this one. Relatedly, Eisenberg does not articulate the source of

---

[85] ibid 276-7.
[86] ibid 276-7.
[87] See text to Section 3.5.
[88] MA Eisenberg, *The Nature of the Common Law,* (Harvard University Press, 1988).
[89] Fiss (n 56); and OM Fiss, "Conventionalism," (1985) 58, South California Law Review, 177-197.
[90] Burton (n 23) 95-98 and 204-07.
[91] Eisenberg (n 88).

or how constructing content to ultimate guidelines should be arrived at, let alone what values should inform the principles embedded in them.

Nevertheless, Eisenberg's proposals are a viable attempt at managing the tension using judging guidelines. He noted that common-law rules dominate the law of contract and tort, but it is far from clear what principles courts use or should use in establishing common-law rules. The rules established are a result of interplay between rules in precedents and moral norms, experience and policies, but courts are not free to employ social norms, policies and experience as they see fit.[92] Accordingly, Eisenberg proposed that the common-law rules that judges develop should satisfy four standards:[93]Firstly, rules should be in conformity with all moral norms, policies and experiences that have social support. Secondly, rules should be consistent with one another to make one body of law. Thirdly, the rules adopted in the past (precedents), should be applied consistently over time. Fourthly, if there is a conflict between norms, policies and experiences that have social support, the best choices should be made. If these standards are all pointing to one answer, then the system of common-law rules is running normally. In the event of a conflict between the above standards – in other words, in hard cases – the judge has to change the law. Eisenberg therefore proposed that courts be guided by a professional convention of judges, employing four foundational principles of adjudication rooted in the social function of courts.[94]

The first principle is objectivity, which entails impartiality and universality, meaning that there will be no influence from anyone, or anything, and rules should not be

---

[92] ibid 14-42.
[93] ibid.
[94] ibid.

applied uniquely but as would be applied to anyone.[95] The second principle is support, which requires that rules established or applied by the courts should be supported by general standards of society or special standards in the legal system.[96] The requirement of support comes from the social function of courts plus the structure and fairness of the foundational principles.[97]

The third principle is replicability, which stands for predictability and legal certainty. However, the importance attached to replicability should be context-specific. Its importance in any given area should depend on the weight attached to the value of planning, as against the value of flexible response to new conditions; and the value of channelling the behaviour of private actors, as against that of responding to their fair expectations.

Eisenberg's fourth principle is responsiveness, which comes from the position of courts in the legal system and society as a whole. Courts are not obliged to respond to society, but only relate to it through the intermediary of lawyers. On the other hand, courts are not obliged to follow the professional discourse of lawyers, but only respond to it. Eisenberg proposed that courts should respond to legal discourse in the narrow and wide senses. The narrow sense is that of responding to the case as presented before court. This means responding to pleadings, briefs and other actions of counsel. The wider sense is responding to opinions of the legal profession generally, such as publications and deliberations, or reviews at conferences.

---

[95] ibid 8-9.
[96] ibid 9.
[97] ibid.

With regard to the source of ultimate principles, standards and rules for adjudication, the study rejects the practice of placing excessive trust in judicial discretion, economic determinism and the self-regulation perspective. Instead, the institutional theory, to the extent that it looks at the source, nature and effects of legal phenomena as context-based, is found more persuasive.

Accordingly, a combination of interests jurisprudence and the institutional theory of law is adopted to guide a search for underlying interests and values from which a coexistence management regime can be derived to guide commercial contracts adjudication in Uganda's context. The specific elements of these theories adapted to guide this study are highlighted below.

5.4 Guiding Theories of the Study

In finding the appropriate management regime for realising coexistence, no single legal theory is exhaustive. Therefore, with respect to the nature and content of a coexistence management regime, and to the extent of the applicability of the theories to Uganda's unique context, the jurisprudence of interests, and institutional theory, are guiding the study. In the exacting search for what should guide the judges, one needs first to understand the nature and structure of the legal system in question. What is appropriate is bound to differ from one jurisdiction to the next. Uganda is viewed as a country with unique characteristics; for instance, legal pluralism is not merely a matter of debate between academics, as is the case elsewhere, but in fact constitutes part of the legal order created by the 1995 Constitution. In this regard, the notion of general clauses advanced by

Schmitt's institutional theory is revisited as a possible tool for identifying a framework for a commercial judging guide for Uganda.

However, to construct the general clauses, institutional theory proposes a framework to guide judges, and this framework embodies morals, faith and public reason.[98] In Uganda, these components are already set out as judicial guidelines by the constitution, and these general clauses are part of the problem and not the solution; which calls for a re-examination of what character the guidelines suitable for the Ugandan context should take. Contribution is therefore made by proposing ways to arrive at a rational and comprehensive framework for management of the tension, tailored for the Ugandan context, guided by interests jurisprudence.

5.5 Interests Jurisprudence

Sociological jurisprudence proposes, as the way towards managing the tension, a theory of interests – otherwise referred to as the jurisprudence of interests.[99] The idea is that during adjudication, judges are faced with competing interests; the facts, society's reality and the rules of law, each fighting to prevail at the expense of others. Every decision they make is a compound brewed using these different ingredients, mixed in varying proportions.[100] However, justice is best served by a system of adjudication that is not a prisoner of rules. Judges should identify, openly

---

[98] M Croce, 'Does Legal Institutionalism Rule Out Legal Pluralism? Schmitt's Institutional Theory and The Problem of The Concrete Order', (2011) 7(2) Utrecht Law Review, 54.

[99] Minda (n 9) 33.

[100] BN Cardozo, 'The Nature of the Judicial Process' (Yale University Press 1921) 8-12; an argument similar, but going beyond the marxist one, that the formalism-instrumentalism dichotomy should be transcended by realisation that, embedded in the legal imperatives, are interests of the dominant class, and the judicial approaches reflect the struggle between the proletariat and the bourgeoisie (see P Beirne and Beirneand SR Pashukanis, *Selected Writings on Marxism and Law* (Academic Press Inc. (London) Ltd 1980) 4)..

articulate, adjust and balance such competing interests so that the overriding ones prevail in particular cases.[101] The word 'interest' is in this case used in the widest range of its connotations, to cover all things that man holds dear and all ideals, which guide man's life, making it interchangeable with the word 'values', as is done in this study.[102] Accordingly, past practices and existing rules of law should only have force if and when they represent the continuing values of society; otherwise they should be rejected or modified. This theory, it is argued, has worked to deliver group and individual justice during constitutional adjudication in the United States,[103] under the influence of the German jurist Jhering.[104] He is credited with being the godfather of this theory, in turn influencing the sociological jurisprudential thinking of theorists like Cardozo, Pound and Holmes, as a reaction to what was perceived as the tyranny of legal concepts.[105]

Like this study, their theories have contributed to answering the questions of what the foundations to judicial choices are, and therefore why the tension has prevailed, and also how it can be managed. Contribution to knowledge is in turn made by this study operationalising the theory, subject to the injunctions and modifications indicated below. This serves to extend its viability as an adjudicatory theory that provides a framework for arriving at the coexistence of formalism and

---

[101] J Antieau 'The Jurisprudence of Interests as a Method of Constitutional Adjudication', (1977) 27:4 Case Western Reserve Law Review, 823, 833.

[102] M M Schoch, (translator and editor), *The Jurisprudence of Interests: Selected Writings of Max Rumelin, Philipp Heck, Paul Oertmann, Heinrich Stoll, Julius Binder & Hermann Isay (Harvard University Press, 1948)* 33.

[103] Antieau (n 101) 833; W Seagle 'Rodolf von Jhering: Or Law as A Means to An End' (1945) 13:1 University of Chicago Law Review 71, 87.

[104] F Powers 'Some Reflections on Pound's Jurisprudence of Interests' (1953) 3:1 Catholic University Law Review 10, 11

[105] W Seagle 'Rodolf von Jhering: Or Law as A Means to An End' (1945) 13:1 University of Chicago Law Review 71, 87; Antieau (n 101) 825.

flexibility, and therefore management of the tension. The following sub-sections explain the theory's key propositions, as they relate to this study.

5.5.1 Foundations to Judicial Choice

The phenomena that interests jurisprudence came to challenge arose from the dominant positivist conception of law as logic, where judges formalistically applied capitalist/individualism-oriented abstract concepts like freedom of contract, at the expense of reality.[106] In place of such conceptual jurisprudence, the theory proposes that judges should respect existing doctrine, but adopt a utilitarian understanding of the task of the law, to inform their decisions. The task of the law is the satisfaction, at all times, of as many as possible human demands, claims, desires and interests, with the least possible friction and waste to the entire scheme of interests at the time.[107]

Therefore, legal concepts should be applied in hard cases with regard to how they actually work and affect people in real life. As in this study, Pound dealt with the tension between formalism and flexibility in hard cases, because his focus was on cases where there was a discrepancy between legal doctrine in books and empirical data about law, as well as cases where the court decisions differed from the words of statutes.[108] The judges, through legal reasoning, are expected to

---

[106] Seagle (n 105) 87.
[107] R Pound 'A Survey of Social Interests', (1927) 15 Papers and Proceedings of The American Sociological Society, 16, 44-45; Antieau (n 101) 825; J Stone, 'A Critique of Pound's Theory of Justice' (1935) 20:3 Iowa Law Review 531, 537; Powers (n 104) 12, 15.
[108] J Louis Halpern 'Law in The Books and Law in Action: The Problem of Legal Change' (2011) 64:1 Maine Law Review 46, 47.

reconstruct legal doctrine to reflect the balancing of competing interests and thereby manage the tension.[109]

According to Pound, to achieve an interest-based analysis, judges should hierarchically classify and arrange competing interests (to be recognised, adjusted, enforced and secured by the law) as: individual interests; public interests; and social interests.[110] Although all these categories are traceable to individual interests,[111] in case of conflict neither individual nor public interests should be treated as absolute, for the value of each depends on the reality and utility in a particular case.[112] A judge should however view the underlying goal or end of law and adjudication as serving social welfare;[113] therefore, wherever there is a clash with other categories, social interests should prevail. But even then, social interests can at times also be outweighed by more important interests, values and other considerations of society.[114]

In the treating of all values as equal lies one of interests jurisprudence's limitations, as it creates indeterminacy during the balancing, in the sense that a judge is left with no objective criteria for choosing which value to sacrifice for another. Judicial subjectivity and outright law making, intended to be minimised, are instead left to determine judicial choice. Accordingly, one of the major criticisms levelled against Jhering and Pound relates to failure to propose an objective-judging criterion.

---

[109] Minda (n 9) 33.
[110] R Pound, *New Paths of the Law* (University of Nebraska Press, 1950) 24-27; R Pound, *Outline of Lectures on Jurisprudence* (Harvard University Press, 1943)142-151.
[111] Powers (n 104) 15.
[112] Antieau (n 101) 832.
[113] HD Laube 'Jurisprudence of Interests',(1949) 34 (1) Cornell Quarterly Law Review 297; Antieau (n 101) 823; Minda (n 9) 33; Cardozo (n 100) 65-73; Powers (n 104) 14; J Stone, 'A Critique of Pound's Theory of Justice' (1935) 20:3 Iowa Law Review 537.
[114] Antieau (n 101) 832

There is controversy as to whether Pound died trying to search for 'the ideal element in law'[115] as an objective way of managing the tension, or had abandoned the search in favour of the view that criteria must be derived from the situation of the members of a society whose law is being considered in a particular case at hand.[116] Jhering, on the other hand, failed to answer the questions of ultimate ends and objective criteria for selection and preferment of interests.[117]

I will not divert into evaluating the different accounts of Pound's final mission with regard to finding an objective mechanism for judicial choice that can achieve coexistence.

Instead, this study views the jurisprudence of interests as having provided the basic framework for constructing such a mechanism, in a number of ways. Firstly, the theory brings to the fore the need to recognise articulate and inarticulate values competing in adjudication as the foundations to judicial choices such as formalism and flexibility. Secondly, the theory provides for the next step, balancing the identified values; and beyond this, some of the theory's proponents, including Pound, have gone ahead to propose techniques on how objective criteria can be developed from the balancing of such values.[118] These efforts towards achieving coexistence, as a way to manage the tension, are explained and evaluated in the next sub-section, indicating the extent to which they influence this study.

---

[115] Tamanaha (n 19) 76.
[116] J Stone, 'A Critique of Pound's Theory of Justice' (1935) 20:3 Iowa Law Review 537.
[117] ibid 537.
[118] Pound, *New Paths of the Law* (n 110)24-27.

5.5.2 Relevance to the Study

Although proponents of interests jurisprudence approached the tension from a United States or European constitutional law perspective, the theory is adapted to guide this study, and this is so for a number of reasons. Firstly, constitutional adjudication is relevant to commercial adjudication. The basis of constitutionalism in countries with written constitutions, like the United States and Uganda, is contracts – the social contracts about how people should be governed.[119] Like commercial contracts, these contracts have parties; all the citizens; and terms that have been reduced into writing, and to which judges give adherence.

Secondly, in the case of Uganda, the constitution, as the supreme law, is the final point of reference for the law on judging and substantive rights, including commercial ones.[120] In this respect, it is directly linked to all commercial adjudication; especially in that it has obliged judges to consider, not only the rules of law, but also extra-legal normative sources like society's peculiar circumstances, values and aspirations.[121] This is confirmed by the fact that in a number of commercial disputes the constitution has been relied on to allocate the rights and obligations of parties to the contract.[122]

Thirdly, the jurisprudence of interests approaches the answer to the management of the tension with a view similar to the main thesis of this study, namely that formalism and flexibility can coexist by means of their underlying values being

---

[119] L Henkin 'The United States Constitution as Social Contract' *Proceedings of the American Philosophical Society* (The American Philosophical Society, Vol. 131:3,1987) 261, 264-266.
[120] Article 1.
[121] National Objectives and Directives of State Policy, No. XXIV and Article 126 (1).
[122] See Appendix 1: Cases 15, 22, 45, 54, 62 and 65; Appendix 3: Case 10 and Appendix 5: Cases 6, 13,24, 28, 32, 33, 39, 53, 72, 76, 79 and 89

ascertained and balanced.[123] This is based on the realisation that certainty – engendered by formalism – and the law's adaptability – to take care of society's changes reflected by new interests – are both necessary.[124] Accordingly, although it promotes a utilitarian understanding of law, the theory is neither a strand of realism, nor does it entirely fault either side of the formalism-flexibility divide.[125] Therefore, the jurisprudence of interests supports the coexistence of formalism and flexibility, providing a theoretical framework that is relevant and appropriate to guide this study in its efforts towards finding ways to manage the tension.

5.5.3 Towards Coexistence

According to the jurisprudence of interests, the duty of judges is viewed as recognising competing interests that need protection, weighing and balancing them through a systematic and rational ordering, and reconciling or adjusting using an authoritative technique.[126] The evaluation and adjustment of competing interests is meant to identify those that should prevail when there is a clash, the ultimate interest being social welfare and the general wellbeing of man.[127] In doing this, judges are expected to develop a legal policy oriented analysis, or interest analysis, as a method of reaching right answers in all similar cases.[128] Two of the main proponents of the theory, Pound and Cardozo, have each proposed techniques that can be used not only to identify competing values but also to develop or ascertain judging guidelines to manage the tension, through coexistence.

---

[123] Powers (n 104) 14
[124] R Pound, *Outline of Lectures on Jurisprudence* (Harvard University Press, 1943)1.
[125] Stone (n 116) 533, 535.
[126] Pound, *Outline of Lecturs on Jurisprudence* (n 124) 4; Powers (n 104).
[127] Laube (n 113) 297; Antieau (n 101) 823; Minda (n 9) 33.
[128] Laube (n 113).

5.5.3.1 *Cardozo's Adjudicatory Methods*

Cardozo viewed judges as reaching decisions using four methods and sources of criteria (logic, history, tradition and sociology) that should to achieve coexistence; be applied hierarchically in the adjudication of hard cases.[129] Firstly is what he called the method of philosophy, which is reasoning by analogy. Judges compare cases to others, seeking to establish unity and a rational logical order in the law. The analogy is ultimately based on human experience and espouses values like efficiency and utility.[130] Accordingly, Cardozo's first criterion is what would create consistency, unity and rationality in the law, as well as utility, based on the experience and personal reasoning of the judge, thereby having formalism coexist with flexibility.

Secondly, Cardozo identified the historical or evolutionary method.[131] This refers to the tendency by judges to look at principles within the limits of their history; in other words, the use of history to understand principles, rules and doctrine, which understanding then determines judicial choice in hard cases. For instance, the extent and applicability of the doctrine of freedom of contract can be understood in reference to its having developed within the conditions of the classical era, which speak of capitalist market individualism as the value it represents.[132]

Cardozo's third method refers to tradition, which represents the general standards of rights or duties perceived and practised in a community, such as custom, course

---

[129] Cardozo (n 100) 8-12.
[130] Freeman (n 3) 1570.
[131] Cardozo (n 100) 51-53.
[132] ibid.

of dealings in contracts, usage of trade and the like.[133] Cardozo connects tradition to judicial choices, not in the making of new law, but in the application of existing rules.[134] It should guide judges where history and reason cannot help them. Fourthly, Cardozo identifies social welfare, expressed through the method of sociology, as the greatest criterion and underlying purpose that adjudication should work to satisfy.[135] By 'social welfare' he meant all extra-legal considerations of a public nature, such as public policy, common good, and standards of right conduct like those commanded by religion or the ethics of social justice.[136]

Cardozo's mechanism helps to define the internal judging culture in common-law jurisdictions, which is a step towards uncovering the real values underlying adjudication. However, besides identifying social welfare, he does not extend the search to the values themselves, as is done in this study. But even with regard to social welfare as being the ultimate judging criterion, Cardozo needed to go further and elaborate how judges would determine it and simultaneously maintain the consistency, predictability and neutrality of law. Subjecting final judicial decisions to absolute social welfare will create a lot of uncertainty, unless clear principles and guidelines exist on how and when a judge can ascertain its content, and invoke it, and likewise, how a party to a contract can phrase the terms to achieve commercial gain without offending social welfare.

Further, as with other social values, the process of Uganda becoming more developed and embracing global trends means that what serves social welfare is bound to change more often than not, but unevenly within different parts and

---

[133] ibid 58.
[134] ibid.
[135] ibid 65-73.
[136] ibid 72-73.

communities in the country. Uganda's reality in terms of civilisation is that communities are characterised by social and economic disparities – rural versus urban and even urban versus urban – unlike much of the Western world, where you find standardisation in different parts of the country. In such societies as Uganda's, judges cannot be guided by allowing social needs to prevail on a case-by-case basis, as their definition will not be obvious, and indeterminate. Whose understanding of social welfare should the judge adopt? The rural or urban businessman? The urban businessman in the capital city? Or the much less developed townships? Clear principles have to be formulated to guide judges as a way to avoid uncontrolled subjectivity and achieve certainty, using a more methodical mechanism, as is investigated in this study. The question that comes next is, how relevant the jurisprudence of interests is in this investigation.

5.5.3.2 *Pound on Coexistence*

Stone rightly argues that Pound supported coexistence, having proposed that judges should follow the gathering and interpretation of law and facts with the discovery of the ends intended by the law and how they have been served.[137] But on the other hand, he viewed judicial lawmaking as relying on the subjectivity of judges and their philosophy of values, which fails to take into account all the relevant facts; a view shared by Cardozo.[138] Therefore subjectivity ought to be minimised and in its place there should be a determinate technique of arriving at judicial choices informed by facts from the judging context, legal and extra-legal.

---

[137] Stone (n 116) 535-6.
[138] Cardozo (n 100) 8-12

Further, Pound[139] directly supported coexistence by advocating for judges to recognise that law in the books is significantly connected and related to the law in action – the ends of the law, a relationship that should be investigated to arrive at ways to manage the tension. Using the childhood adventures of Finn and Sawyer, Pound illustrated this by referring to a situation where certain tools are prescribed for the performance of a certain task, but where those that can actually do it are different, requiring the mechanic (judge) to discover those other tools and change from the prescription to have the ends served and complete the task.[140]

The above coexistence proposals by key proponents of the jurisprudence of interests demonstrate that the theory aims at resolving the same problem as this study seeks to help manage, answering similar questions. It seeks to provide a method for finding principles that judges should follow in deciding cases,[141] by looking at the role of judges as collaborating in the realisation of recognised ideals within a given legal order.[142] This study agrees with such an identification of interests, in this case covered under 'values', competing in court cases as speaking to the needs of the commercial community that adjudication should address.

Accordingly, this study seeks to extend the applicability and validity of this theory in Uganda, as it proceeds on the presumption that the tension in Uganda has been underpinned by a competition between formalism-engendering values and flexibility-engendering ones. The content of judicial opinions as texts are analysed with a view to uncovering such competing values, although the theory has some

---

[139] R Pound 'Law in the Books and Law in Action' (1910) 44 American Law Review 12, 12-13.
[140] ibid.
[141] Minda (n 9) 31; Stone (n 116) 537.
[142] Laube (n 113) 296.

limitations that have led to exceptions to its adoption, and therefore partial departure in this study.

5.5.4 Limitations of Interests Jurisprudence

Firstly, the theory's major proponents, like Pound, leave the identification and evaluation of interests, plus the formulation of judging guidelines, to the judges, who should perform these functions using practical reasoning.[143] They view all interests to be equally valuable and only invoked and given weight by judges in particular cases,[144] with the task being to bring rational reconciliation and harmony between legal institutions and the interests of society at the appropriate time and place.[145] This thinking reveals a number of weaknesses in the theory, and has attracted criticism. Pound,[146] James,[147] Dewey[148] and Jhering[149] are criticised for failure to propose an objective system for the selection and evaluation of interests underlying adjudication.

Further, judges – by virtue of the nature of training, experience and exposure in common-law jurisdictions like Uganda – lack the means and competence to weigh and adjust societal values, or forecast the utility and impact of proposed guidelines.[150] Therefore, the finding of judging guidelines is better done as a deliberate and autonomous task of legislation, although judges' input should be used by way of studying their decisions, as proposed in this study.

---

[143] R Pound 'Mechanical Jurisprudence' (1908) 8 Columbia Law Review 609-10.
[144] T Di Fillipo 'Pragmatism, Interest Theory and Legal Philosophy: The Relation of James and Dewey to Roscoe Pound' (1988) 24:4 Transactions of the Charles S. Peirce Society, 487, 494
[145] Pound 'A Survey of Social Interests' (n 107) 1, 4.
[146] ibid.
[147] ibid.
[148] ibid.
[149] Powers (n 104) 11.
[150] Antieau (n 101) 832.

Leaving the tasks to judges would also be self-defeating, because the process of reasoning cannot create complete and determinate rules or principles. If judges were to continue engaging in practical reasoning to create the judging rules and principles, such guidelines would often be changing, as reasoning can change even in a matter of hours.

Relatedly, the proposal creates a danger of judges managing litigation in a way that would reflect their personal preferences and prejudices, and in turn claim an accumulation of similar cases reflecting their subjectivity as representative of competing interests in cases. This is especially true under a court procedure like Uganda's, where the judge has a final say on matters like issues to be framed, and admissible evidence, and where the judge can generally restrict lawyers on matters they should address him or her about in a particular case.

Secondly, there is the failure by the jurisprudence of interests to construct a theory of values that could guide judges, which stems from the little or lack of weight they attached to values as motivators of judicial decisions. For instance, Heck declared that the theory aids judges to reach decisions by balancing and weighing competing interests, not values, because the jurisprudence of interests is not a theory of substantive values.[151] This study supports Isay's criticism of Heck, and other interests jurisprudence scholars, for refusing to inquire into values, citing the lack of standards for judges weighing values.[152] Also supported is his call for a method to guide judges, having at least some directive as to the viewpoints from which judges should make evaluations and the standards by which they should weigh the interests thus evaluated. On the other hand, Isay wrongly took the

[151] ibid 31 and 317.
[152] ibid 317.

defeatist view when he went on to claim that, although we should search for values, constructing a rational theory of values is beyond human attainment.[153]

Contrary to such defeatist views, this study seeks to expand Laube's view on how to resolve the problem of the absence of a scale of values, by recommending that concrete reality, informed by history and culture, be used to identify the value of ideals in each specific context.[154] In the case of Uganda, the constitution makes substantive justice, values, aspirations and the norms of Ugandans part of the legal regime judges are to apply.[155] Therefore, any viable theory of adjudication should allow the identification and balancing not only of competing interests, but also of the values – understood as encompassing the interests and aspirations (in the jurisprudence of interests sense, 'ideals', and therefore part of values) – the constitution seeks to protect and promote.

Thirdly, most of the theorists in the jurisprudence of interests had no answers to the question of how judges would be guided in the evaluation of interests; which is understandable, considering their failure to appreciate the role of values, in a wider sense that goes beyond mere interests. Heck preferred to call it a matter for legal philosophy, a science that to him was pre-legal.[156] Cardozo and Pound seem to be among the few that tried to go beyond the mere identification of competing interests and values, to answering how the tension should be managed. However, as analysed above, their efforts do not go far enough.[157] Other key interests theorists like Heck only envisioned formulation of judging rules, an indication of

---

[153] ibid.
[154] Laube (n 113) 297-298.
[155] Article 126 (1) and (2) (e).
[156] Schoch (n 102) 315-317.
[157] See text to section 3.4.2.

extreme positivist methodology. Indeed Heck declared that the law viewed as a whole consists of commands, although such commands affect social life leading to interests competing with one another.[158] However, like Dworkin, he rightly attacked positivism; a view that looks at ultimate guidelines as rules, leaves out principles and other standards that could help to guide judges in decision-making.[159] Principles and standards are crucial as part of ultimate guidelines, because they will create space and restraint on flexibility without making the judge feel imprisoned by another version of formalistic rules.

Fourthly, in accepting that the values differ from context to context, and that understanding each context requires reference to concrete reality informed by history and the reality's cultures, the jurisprudence of interests is then faced with another problem of institutional competence of judges. It is not feasible that any single judge will be possessed with such far-reaching knowledge of the law's context as relates to each case before him or her. Certainly, Ugandan judges are trained as lawyers in the same way, and in the same institutions, as all of us Ugandan lawyers were; and from such training, one would not acquire expertise in subjects like history or sociology. It is also not practical that before making each hard decision an already overburdened Ugandan judge should therefore have the added duty of conducting research on Uganda's reality to uncover such values. What is logical is to have the underlying values that have commonly competed in litigation and adjudication independently searched for and synthesised, as this study proposes, to reveal the rules, principles and standards that should guide judges with certainty.

---

[158] Schoch (n 102) 33.
[159] Dworkin (n 1) x.

Finally, the categorisation of interests is logical only if one takes social interests to represent interests of the special society or community of persons to which the adjudication is relevant. For instance, the commercial community is the society whose interests will be identified in a contract dispute. Short of this injunction, there is no difference between public and social interest. Awareness of the above limitations has helped in defining the premises within which interests jurisprudence guides the study.

5.5.5 Guiding Theoretical Premises

This study is therefore guided by the jurisprudence of interests, but with the following injunctions. Firstly, the importance of ascertaining competing values in adjudication is recognised alongside that of competing interests, and interests are treated as a subset of values and not as independent or remote criteria to the judicial approach. Secondly, judicial guidelines in the form of ultimate rules, standards or principles should be formulated as a conscious law reform exercise, and not left to be determined by internal criteria; in other words, not left to the discretion of judges. Accordingly, the identification of competing values should not be a matter of pure process and practical reasoning by judges, but of research like this study, guided by appropriate legal theory and methodology.

Therefore, in this study, the task is not left to judges; but in a more methodical and objective way, content analysis is made of judicial opinions in Uganda's courts of judicature to ascertain the values competing in the country's commercial adjudication. The opinions are analysed not for their effect on doctrine, but as texts that tell the facts of Uganda's commercial community civilisation over the years; this being the most appropriate basis on which to arrive at results that can be interpreted to ascertain values for balancing. Values of an internal nature, that make up Uganda's commercial judging culture, as well as those external to the judiciary but influencing formalism and flexibility, are uncovered. Such values are revealed by analysis of words used by judges in their legal opinions, together with further interpretation and inference from the values recognised, with aid of the institutional theory of law.

5.6 Relevance of Institutional Theory

Using the Ugandan context, the study partly validates the claims of Holmes, that law embodies the stories of a nation's development and its life is experience informed by the necessities of the time; the moral and political theories, intuitions about public policy and the prejudices judges share with their fellow men.[160] Likewise, the study validates the claim of scholars like Schauer[161] and Vermeule[162] that the question of whether formalism or flexibility is the appropriate judicial approach is a purely contextual one, depending on the decision-making environment and the personal attributes of the judges. The above views of Holmes, Schauer and Vermeule find resonance with the institutional theory of law propounded by Schmitt and his followers.[163]

Institutional theory holds that norms arise from previous social practices, which the concrete order must preserve and promote. These pre-legal social practices at the core of a specific cultural order are what Schmitt called institutions.[164] As defined by Durkheim and Schmitt, institutions are therefore the beliefs and modes of conduct instituted by a collectivity and having a reality outside the individual who conforms to them.[165]

The theory is used to elaborate on the values ascertainable from interests jurisprudence, because it also supports coexistence, by holding that both formalism

---

[160] ibid 3.
[161] F Schauer, *"Formalism: Legal, Constitutional, Judicial"*, The Oxford Hand Book of Law and Politics, Edited by Keith Whittington, R. Daniel Keleman and Gregory A. Caldeira, Oxford University Press, 434
[162] A Vermeule, *Judging Under Uncertainty: An Institutional Theory of Legal Interpretation*, (Harvard University Press 2006).
[163] Croce (n 98).
[164] ibid 47-50.
[165] ibid.

and flexibility are needed at the same time. This is because formal norms do not contain all that judges need in order to interpret and enforce them, yet norms require a certain degree of formality since they are to be used in gauging different situations.[166] To arrive at coexistence, Schmitt proposes the use of something similar to the jural postulates of interest theorists – the concept of general clauses *(Generalklausel)*, such as good faith and reasonableness.[167] General clauses should be used by legislators to cater for concrete reality,[168] and provide a general framework of values and principles such as 'morals', 'faith' and 'public reason' to guide judges.[169]

The list of general clauses and guiding values and principles proposed by Schmitt was widened by MacCormick, who claimed that there are general principles of a pervasive nature that bear on the decision maker in all circumstances including giving guidance to judicial discretion.[170] The law, such as the American Uniform Commercial Code, and the UK's Sale and Supply of Goods Act of 1994, obliges the decision maker to consider standards or concepts made up of different interests and values in particular cases. Such values include fairness, efficiency, wisdom/prudence, reasonableness, rationality and other salient values that should be followed by an application of common sense.[171]

The questions that arise are – What is the source of such general principles or clauses? And how can they be recognised by a judge in Uganda's commercial

---

[166] Croce (n 98) 48 and N MacCormick, *Institutions of Law: An Essay in Legal Theory,* (Oxford University Press, 2007) 29.
[167] Croce (n 98) 48.
[168] ibid.
[169] ibid 51.
[170] N MacCormick, *Institutions of Law: An Essay in Legal Theory,* (Oxford University Press, 2007) 30.
[171] ibid.

adjudication? The answer from institutional theory is that all theory and practice by humans, including such judicial guidelines, are shaped by the institutions, which in turn form the context of a particular stable collectivity.[172] The judges' role is therefore to select the normative facts of such a collectivity, and use the results as the general standards binding on the collectivity.[173] In this sense, institutional theory is compatible with the jurisprudence of interests as represented by Laube, which claims that values are crucial in adjudication, and context-specific; they arise out of the concrete reality as informed by the historical facts, phases of evolution of the law and effects of cultural antecedents at play.[174]

The difference between the jurisprudence of interests and institutional theory, with regard to the source of ultimate judicial guidelines, is that institutionalism extends the search and understanding of underlying competing values beyond the purism of procedure. As such, a researcher other than a judge presiding over a case can use the judging environment to interpret and elaborate on values both articulate and inarticulate but discoverable from the words used by judges; as is done in this study. This study therefore adopts the compatible institutional theory as the solution to the weakness of jurisprudence of interests, not only in terms of judicial competence in understanding and interpreting extra-legal institutions and contexts, but also in terms of the replicability of the theory's mechanism in non-judicial studies. Therefore, institutional theory helps in guiding this study by looking at a specific context's peculiar history, and other pre-law institutions, as helping to understand the values competing during adjudication.

---

[172] Croce (n 98) 58.
[173] ibid.
[174] Laube (n 113) 296-297.

This is however not to support institutional theory's general clauses or principles notion as a solution to the tension, or to say that the theory should be adopted entirely. To the contrary, institutional theory has a number of weaknesses; it is only a logical choice to the extent that it helps to explain the source of interests and values for consideration, and not how they should be used in managing the tension.

Firstly, what the Institutionalists call general clauses or principles and standards – such as morality, fairness, good faith, wisdom, rationality and reasonableness – are all subjective values that will certainly differ from society to society. The universalism claimed by MacCormick is at best wishful thinking; even in the same community one is bound to find different perceptions of what constitutes fairness, reasonableness and the like.[175] MacCormick himself admits that adjudication over such values should not be about finding the right or wrong answer but whether a decision creates a better or worse situation.[176] This means that litigation involving a definition of such standards is bound to be highly contentious, creating conceptual flexibility and legal uncertainty.

Secondly, giving the subjective values the upper hand in guiding judicial choice does not take care of the interests served by formalism. Judges' application of subjective values without guidelines will result in flexibility becoming the ultimate judicial approach, yet even institutionalists admit that formalism is to an extent vital in a stable legal system.[177] Thirdly, in Uganda, the sources of normativity in the country's legal system are pluralist, with both formalistic and flexible sources having equal force of law. To put morality and other subjective values like

[175] MacCormick (n 170) 30.
[176] ibid.
[177] Croce (n 98).

reasonableness at the apex of judicial guidance is to create an unresolvable crisis of values; a crisis Schmitt himself admitted would be a weakness in his general clauses theory.[178]

Fourthly, institutionalists, like interests theorists, are also guilty of placing too much trust in the judges, especially in claiming that the underlying values are to be constantly sought and weighed by the very persons whose decisions are to be guided.[179] The reasoning behind this weakness seems to be the fixation that separation of powers has always to imply non-interference of one institution in another's job; therefore judges should find guidelines for their own discretion. This fixation does not tally with reality, as MacCormick[180] again admits; in one-party and despotic states, there is no independence of the different institutions of government. Uganda has had a history of recurrent despotic regimes and single-party rules, either de jure or de facto. Therefore, its reality is one where the 'separation of powers' concept is a mere illusion, in the sense that it is the exception rather than the norm.

Notwithstanding the above weaknesses however, institutional theory is helpful because understanding of the values underlying the tension cannot be sufficiently reached to justify their adjustment and balancing, without going beyond their mere observation and recognition.[181] It is unlikely that a full elaboration of motivating values will appear on court record; some of the detailed implications of words and phrases used, like judicial absolutism, if written will be grounds of appeal because the law may look at them as not being justiciable. Further, parties to a dispute will

---

[178] ibid.
[179] Croce (n 98) 58 and MacCormick (n 170) 35-36.
[180] Croce (n 98) 58
[181] Powers (n 104) 15-16.

inevitably not reveal matters of social policy or commercial reality that could be at play, due to the rigid rules on cause of action, pleadings not being argumentative or oppressive and relevance or admissibility of evidence.

Therefore, there is a need for the jurisprudence of interests to be supplemented by guidance from a theory that helps in drawing inferences from the judges' words and phrases, informed by other institutions surrounding the judicial opinions. This is because as noted by Croce,[182] such institutions are the actual source of the values that compete during adjudication, yet they are also informed by the realities of a particular context as a collectivity. At the centre of this effort towards building coexistence is a need to have a mechanism for managing the tension that is viable, as being rooted in the real causes of the tension, and at the same time coherent and rational.

Accordingly, as part of the content analysis methodology,[183] the coding of values to be observed in the judicial opinions is informed by the existing literature and theory on the subject. In the same vein, interests jurisprudence counsels that such a search is informed by existing *jural* (in this case value*)* postulates – the presuppositions about the ideals motivating judges.[184] Accordingly, as part of making a case for the rationality, logicality and viability of coexistence between formalism and flexibility, the next chapter revisits the views of other scholars on what values motivate formalism. The chapter will show that other scholars who have tried to understand the foundations to formalism either support coexistence or fail to make a case for absolute formalism. At the same time, in an effort to make a

---

[182] Croce (n 98) 58.
[183] Krippendorff K, *Content Analysis: An Introduction to its Methodology,* (Sage Publications Inc., 2004).
[184] R Pound, *New Paths of The Law* (n 110) 32; Stone (n 116) 537.

case for the viability of such coexistence, the presumptive values advanced by other scholars are treated as the value postulates whose defining manifestations and sub-values are then coded to guide the content analysis.

Chapter 6: The Value Postulates Underlying Formalism

6.1 Introduction

This chapter revisits, with three purposes, the values scholars have proposed as underlying formalism in the tension. Firstly, it intends to apply coexistence adjudicatory theory to the arguments of other scholars for or against proposed underlying values, to further make a case for the logicality of coexistence between formalism and flexibility.

Secondly, as a contribution to theory on how to manage the tension, it seeks to support Eisenberg,[1] as well as Schwartz and Scott,[2] in saying that none of the single-norm or pluralist theories, formalist or flexibility-oriented, articulating internal or external values, fully accounts for and should be the ultimate guide to judicial choice. Rather, those different values shown by heterogeneous contractual and dispute contexts limit each other's domain. Therefore, in resolving conflicts, adjudication and other law making should balance the different social propositions conflicts generate, using a multivalued approach, which applies good judgement to weigh and accord roles to each conflicting value. However, these scholars join others like Trebilcock[3] and Tamanaha[4] in admitting to the lack of a mechanism to

[1] M Eisenberg 'The Theory of Contract', in P. Benson, ed. *The Theory of Contract Law*: *New Essays* (Cambridge University Press 2001) 243-244.
[2] A Schwartz and RE Scott, 'Contract Theory and the Limits of Contract Law' (2003) John M. Olin Center for Studies in Law, Economics and Public Policy Working paper, Paper 275, 2-3.
[3] MJ Trebilcock, *The Limits of Freedom of Contract*, (Harvard University Press, 1993) 248.
[4] BZ Tamanaha, *Law as a Means to an End: Threat to the Rule of Law* (Cambridge University Press 2006) 233.

attain such weighing and balancing of values, and a gap in the knowledge on whether and how it can be done.[5]

Thirdly, as further such contribution, the values advanced by other scholars, and their informative lower values, or manifestations are identified as presumptive values. They are presumptive, because they are used to guide the coding, search for and analysis of formalism-engendering values, at competition with flexibility-engendering ones. The chapter therefore provides landmarks for identifying both internal and external formalistic values that should inform the weighing and balancing of values and interests, when constructing commercial judging guidelines to help manage the tension.

6.2 The Internal Criteria

This section contributes to knowledge by articulation and elaboration of formalism-engendering values that are internal to judging culture – which, according to Ostrom & Hanson[6] is ultimately rooted in the beliefs and behaviours shaping the way things get done by individual judges; defines what is possible in the work environment; relates to the daily tasks of judges; and is grounded in activities familiar to all courts in the legal system. Fuller,[7] Dworkin,[8] Bagchi[9] and Chen-Wishart[10] have acknowledged the central role-played by judging practice and procedural values in the prevalence of formalism. In pursuit of this view, the

[5] Schwartz and Scott (n 2) 3; Eisenberg, 'The Theory of Law' (n 1) 244.
[6] BJ Ostrom & RA Hanson, 'Understanding and Diagnosing Court Culture' (2009) 45 Court Review: The Journal of The American Judges Association, 104, 104-105.
[7] L Fuller & W Perdue, 'The Reliance Interest in Contract Damages' (1936) 46 Yale Law Journal 52.
[8] R Dworkin, *Taking Rights Seriously* (Duckworth & Co. Ltd 1977) x-xi and 22.
[9] A Bagchi, 'Contract as Procedural Justice', 7:1, (2016) Jurisprudence, 47, 48, 50-51.
[10] M Chen-Wishart, *Contract Law* (Oxford University Press, 2010)12-18.

interests jurisprudence and neutral principles strands of the legal process theory,[11] as well as Denning,[12] Fuller and Perdue,[13] propose the discovery and use of the values in procedural laws as objective internal normative criteria for hard case judging, and a way to overcoming the tension.

Denning, for instance declared in *George Mitchell's case*[14] that there is a 'secret' judging criterion, what he called the 'notion of true construction'. The word secret implies normative values the judiciary internally uses as judging criteria. They are not visible from a simple analysis of the legal or extra-legal sources of normativity. Rather, they constitute 'judging culture',and are discoverable by analysing the practices, policies, processes and traditions underlying judicial approach. The existing literature reveals a number of such values, which are internal to the personality of the judge and the institution of the judiciary. Such internal values in this case include rule of law values; values of judicial perceptions about the nature of law, its sources, as well as judges' roles in commercial disputes; and judging cultural values – those informed by judges' practices and traditions.

6.2.1 Rule of Law Values

Occupying the central place in influencing formalism are the rule of law values,[15] that denote judges resolving disputes following settled principles or rules, as

---

[11] G Minda, *Postmodern Legal Movements: Law and Jurisprudence at Century's End* (New York University Press 1995) 37-48.
[12] In *the George Mitchell case* (1983) 2 AC 803
[13] L Fuller, 'Human Purpose and Natural Law' (1958) 3 Natural Law Forum 68; and L Fuller & W Perdue, 'The Reliance Interest in Contract Damages' (1936) 46 Yale Law Journal 52.
[14] (1983) 2 AC 803.
[15] MC Dorf 'Predictions and the Rule of Law', (1994-1995) 42 UCLA Law Review, 651, 680-81; F Schauer, 'Formalism', (1988) 97 Yale Law Journal 509, 510; Tamanaha (n 4) 227-231.

opposed to personal whims or extra-legal considerations.[16] In a wider context, the 'rule of law' means an orderly normative framework that is enforced by the state. Such enforcement is built around the judge as its central pillar; the judge should however be independent, reaching decisions without influences external to the law, be they political, social or personal preferences and intuitions. Judicial decisions should however also be reasoned and rationally justified, taking into account the general principles applicable and the demands of the peculiar circumstances at hand.[17] 'The rule of law' further connotes a society where the law regulates human conduct, as opposed to the 'rule of men or women', whether such persons are judges or otherwise. It is also is said to '...embody the absolute supremacy or predominance of regular law'.[18]

Therefore, in pursuit of rule of law values, judges desire the fulfilment of the legal enterprise, in which courts act as adjudicators of disputes within the boundaries of a legal order,[19] and rules are vital as the essence of law and order.[20] Poor, emerging and developing countries need the rule of law and its attributes of legal and institutional certainty/predictability, as a necessary precondition in the process of becoming market economies.[21] Carothers argues that because the rule of law is the universally accepted ideal, no leader can publicly challenge the rule of law as being bad.[22] Therefore in all countries, Uganda not being an exception, the rule of

---

[16] ibid.
[17] TA Aguda, "The Judge in Developing Countries"," BJ Odoki (ed), *An Introduction to Judicial Conduct and Practice,* (Law Development Centre Printing Press 1984) 138, 138-9.
[18] LC Wolff, 'Law and Flexibility – Rule of Law Limits of Rhetorical Silver Bullet' (2011) 11 The Journal of Jurisprudence553.
[19] P Weiler, 'Legal Values and Judicial Decision Making', (1970) 48:1 Canadian Bar review, 1, 9.
[20] ibid 10.
[21] T Carothers, 'Rule of Law Temptations', in Ginsburg T and others (eds), *Global Perspectives on The Rule of Law* (Routledge 2010).
[22] ibid 20.

law with its pillar of legal certainty should form part of the legal system's key goals. Carothers also argues that there is no common understanding of 'the rule of law', even amongst different political parties in the same country.[23] Therefore, owing to the way the rule of law emerged in the West, it cannot be readily transplanted to developing countries.[24]

The role of courts, and the institutional competences of organs in the legal system, also vary from country to country depending on the needs, interests and powers of regime actors.[25] As such, there is no consensus on a definite list of higher or lower values that comprise rule of law values, but they include: the conception of justice as legal justice;[26] legal certainty and predictability;[27] judicial objectivity;[28] rationality;[29] judicial accountability;[30] and equality.[31] The following brief elaboration of each value demonstrates their roles in motivating formalism.

---

[23] ibid.
[24] BR Weingast, 'Why Developing Countries Prove so Resistant to the Rule of Law', in Ginsburg T and others (eds), *Global Perspectives on the Rule of Law*, (Routledge, 2010).
[25] T Ginsburg, 'The Politics of Courts in Democratization', in Ginsburg T and others (eds), *Global Perspectives on the Rule of Law* (Routledge, 2010).
[26] TC Grey, *Formalism and Pragmatism in American Law*, (Koninklijke Brill, NV, 2014) 53; Weiler (n 19)10.
[27] A Scalia 'The Rule of Law as a Law of Rules', (1989) 56 University of Chicago Law Review 1175, 1179; Dorf (n 15) 683; Weiler (n 19) 10, 12-13.
[28] Atiyah *The Rise and Fall of Freedom of Contract* (Clarendon Press 2008) 390; Weiler (n 19) 11; D. Kennedy, 'Legal Formality', (1973) 2 Journal of Legal Studies 351, 364; Tamanaha (n 4) 234, 241-43.
[29] IR Macneil, 'Values in Contract: Internal and External', (1983-84) 78 New York University Law Review, 340, 393; Scalia (n 27); Grey (n 26) 54; Atiyah, (n 28) 399-400, 402-403; Minda (n 11)13-14.
[30] Professor, Justice of the Uganda Supreme Court, T. Ekirikubinza, in Attorney General v Gladys Nakibuule Kisekka, Supreme Court Constitutional Appeal No. 2 of 2016, (Judgement delivered on 11/07/2018); and Judicial Accountability is one of the core values and part of the mission of the Uganda judiciary, listed on the Uganda Judiciary Official Website, https://judiciary.go.ug/data/smenu/86//, Accessed on the 14Th of March 14, 2018.

6.2.1.1 *Justice as legality*

The key value the law aims to realise is justice,[32] the rule of law being the minimum moral content said to be acceptable by the whole of mankind as the main basis of justice;[33] and justice as the end of the rule of law.[34] However, different conceptions of justice will be at play in judging formalistically or flexibly. Judging in accordance with rules rests on judges conceiving justice as legality,[35]which motivates formalism as opposed to substantive justice. Adjudication according to rules involves applying the law with a value-free mind-set, and without regard to legal or contractual purposes, or other extra-legal values,[36] that would otherwise form the basis for flexibility. Disputes will be considered through the lens of pure procedural justice, legality and formality, no matter the merits of the case. There is no human face to justice (the basis for flexibility conceptions of justice like the African Ubuntu[37]) as seen against the backdrop of commercial law having been dehumanised to protect interests in businesses transacted at long distances, between strangers,[38] and through notions like artificial persons, being able to do business and have locus in courts. For instance in the colonial case of *Katate v*

---

[31] T Ekirikubinza, JSC, in Attorney General v Gladys Nakibuule Kisekka (n 33); LM Gribnau 'Legitimacy of the Judiciary', E. Hondius and C. Joustra (eds.), *Netherlands Reports to the Sixteenth International Congress of Comparative Law,* (Intersentia, 2002) 25, 34.
[32] LM Gribnau 'Legitimacy of the Judiciary' E Hondius and C Joustra (eds.), *Netherlands Reports to the Sixteenth International Congress of Comparative Law* (Intersentia, 2002) 34.
[33] Aguda (n 17).
[34] Justice JO Orojo , "The Role of the Judiciary in the New Commonwealth Countries" BJ Odoki (ed), *An Introduction to Judicial Conduct and Practice,* (Law Development Centre Printing Press 1984) 142, 144.
[35] Weiler (n 19) 1, 10.
[36] Tamanaha (n 4) 229-30.
[37] Gade CBN, 'The Historical Development of the Written Discourse on Ubuntu' (2011) South African Journal of Philosophy, 303, 303-329; TW, 'Ubuntu: An African Unity' (2011) 14(4) Potchefstroom Electronic Law Journal, 4.
[38] Tamanaha (n 4) 30.

Nyakatukura,[39] business associations like companies wholly owned by Africans were held not African.[40]

In commercial adjudication, at the heart of the decision by a judge whether to interfere with contractual terms, and their attendant interpretation or enforcement, is their conception of justice.[41] Under the formalistic approach to justice as legality, all issues before court are deemed legal issues.[42] Specifically, court is preoccupied with inquiring into whether or not there was conformity with due process of contract formation and performance, litigation and adjudication, as defined by the rules of law.[43] According to Bagchi[44] and Rawls,[45] this formalistic view is informed by the pure theory of contractual justice. Under this pure theory, process and procedure justify the enforcement or otherwise of contracts, and shape rules without regard to contractual outcomes or purposes; thus the perception of justice in contract as procedural, and therefore 'legal justice'. This being the case, judges are motivated by the desire to fulfil the public expectation of legality embodied in principles like predictability; that disputes between contracting parties would be resolved on an equal footing using existing, value-free and determinate rules.[46] This line of reasoning prompts a review of the influence of predictability, and its attendant legal certainty, in motivating formalism.

---

[39] (1952-56) ULR 47.
[40] RW Cannon, 'Law, Bench and Bar in the Protectorate of Uganda' (International and Comparative Law Quarterly, (1961) Vol. 10) 884.
[41] Bagchi (n 9) 47, 51.
[42] Atiyah (n 28) 391
[43] Dorf (n 15) 682; Macneil (n 32) 378; Bagchi (n 11) 50.
[44] ibid 48-49.
[45] Rawls J, *A Theory of Justice* (Harvard University Press, 1971),) 85-86.
[46] Weiler (n 19) 10.

6.2.1.2 *Predictability and Legal Certainty*

Legal certainty has been proposed as the prime value of common-law legal systems like Uganda's,[47] and adherence to this value has become synonymous with, and motivated the formalistic rule of law, with flexibility viewed as not rule-of-law-compatible.[48] It is an integral component,[49] a fundamental pillar[50] and the central principle of the rule of law.[51] Related is predictability, a sub-value and integral component of legal certainty. Goode[52] tries to draw a distinction between legal certainty and predictability, claiming that predictability is vital for the market economy, but commercial life is inherently uncertain and adherence to the former is not dependant on the latter. Therefore, judges employ a number of tools to adjust doctrine to suit changing circumstances, and thereby thrive on uncertainty.

Goode's argument however confuses relevance with the character of the values at issue. To the extent that his examples are factually correct, he simply proves that both the legal certainty from predictability, and the uncertainty from changes in the market, are motivators to judicial choice as they respectively contribute to the formalism and flexibility in the tension. In a market economy, the rational calculating commercial men require the predictability that comes with judging per clear rules,[53] and the result is legal certainty as opposed to judging by hunch.[54]

---

[47] BA Kritz, *Palestinian Sulha and the Rule of Law* (2013) 27 Arab Law Quarterly 154, 157, 170; WC Whitford, 'Faculty Perspectives: The Rule of Law', (2000) Special Issue, Wisconsin Law Review 723, 726; Tamanaha (n 4) 62.
[48] ibid.
[49] Resolutions of the G8 Foreign Ministers' Meeting of 2007 in Potsdam .
[50] Wolff (n 18) *549, 553*.
[51] ibid.
[52] R Goode, *Commercial Law in the New Millennium,* the Hamlyn Lectures (Sweet & Maxwell 1998) 23.
[53] Atiyah (n 28) 390; Weiler (n 19)12-13.
[54] Goode (n 52) 14; Grey (n 26) 56.

Formalist judges adhere to the rational materialist's need to know, and plan to evade or invoke the legal incentives and penalties in advance, as a way to secure the best return.[55] Likewise, clients want to know their rights and obligations, as well as their chances of success in disputes, to guide business decisions, which adjudication should respect.[56] Besides, in market economies the structure of contract is dominated by the predictability of standard contracts, which imposes a demand for predictable outcomes of disputes,[57] which formalism seeks to guarantee.

In terms of manifestations, Alexy[58] observes that this notion is the ground of positivity, since all that is called positive law stems from the requirement for legal certainty.[59] Therefore, exhibiting a positivist conception of law manifests legal certainty as a value. Atiyah also notes that it was the reason general abstract principles applicable to all contracts were developed and favoured for the market economy during the classical era.[60] The subject matter of contract was deemed immaterial to legal discourse; more important to judges was the formalistic conceptual ordering of law, derived from abstract general principles.[61] The other manifestation is the rejection of equity, as legal certainty that stands on fixed and

---

[55] JW Evans and AL Gabel, 'Legal Competitive Advantage and Legal Entrepreneurship: A Preliminary International Framework', (2014) 39 (2) North Carolina Journal of International Law, 2-3.
[56] A D'Amato, 'Legal Uncertainty', (1983) 71 California Law Review 1, 1.
[57] Goode (n 52) 14.
[58] R Alexy, "Legal Certainty and Correctness*" (www.fd.unl.pt);* and although not as direct, the same scholar in R Alexy, *The Argument from Injustice: A Reply to Legal Positivism*, Clarendon Press, Oxford (2002).
[59] ibid
[60] Atiyah (n 28) 399-400.
[61] ibid 400.

certain principles is considered more important than equity that depended on the subjectivity and will of judges.[62]

On the face of it, this location of legal certainty within legal theory seems to suggest that its adherence always motivates formalism. However, with regard to the possibility of coexistence, it is also plausible that adherence to the rule of law contributes to legal certainty and not the other way around, and that the space legal certainty occupies within the sphere of the rule of law is exaggerated. This argument is based on the view that legal certainty is a mere perception of how predictable the legal position looks, with respect to any given set of facts, such that – as Perry observes – legal systems that deviate from the ideal paradigm may provide efficiency and predictability in the eyes of some investors.[63] This contextual basis of perception implies that legal certainty can be attained even by working towards a coexistence of formalism and flexibility, in the sense that the resultant legal framework is what will be predictable, as the applicable adjudicatory regime.

Further, the scholars who elevate the position of legal certainty as discussed above seem to be under the influence of Radbruch's school of thought, that justice is a notion connoting correctness, at the source of a constant tension with legal certainty, the latter embodying no more than positive law.[64] They base their views on the issue on the foundation of a positivist understanding of the nature of law. Evans and Gabel,[65] for instance, maintain that there is a difference between laws and their supporting institutions (on the one hand) and the norms, customs, values

---

[62] ibid 399-400.
[63] A Perry, 'An Ideal Legal System for Attracting Foreign Direct Investment? Some Theory and Reality' American University International Law Review, [2000] Vol.15 1647
[64] Alexy (n 58).
[65] Evans and Gabel (n 55) 2-3.

and beliefs that define socially-acceptable behaviour, otherwise known as informal institutions, on the other.[66]

Such conclusions are not in consonance with both written law, or with judicial practice, in Uganda, where there is a fusion between law and what Evans and Gabel deem informal institutions. Constitutionally, judges are obliged to make decisions in civil disputes in conformity with, not only the law, but also the norms, values and aspirations of the people.[67] Further, custom is another source of law in Uganda; indeed it is called 'customary law', which is not written anywhere, but provable through evidence of norms dictated by cultural practices and beliefs.[68]

What constitutes legality and therefore the subject of legal certainty differs from jurisdiction to jurisdiction, contrary to Wolff's argument that legal flexibility is unconstitutional since the English constitution is based on the rule of law. In the same way, Evans and Gabel[69] wrongly claim that if any country wants to participate in the global economy, it must adhere to some rule of law. This limited focus of most scholars on Western legal systems explains the exaggerated value attached to the notion of the rule of law, and its attendant legal certainty value.

The studies are irrelevant to jurisdictions like Uganda, where the constitution is clearly not based on the notion of the rule of law, as it puts no duty on judges to adhere to it. Instead, under the Ugandan constitution,[70] the ultimate source of normativity is given as not only the law, but also the 'power of the people', whose aspirations even the judiciary must conform to; which implies that realistic certainty and predictability demand a co-existence between formalism and flexibility.

---

[66] ibid.
[67] Article 126 (1).
[68] Judicature Act, ss 14-15.
[69] Evans & Gabel 7.
[70] Article 126.

Unfortunately, official and scholarly attention has hardly been drawn towards finding how this coexistence can be managed, as is investigated in this study. Related to legal certainty is the value of judicial objectivity, also proposed as underlying formalism.

6.2.1.3 *Judicial Objectivity*

Another key rule of law value underlying formalism is judicial objectivity. So celebrated is it, that an objective judge was the ideal behind classic phrases used to capture the rule of law, such as *the rule of law not man*, and *law is reason, not passion*.[71] The objective judge is a loyal, unquestioning servant of the law, who can will nothing but in an impartial way discovers and pronounces it without extra-legal influences.[72] Therefore, judges will in a formalistic manner logically deduce contract law from the ordinary and plain meaning of statutes and precedents; reject non-legal considerations, treating them as subordinate to positive law; and derive contract law from fundamental, general and abstract principles.

Relatedly, literalism remains prevalent in commercial adjudication, due to the objective theory of contract formation and interpretation, which holds that the contractual parties' intentions are only ascertainable from their words and conduct, rather than subjective notions.[73] Literalism is part of formalism, and the objective theory of contract is part of judicial objectivity; not only because contract is a source of normativity in its own right, but also because the two are historically conjoined. Although Perillo casts doubt on the date of invention of the theory he

---

[71] BZ Tamanaha, *On the Rule of Law: History, Politics, Theory* (Cambridge University Press, 2012) 122-5; Tamanaha, *Law as Means to an End* (n 4) 234.
[72] Tamanaha, *Law as Means to an End* (n 4) 234.
[73] JM Perillo, 'The Origins of the Objective Theory of Contract Formation and Interpretation', (2000) 69 Fordham Law Review, 427.

advances, Gilmore traces the linkage between the predominance of the objective theory and Langdallian formalism, especially the notion of contract law as derivable from general principles.[74]

Further, like formalism, the objective theory grew during the classical period in response to the demands and conditions of the market economy; like the quest for predictability,[75] *laissez faires* economics[76] and commercial class interests protection.[77] The objective theory is also at the centre of the *parol* evidence rule,[78] which outlaws the use of extraneous evidence to prove, vary or alter the plain meaning of written terms or those that are required to be written by law; adherence to which is one of the manifestations of objectivity.[79]

However, extreme sceptics argue that judicial objectivity is an illusion and judges are always subjective, with legal values like predictability, certainty, stability and equality subject to the judicial hunch. Consciously or otherwise, judges' personal wills, preferences and prior non-legal objectives always colour the correct interpretation and ends of rules, the whole idea of rule of law thereby being a fraud.[80] On the other hand, there are indicators that objectivity can be served through a coexistence-judging paradigm as well. For instance Tamanaha[81] points out that a careful review of flexibility theory suggests that it also subscribes to judicial objectivity being a value of the rule of law. This is where decisions are

---

[74] CR *Gilmore G*. *The Death of Contract,* (The Ohio State University Press, 1974, 2ND Edn. 1995) 12.
[75] Perillo (n 73) 427, 428-9. Although he stays demanding for evidence of the phenomena, Perillo admits that the nexus was more than likely there.
[76] Gilmore (n 74) 7.
[77] Perillo (n 73) 427, 428-9.
[78] ibid 432; Macneil, 'Values in Contract: Internal and External' (n 29) 373.
[79] Sections 91-94 of the Uganda Evidence Act (Chapter 6 of The Laws of Uganda).
[80] Tamanaha, *Law as Means to an End* (n 4) 236.
[81] ibid, 236-41.

based on the law, rather than the hunch theory of judging, that allows untamed judicial subjectivity.[82] The actual problem being the unfounded scepticism amongst judges over whether objectivity is possible to practice.[83] Yet, judicial objectivity is part of the formalism-engendering judicial values yielded, not by mere perception, but also by practice required by the higher rule of law value, alongside others like rationality, judicial accountability and equality.

6.2.1.4 *Rationality*

Rationality is not used in the general sense discussed in chapter five, of being the phenomenon of decisions being directed into particular patterns or trends by clear and calculated goals or values, as well as universalism. This general sense is recognised only as an attribute of a possible coexistence regime, than a value underlying either judging approach. In this case, rationality is discussed as a value, being the desire by judges, like other humans, for logic, unity, order and consistency in all matters, including contract behaviour, principles and rules.[84] It is one of the values underlying formalism, as it promotes the classical nature of contract law. [85]

To maintain the predictability required by the free market economy, judges objectively stick to the rule of law by upholding the formalistic conceptual ordering of contract law.[86] Specifically, contractual validity and enforcement are a question of compliance with the coherence and consistency of doctrine, which is refined and

---

[82] ibid, 237.
[83] ibid, 236-7.
[84] Macneil, 'Values in Contract: Internal and External' (n 29) 393, 396-7.
[85] ibid 396.
[86] Atiyah (n 28) 402.

reduced to a set of systematically and logically ordered concepts and principles, from formation triggered by an offer, to the end of contract.[87]

Normativity in all types of contract disputes will therefore be derivable from a few abstract but fixed general principles and concepts, notwithstanding considerations of substantive justice or fairness.[88] Examples of such principles are listed by Atiyah, and explained earlier in this thesis.[89]

At the same time, the classification and categorisation of law will be strictly adhered to as a way of maintaining some order, which – however inconvenient – has formed the foundation for legal reasoning.[90] For instance, negligence or property law remedies are unavailable in contract disputes. Also, exceptional principles regulating specialised categories of contract, like sale of goods and insurance,[91]are inapplicable to other types of contract.

However, rationality is better secured by ultimate judging guidelines, constructed to balance formalism and flexibility, rather than by trying to stifle judicial innovation and its adjustment in cases where the result would be manifestly unfair or irrelevant to the commercial practices and philosophy of the day. Such judicial rationality is accompanied by the value of judges being accountable to the source of their power and authority.

---

[87] LM Friedman 'Contract Law and Contract Research' (Part 1) (1968) 20 Journal of Legal Education, 452, 452, 453.
[88] Atiyah (n 28) 402; Grey, *Formalism and Pragmatism in American Law* (n 26) 54.
[89] Atiyah (n 28) 403.
[90] D. Kennedy 'The Structure of Blackburn's Commentaries', (1979) 28 Buffalo Law Review 209, 215; Grey, *Formalism and Pragmatism in American Law* (n 26) 55.
[91] Atiyah (n 28) 632, arguing that insurance grew as a consumer rather than a commercial device like the rest of contract.

6.2.1.5 *Judicial Accountability*

Judicial accountability is gaining prominence as a hallmark of the rule of law,[92] and is listed as one of the core values of modern judging,[93] and specifically as part of Uganda's internal judging criteria.[94] Under the Latimer House principles,[95] judges are to be accountable to the constitution and the law, and the judiciary is restrained from law making, that responsibility being left to parliament.[96] The judiciary should only interpret and apply laws so made. However, room is left for flexibility, as purposive and constructive judging is permitted, as long as such does not amount to making or filling gaps in law.[97] This implies that judicial accountability is perceived in the coexistence sense, but the law being the default normality recognition criterion.

In the same way, under Uganda's judicial values and mission statement,[98] judicial accountability means the judiciary taking full responsibility for its actions and being always answerable to the people of Uganda and its partners. This connotes a requirement for judicial accountability by balancing formalism and flexibility. The reference to Uganda's partners connotes judging by flexibly paying regard to the special interests and demands of investors and other development partners. On the other hand, reference to the people of Uganda implies judging formalistically in accordance with the expressions of people's interests and values, which are

---

[92] T. Ekirikubinza, JSC, in Attorney General v Gladys Nakibuule Kisekka (n 31) 11-12.
[93] Principles II and VII of the Commonwealth (Latimer House) Principles on the Three Branches of Government, (2003), and Principle VI (I) of the Annexed principles of 19/6/1998.
[94] The Uganda Judiciary, https://judiciary.go.ug/data/smenu/86//About the Judiciary.html. Accessed on the 15th March 15, 2019; The Chief Justice of Uganda B. Katureebe's speech to the 18TH18th Annual Judges Conference, on 20/01/2016, in Kampala Uganda.
[95] Principle VII (b), Latimer House Principles (n 93).
[96] Principle II (a).
[97] Principle V of The 1998 Principles (Annex to the 2003 Principles).
[98] The Uganda Judiciary (n 94).

represented by the constitution, and laws enacted by people's elected representatives.[99] This tallies with the command of the constitution that judicial power is derived from the people and shall be exercised in their name, and in conformity with the law, people's norms, values and aspirations.[100] The coexistence approach to accountability in Uganda has recently been confirmed by the Supreme Court of Uganda in *Attorney General v Gladys Nakibuule Kisekka*,[101] where Justice Ekirikubinza declared that accountability is breached where a judge's decision deviates too much from the generally recognised standard, as expressed through the law. Therefore, judicial accountability in Uganda is satisfied if the judge's decision conforms to the law, but only to a reasonable degree. The person of the judge is therefore central in Uganda's adjudication, which implies that besides rule of law values, judicial choice will also depend on values arising from their perceived roles in contract disputes.

6.2.2 Values of Judicial Perception

Although generally studied under virtues jurisprudence, which is not the main focus of this study, judicial perception values have been viewed as the most important in decision-making, which ultimately defines what motivates judges.[102] Judicial perception refers to the way a judge employs other key values and concepts, in understanding the particulars of a case, and what should motivate him or her.[103]

---

[99] Article 1(4) of the Uganda Constitution, 1995.
[100] National Objective XXVI and Article 126 (1).
[101] [2018] UGSC 30 (Judgment of 11/07/2018).
[102] VE Flango, LM Wenner, & MW Wenner, 'The Concept of Judicial Role: A Methodological Note, (1975) 9:2 American Journal of Political Science, 277, 277, 281; I. Van Domselaar, 'The Perspective Judge', (2018) 9:1 Jurisprudence: An Internal Journal of Legal and Political Thought, 71, 78, 84; I. Van Domselaar, 'Moral Quality in Adjudication: On Judicial Virtues and Civic Friendship', (2015) 44 Netherlands Journal of Legal Philosophy, 1, 26.
[103] I Van Domselaar, 'Perspective Judge' (2018) 9:1 Jurisprudence: An Internal Journal of Legal and Political Thought 78, 84.

This includes the facts, competing values and what norms have legal validity, or are otherwise relevant and applicable in resolving the dispute.[104] Judicial perception pervades all other judicial virtues,[105] and is acquired through training, practice and the experience of the judge.[106] Therefore, it is a professional skill,[107] a set of virtues-stable dispositions or sensitivities of judges, as well as a reference to a judge's ultimate professional values.[108]

The internal judicial criteria underlying formalism include certain values of judicial perceptions. These are the perception of contract law as certain and conceptually ordered logic, which has been discussed earlier;[109] the perception of a judge's role as mechanical application of law; and judicial non-interventionism – the perception of a judge as a neutral enforcer of contractual terms, as if the Police of Contract.

6.2.2.1 *The Mechanic Judge*

As elaborated earlier,[110] formalism is partly motivated by particular judges perceiving their roles in the legal system as that of skilled mechanics. Such judges, with neutrality and impartiality, apply law as logically discoverable from statutes and precedents.[111] They have no business with law making, experience, policy considerations or finding fairness in individual cases. However, in a coexistence way, such deductive judicial reasoning works alongside flexibility's intuitive

---

[104] ibid.
[105] I Van Domselaar, 'Moral Quality in Adjudication: On Judicial Virtues and Civic Friendship' (2015) 44 Netherlands Journal of Legal Philosophy 26.
[106] Van Domselaar, 'The perspective Judge' (n 124) 78, 84.
[107] ibid 78.
[108] Van Domselaar, Moral Quality in Adjudication (n 126) 25-26.
[109] See text to section 3.2.1, 3.2.2.
[110] See text to section 3.2.3.
[111] Flango, Wenner & Wenner (n 123) 281.

reasoning, under what is termed *realist formalism*.[112] This is where judicial intuition is acceptable as the first tool available to judges, but is overridden by judicial deliberations that involve the deduction of rules.[113] Therefore, the mechanical mind of the judge acts as the fence defining how far his or her creativity and hunch should extend.

6.2.2.2 *Judicial Non-Interventionism*

The value of a judge having the role of a mere enforcer of bargain, as if a police officer enforcing traffic rules, arises from the value of freedom and autonomy of contract, which require contracting parties to reserve the complete choice as to whether, when and to what they bind themselves. As such there is no need for judges to invoke other values and justify a substitution of the parties' bargain with what they deem fair or just in the circumstances.

Lord Denning[114] explained the role of courts in this case as upholding the parties' freedom by finding the intention of the parties, not from their evidence or outside aids, but from the expressions conveyed by the words set out in writing or spoken. The courts should find and give effect to the grammatical meanings of the words and refuse to fill the gaps by implying terms or otherwise.[115] Therefore the sub-value of freedom of contract gives birth to such judicial perception, that some scholars have viewed as part of the higher value of non-interventionism;[116]the

---

[112] D. Simon, 'A Third View of the Black Box: Cognitive Coherence in Legal Decision Making', (2004) 71 University of Chicago Law Review, 511; C. Guthrie, A. J. Wistrich & J.J. Rachlinski, 'Judicial Intuition', (2019) www.researchgate.net/publication/265435851_judicial_intuition, Accessed on the 18/03/2019.
[113] ibid 3, 5-10, 35, 37.
[114] Denning LJ, *The Discipline of Law* (Butterworth 1979).
[115] ibid.
[116] Friedman (n 87) 12-18; Macneil, 'Values in Contract: Internal and External' (n 29) 369-370

other strand being statutory non-interventionism, which is discussed in the next section.

Judicial non-interventionism is manifested by judges paying due regard to freedom of contract's sister contractual sub-value – sanctity of contract.[117] Where sanctity of contract holds, in the absence of extraordinary illegality, lack of capacity, fraud, misrepresentation, or mistake, otherwise known as vitiating factors, the courts are perceived as bound to give effect to whatever the parties agreed to. Further, the courts, without regard to considerations of fairness, reasonableness or other value or policy standards, enforce contractual terms. According to Goode, the court is philosophically not concerned with substantive fairness or justice, since in pursuance of freedom of contract and competition, English contract law knows no general duty to be fair, or other elements of morality.[118]

However, the fact that there is a long list of exceptions to courts' adherence to sanctity of contract is in itself evidence of the amenability of judicial non-interventionism to flexibility considerations, thus coexistence theory. This is because the vitiating factors that legally justify intervention are essentially sub-values of the wider flexibility values of fairness, equity and justice. In a structural sense, it is such values that make the divide between the internal and external criteria of judging difficult, although necessary for a logical analysis. On the borderline is also judicial responsiveness, which the following sub-section elaborates.

---

[117] JN Adams and R. Brownsword, *Understanding Contract Law* (Thomson Sweet & Maxwell, 2007) 194-197; JN Adams and R Brownsword, 'Ideologies of Contract', (1987) 7:2 Legal Studies, 205, 208.
[118] Goode (n 52) 12-13.

6.2.3 Judicial Responsiveness

Responsiveness is an internal judging value; a norm recognised in legal theory but understood in two varying ways, which on its own points to the value's influence in the tension. According to Sourdin & Zariski, judicial responsiveness is the acknowledgement by judges that the law is not neutral and autonomous, but a practice embedded in society, that is answerable to the desire for justice by members of that society.[119] It therefore embodies sub-values like openness and public accountability, and sensitivity to the effects of adjudication both to the litigants and society. These point to flexibility-oriented internal judging values.

On the other hand Fuller,[120] Eisenberg[121] and Oldfather[122] advance an understanding of responsiveness that points to a formalistic, or at best coexistence perspective, also as further proof of support for the middle, non-extremist view this study pursues. In their view, responsiveness is the extent to which a court decision responds to the proofs; arguments and materials presented by the parties to the dispute; otherwise, the parties' participation. The preferred norm is that courts should adhere to strong responsiveness, or else adjudication is without integrity and a sham.[123]

---

[119] Sourdin T, & Zariski A, *The Responsive Judge*, (Springer, 2018) ix-x, 1-38.
[120] Fuller LL, 'The Forms and Limits of adjudication', 92 Harvard Law Review (1978), 353-4, 364 & 387-8, where he added that adjudication ought to be in line with the parties' participation through reasoned arguments, otherwise a sham, and window to allow corruption, prejudice and the like to take over.
[121] Eisenberg, 'The Theory of Contract' (n 1) 9; and Eisenberg MA, 'Participation, Responsiveness, and the Consultative Process: An Essay for Lon Fuller', 92 Harvard Law Review (1978) 410, 411-2.
[122] CM Oldfather, JP Bockhorst & BP Dimmer, 'Triangulating Judicial Responsiveness: Automated Content Analysis, Judicial Opinions, and the Methodology of Legal Scholarship (2012) 64(2) Florida Law Review 1194; Oldfather CM, 'Defining Judicial Inactivism: Models of Adjudication and the Duty to Decide', 94 The Georgetown Law Journal (2005), 121, 168, 174.
[123] Fuller 'The Forms and Limits of Adjudication' (n 120).

This study takes the view that the two meanings of judicial responsiveness speak to the formalism-flexibility divide the tension represents. The Sourdin& Zariski[124] sense is what flexibility proponents would view as the norm a judge should be motivated by, while intriguingly the Fuller,[125] Eisenberg[126] and Oldfather[127] sense speaks to what formalists would expect of judges. It is intriguing because of Fuller's known support for judicial flexibility; but again, it goes further to make a case for the real possibility of coexistence. What this study proposes in chapter ten is that responsiveness is one of those norms to which both sides of the divide clearly agree, but one that needs an objective meaning that balances both formalism and flexibility values and interests.

For now, the perceptions of responsiveness on each side inform the search for sub-values that have made it integral to Uganda's judging culture. Accordingly, my view is that in the formalistic sense, responsiveness is the value referred to as *acceptability* by Weiler[128] and Grey[129] – the extent to which the judicial opinion conforms to the existing legal order. Weiler calls it acceptability, because to him the level of such conformity determines the decision's acceptability by society,[130]a proposition whose validation calls for further research. For this reason, in this

---

[124] Sourdin & Zariski (n 119) ix-x, 1-38.
[125] Fuller 'The Forms and Limits of Adjudication' (n 120) 353-4, 364 & 387-8, where he added that adjudication ought to be in line with the parties' participation through reasoned arguments, otherwise a sham, and window to allow corruption, prejudice and the like to take over.
[126] MA Eisenberg, *The Nature of the Common Law,* (Harvard University Press, 1988) 9; and MA Eisenberg, 'Participation, Responsiveness, and the Consultative Process: An Essay for Lon Fuller', 92 Harvard Law Review (1978), 410, 411-2.
[127] Oldfather, Bockhorst & Dimmer (n 122) 1194; Oldfather CM, 'Defining Judicial Inactivism: Models of Adjudication and the Duty to Decide', 94 The Georgetown Law Journal (2005), 121, 168, 174.
[128] Weiler (n 19)10.
[129] Grey (n 26) 55-56.
[130] ibid.

study, understanding of responsiveness or acceptability is limited to the extent to which the judicial opinion responds to existing legal imperatives that define the legal order.

Strong responsiveness therefore means judging in a purely formalistic way; weak responsiveness means mixed-approach judging, that makes an effort towards coexistence; while non-responsiveness means flexible judging. Non-responsiveness in the formalistic sense therefore carries the same meaning as strong responsiveness in the flexibility sense – the Sourdin & Zariski meaning.[131] This understanding covers the two veiled formalistic-flexible scholarly views of responsiveness advanced above, and has helped in revealing the extent to which the value has played a role in the tension. The next section provides more light on the extra-legal values judges respond to, and other values, external to the institution and person of the judge, underlying formalism.

6.3 The External Criteria

The reference to externalism in judging criteria has been understood in two ways. Firstly is the view of scholars like Shapiro[132] and Macneil,[133] that values forming external judging criteria refer to any considerations besides the law, imposed by the external social matrix. This meaning is extended by Rosenfield[134] and

[131] Sourdin & Zariski (n 119) ix-x, 1-38.
[132] Shapiro M, 'Supreme Court and Constitutional Adjudication: Of Politics and Neutral Principles (1962) 31 George Washington Law Review, 587, 604.
[133] IR Macneil, 'Values in Contract: Internal and External' (n 29) 340, 390.
[134] M Rosenfield, 'Contract and Justice: The Relation between Classical Contract Law and Social Contract Theory', (1985) 70 Iowa Law Review, 769.

Dorfman,[135] to imply the consideration of fairness as being anything besides the dictates of positive law and contractual terms.

Secondly, the meaning, which this study adapts, is the one given by Domselaar[136] and Lind,[137] that external criteria are considerations, used by judges to reach decisions, which are external to the person and practice of the judge. These include rules of law, precedents, doctrine, and the moral or other contextual background to the principles of law.[138] Lind[139] extends this meaning to include the views of all scholars, such as Dworkin, Rawls and Locke, who expounded the theory that judges should be judged against their conformity to considerations outside judicial practice.[140]

Such externalists are result-oriented, seeking conformity with matters like morality, political theory, activism, neutrality and integrity, which are external to adjudication.[141] In this sense, adjudication is a matter of practice, which is the internal criterion, defined by conformity to conditions of adjudicative excellence, such as impartiality, reasoned explanations, articulative boundaries, cohesion and workability.[142] This second view speaks more to what one would see during legal practice[143] than the law/contractual terms yardstick. However, Lind's proposition is

---

[135] R Dorfman, 'The Regulation of Fairness and Duty of Good Faith in English Contract Law: A Relational Contract Theory Assessment', (2015) The New Jurist, newjurist.com/fairness-in-english-contract-law.html/, accessesaccessed on 03/09/September 3, 2018.
[136] Domselaar, 'Moral Quality in Adjudication: On Judicial Virtues and Civic Friendship' (n 105) 24.
[137] D Lind, 'Constitutional Adjudication as a Craft-Bound Excellence', (1994) 6:2 (3) Yale Journal of Law & Humanities, 353, 377-78.
[138] Domselaar, 'Moral Quality in Adjudication' (n 105).
[139] Lind (n 137)
[140] Lind (n 137)
[141] ibid 378.
[142] ibid.
[143] From the author's approximately 25 years of commercial litigation experience.

far from accurate, for he takes a narrow view of what adjudication and its internal criteria are, [144]and is therefore adopted with the following exceptions.

Firstly, adjudication is not mere practice, but rather includes practice as part of its internal criteria, the other aspects being the traditions and individual preferences or prejudices of judges; thus the reference in this study to internal criteria as judging culture. Secondly, not all the values Lind mentioned, as internally forming justification for the decisions,[145]are supported by the content analysis of judicial opinions in this study. Only coherence and workability were observed, and discussed in chapters seven and eight under responsiveness. On the other hand, a number of other values have been found to be part of the internal judging criteria, rendering part of his list of internal values merely theoretical and at best cosmetic in the Ugandan context.

Therefore, external judging criteria are made up of values that influence judicial approach, not as a result of a judge's preferences or prejudices, or the judicial institutional constructs and culture. Rather,they are the judicial motivating values that have been found to emanate from the legal and extra-legal environment, including the philosophies and general context in which both the judicial institution and individual judges have grown and operated. The legal values include both doctrinal and systematic values, both of which are discussed in the next sub-section.

---

[144] (See text to n 1107 & 1108)
[145] Lind (n 137) 378.

6.4 Legal Values

Formalism has been motivated by community values of a legal nature, which compete with flexibility values to produce the tension. In this sense, the tension is a problem generated by the legal system, whose solution lies in looking inwards, rather than searching for what causes it in external forces like changing economic circumstances. This section reviews the literature on both the doctrinal and systematic values of the legal system behind the formalism in the tension.

6.4.1 Values of Contract Doctrine

Formalism has been partly motivated by value categories within the anatomy of contract doctrine, which constrain judges to adhere to formalistically oriented rules, principles and concepts. Such value categories include market individualism, which refers to the closely related higher values of market conformism and individualism,[146] reciprocity,[147] propriety of means[148] and promise,[149] each of which deserves more elaboration.

6.4.2 Free Market Conformism

The growth of formalism was closely related to that of the market economy and the attendant ideas of political economists during the 1770 to 1870 period of English legal history.[150] The free market economy precipitated a change, from specialised rules governing particular contracts, to the formalistic fundamental, general, and

---

[146]Adams and Brownsword, *Understanding Contract Law* (n 117) 192,194; Adams and Brownsword, 'Ideologies of Contract' (n 117) 206.
[147] Macneil, 'Values in Contract: Internal and External' (n 29) 374-375
[148] ibid, 378-379
[149] C Fried *Contract as Promise: A Theory of Contractual Obligations* (Oxford University Press, 2015) 1-8; Atiyah (n 28) 652-3.
[150] Atiyah (n 28) 389, 398.

abstract principles applicable to all types, as well as the parties' will manifested by promise, becoming the source of obligations and rights.[151] It is these developments that led to classical contract law being viewed as the law of the marketplace;[152] one that stands to facilitate and ensure such fair play as would maintain conformity to the free market economy, by upholding the institutions of contract bargaining and competition.[153] Contract law is in that sense an expression of political philosophy, formalistic judging being a reflection of support for freedom, in its tension with flexibility-engendering social control, such as through the notions of justice and equity.[154]

Accordingly, contract doctrine that is modelled on classical contract law, as is the case with Uganda's, having received it as part of the classical English law transplant,[155] contains rules, principles and concepts that constrain judges to such formalistic market conformism. Typically, the law will command facilitation of exchange and competition as cornerstones of a free market. Therefore non-disclosure and misrepresentation are seen as part of the competitive culture of value-free bargaining, and all freely entered bargains must be strictly enforced.[156] During adjudication, judges formalistically ensure conformity to such a free market economy by giving normative recognition to values through which its demands are

---

[151] ibid 398-400
[152] ibid 402-404; Macneil, 'Values in Contract: Internal and External' (n 29) 367-8.
[153] Friedman (n 87) 454-5; Atiyah (n 28) 404; Macneil, 'Values in Contract: Internal and External' (n 29); Goode (n 52) xv, 12.
[154] Adrian Chandler, James Devenney, and Jill Poole 'Common Mistake: Theoretical Justification and Remedial Inflexibility' (2004) 1, Journal of Business Law, 34; Friedman (n 87) 454; M Kenny and J Devenney 'A Comparative Analysis of Bank Charges in Europe: OFT v. Abbey National Plc through the looking glass', in J Devenney and M Kenney (eds), *Consumer Credit, Debt, and Investment in Europe* (Cambridge University Press, 2012) 212, 217, 219..
[155] Under Article 20 of the 1902, Uganda Order in Council.
[156] Adams and Brownsword, *Understanding Contract Law* (n 117) 193; Adams and Brownsword, 'Ideologies of Contract' (n 117) 207.

expressed and manifested in contract doctrine, such as predictability and certainty, as well as positive law's superiority over practice and experience, transaction security and reciprocity.

Speaking to another higher value of free market conformism, a number of such other values identified by scholars have been elaborated earlier,[157]which deserves no repeat here. They form part of the internal judging criteria as well, that arise from the judicial desire to maintain the rule of law as a higher value. In that sense, contract doctrine is part of law and therefore an offshoot of the rule of law values, which need no further elaboration.

6.4.2.1 *Predictability and Certainty*

Legal predictability and certainty being a value underlying formalism serves to maintain the market free of shocks from legal forces beyond the control of parties to transactions.[158] Similarly, both formalists and flexibilists agree that in a free market economy, the parties require not only legal but also contractual certainty.[159] This is what Macneil calls *planning est servanda* – implementation of planning.[160] Therefore, in formalistic adjudication, predictability and certainty manifest in four ways.

Firstly – using contractual certainty as a judging criterion, where uncertain contracts are declared unenforceable. Secondly – treating contract law as

---

[157] See text to sections 3.3.1.1 to 3.3.1.4.
[158] R Jukier, 'Flexibility and Certainty as Competing Contract Values: A Civil Lawyer's Reaction to the Ontario Law Reform Commission's Recommendations on Amendment to the Law of Contract', (1988) 14 Canadian Business Law Journal 13, 14, 22, 26; Adams and Brownsword, *Understanding Contract Law* (n 117) 193-4; Adams and Brownsword, 'Ideologies of Contract' (n 117) 207; and Goode (n 52) 14.
[159] Goode (n 52) 14.
[160] Macneil, 'Values in Contract: Internal and External' (n 29) 356.

conceptually ordered, in the sense that it is derived from general, value-free and fixed abstract principles, which create the order and predictability needed by the market.[161] Thirdly – justice being viewed as legality and procedural fairness.[162] Judges are only concerned with adherence to predictable procedural rules, as opposed to the uncertain substantive fairness.

Finally, – maintaining the market's demand for calculability and accuracy, not only in commercial transactions but also in law and adjudication. This is done by employing money as a medium of ensuring accuracy in contract terms,[163]and awarding remedies. Additionally, predictability needs the support of legal sources, making the hierarchical ranking of norms, and not necessarily values, essential to market conformism and formalism.

6.4.2.2 *Superiority of Positive Law*

Positive law's superiority is the judicial recognition of the superiority, of rules from statutes and precedents, superior to practice and experience. This implies that law should accommodate practice or experience and not the reverse flexibility philosophy.[164] It is manifested by judges allowing implied terms only if effective notice of them was given; and invoking market convenience only when already built in, and flowing from the logic of rules, such as on the subject of when an offer is effective.[165] Further, it manifests by the judicial rejection of practice or other

---

[161] Atiyah (n 28) 398-404.
[162] Atiyah (n 28) 398-404; Goode (n 52) 9-10. .
[163] Section 2 (1) of both the Sale of Goods and Supply of Services Act, 2017 (and formerly section 2 (1) of the Sale of Goods Act, 1932) requires only money consideration for the sale of goods contract to be valid.
[164] Adams and Brownsword, *Understanding Contract Law* (n 117) 193-4; Adams and Brownsword, 'Ideologies of Contract' (n 117) 207.
[165] ibid.

extra-legal considerations that are inherently uncertain, to uphold the predictable rules of law.

Related to such rule of law, market conformism values also include transaction security;[166] reciprocity; and contractual rights and obligations as based on choice,[167] or sometimes called the autonomy of the will.[168] Choice and autonomy of will are discussed later under individualism, for it speaks to a higher, and although related to the market, independent value. Therefore, only security and reciprocity are elaborated further in the next sub-sections.

6.4.2.3 *Transaction Security*

Transaction security connotes a strand of *pacta sunt servanda*, for it holds that in a market, persons who are parties to bargains should be protected by the law.[169] Judicial adherence is manifested in a number of ways. Firstly, is the formalistic objective approach to contractual intention as the determinant of rights and obligations,[170] which implies apparent or legally defined intention, as opposed to evidentially based intention. Secondly, is the strict enforcement of contracts, while rejecting the subjective defences of mistake and third-party purchases,[171] and for that matter other legally permissible vitiating factors that are subject to extraneous proofs. Thirdly, is the ordering of specific performance or employing the

---

[166] ibid.
[167] Atiyah (n 28) 399, 403-4; Goode (n 52) 6, 12-13; Macneil, 'Values in Contract: Internal and External' (n 29) 357, 392, 395.
[168] Jukier (n 158) 27-8;
[169] Adams and Brownsword, *Understanding Contract Law* (n 117) 193-4; Adams and Brownsword, 'Ideologies of Contract' (n 117) 207
[170] ibid.
[171] ibid.

expectation measure of damages.[172] This is as opposed to indeterminate bases of remedies like reliance and restitution. Relatedly, in the measure of damages, actual loss will guide the judge and no value will be given to unliquidated or otherwise uncertain damages like pure economic loss or inconvenience.

However, in a coexistence-judging paradigm, such judicial adherence to transaction security can still be served and is needed, for its absence would kill the institution of contract. This explains why it is supported by flexibilists as well, with Atiyah noting that where there is no time for further inquiry, even utilitarianism will be willing to treat rules as rules of thumb.[173] Such utilitarianism accepts that prima-facie, observing a promise as made, is best in advancing utilitarian goals. Promise will have furthered transaction security arising from the reciprocity between contracting parties, which leads me to elaborating the latter's role in formalism.

6.4.2.4 *Reciprocity*

Underlying formalism is also the market conformism value of reciprocity, or what Barnett[174] calls the bargain theory of consideration, a value speaking to the selfishness of human nature, that is many times only willing to give up something in exchange for something else.[175] This mutuality of bargain characterises the essence of contracting in the market place, facilitated by contract doctrine that imposes the value on contracting parties, such as rules on employment benefits;[176]

---

[172] ibid.
[173] Atiyah (n 28) 652-4.
[174] RE Barnett, 'A Consent Theory of Contract', (1986) 86 Columbia Law Review 269, 287-289.
[175] A Hutchinson, 'Reciprocity in Contract Law', (2013) 24 Stellenbosch law Review, 3, 3-10; Macneil, 'Values in Contract: Internal and External' (n 29) 348-9, 374-5.
[176] Macneil, 'Values in Contract: Internal and External' (n 29) 374-5.

the remedy of specific performance;[177] and the requirement that without consideration, there is no valid or enforceable contractual promise.[178]

According to Chen-Wishart, contracts are in this sense made up of negotiated terms as opposed to standard ones, and exchanges are distinguished from exploitation or compulsory acquisition by the requirement for consideration as evidence of neutrality and fairness of bargain.[179] The formalistic courts will not be concerned with adequacy of consideration because of the values of freedom of contract and non-interventionism, which take contracting parties as the best judges of what they value most in particular contexts;[180] plus the lack of a common-law duty to be fair.[181]

However, Chen-Wishart's view that normative recognition of standard term contracts would be flexibility as opposed to formalism is at odds with the view of other scholars like Goode, who attribute the evolution of standard term contracts to the need to accommodate high volumes of business, which led to their judicial recognition in a bid to maintain legal predictability/certainty.[182] In this study, the latter view is preferred, in that judicial recognition and enforcement of standard terms is treated as part of formalism, for such is the reality in Uganda's commercial adjudication. For example in *Equinox Global Trading Co Ltd v. Panalpina Uganda*

[177] Hutchinson, Reciprocity in Contract, (n 175) 10-13.
[178] ibid 6;
[179] Chen-Wishart (n 10) 14.
[180] ibid 15.
[181] Goode (n 52) 12-13.
[182] ibid.

Ltd,[183] such pre-printed terms were formalistically recognised by the judge as binding on the contracting parties.

Because this is the reality, many contracts between parties with unequal financial strength, with the stronger party dictating unfair terms, will sometimes pass as market conformity, without a history of negotiations.[184] Such reality in modern contracting being given normative recognition by courts speaks to reciprocity as being independent from bargaining. Therefore, contrary to that view by Chen-Wishart, what matters is that something was given for something, not whether the parties actually engaged in real bargaining over contractual terms, for contracts are enforceable even without neutrality and genuine mutuality of bargaining.

Coexistence is nevertheless viable because even the interventionist court protecting the workers or poor from exploitation will not seek to replace consideration with charitable gifts, but rather to ensure that reciprocity did not only exist but was also fair, in the sense that it did not amount to worthlessness. The next section revisits individualism –the other doctrinal higher value underlying formalism – and the lower values that feed and manifest it.

6.4.3 Individualism to Non-Interventionism

The value of individualism is part of what leads to the formalistic judicial *non-interventionism*, for it refers to contracting parties in a free market having the freedom to choose who to contract with (partner-freedom), the subject matter, and

[183] HCT-00-CC-CS-0314 -2008.
[184] Chen-Wishart (n 10) 14.

contractual terms (term-freedom).[185] The right to freedom of contract is accompanied by a duty to stick to the bargains, both of which are guaranteed by formalism in adjudication. Therefore, individualism is upheld by courts by paying due regard to its traditionally acknowledged underpinning values of freedom and autonomy of contract, otherwise called *choice or will*, and *pacta sunt servanda* – sanctity of contract.[186] However, in addition, scholars have recently propounded the overarching and coexistence-engendering values of promise[187]and consentualism.[188] The two are meant to offer a basis for balancing individualism and values like efficiency that compete with it during adjudication.[189] The following sub-sections briefly elaborate each of these individualism values and how they help in explaining formalism.

6.4.3.1 *Freedom and Autonomy of Contract*

Freedom and autonomy of contract has two aspects, one being that contracting parties have the right of choice on who to contract with and on what terms. Term freedom holds that as much space as possible should be left for the parties' choice and free will to determine contractual terms, [190] as opposed to courts filling gaps in

---

[185] JN Adams and R Brownsword, *Understanding Contract Law* (n 117) 194-195; JN Adams and R Brownsword, 'Ideologies of Contract', (n 117) 208; RA Epstein, 'Unconscionability: A Reappraisal' (1975) 18 Journal of Law and Economics, 293, 297.
[186] JN Adams and R Brownsword, *Understanding Contract Law* (n 117) 194-195; JN Adams and R Brownsword, 'Ideologies of Contract', (n 117) 208.
[187] Fried (n 149) 1-8; A. Schwartz and R Scott 'Contract Theory and The Limits of Contract Law', (2003) John M Olin Center for Studies in Law, Economics and Public Policy Working Papers. Paper 273, 2; Schwartz and Scott (n **Error! Bookmark not defined.**); CJ Goetz and R.E.RE Scott, 'Enforcing Promises: An Examination of the Basis of Contract' (1980) 87:7 Yale Law Review, 1261, 1261-65.
[188] Barnett, A Consent Theory of Contract (n 174) 270-71, 291-321.
[189] Trebilcock (n 3) 248; Barnett, A Consent Theory of Contract (n 174) 2-10.
[190] JN Adams and R. Brownsword, *Understanding Contract Law* (n 117) 195-196; JN Adams Adams and R Brownsword, 'Ideologies of Contract', (n 117) 208-209.

contract terms. Further, courts should strictly treat the terms so agreed as binding on the parties,[191]thereby not allowing intervention for purposes of finding fairness, justice, efficiency or otherwise.

The second aspect is that courts should strictly treat contract as autonomous from will and impositions external to those defined by the parties' will. For instance, as was held in *Thunderbolt Technical Services Ltd v Apedu Joseph & K.K Security (U) Ltd*,[192] and *Tight Securities Ltd v Chartis Uganda Insurance Co. Ltd & Brazafric Enterprises Ltd,*[193] implied terms, whether by statute or common law, as well as social policy considerations like fairness, should have no place in contract. In this spirit, matters extraneous to expressed terms should never be admitted, to contradict, amend or explain them – the *parol* evidence rule.[194] This leads me to elaborating the role-played by the second individualistic such value, sanctity of contract.

6.4.3.2 *Pacta Sunt Servanda – Sanctity of Contract*

Underlying contract law, and indeed courts' formalistic insistence that contracting parties be held to their bargains, is the value of *pacta sunt servanda*, which means sanctity of contract. The value is so fundamental to contract because it is a golden

---

[191] Ibid; Chandler, Devenney, and Poole (n 154).
[192] HCCS No. 340 of 2009.
[193] HCCA No. 16 of 2014 (UG COMMC 135/2015). In both disputes, the contracts to provided for limitations of liability against the security companies in the event of theft. The guarding company's employees who were meant to guard the premises carried out the thefts. Both judges acknowledged that the thefts by the employees who were meant to guard were fundamental breaches of the security contracts, but invoked freedom of contract to award only the maximum special damages fixed by the contract terms.
[194] Perillo (n 73) 432; Macneil, 'Values in Contract: Internal and External' (n 29) 373 and Sections 91-94 of the Uganda Evidence Act (Chapter 6 of The Laws of Uganda).

thread that runs throughout contract from formation to end.[195] Further, like reciprocity, it is not only valued by commercial persons but, according to Macneil,[196] speaks to human nature's higher value called *contractual solidarity* –the belief in being able to depend on another person, which permits the acceptance of reciprocity over a long time.

During adjudication, its influence in formalism manifests by contracting parties being treated as the masters of their bargains,[197] such that the court will not interfere with the terms on any grounds, be it unconscionability, unreasonableness, worthlessness or other pleas of equity, fairness or justice. At the same time, the court will not release contracting parties from performance of bargains freely made,[198] such as allowing withdrawal by one feeling disadvantaged by contractual consequences.

Therefore, in the analysis of judicial opinions, judicial adherence to sanctity of contract will be manifested in three ways. First is by judges rejecting or limiting defences built on contract vitiating factors like mistake, frustration, economic duress, and uncertainty of contract.[199]Secondly, is the rejection of substantial justice pleas like inequality of bargaining powers, inadequacy of consideration, unreasonableness, economic waste, unmerchantableness and the like. Thirdly,

---

[195] JN Adams and R Brownsword, *Understanding Contract Law* (n 117) 197; JN Adams and R Brownsword, 'Ideologies of Contract', (n 117) 210.
[196] Macneil, 'Values in Contract: Internal and External' (n 29) 347-349.
[197] JN Adams and R. Brownsword, *Understanding Contract Law* (n 117) 196; JN Adams and R Brownsword, 'Ideologies of Contract', (n 117) 209
[198] ibid.
[199] ibid.

implied terms will be rejected, and only permitted in cases of necessity, for the contract to make sense.[200]

Market individualistic values like freedom and sanctity of contract are generally looked at as motivating formalism in adjudication, with realist judging invoking only as opportunistic formalism.[201] This is in contrast to flexibility judging and its engendering values that compete with formalistic ones to produce the tension in courts.[202] However, efforts have been made towards a coexistence understanding of contract doctrine, by viewing individualism as speaking to contract theories that articulate unifying values like promise and consent.

6.4.3.3 *Contract as Promise*

Coexistence voices have put promise at the centre of contract, at least as formalistically understood and enforced, Fried[203] terming it contract's moral basis, thus the phrase, contract-as-promise.[204] It refers to fidelity of contracting parties' words that flow from their will,[205] thereby choice being the dominant value underlying contract doctrine. Accordingly, traditionally, contract has been understood as the promises the law will enforce.[206] However, this theory has limitations, that are even acknowledged by its contemporary proponents, such as

---

[200] ibid.
[201] M Horwitz, *The Transformation of American Law, 1780-1860* (Harvard University Press, 1977) 1-2, 253-255; JN Adams and R Brownsword, *Understanding Contract Law* (n 117) 203-204; JN Adams and R.Brownsword, 'Ideologies of Contract', (n 117) 219-220.
[202] JN Adams and R Brownsword, *Understanding Contract Law* (n 140) 203-204; JN Adams and R Brownsword, 'Ideologies of Contract', (n 140) 219-220.
[203] Fried (n 149) 1.
[204] Macneil, 'Values in Contract: Internal and External' (n 29) 390.
[205] ibid 76.
[206] A Schwartz and R. Scott 'Contract Theory and The Limits of Contract Law' (n 2) 2.

Goetz and Scott,[207] and Fried,[208]thus: some promises are not legally enforceable; and at the same time modern contract law has discarded the classical restriction of enforcing only promise following bargains—extending contract premises to enforcing contracts backed by mere reliance and proof of benefits.

Nevertheless, during adjudication, serving the value of promise manifests by courts recognising a promissory obligation to make the defendant perform or pay money's worth of one's promise, or compensate the plaintiff for having relied on the promise.[209] In support of coexistence, Macneil attacks Fried for sacrificing flexibility values like restitution, reliance, good faith, conscionability, absence of duress, fairness, decency, and common sense as not being moral values, while promoting formalistic ones like discrete contracting, choice, consent and rationality; [210] – together speaking to order and consistency, which would imply promise being propounded as a purely formalistic value.

However, Macneil's attack is harsh, as Fried,[211] and Goetz & Scott,[212] in putting efficiency lower in the hierarchy than choice, in the event that the two clash, propose promise as a unifying value. They view promissory obligations as supporting exchange in a free market,[213] and as products of market demands such as wealth maximisation and efficiency, yet also underpinned by the autonomy of the individual, expressed by choice, and the value of sanctity of contract.[214]

---

[207] CJ Goetz and RE Scott, 'Enforcing Promises: An Examination of the Basis of Contract' (1980) 87:7 Yale Law Review 1261-1262, 1264-1265.
[208] Fried (n 149) 3-6.
[209] ibid 3-4.
[210] Macneil, 'Values in Contract: Internal and External' (n 29) 392
[211] Fried (n 149) 5.
[212] Goetz and Scott (n 207) 1264-1265; see also Trebilcock (n 3) 248.
[213] Goetz and Scott (n 207) 1264-1265.
[214] Fried (n 149) 5.

Relatedly, the view by Macneil, [215] that consent is a value that promise speaks to, but one that means real choice, 'not just consent', leads us to a brief elaboration of consentualism in contract.

6.4.3.4 *Contractual Consentualism*

Consentualism expresses consent as the moral basis of contractual obligations,[216] the prime value whose judicial recognition satisfies lower values represented by formalistic contract theories: will theory, which includes contract-as-promise;[217] and consideration-as-bargain theory.[218] It provides that contractual obligations come from the consent of the rights holders to the transfer of their entitlements. In a legal system of entitlements like the common law, the presence or otherwise of consent will guide judges in determining the validity of a transfer of one's rights to freely own, use, possess and transfer entitlements.[219] Therefore consentualism, like 'will', is one of the monist theories of contract, which expresses and emphasises the liberty of contracting parties.[220] It articulates consent as a single prime value, subordinate to which the other values, in a hierarchical manner, play a role in determining rights and obligations, and those others only having value if supporting its fulfilment.

The central difference between consent and will theories is that under the latter, contractual obligations only arise if there was, at the time of contracting, the will by the promisor to be bound, which implies proof of the substantive will of the parties

---

[215] Macneil, 'Values in Contract: Internal and External' (n 29) 392.
[216] Barnett, A Consent Theory of Contract (n 174) 299-300.
[217] RE Barnette, 'Contract is not Promise: Contract is Consent', (2012) 45 Suffolk University Law Review, 647, 649; Barnett, A Consent Theory of Contract (n 174) 300-301, 306, 311-312.
[218] Barnett, A Consent Theory of Contract (n 174) 313-314.
[219] ibid 299-304.
[220] L Trakman, 'Pluralism in Contract Law', (2010) 58 Buffalo Law Review, 1031, 1032-33, 1038.

– their state of mind.[221] Barnett[222] cites difficulties like the possibility of fraud, damage to the security of transactions and reliance, and uncertainty of obligations, as grounds for consentualism being an alternative to Fried's attempted cure of flipping back to reliance and thereby killing the essence of his contract-as-promise theory.[223] Instead of mere promise or reliance, courts should enforce contracts because the parties consented expressly, or were implied to have consented by fact or law. Consent as a judicial criterion only requires the presence of a manifestation to be legally bound,[224] thereby requiring demonstration of only a *prima facie*, rebuttable presumption of intention to be bound.

During adjudication, its influence will manifest by judicial recognition of consent from the words, conduct, as well as context of the contract. From a coexistence perspective, this encompasses both formal and informal consent,[225] and provides the elasticity autonomy theories require and accommodating the diverse contractual behaviours and contexts of modern times.[226] By relying on the meaning of the words used, and considering the parties' liberty, expressed through will and bargains as evidence of consent, consentualism provides objective justification for formalistic values like freedom of contract in commercial adjudication.[227] This is expected to liberate contract doctrine from dilution by indeterminate, subjective and therefore uncertain flexibility criteria like wealth maximisation[228] and substantive

---

[221] Barnett, A Consent Theory of Contract (n 174) 301.
[222] Barnette, Contract in not Promise (n 217) 651-654; Barnett, A Consent Theory of Contract (n 174) 272-373.
[223] Barnett, Contract is not Promise (n 217) 649; Barnett, A Consent Theory of Contract (n 174) 274; Trakman (n 220) 1044-45.
[224] Barnett, A Consent Theory of Contract (n 174) 304-305.
[225] ibid 305, 309-312.
[226] Schwartz and Scott 'Contract Theory and The Limits of Contract Law' (n 2) 2.
[227] Barnett, A Consent Theory of Contract (n 174) 306.
[228] ibid 280-283.

fairness,[229]but while trying to avoid the problems judges find from formalistic rigidity, by accommodating contextual consent.

Consentualism theory therefore aims at serving as a theoretical basis for coexistence. To confirm this, its proponents propose that basing contractual obligation on consent provides adjudication with an objective and coherent theory of contract,[230] while at the same time catering for the values underpinning flexibility, such as economic and allocative efficiency,[231] reliance,[232] and fairness – although rejecting proof of efficiency beyond its being implied in consent, as well as substantive fairness for procedural fairness.[233]These limited flexibility value inputs are given room to be judicially considered during the process of arriving at answers to whether or not the presumption to be bound existed.

However, viewed in coexistence terms, consentualism weighs more on the formalistic side, ending up acting as further support for classical contract theory,[234] rather than as a balancing theory of adjudication – rejecting anything that applies limitations to, while accepting all that tallies with, freedom of contract. As such, in a number of ways, consentualism fails to overcome the problems of traditional theories of contract,[235] leaving unresolved the question of how to balance the competing values in the tension.

---

[229] ibid 283-284.
[230] ibid 269, 300-307.
[231] ibid 283, 320.
[232] ibid 312, 275-276, 314-318.
[233] Barnett, A Consent Theory of Contract (n 174) 285, 320.
[234] Jukier (n 194) 27.
[235] L Kalevitch, 'Gaps in Contracts: A Critique of Consent Theory', (1993 54:2 Montana Law Review, 169, 188-195.

Firstly, reliance, which reflects the reality of some contracts being relational in nature, thereby calling for a flexible approach to understanding the basis of contractual obligations, is viewed as evidence of legalistic consent criteria,[236] without attending to the relational values. Secondly, substantive fairness is treated as irrelevant for its extreme indeterminacy, in favour of procedural fairness.[237] Accordingly, consentualism fails to account for justice as would be required by the contract's substance, and instead proposes a hypothetical and opportunistic imposition of intention.[238] This is at the expense of the parties' real choices and will; leading Kalevitch to argue that such legalistic consent threatens the consensual transfer of rights, and the true basis of contract, which is party autonomy. [239]

Thirdly, efficiency is viewed as not containing a normative theory – wealth maximisation not being a value of the legal order,[240] and not a determinant of contract validity, unless backed by consent.[241] The reality is however that economic efficiency motivates judges towards flexibility, the presence or absence of consent notwithstanding.[242]

Finally, consent theory fails to articulate how gaps in law and contractual terms should be dealt with, a limitation for which Barnett strongly criticises Fried's contract-as-promise.[243] The reality is that during adjudication judges will rely on

---

[236] Barnett, A Consent Theory of Contract (n 174) 313-317.
[237] ibid 320.
[238] Kalevitch (n 286) 179, 193.
[239] ibid 179.
[240] Barnett, A Consent Theory of Contract (n 174) 282-283.
[241] ibid 320.
[242] Such was the case in Construction Engineers and Builders Limited v Attorney General (SCCA 24/94, (2/9/95), Case No. 1 in Appendix 5.
[243] Barnett, Contract in not Promise (n 217) 652-653.

experience or contractual purposes,[244]rather than solely on the law and strict meaning of contractual terms, for in hard cases these latter two will not provide clear answers. However, consent theory is devoid of contract gap filling mechanisms. It rejects judicial resort to legal and extra-legal community values (reflected by experience, trade custom, practices, and usage), in favour of a singular consent-based interpretation of contractual terms.[245] These are express or implied terms; the consentualist interpretation being part of a doctrine that allows use of the ordinary meaning of words, conduct and context of a particular contract. The impacts of political, social or economic contexts on contractual obligations and justice are ignored.

Therefore, in the same way Barnett evaluates Fried's promise thesis, consentualism does not fully account for the values underlying flexibility and formalism in the tension as factors of reality in adjudication. This study's investigation of the values underlying the tension through the lens of adjudication as an institution enables looking beyond the possibility of a single value to explain contract doctrine. It allows one to also explore legal values of a non-doctrinal-systematic nature, as well as extra-legal ones that underlie formalism and thereby more exhaustively reveals formalism values that compete with flexibility ones in the tension.

6.4.4 Systematic Values

Systematic formalism is a term adopted from the mathematical scholar Savageau, who used it in reference to the formalism of an organisationally complex system

---

[244] ibid.
[245] Kalevitch, (n 235) 171-172, 179; Trakman (n 220) 1035-1038.

with nonlinear features, but still amenable to mathematical analysis.[246] Formalism critics have themselves taken it to imply that law is like a book of mathematics,[247] which makes it sensible to look at systematic formalism in a legal values context. Exploration of systematic formalism values is therefore part of the wider systematic or expository jurisprudence, which seeks to understand the foundations to formalism originating in the nature of existing and past legal systems.[248] In this study, it refers to the formalism-engendering values of Uganda's legal system.

The systematic legal values underlying formalism include the values of legality; legal or procedural—as opposed to substantive justice; conceptual formalism; restraint to authority (the power value); and equalitarianism. Amongst these values, legal justice doubles as an internal judicial cultural value that has been discussed earlier,[249] and therefore needs no further elaboration. The next sub-sections throw more light on the other systematic values. Before reviewing the literature on equalitarianism and the power value, more elaboration is made of the values of legality and conceptual formalism, both of which have also been discussed earlier, but which by nature transcend strict categorisation by being external systematic values as well.

---

[246] Savageau M.A, 'Introduction to S-Systems and Underlying Power-Law Formalism', (1988) 2, Mathl Comut. Modelling, 546.
[247] OW Holmes, *The Common Law* (Little Brown and Company 1963) 5
[248] USLEGAL.COM, hllps://definitions.uslegal.com/e/expository-jurisprudence/. (Accessed on the October 19/10/2018).
[249] See text to section 6.3.1.1.

6.4.4.1 *The Values of Legality*

Another set of values that underlie the formalism in the tension are the values of legality, which, although they differ in terminology on the values, both Fuller[250] and Grey referred to as 'goals of legality that are implicit in the legal system'.[251] They are values arising out of both the duty and the aspiration that human conduct is governed by rules of law.[252] Grey[253] treats values of legality as a direct offshoot of law's nature being perceived formalistically, that in turn motivates formalism, a view Schauer supports by declaring formalism synonymous with rulism.[254] Scholars have proposed a number of systematic legal values of such legality, all serving the higher value of perfection – rules being perfectly clear, consistent, certain to all, and never retroactive.[255]

Firstly is *comprehensiveness*, which refers to the court's dispute resolution role being the central role in the legal system, such that it enables all disputes to be resolved.[256]Secondly is *completeness*,[257] or clarity,[258] which implies the law providing a correct answer in all cases, hard or otherwise. However, due to the controversy regarding the possibility of there being a right answer in a hard case, as proposed in this study, the same scholars call for formalisation of the weighing

---

[250] LL Fuller, *The Morality of Law*, (Yale University Press, 1969, Revised Edition) 41-64.
[251] Grey, *Formalism and Pragmatism in American Law* (n 26) 56-57.
[252] Fuller, *The Morality of Law* (n 250) 42.
[253] Grey, *Formalism and Pragmatism in American Law* (n 26) 54-56.
[254] F Schauer 'Formalism' (1988) 97 Yale Law Journal 296, 535.
[255] Fuller, *The Morality of Law* (n 250) 41.
[256] Grey, *Formalism and Pragmatism in American Law* (n 26) 52.
[257] ibid 52-53.
[258] Fuller, *The Morality of Law* (n 250) 63-64.

of competing values during adjudication, so that completeness or clarity become realisable in actual practice.[259]

Thirdly is *formality*,[260] a necessary condition for completeness, which stands for all decisions being dictated by rationally compelling reasons, as opposed to uncertain standards or subjectivity. Fourthly is *conceptual ordering*,[261] or what Fuller terms the value of *generality of law*,[262] which stands for the legal system having coherence arising from rules being derived from a few, general, discoverable and abstract principles and concepts. It also includes the law being classified and categorised, [263]usually done according to subject matter and nature of the dispute, such as contract being different from tort and property law.

Finally is *acceptability*,[264] which has been discussed earlier as connoting judicial responsiveness,[265] but which is viewed by Grey,[266] and Weiler;[267] as the most important value served by judicial adherence to rules. It stands for the legal system being able to satisfy the demands and needs of its subjects. In this sense, it includes the desire to be regulated by a legal order made up of established rules and principles; thereby other implicit values of legality being judicially adhered to, as well as extra-legal values of the community. However, in hard cases, such extra-legal values, as well as judges' personal preferences and intuitions, are subject to developing forces within the law. Precedence should be given to the

---

[259] Grey, *Formalism and Pragmatism in American Law* (n 26) 53
[260] ibid 53-54.
[261]ibid 54-55.
[262] Fuller, *The Morality of Law* (n 250) 46-49.
[263] Grey, *Formalism and Pragmatism in American Law* (n 26) 55.
[264] Weiler (n 19) 14-15, 24-26; Grey, *Formalism and Pragmatism in American Law* (n 26) 56.
[265] See text to section 6.3.3.
[266] Grey, *Formalism and Pragmatism in American Law* (n 26) 56.
[267] Weiler (n 19) 14.

formalistic rationalisation of decisions in line with legal tools like precedents and canons of interpretation.[268] This implies a coexistence framework, in which formalistic legality is the default, and flexibility considerations the exception.

Therefore, much as they propose it as a value of legality, Grey and Fuller's arguments actually support Freeman's view, that acceptability is a coexistence judging criteria that obliges judges to decide in accordance with the community's agreed or verifiable legal and other standards.[269] Grey himself admits that none of the values of legality fully accounts for its purport, notable lapses being realisable during hard cases, and that because of this, there is a need for a formalism-flexibility balancing mechanism.[270] Fuller also puts up a decent fight, demonstrating that values of legality also justify flexibility.[271] An example is what Fuller[272] calls the value of clarity of laws, and Grey calls completeness, which to him, can be satisfied even better when the law provides for common sense standards like good faith, or leaves fairness in contracts to be clarified by reference to actual practices and the conduct of the commercial community;[273]a job best done using flexible judging. Back at the foundations of formalism, the above values of legality are only realisable because implicit in the legal system is also conceptual formalism.

6.4.4.2 *Conceptual Formalism*

Conceptual formalism includes formalism being part of the nature and character of legal imperatives in statutory provisions as well as rules in precedents, which goes

---

[268] Weiler (n 19) 25-26.
[269] M Freeman, *Lloyd's Introduction to Jurisprudence* (Sweet & Maxwell 2014) 1569; See also text to section 3.3.1.3.
[270] Grey, *Formalism and Pragmatism in American Law* (n 26) 51-56.
[271] Fuller, *The Morality of Law* (n 250) 41-64.
[272] ibid 63-64.
[273] Grey, *Formalism and Pragmatism in American Law* (n 26) 52.

beyond the values underpinning contract doctrine. Tamanaha explains it as an account of law, that views it as legal rules, concepts, and principles with necessary-predetermined content, and implications; are logical; and so interconnected, that they form a coherent, internally consistent, determinate and comprehensive body of law. These attributes create the binding effect of formal rules, principles and concepts that define formalism.[274] Manifestations of such conceptual formalism attributes are observable during the analysis, and will accordingly guide this study. I will now elaborate the other two legal systematic values underlying formalism– judicial restraint and equality.

6.4.4.3 *Legal Power: Restraint of Judicial Authority*

Judicial restraint relates to the legal system placing of identifiable restraint on officers, such as judges.[275] According to Posner, it is a chameleon rich with definitions, including: judicial modesty or institutional competence, as judges defer decisions to other organs or courts; constitutional restraint, being the reluctance of judges to declare statutes unconstitutional; and formalism or legalism, as judges restrict themselves to applying the law and not making it.[276]

However, the sense in which this study views formalism as motivated by judicial restraint is one well alluded to by Posner,[277] when he commented that the judge would say 'the law made me do it', and thus apply only the semantic surface or plain meaning of statutes.[278] This implies that besides applying the law as is, which

---

[274] Tamanaha (n 4) 48, 66 & 70.[275] Scalia (n 27).
[275] Scalia (n 27).
[276] Posner, R.A, 'The Rise and Fall of Judicial Self-Restraint', (2012) 100 (3), California Law Review, 519, 519-21.
[277] ibid 519
[278] ibid 524.

refers to judges making a voluntary choice to be formalistic, the judge is also compelled to be formalistic by the value of legal power. It is akin to the power value Macneil observed as underlying formalism by underpinning discrete contracting,[279] the difference being that he perceived it as a value of contract behaviour, rather than one that is part of the nature of the legal system. However, as Macneil indicates, the power value is a common one, that can influence both formalism and flexibility, depending on the commands of the legal norms.[280] This makes the value one that can be satisfied better by a coexistence of the two approaches, than by a preference for one, or by leaving them at tension.

6.4.4.4 *Equalitarianism*

The value of objectivity, expounded by Eisenberg, has already been discussed under the heading of internal judging culture.[281] However, it is inseparable from equalitarianism, a legal value requiring rules not to be applied uniquely, but uniformly to everyone. Contracting parties are in this case not only treated as equal before the law, but also presumed to have been so at the time of contracting. Objectivity through equal treatment is a value of formalistic classical contract theory, adherence to which implies everyone having the same opportunity to enter any kind of transaction to improve his position in life.[282]

Atiyah attributes the growth of such formalism to the feeling and demands that law should not discriminate between people, such as those whose fault it was in failing

---

[279] Macneil, 'Values in Contract: Internal and External' (n 29) 375-378.
[280] ibid 347.
[281] Eisenberg, *The Nature of the Common Law* (n 126) 8-9.
[282] Chen-Wishart (n 10) 14.

to pay debt and those who failed out of misfortune.[283] Chen-Wishart on the other hand, saw equality as having been the result of progressive society's movement from status to contract in the terms Mains claimed, since opportunities to contract were now open to all, notwithstanding social status.[284] The two scholarly explanations imply that within contract doctrine, equality manifests in, and has two dimensions.

Atiyah's explanation points to equalitarianism as a value of the commercial community, where attributes arising from commercial practices, such as insolvency, define the characters of men and women that the law should hold and treat equally. This in turn means that the court would shut its eyes and ears to attributes like insolvency while determining rights and duties under a contract. On the other hand, Chen-Wishart's sense of equality is that of a value of society as a whole, where all men and women are deemed equal, and treated equally during adjudication, regardless of their real social, economic or political status. During formalistic judging, social-economic classification considerations are for that reason not on the judge's table for weighing, as happens during flexibility judging.[285]

However, as pointed out by Macneil,[286] and Horwitz,[287]in many cases this can be deceptive, the reality being that contracting takes place between unequal parties. All the value does is presuppose and maintain the status quo in aid of the more powerful, as court will not interfere to make the necessary adjustments in

---

[283] Atiyah, (n 28) 397.
[284] Chen-Wishart (n 10) 14.
[285] As was the case in Kirasha v United Assurance Co. Ltd HCCS 861/2004 (10/5/2006), Case Number 31 in Appendix 4.
[286] Macneil, 'Values in Contract: Internal and External' (n 29) 359.
[287] Horwitz (n 201) 1-2, 253-255.

obligations for real equality to be realised. Because equality is about the parties' status in society, the value doubles as a legal and an extra-legal one. Likewise, there are other underlying extra-legal underlying values to formalism.

6.5 Extra-Legal Values

Extra-legal values are the external judging criteria, besides legal values. They are products of the non-legal judging environment, such as the historical, political, social and economic contexts relevant to the dispute before court, or the institution of adjudication generally. The value of extra-legal judging criteria should not be misunderstood, as was done by Dworkin, who referred to the term 'extra-legal' as a dishonourable standard, to which positivists should not have relegated the use of principles as judging criteria in hard cases.[288] To call them dishonourable is to insult the entire judging paradigm of Uganda, not to mention the entire flexibility philosophy, whose main source of acceptability is the relevance of extra-legal considerations to the pursuit of justice and fairness in contract. The better view is to acknowledge the influence of extra-legal values, in judicial choice between formalism and flexibility, and the fact that the dominant amongst those values need to be part of the equation in the search for a way to manage the tension.

The nature of extra-legal values includes judging environmental values that relate to the general body politic of a particular jurisdiction, as neither judges nor the legal system generally operate in a social vacuum. They also include value categories that relate to contract behaviour,[289] the key being values of discrete contracting that motivate formalism on one hand, and relational contracting values that ordinarily engender flexibility. An investigation into the judging environmental

[288] Dworkin, *Taking Rights Seriously* (n 8) 39.
[289] Macneil, 'Values in Contract: Internal and External' (n 29) 347-367.

values is beyond the scope of this study, for it requires a dedicated social-legal inquiry that time and space does not permit in this case. Therefore, only extra-legal values of a contractual behaviour nature are elaborated, and have been observed during the subject of the content analysis.

6.5.1 Values of Discrete Contracting

Discrete contracting is one of the values of contract behaviour, conceptualised under the formalistic classical model of contract law.[290] It is the model of contracting based on antagonism, with parties detached from one another, only connected by the assertion of contractual rights.[291] The law commonly allows such discrete contracting with its corresponding notions of freedom of contract and property,[292] making it one of the higher values underlying formalism.

According to MacNeil,[293] the lower values that underpin and manifest discrete contracting include freedom of contract, consent, and equalitarianism, which have been elaborated earlier in this section.[294] In addition to these however, he suggests that formalistic recognition of contracting as discrete is also underpinned by four other values.

Firstly is the value of precision, which stands for the human character of focusing on one thing at a time.[295] However, Macneil admits that it is often resisted and not

---

[290] Chen-Wishart (n 10)12-18.
[291] ibid 15
[292] IR Macneil, 'Relational Contract: What we do and do not know', (1985) Wisconsin Law Review, 483, 492.
[293] Macneil, 'Values in Contract: Internal and External' (n 29) 355-360.
[294] See text to Sections 6.5.3.1 for freedom of contract; 6.5.3.4 for consent; and 6.5.4.3 for .equalitarianism
[295] Macneil, 'Values in Contract: Internal and External' (n 29) 355.

a universal value,[296] which points to the need to balance it with competing flexibility values. Secondly is the value of planning. Contracting parties not only plan, but also seek to implement the plans, making it one of the values underpinning the already discussed formalistic doctrinal value of *pacta sunt servanda*.[297]Thirdly is the value of efficiency, ordinarily a flexibility-engendering value, but which Macneil claims to be underpinned by the same values as those underpinning discrete contracting.[298] In effect, parties discretely contract to achieve economic efficiency, which points to common ground between formalism and flexibility, that can be harnessed more using a coherent and rational set of coexistence judging guidelines.

Finally is the value of presupposing and maintaining the status quo, as a necessary effect of valuing parties' consent and its attendant freedom of contract, as well as looking at discrete contracting as a route to efficiency. The argument then, is that viewing contract as discrete leads to social and economic change, which would make flexibility judging groundless. Without going into the merits of the claim, it implies that even proponents of discrete contracting perception acknowledge the need to take care of social-economic change. However, adjudication should balance such flexibility values with formalistic ones, under a clear and more formal framework, rather than waiting for what contracting parties will come up with, which is many times not clear or certain to the judge.

The next issue to consider is, whether the above-elaborated value postulates have relevance in explaining the prevalence of formalism that has contributed to the tension in Uganda's commercial adjudication across judging history. This helps to

[296] ibid 355.
[297] ibid 355-356 also see text to section 6.5.3.2.
[298] ibid 356.

make a case for the logicality of coexistence in Uganda's specific context, as well as contribute to a reliable scheme of values, the balance of which should inform any viable means towards coexistence. Chapter seven proceeds to answer the issue by discussing the findings of the content analysis of Uganda's commercial hard cases, revealing the dominant higher values represented by the sub-values observed during the content analysis as having motivated judges in formalistic opinions across Uganda's judging history. The categorisation in chapter six was used during the coding and content analysis and is therefore followed in chapter seven as well.

Chapter 7: The Values Underlying Formalism in Uganda

7.1 Introduction:

This chapter contributes to understanding the values defining the internal and external normative criteria responsible for the formalism at tension with flexibility in Uganda's commercial judging paradigm. In accordance with the jurisprudence of interests,[1] the weighing and balancing of the dominant amongst such values with flexibility-oriented ones should inform Uganda's commercial judging guidelines as a way towards coexistence. Identification of the values to weigh has to follow the content analysis of Uganda's commercial judicial opinions from the colonial era

[1] R Pound 'A Survey of Social Interests' (1943) 57 Harvard Law Review 1; R Pound, *Outline of Lectures on Jurisprudence* (Harvard University Press, 1943) 97-112; F. Powers 'Some Reflections on Pound's Jurisprudence of Interests' (1953) 3:1 Catholic University Law Review 10,15; and See text to section 3.5.1.

(1894-1962) to date, the results for which this chapter discusses in answer to why formalism has prevailed.

The coding of analytical units for the content analysis has been guided by the methodology described in chapter two, and the values advanced by the existing literature as underlying formalism in commercial adjudication.[2] The coding has in turn guided value and sub-value observations and identification from the words used by judges. Observations as well as inferences have produced the resultant data presented in the Appendices 1, 2 and 4, as well as Figures 9 and 10 below, that are constructed from the data in those appendices. The results have informed further understanding of the observed sub- or lower values and manifestations, by way of a third-level analysis. The findings of this third-level analysis are presented in the tables forming Appendix 7, indicating the higher values to which the lower values speak. It is these latter results that guide this fourth level of research output, an articulation of the internal and external values underlying formalism that should be weighed and balanced with flexibility values in the quest for coexistence.

7.2 The Internal Judging Criteria

[2] See text to chapter six.

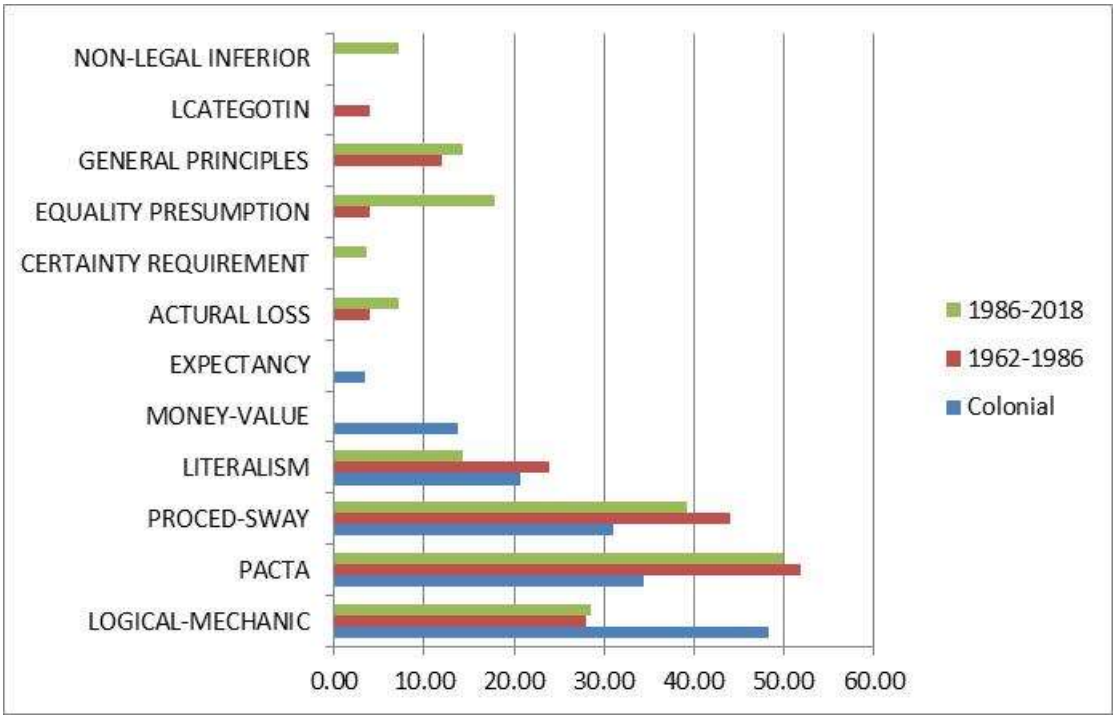

Figure 9: Judging Cultural Values in Formalistic Judicial Opinions

The values making up the internal criteria, whose sub-values and manifestations appear in Figure 9, fall into the categories of rule of law values, values of judicial perception and responsiveness values. Each category has prevailed and contributed to the tension in varying measures at the different times of Uganda's judging history, which in accordance with interests jurisprudence, should determine their relevance for purposes of qualification for weighing and balancing.[3] The three categories are further elaborated in the sequence, in sub-sections 7.2.1, 7.2.3, and 7.2.2.

[3] F. Powers 'Some Reflections on Pound's Jurisprudence of Interests' (1953) 3:1 Catholic University Law Review 15-16.

7.2.1 Rule of Law Values

As discussed earlier, existing literature reveals that the rule of law values underlying formalism are the conception of justice as legality, predictability and legal certainty, judicial objectivity, rationality, and accountability.[4] The manifestations to these values are not exclusive. Practices or traditions that speak to more than one rule of law value have been observed, and used to articulate them. However, judicial accountability is discussed under judicial responsiveness, the two being closely related and informed by similar sub-values. Otherwise, the findings show that these rule of law values have motivated judges to decide formalistically across Uganda's judging history, and were the most dominant in contributing to formalism being part of Uganda's commercial judicial culture.

7.2.1.1 *Justice as Legality*

At the heart of the higher value of rule of law is the value of justice, whose conception by judges motivates them to judge formalistically, for example by practising non-interventionism.[5] In such cases, the conception of justice as legality has defined the internal judging criterion. Judges have adhered to it by: following procedural justice, coded as 'PJ', but which in this study has been treated as adequately represented by procedural justice taking sway during adjudication, coded and appearing as PROCED-SWAY in Figure 9. However, because it speaks to both the internal and external criteria, procedural justice appears in appendices 1-5 and 7 under the external values columns as 'PJ'. The other sub-values of justice as legality are: treating extra-legal considerations as inferior to positive law, coded as 'NON-LEGAL INFERIOR'; generally practicing legalism; and using

[4] See text to sections 6.2.1.1, 6.2.1.2, 6.2.1.3, 6.2.1.4, and 6.2.1.5.
[5] Bagchi A, 'Contract as Procedural Justice', 7:1, (2016) Jurisprudence, 47, 51.

formality as a way to dispense justice, coded as 'FORMALITY' and presented in figure 10. With the exception of 'FORMALITY' – for having only appeared in colonial opinions, and even then insignificantly, at only 3%, – each of these values is discussed separately below.

With regard to *procedural justice*, it has continued to motivate formalism to stay in the tension, even when substantive justice and therefore flexibility was constitutionally made superior to procedural justice,[6] with some judges even treating the 'article 126' command as subject to the formalistic values of procedure, as Justice Madrama did *in Nahurira v Baguma and 2 others.*[7] These are values speaking to justiciability of issues like fairness being subject to procedural propriety.[8] Figure 10 indicates that is has appeared in 31% of colonial formalistic judging, 42% of early postcolonial-judging, and only reduced to 25% of late postcolonial-judging. The content analysis has revealed that such procedural justice has underpinned formalistic judging in a number of ways.

Firstly is a judge measuring justice by the extent to which a party conformed to the due process of contract formation and or performance.[9] Specifically, these cases support Bagchi, that as long as promise and consent are proved to have existed, no matter the contents, judges have treated contract as enforceable.[10]

Secondly, disputes have been determined using the extent to which litigating parties have conformed to matters of formalities of contracting or court civil and

---

[6] Article 126 (2) (e).
[7] [2015] UGCOMMC 76 (30/4/2015)
[8] Nahurira v Baguma and 2 others [2015] UGCOMMC 76 (30/4/2015).
[9] ibid 50.
[10] Bagchi (n 5) 53.

evidence procedures.[11] In this regard, Lista's demonstration that there exists a battle of forms in contract adjudication,[12] is applicable to Uganda. Lista limits his analysis to the proof of whether standard terms are part of a contract and if so, when they so became. He proves the dominance of 'the last shot doctrine',[13] meaning that the party that presented the terms last, without subsequent actions by the adversary amounting to a counter offer, will carry the day. Ugandan judges have exhibited such procedural based formalistic perceptions of justice in a range of disputes.

Both strands of procedural justice are represented and were coded together at stage two of the analysis as 'PROCED-SWAY', presented as such in figure 9, and are illustrated together. From colonial judging, as in *K.B. Parekh v F. Mahomed and J. Esmail*,[14] formalities of contracting were treated as superior to the intention of the parties. The trend grew during post-colonial Uganda; in a number of cases, as procedure and process of contracting were relied on to determine disputes without taking care of the merits or fairness of the case,[15] and in others, legalism was expressly declared the ultimate rule of recognition of normativity.[16]

---

[11]The Civil Procedure Act, Civil Procedure Rules, The Court of Appeal Rules, The Supreme Court Rules, the Evidence Act.

[12] Lista A, *International Commercial Sales: the Sale of Goods on Shipment Terms*, (Routledge, 2017) 34-41.

[13] As defined by Havelock-Allan in Sterling Hydraulics Limited v. Dichtomatik Limited [2007] 1 Lloyd's rep. 7, 14.

[14] [1920-29] 3 UPLR 224.

[15] See Appendix 2: Cases 38, 41

[16] NR Lakhani v HJ Vaitha & Another Limited [1965] EA 452; A. Kambe v African United Auto Engineers & Another [1976] HCB 105; Bibonde v Waiswa [1974] HCB 120; Ethiopian Airlines v Motunrola [2005] 2 EA; Congolese Rally for Democracy v Palm Beach Hotel (HCMA 279/2000); Mansur Alam v The Embassy of Saudi Arabia

Further, many cases were determined on the basis of how perfect pleadings were, and the pattern became to dismiss cases for want of proper pleadings.[17] For instance in *Take Me Home Limited v Apollo Construction Co. Limited,*[18] pleadings were rejected for lacking a signature and being uncertain, although there was evidence that both parties knew the matters of breach of contract in dispute.

In late post-colonial Uganda, the trend has continued and the prevalence of the phenomenon has greatly increased, notwithstanding the reduction in formalism as a judging paradigm. Substantive justice has been ignored, and denied to parties, and rights/obligations have been allocated on the basis of process.[19] Again, failure to strictly comply with court procedure has been used to declare many cases unjusticiable and dismissed.[20] In *Omega Construction Co. Ltd v Kampala Capital City Authority*,[21] where a party sought to amend the price agreed in a building contract, arguing that her manager erred during contracting and signed on an unfair amount, Justice Madrama openly ignored substantive justice in preference for procedural justice, noting that if a contract is clear, it has to be interpreted as is, and expositions of common law or equity or considerations of fairness of price could not be applied.[22]

Furthermore, Coded as 'ACTUAL LOSS', contractual justice as procedural justice has been used by judges granting only actual financial loss suffered as damages, as opposed to pure economic loss or other losses arising from mere expectancy. However, this sub-value should not be considered for weighing because it was not

[17] See Appendix 2: Cases 9, 10, 17, 28, 31, 33, 39, and 40.
[18] [1981] HCB 43.
[19] See Appendix 4: Cases 14, 16, 22, 30, 39, 40, 51 and 52.
[20] See Appendix 4: Cases, 1, 5, 8, 12, 13, 14, 16, 20, 21, 26, 31, 39, 44, and 48.
[21] HCCS 780/2015 (28/4/2017)).
[22] HCCS 780/2015 (28/4/2017)

observed before independence, and appeared insignificantly in early postcolonial-judging, at 4%, and in late postcolonial-judging at 7%. However, the fact that in recent times it is growing while formalism is reducing, still points to the persistence and current relevance of procedural justice as a perception of contractual justice.

The second indicative sub-value to justice as logic, *non-legal values being treated as inferior* to positive law, is very closely related to logical interpretation, being the value that completes 'the law as value free puzzle'.[23] One would therefore expect that it deserves no special attention, but the Ugandan paradigm proves otherwise. Under the code 'Non-Legal Inferior', it appeared in far fewer cases than 'Logical-Mechanic', having appeared for the first time in late post-colonial judging, and even then counting for only 7% of judicial opinions. It means that in Uganda, as much as the judges have traditionally adhered to rule of law values, including perceiving justice as legality, and logically deduced law, they have not necessarily seen the law as value-free. This, amongst other values, helps to explain the story in Figure 1, that alongside the decline in formalism, the judging culture informing mixed-approach opinions, and therefore the tension, is constantly growing—further demonstrating the significance of studies like this one, towards coexistence and management of the tension.

Finally, and relatedly, justice as legality has been manifested by the judicial practice of *legalism*, prevalent especially from early post-colonial judging.[24] Legalism is the view of adjudication, which holds that judges interpret the law by

---

[23] G Minda, *Postmodern Legal Movements: Law and Jurisprudence at Century's End* (New York University Press 1995) 14.
[24] See for example Appendix 2: Cases 10, 11, 17, 27.

reading the natural sense or plain meaning of its provisions,[25] and has sometimes been referred to as the legalistic approach to adjudication.[26] Its strict and complete observation has been propounded by Sir Owen Dixon,[27] as the only safe guide to judicial decisions in great conflicts, implying hard cases.

Ugandan courts have refused to enforce contracts not entered into in strict compliance with statutory formalities; for instance, advocates-clients remuneration contracts not being notarised and filed with the Uganda Law Council, in accordance with section 51(1) of the Advocates Act.[28] Further, in *Steam Aviation FZC v Attorney General*[29] and *Kibalama v Alfasan Belgie CVBA*,[30] formalistic decisions were guided by the formality in section 6 of the Sale of Goods Act, as amended by section 10(5) of the Contracts Act, 2010, which meant that contracts were not enforceable unless in writing, if they exceeded 200 Ugandan shillings, or 25 currency points.

Such formalities of contract formation – hitherto spelt out by common law, but now part of the 2010 Contract Act–are still young, but are already being invoked by courts to reach formalistic decisions. This is evident from *Batanda v Bollore Africa Logistics Limited,*[31] in which the judge refused to give effect to a contract for want of signatures by both parties, reasoning that the rules on offer and acceptance

---

[25] B Galligan, 'Realistic "Realism" and the High Court's Political Role' (1989) 18 Federal Law Review, 42.
[26] TP Spiller and R Gely, 'Strategic Judicial Decision-Making', in Whittington KR and others (eds), The Oxford Hand Book of Law and Politics (Oxford University Press 2008) 34.
[27] Australian Judge, Sir Owen Dixon's 1952 swearing in speech, in Galligan B, *Politics of the High Court: A Study of the Judicial Branch of Government in Australia* (University of Queensland Press, 1987), 30-31.
[28] Kituuma Magala & Co. Advocates v Celtel (Uganda) Ltd CA 39/2003; Pandit v Sekatawa [1964] EA 491.
[29] HCCS 9/2010 (25/1/2015).
[30] [2004] 2 EA 146.
[31] HCCS 182/2009 (Judgment dated 23/1/2017).

under the Act required that they be communicated in an effective way to result into a contract.

Regarding the justiciability of disputes, the judicial reliance on legal technicalities has defined legalism in late post-colonial judging, especially before the substantive command in the 1995 constitution took effect. Following a plain interpretation and application of rules, contractual disputes were declared by judges as unjusticiable on the basis of improper pleadings[32], and want of standing, such as cases brought by agents with known principles. In some of the cases that reached trial, proofs were rejected for being extraneous to written evidence.[33] Cases like *Auto Garage & Another v Motokov*[34], which formalistically declared standing as being limited to one having a right that has been violated and the defendant being the one liable, became fixtures on lists of authorities and court-kit of every litigation lawyer.

From the author's experience as a commercial litigation lawyer of twenty-four years standing, it was not until the 2000s that the impetus given to the flexibility movement by the 1995 Constitution,[35] began to bear on judicial decisions. Before, formalistic decisions influenced by legalistic judicial inclinations had become so common, that with time, to be a successful litigation lawyer meant mastery of procedural and evidence rules, before even the art of advocacy, substantive laws or even preparation of evidence, and other litigation tools. One would rightly call the early post-colonial era *the age of legal technicalities,* in which non-legal values

---

[32] Appendix 4: Cases 1, 5, 8, 12, 13, 20, 21, 26, 31, 35, 44 and 54.

[33] Appendix 4: Cases 2, 3, 4, 11, 53

[34] (1971) EA 392

[35] Article 126 (2) (e), later buttressed by Section 4 of the Judicature Amendment Statute, 2002.

had no place in the creation of legally valid norms. The other way of explaining such formalism is that it is judging in the service of the value of judicial objectivity.

7.2.1.2 *Judicial objectivity*

As discussed earlier,[36] formalism is generally known to result from and characterised by judicial objectivity, manifested by, among others, logical deduction of rules, treating law as value-free, deriving contract law from general principles, literalism, *Pacta Sunt servanda*, and adherence to the parol evidence rule. Observance of these sub-values and manifestations in the opinions has informed the conclusion that in Uganda, judicial objectivity has contributed to the formalism in the tension. However, by way of elaboration, treating the law as value-free needs no further discussion beyond its influence noted under justice as legality.[37] Likewise, to avoid repetition, the derivation of contract law from general principles and adherence to the parol evidence rule are noted as indicative of judicial objectivity, but discussed later, as indicative of judicial rationality and systematic external values respectively. Therefore, only deductive reasoning, literalism and sanctity of contract are elaborated here.

The deductive logic of rules was coded as part of 'LOGICAL-MECHANIC', the other component being the related mechanical application of the law so deduced. It implies the terms of a rule being the main premise, the facts the minor, and the legal result is the conclusion from applying the two.[38] It was observed in 48% of

---

[36] See text to sections 3.2.1; 3.2.3 and 6.2.1.3.and 2.5.
[37] See text to section 7.2.1.1.
[38] W Huhn, 'The Stages of Legal Reasoning: Formalism, Analogy, and Realism, (2003) 48:1 Villanova Law Review 305, 309-10.

colonial cases, 30% of early post-colonial judging, and 29% of post-colonial judging.

Further, the data in Appendix 1 reveal that, during colonial judging, logical deduction of law mainly served in restatement of English contract doctrine and asserting its applicability to Uganda.[39] This is explainable by virtue of the English legal system having been newly transplanted to Uganda,[40] such restatement having fizzled out during independent judging. Figure 9 indicates that in early post-independence period, the influence of logical deduction of laws in formalistic judging was tremendously reduced. Underlying this pattern, the strict restatement of English contract doctrine, especially in sale of goods disputes, continued but at a far reduced rate while other ways in which logical deduction manifested and defined judging culture have since become more prominent.[41]

During the content analysis, *literalism*, the other indicative value to judicial objectivity, was coded as 'LITERALISM'. It was found as one of the dominant values underlying formalism. As appendices 1, 2, 4 and 7 indicate, wherever it appeared, so did *pacta sunt servanda,* a formalistic view of contract, coded as 'PACTA', although the latter appeared more frequently. This supports McLauchlan's declaration that objectivity is deeply rooted in the common law of contract, and that without objectivity sanctity of contract and its attendant security of transactions would be seriously undermined.[42] Therefore, although sanctity of contract is later revisited as indicative of individualism, it is inevitable to also

---

[39] See Appendix 1: Cases number 4, 27, 48, 49, 50, 51, 69, 69 and 70.
[40] The 1900 Uganda Agreement and the 1902 Uganda Order in Council.
[41] See Figure 8 and Appendix 2 Cases 24, 26,28,31 and 36.
[42] DW McLauchlan, 'Objectivity in Contract', (2005) 28 University of Queensland Law Journal, 479.

analyse findings relating to it, and literalism as part of one set of values that speak to judicial objectivity.

Figure 9 reveals that during colonial judging, pacta sunt servanda appeared in about 35%, and literalism 22%, of the hard cases analysed. These opinions involved treating written terms such as insurance policy terms[43] and sale of goods contractual terms,[44] as sacrosanct. Pleas of fairness were disregarded in a number of such cases,[45] a notable one being *Twentsche Overseas Trading Company Limited v Uganda Sugar Factory Limited*,[46] where a plea of frustration was rejected, notwithstanding war having broken out and made delivery of the goods sold impossible.

After colonialism, literalism grew to over 25% in early post-independence, while *pacta sunt servanda* shot up to become the most influential formalistic internal judging criterion throughout Uganda's history, at 54%. Therefore, while formalism declined in prevalence, within formalistic judging culture the insistence on enforceability of contract terms was growing to become the dominant value underlying what was left of formalism. Judges continue to treat contract terms as sacrosanct, insisting on their literal interpretation and strict enforcement, while rejecting statutory restrictions,[47] equitable pleas of the terms being harsh and unconscionable,[48] vitiating factors like mistake,[49] contextual fairness and business

[43] Appendix 1: Cases 29 and 37.
[44] Appendix 1: Cases 4, 25, 46, 50, 51, 53 and 67.
[45] See Appendix 1: Cases 4, 25, 37 and 50.
[46] (1945) 12 EACA 1.
[47] Appendix 2: Case 6.
[48] Appendix 2: Cases 3 and 23.
[49] Appendix 2: Case 13.

reality;[50] and on several occasions refusing to fill gaps by implying terms in contracts.[51]

The Motor Union Insurance Co. Ltd v Ddamba,[52] and *Jubilee Insurance Co. Ltd. v John Sematengo,*[53]were about whether knowledge of an agent should be imputed on the principal in insurance law, an issue that has internationally been a battlefield in the tension. In *Ddamba*,[54] a proposal filled by the insurer's agent and accompanied by a signed warranty failed to disclose all material facts, although the insured had made full disclosure. The court followed *Newsholme Brothers v Road Transport and General Insurance Co. Ltd,*[55] to find the agent to have been an amanuensis of the insured. It allowed the insurer to avoid the policy on grounds of non-disclosure, reasoning formalistically that only the written contract could be looked at to ascertain the terms.

That the judge followed *Newshlome* is significant, because under English insurance law there was, and still exists, a tension between two competing theories on imputation of knowledge of agent on the insurer. On the one hand is the formalistic *Newsholme* approach, and on the other, the flexible approach in *Bowden v London, Edinburgh and Glasgow Life Insurance Co.*[56] Bowden was illiterate, like many Ugandans during 1963 when the *Ddamba* case was decided,[57] and on that basis the court held that the misrepresentation by the agent who filled the form could not be visited on him. Faced with a flexible option that would suit the

[50] Appendix 2: Cases 33 and 35.
[51] Appendix 2: Cases 7, 9, 34, 35 and 41.
[52] [1963] 1 EA 271.
[53] [1965] 1 EA 233.
[54] [1963] 1 EA 271.
[55] [1929] ALLER 442, 444.
[56] (1892) 2 QB 534.
[57] [1963] 1 EA 271.

social circumstances of the majority of Ugandans, the judge chose to adhere to *pacta sunt servanda* and judge formalistically.

Formalism was also applied in similar cases, even when they involved illiterates. This is demonstrated by the judgment in *Jubilee Insurance Co. Ltd. v John Sematengo,*[58] where the Chief Justice held against the illiterate insured, and refused to impute knowledge on the insurer. He reasoned that illiterates were taken as having a duty to insist that the proposal form is read to them and interpreted. Failure of the illiterate to perform his duty, the proposal form was taken as having been read and so interpreted, and the falsehood had to be visited against him.

The Ddamba case is also significant because the judge justified his formalistic decision by reasoning that the insured defendant was an intelligent man who knew the importance of telling the truth.[59] This speaks to the judge having been motivated by considerations of the economic and social class of the insured (which considerations are analysed further in chapter nine) to formalistically find against him. Therefore, formalism sometimes represented political agendas, which calls for further investigations into the judging environment surrounding the invocation of observed values like literalism and *pacta sunt servanda,* a task beyond the scope of this study.

During late post-colonial judging, the influence of both literalism and *pacta sunt servanda* has dropped to 14% and 50% respectively, but the latter has continued to be the most influential formalistic judging cultural value. The manifestations and manner in which the two values contributed to formalistic judging remained the same as in early post-colonial judging with a few notable exceptions.

---

[58] [1965] 1 EA 233.
[59] ibid 410.

Firstly, the sharp decline in literalism, while there was no significant decline in *pacta sunt servanda*, implies that judges could simply have reduced the tendency to justify their decisions with reasoning, which in this case would be the literal interpretation of contract terms. Indeed many of the opinions, in Appendix 4, that bear the code 'PACTA' do not go far enough to justify the decisions reached by assigning interpretations that would qualify for the label 'LITERALISM.' The explanation of this trend appears to be the significant rise of the judicial exercise of unrestrained authority. This is because, as Minda points out, reasoned elaboration is one of the neutral principles by which judges in common-law systems are restrained, and the tension thereby managed.[60]

Secondly, as indicated earlier,[61] while refusing to fill gaps in contracts by implying terms, in *Kibalama's case, Byamugisha J.A* declared as the ultimate judging guideline the notion of treating competing norms and values hierarchically, formalistic values being the default and flexibility ones the exception.[62] For instance, *pacta sunt servanda* should only be interfered with upon proof of flexibility enjoying public (business community) support.

Thirdly, amongst vitiating factors that were ignored in the quest to uphold *pacta sunt servanda,* this period reveals blatant rejection of reliance on legality that would make contractual terms unenforceable.[63] For instance in *Suffish International Food processors (U) Ltd & Pan World Insurance Co. Ltd. v Egypt Air Corporation*,[64] the Supreme Court rejected *King v Victoria (1896) AC 250 PC,* a common-law *locus*

---

[60] Minda (n 23) 37-48; and see text to section 5.2.6.
[61] See text to Section 2.5.1.
[62] [2004] 2 EA 146.
[63] See Appendix 4: Cases 3, 4, 7, 21, 23.
[64] [2002] SCCA 6 (19/6/2002).

classicus for the principle that as long there was evidence of an insurance contract and indemnity, it was not open for the third party to question the insurer's having indemnified the insured.[65] Fairness and justice that barred allowing a transporter who delivered spoilt fish to escape liability; and the principle that in marine insurance the contract was provable by means other than the policy, were both also rejected.

This disregard of legality in preference for *pacta sunt servanda* in late post-colonial Uganda does not appear to be plain judicial insistence on formalism in the classical sense, because if that were the case, upholding legality would be at the forefront. It is noteworthy that the practice coincided with the rise in purposive and contextually based judging, together with high levels of judicial law making, as demonstrated in Figure 10 below. This supports Tamanaha,[66] in that judging has oscillated between formalism and flexibility, turning into a mish-mash of a system suspended in uncertain and shifting space, without a common criterion on when judges should follow or depart from the rules.[67] This makes efforts like this, towards balancing and coexistence of the two pertinent. In that regard, the following sections illustrate that, the rule of law values of rationality, predictability and certainty are part of Uganda's judging culture, and therefore part of the internal criteria that motivates the formalism in the tension, worth consideration in the balancing.

---

[65] [2002] SCCA 6 (19/6/2002).
[66] BZ Tamanaha BZ, *Law as a Means to an End: Threat to the Rule of Law* (Cambridge University Press 2006) 233.
[67] ibid

7.2.1.3 *Judicial Rationality*

As discussed earlier,[68] judicial rationality is manifested by the judicial recognition of contract law as conceptually ordered, which is informed by the sub-values of order, logic and consistency. These three are satisfied by the law being categorically ordered, and always derived by judges from general and fundamental abstract principles, that contribute to a holistic system.[69] Categorical ordering, coded as 'LCategorisatin', has been observed, although not above 10% in any judging epoch, but with notable significance, because cases where the reverse has happened were hardly observed either. Judges have declined to flexibly find contractual remedies in tort,[70] as happened in *David Dungu v East African Posts and Telecommunications.*[71] This case was decided around the time of Gilmore's declaration of 'the death of contract' and the rise of 'a new era of contort'.[72] Under the contort era, tortious doctrine would be viewed as freely usable to determine contractual disputes, as contract was not rooted in the organic growth of common law from case law, but was a creature of Langdalle, who pieced together several disconnected branches of law and called them contract.[73] The merits or otherwise of Gilmore's thesis notwithstanding, in Uganda the findings reveal that the formalistic culture of judging contractual disputes according to strict and abstract rules of contract as laid down,[74] with exclusion of tort, is far from dying.

---

[68] See text to section 6.2.1.4.
[69] Tamanaha (n 66) 13-14.
[70] See Appendix 2: Cases 16, 24, and 38.
[71] [1974] HCB 290.
[72] CR Gilmore G., *The Death of Contract,* (The Ohio State University Press, 1974, 2nd Edn. 1995).
[73] ibid.
[74] Tamanaha (n 66) 228-229.

Deriving contract law from general principles, coded as 'GENERAL PRINCIPLES', was not observed amongst colonial judicial opinions. It starts appearing in early post-colonial judging, with about 13% of the opinions, and 14% in late post-colonial judging. In a number of opinions, rules and principles in statutes have been treated as cutting across and containing everything by which a judge should be guided. This was observed in opinions interpreting and applying statutory provisions regulating contract formation,[75] contract enforcement formalities,[76] the passing of property in the goods,[77] the passing of title in the goods,[78] implied terms, such as fitness of goods for purpose,[79] duties, and remedies of the parties.[80] In *Batanda's case*,[81] for example, the general principles of offer and acceptance were used to formalistically decide that without effective communication, which could be evidenced by signing, there was no contract.

Rationality's influence in formalism also manifested in judicial application of general common-law principles across different types of contracts. The examples are the

---

[75] Sengooba & 4 Others (Minors) v Stanbic Bank Ltd (HCCS 184/2001); Uganda Telecom Ltd v Tanzanite Corporation [2005] 2 EA 331; Kituuma Magala & Co. Advocates v Celtel (Uganda) Ltd CA SCCA 9/2010; Steam Aviation FZC v Attorney General (HCCS 9/2010 (25/1/2015); Ruhemba v Skanka Jensen (U) Ltd [2002] 1 EA 25; Batanda v Bollore Africa Logistics Limited (HCCS 182/2009 (Judgment dated 23/1/2017); and AbdulRahman Elamin v Dhabi Group, Warid Telecom Ltd & Others [2017] CACA 60(16/11/2017).

[76]. Greenland Bank ltd (In Liquidation) v Express Sports Club Ltd (HCCS 232/2006 (1/6/2007).

[77] See Appendix 1: Cases 48 & 50; Appendix 4: Cases 10.

[78] Jade Petroleum Ltd v Salim Ramzanli & Another [2017] UGCOMMC 114(18/8/2017); Sula Lwanga v SDV Transami (U) Limited

[79] Douglas v Carr Lawson & Co. [1920-29] 3 UPLR 234.

[80] Viram v Chorley (1920-29) 3 ULR 63; Dr. Syedna Mohamed Burhannudin Saheb & 2 Others v Jamil Din & Others [1973] 1 EA 254; Sekayombya v Uganda Steel Corporation [1984] HCB 42; Honday Ellab v Attorney General [2011] 1 HCB 38; Triad Holdings Ltd v Networks Exports PVT Ltd & Others (HCCS 358/2000 (Judgment of 19/8/2005); and Mogas (U) Ltd v Benzina (U) Ltd) HCCS 88/2013 [2017] UGCOMMC 92 (5/9 2017).

[81] Batanda v Bollore Africa Logistics Limited (HCCS 182/2009 (Unreported-Judgment dated 23/1/2017).

notions of freedom of contract[82]and privity of contract,[83] and the rules on enforceability of contracts.[84] The use of such general principles as applicable to cases with different sets of facts validates the effect of general principles as the basis given by formalists,[85] for the proposition that law is conceptually ordered and therefore consistent. Therefore, it is significant enough to demonstrate that judicial rationality is one of the values underlying the formalism in the tension, although not as influential as justice as legality, judicial objectivity or even predictability and legal certainty.

7.2.1.4 *Predictability and Certainty*

As discussed earlier,[86] and declared by Lord Bingham in *Golden Strait Corporation v. Nippon Yusen Kubishka Kaisha*,[87] predictability and certainty of both the law and contracts is the prime value that permeates through all judicial motivations of formalism. In this sense, all findings on rule of law, as well as other values engendering formalism, are in a way findings of certainty as a value of both an internal and external nature. Therefore, the study contributes to knowledge by

---

[82] See text to text 8.2.1.2.
[83] Greenland Bank ltdLtd (In Liquidation) v Express Sports Club Ltd (HCCS 232/2006 (1/6/2007); and Triad Holdings Ltd v Networks Exports PVT Ltd & Others (HCCS 358/2000 (Judgment of 19/8/2005).
[84] Greenland Bank ltdLtd (In Liquidation) v Express Sports Club Ltd (HCCS 232/2006 (1/6/2007)).
[85] TC Grey, *Formalism and Pragmatism in American Law*, (Koninklijke Brill, NV, 2014) 54.
[86] See text to section 6.2.1.2.
[87] [2007] UKHL 12, otherwise commonlly referred to as the golden victory case. Lord Bigham indicated that this view goes back to Lord Mansfield CJ, in Vallejo v. Wheeler (1774) 1 Cowp. 143,153. But equally importantly, Lord Scott disqualified predictability and certainty from being a principle, and instead referred to it as something important (implying a value), but one that is subject to principle and the coherence of /rationality of law; while upholding the common law principles of fair compensation (measure of damages as being what one would have benefited from the contract's performance).

providing justification for departure from the claim by Frank,[88] that the real problem of the law is the *basic myth* that the law is certain, and the claims of scholars who view certainty as an illusion, allegedly because repose is not the destiny of man.[89] These scholars make these claims to support the view that judging is always a flexible weighing of competing interests, and there is no need for efforts like this study trying to create certainty by having flexibility co-exist with formalism.

However, in Uganda's case, the findings presented in Figure 10 reveal that certainty, coded as 'COL', is a major rule of law value that has motivated formalism in 31% of colonial judging, 13% of early postcolonial-judging, and 29% of late post-colonial judging. By way of manifestation, certainty of contractual terms and claims have been treated as conditions for contractual enforcement, as was the case in SDV *Transami (U) Ltd v Nsibambi Enterprises Ltd*.[90]

Summarising the judicial approach in Uganda in *Hope Mukankusi v Uganda Revenue Authority*,[91] Lameck-Mukasa J reasoned that the rule in *Hadley v Baxendale*,[92] of only foreseeable damages being awardable, would prevail as the rule of assessment of loss by looking into the future, and that per *Esso Petroleum Co. Ltd v Mardon,*[93]was problematic, as it only provided a rough estimate of the loss. This way, the judge was clearly motivated by certainty as the ultimate value that formalism would serve.

---

[88] CL Barzun, 'Jerome Frank, Lon Fuller and a Romantic Pragmatism', (University of Virginia School of Law; Public Law and Legal Theory Research Paper Series, 2016-6, Jan. 2016, 5.
[89] Tamanaha (n 66) 65
[90] [2008] HCB 93, where the judge rejected the applicability of exemption clauses, reasoning that doing so would defeat the contract, and they could only be enforceable if clear and unambiguous. Further, damages have only been allowed for foreseeable loss, and special damages required to be specifically pleaded and proved to be awarded.
[91] HCCS 438/2005(19/7/2010)).
[92] (1854) 9 EXCH. 341, 354.
[93] (1976) 2 ALLER.

Certainty has occupied such a high place in motivating formalism that some judges have treated it as more valuable than legality. This was the case in *Access Financial Services Plc Ltd v Khayongo Rutiba,*[94] where the judge decided that once certainty of terms existed, no plea of illegality based on mistake of fact could be entertained. This was notwithstanding mistake of fact or law having been a ground to declare a contract void at common law, a position since codified under the Contract Act, 2010. A similar decision was made in *Nile Bank Ltd & Another v Thomas Kato & Others,*[95] in which illegality of a contract was ignored on the ground that it had not been pleaded.

Accordingly, the findings also reveal that in many cases[96] legal certainty underlies the strict rules relating to technicalities and formalities, like pleadings, and their blind application, disregarding pleas for fairness, or other would-be flexibility interventionist grounds like utilitarianism. For instance, in *Kibalama v Alfasan Belgie CVBA*,[97] where the judge strictly adhered to Order 7 rule 1 (e) of the Civil Procedure Rules, requiring that the plaint should disclose full particulars of the type of contract, its terms, and subject matter.[98] The judge rejected usage, as would imply utilitarianism, reasoning that it was not made known (predictable) earlier. That certainty was the motivator in such cases was confirmed by the Court of Appeal in *Interfreight Forwarders (U) Ltd v East African Development Bank,*[99]

---

[94] HCCS 61/2007. Notably, this is in contrast with Lord Scott's formalistic decision in the Golden Victory Case [2007] UKHL 12; that certainty is a mere value that is surbodinate to principles of law.
[95] HCMA 1190/1999, from HCCS 685/99, Ruling of 30/8/2000.
[96] Appendix 1: Cases 8, 18, 19, 40, 41, 47 and 52: Appendix 2: Cases 1, 2, 8, 30 and 37; and Appendix 4: Cases 1, 5, 12, 13, 21, 26, 31, 35 and 44.
[97] [2004] 2 EA 146.

[98] [2004] 2 EA 146

[99] (1994-95) HCB 54.

which required parties to strictly adhere to pleadings as being the definition with clarity and precision of the real matters in controversy upon which parties can prepare and present their cases, and courts can adjudicate.

However, as much as the theory that treats certainty as mere illusion is disproved by these findings, there is no evidence of its being the prime value that would support the viability of a judicial quest for absolute legal certainty, as propounded by Wolff[100] and Truscott.[101] Even in terms of prevalence, it does not appear to be exceptionally high, as one would expect of an ultimate value, the competition from flexibility notwithstanding. This implies that accommodating flexibility, alongside formalism, with the uncertainty the former brings, will not fundamentally affect the judging machine, especially when such uncertainty can be managed by certain and coherent judging guidelines, as is later proposed in this study.

7.2.2 Judicial Responsiveness

As indicated earlier, responsiveness, or acceptability as Weiler[102] and Grey refer to it, is a value internal to the institution of judging, that to formalistic judges connotes accountability, and public acceptability of their opinions.[103] These aspirations of the people, to which the Uganda constitution obliges judges to adhere,[104] are viewed as represented by the law's propositions, discoverable from the existing legal order.[105] The analysis of the results, represented in Figure 9 reveals that on the

---

[100] LC Wolff, 'Law and Flexibility –Rule of Law Limits of Rhetorical Silver Bullet' (2011) 11 The *Journal of Jurisprudence 549*.
[101] K Turcotte, 'Why Legal Flexibility is not a Threat to Either the Common Law System of England and Australia or The Civil Law System of France in The Twenty-first Century', (2005) 1 (2) Hanse Law Review, I.S. 190-197.
[102] Weiler P, 'Legal Values and Judicial Decision Making', (1970) 48:1 Canadian Bar review, 1, 10.
[103] Grey (n 85) 54, 55-56.
[104] Article 126.
[105] ibid.

formalistic side, strong responsiveness has been practised through the mechanical and neutral application of rules.

Judges have applied the 'law as is', without regard to considerations outside its corpus. The colonial era registered a 48% rate of strong responsiveness, which fell to about 30% and 29% in early and late post-colonial judging respectively. However, this has been declining in correspondence to the decline in logical interpretation of law, thus their being coded together as 'LOGICAL-MECHANIC'. The observance of logical deduction always coincided with strong responsiveness to legal commands.[106] For instance, in *Hansa & Lloyds Ltd & Emmanuel Onyango v Aya Investments Ltd & Mohammad Hamid*,[107] Kiryabwire J not only admitted to the case being a 'hard case', but to having reached his decision using logic and mechanical application of rules. Further, in a number of cases, especially sale of goods disputes, judges openly declined to take into account considerations of fairness, and responded by formalistically applying the rules in the Sale of Goods Act, and precedent.[108]

Strong responsiveness as a judicial cultural value also explains the considerable number of cases found to have been decided on the basis of technical rules, such as on the burden of proof, or the inadmissibility of extraneous evidence to

---

[106] See for instances Appendix 2: Cases 38 and 39; and Appendix 4: Cases 1, 10, 11, 41, 19, 38, 52 and 53.
[107] (HCCS 857/2007 (26/8/2010).
[108] See for example: Tajdin Hussein & 2 Others v HwanSung Industries Ltd [2006] HCB 101; Jade Petroleum Ltd v Salim Ramzanli & Another [2017] UGCOMMC 114(18/8/2017); Hansa & Lloyds Ltd & Emmanuel Onyango v Aya Investments Ltd & Mohammad Hamid (HCCS 857/2007 (26/8/2010); Congolese Rally for Democracy v Palm Beach Hotel (HCMA 279/2000); Batanda v Bollore Africa Logistics Limited (HCCS 182/2009 (Unreported-Judgment dated 23/1/2017).

contradict the written terms of a contract.[109] One would expect that article 126 has reduced the rate of strong responsiveness,[110] which indeed appears to be the case, as the majority of cases in which it was cited were decided flexibly. However, judicial opinions in which the article has been argued but expressly ignored in favour of formalism are still occurring, such as was the case in *Nahurira v Baguma and 2 others.*[111] Justice Madrama found the suit unjusticiable and a nullity for want of standing, article 126 of the constitution notwithstanding, reasoning that the supremacy of substantive justice over technicalities under article 126 was subject to the substantive law. Therefore, responsiveness is significant enough to be treated as a major value underlying formalism as an internal criterion, which needs to be balanced during the construction of judging guidelines.

However, the continuing increase in flexibility and mixed-approach judging, especially post article 126, means that the tension is inevitable. It also points to the role the judges have considered themselves as playing in the resolution of contract disputes. Are they passive bystanders, as Oldfather claims should be the case with strongly responsive judges, or interventionists, as is to be expected of weakly responsive judges?[112]

---

[109] See for instance: Monday Eliab v Attorney General (S.C.C.ASCCA 16/2010 (Judgment of 14/11/2011); Ethiopian Airlines v Motunrola [2005] 2 EA 57]; Mogus (U) Limited v Benzina (U) Limited (HCCS 88/2013 [2017] UGCOMMC 92 (5/9 2017).

[110] Article 126 (2) (e) of the 1995 Constitution, obliges judges to adhere to substantive justice without due regard to technicalities.

[111] [2015] UGCOMMC 76 (30/4/2015).

[112] Oldfather CM, 'Defining Judicial Inactivism: Models of Adjudication and the Duty to Decide', 94 The Georgetown Law Journal (2005) 140, 145 &151.

7.2.3 Judicial Perception Values

As discussed earlier,[113] scholars claim that judicial perception values are the most important in motivating judicial choices.[114] This would make that set of values eligible for weighing and balancing when determining the source of ultimate judging guidelines, subject to the claim's relevance being verified in Uganda's case. The findings represented in Figures 9 and 10 demonstrate that the component values of this category – the judicial perceptions of law as logic; the role of judges as legal mechanics; and non-interventionism in contract – have all played a role in motivating the formalism in the tension. Therefore they need to be part of the balancing, although their primacy is debatable. However, again to avoid repetitions, judicial non-interventionism will be discussed in the next part of the chapter, under market individualism.

7.2.3.1 *The Conception of Law as Logic*

The judicial conception of law as logic refers to the Langdallian view, which is that law is by nature: discoverable normative imperatives in printed texts;[115] conceptually ordered and therefore rational, and consistent; determinate; certain and predictable;[116] formality;[117] as well as neutral, autonomous, and value free

---

[113] See text to section 6.2.2.
[114] VE Flango, LM Wenner & MW Wenner, 'The Concept of Judicial Role: A Methodological Note' (1975) 9:2 American Journal of Political Science, 277, 277, 281; I. Van Domselaar, 'The Perspective Judge', (2018) 9:1 Jurisprudence: An Internal Journal of Legal and Political Thought, 71, 78, 84; I. Van Domselaar, Moral Quality in Adjudication: On Judicial Virtues and Civic Friendship', (2015) 44 Netherlands Journal of Legal Philosophy 1, 26.
[115] CC Langdell, *A Selection of Cases on the Law of Contract with References and Citations,* (Little, Brown & Company, 1871) Preface.
[116] Minda, (n 23) 13-14 and See text to section 2.2.
[117] Grey (n 85) 52-53.

rules definable by logic.[118] The findings of content analysis presented in appendices 1-5, and 7, as well as Figure 10, illustrate the influence of sub-values and manifestations of this higher value, coded as 'POSITIVISM', 'COL', 'CONCEPT-FORMAL' and 'EQUALITY', which is part of 'EQUALITY PRESUMPTION', presented in figure 9. 'POSITIVISM' represents perceptions of law as discoverable fact, determinate and autonomous, and appeared in approximately 50% of colonial opinions, 38% of early post-colonial opinions and 40% of late post-colonial opinions. 'COL' stands for perceptions of law as certainty, and was observed in 31% of colonial opinions, reducing to 13% of early post-colonial opinions, but sharply increasing to 29% during the late post-colonial period. 'EQUALITY ' stands for law as neutral, a perception that parties to contracts are equal at the time of contracting, and enjoy equal protection of the law during adjudication. It was not observed in any of the colonial opinions, was insignificant at 4% during early post-colonial judging, but has also sharply risen in significance at 18% during late post-colonial judging.

'CONCEPT-FORMAL' stands for conceptual formalism, a perception that law is conceptually ordered, and contains legal imperatives that bind judges to being formalistic during adjudication. This sub-value was found to have been significantly influential throughout Uganda's judging history, appearing in 28% of colonial opinions, 29% of early post-colonial ones, and also sharply rising, to 43%, during late post-colonial judging. These manifestations of the law as logic perception help to understand how it has motivated formalism.

Judicial perception of *law as discoverable fact* is evidenced by the use of deductive reasoning to arrive at the law applicable to a dispute, which during the content

[118] Minda (n 23) 407.

analysis was observed under the code 'LOGICAL-MECHANIC',[119] as well as 'POSITIVISM'. 'LOGICAL-MECHANIC' was used to observe the sub-value as an internal judging criterion that speaks to objectivity, as well as judicial perception of law as logic. On the other hand, 'POSITIVISM' helped in tracing it as indicative of an external and wider legal value, completeness, which will be attended to in the next section.

At the second stage of analysis, the perception of law as logic manifested by judges restricting the source of normativity to written rules in statutes and precedents, and giving no room to extra-legal considerations. Examples are opinions on the law of sale of goods, which were found under colonial,[120] early post-colonial[121] and late post-colonial judging.[122] These cases demonstrate that judges across judging history looked at the strict and literal interpretation of the Sale of Goods Act provisions, and cases that have so interpreted them, for guidance in reaching formalistic decisions.

In other types of contract disputes, the restriction of normativity to rules is demonstrated by *Commissioner of Income Tax v Jaffer Brothers Limited*.[123] The court admitted that it was a hard case, but since no legal authorities had been cited by counsel to show that payment by a tenant to secure a lease, was a contractual expense, there had been a capital expense. Another example is *Samuel Hawaga v*

---

[119] See Appendix 1: Cases 1, 3, 8, 11, 17, 40, 41, 48, 49, 50, 51, and 69; Appendix 2: Cases 9, 10, 11, 16, 17, 28, 31, 39 and 40; and Appendix 4: Cases 4, 10, 38, 41 and 54.
[120] Vithaldas Haridas & Co. v Valji Bhanji & Co. [1920-29] 3 UPLR 217; Yoweri Musaka v Gulkam Mussein Velji [1920-29] 3 UPLR 255; Douglas v Carr Lawson & Co. [1920-29] 3 UPLR 234; Viram v Chorley (1920-29) 3 ULR 63.
[121] Sekayombya v Uganda Steel Corporation [1984] HCB 42.
[122] Jade Petroleum Ltd v Salim Ramzanli & Another [2017] UGCOMMC 114(18/8/2017)).
[123] [1957] 1 EA 519 .

Christopher Bisutu[124], where the court, in enforcing a limitation of liability in insurance contracts, reasoned that however unfair a statute is, it has to be read as is, and the only other way was to have it amended by the legislative organ.

The other sub-value of law as logic found influential in formalism was the positivist perception of *law as value free and determinate*, also observed under the code 'POSITIVISM'. It was manifested by judges ignoring or rejecting calls to invoke considerations of policy, fairness, social welfare or other flexibility-engendering sources of normativity other than written rules in statutes and precedents. This speaks to judges considering rules as having all they needed to reach decisions, even in hard cases. In a number of cases, judges treated non-legal norms like practices as inferior to, and inapplicable in the face of, written rules of law.[125] For instance in addition to Suffish's case discussed earlier,[126] in *Samuel Hawaga v Christopher Bisutu*,[127] the judge categorically reasoned that what mattered to the court was the wording of a statute, and not its purposes.

In other cases,[128] judges reached formalistic decisions, which they justified by expressly showing the perception of the superiority of positive law, which was value-free and determinate. In *East African Plans Ltd v Roger Allan Rickford Smith*[129] and *Arim v Stanbic Bank*,[130] court orders were held as sacred ,and had to be obeyed even if irregular, null or void, implying that all other considerations and

---

[124] HCCS No. 839 of 1973.
[125] Appendix 1: Cases 8 and 40; Appendix 2: Cases 9 and 10; and Appendix 4: Cases 4, 12, 16, 29, 33 and 46.
[126] See text to section 7.2.1.2.
[127] HCCS No. 839 of 1973.
[128] Jamba Soita Ali v. David Salaam (HCCS 400/2005 (3/7/2006); East African Plans Ltd v Roger Allan Rickford Smith (HCCS No. 426 of 1969); Arim v. Stanbic Bank [2016] SCCA 6 (22/12/2016).
[129] (HCCS No. 426 of 1969).
[130] [2016] SCCA 6 (22/12/2016).

norms were useless in the face of commands from precedents. Related is the second high judicial perception value, judges viewing their role as mechanics of the law.

7.2.3.2 *Judges as Legal Mechanics*

Judges who perceived the law as logic were also found to have mechanically applied it, without allowing any flexibility. For this reason, this value was inferred from findings under the code 'LOGIC-MECHANIC'. Therefore, the findings discussed above regarding results for this code apply to prove that formalism was to a large extent motivated by judges looking at their role as mere policing, where rules are applied strictly without assuming the responsibility to balance competing interests, or fill gaps, as would arise in hard cases. What is peculiar is that even after Article 126 (2) (e) of the 1995 constitution commanded judges to dispense substantive justice without regard to technicalities, some judges continued to perceive their role as legal mechanics, as demonstrated by the Justice Madrama decision in *Nahurira.*[131] The implication is that it is not enough to widen judicial discretion, as did Article 126. The better way to manage the rigours of formalism in adjudication is the construction of commercial judging guidelines, stipulating under what circumstances, and the parameters of how, a judge can invoke substantive justice and other extra-legal considerations required to do fairness and justice. This brings us to articulating the values underlying formalism that are external to the institution of judging and the judges' individual values.

---

[131] [2015] UGCOMMC 76 (30/4/2015).

7.3 The External Judging Criteria

This part discusses the findings relating to values external to Uganda's judical culture and institutions, which have motivated the formalism at tension with flexibility in Uganda's commercial judging paradigm. The findings reflecting these values or the constitutive sub-values that combine to define higher values at the third and fourth levels of analysis, are presented in Figure 10 below. The results show that the values are both legal values – those rooted in the nature of the legal system – as well as the extra-legal, informed by the contract behaviour in Uganda.

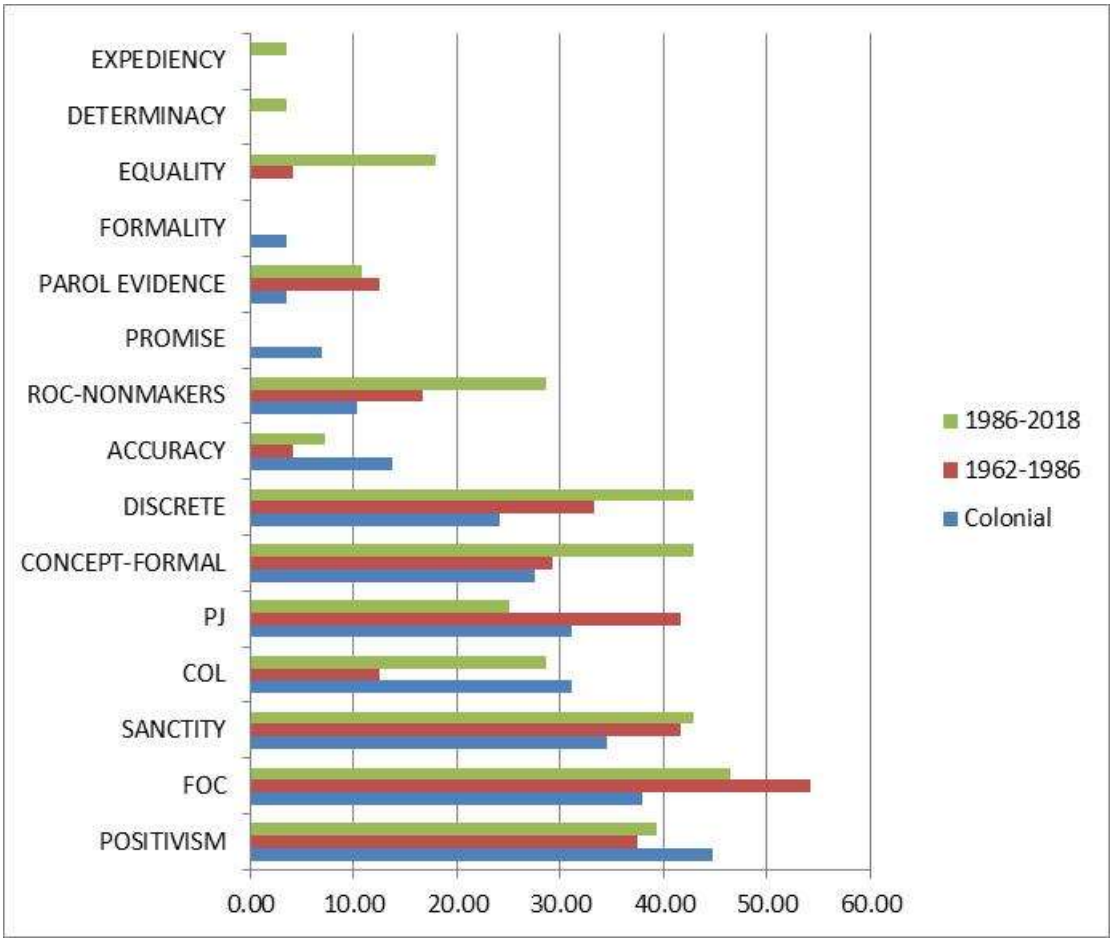

Figure 10: External Values behind Formalism

7.4 Legal Values

By 'legal values' is meant judging criteria that are embodied within or produced by the legal system. They include values embedded within Uganda's contract doctrine, and systematic values produced by the nature and commands of the

general legal system, such as the meaning and nature of contract law;[132] and legal imperatives used to limit and guide judicial choice, as contrasted with illegitimate policy considerations and other substantive goals of adjudication.[133] Accordingly, the content of legal values is bound to depend on Uganda's peculiar legal enterprise, which the courts play an adjudicative role to fulfil.[134] The following section discusses the values underlying formalism, which are systematic by nature.

7.4.1 Systematic Values

The content analysis revealed a prevalence of all the five categories of systematic values underlying formalism proposed by the existing literature.[135] The categories are: values of legality or perfectionism; procedural justice; restraint to authority (the power value); conceptual formalism; and equalitarianism. They are unpacked and discussed below, to demonstrate how each value has motivated formalism, and ascertain which of them qualifies to be part of the balancing towards coexistence. However, procedural justice is not given independent treatment because it is intertwined and adequately covered under the values of legality, as well as the internal criteria of rule of law values earlier discussed.

Otherwise, the values or their sub-values have been coded and reflected in Figure 10 and Appendix 7 as follows: 'ROC-NONMAKERS', which stands for the value of judicial restraint, by virtue of which a judge's authority and role are restrained and limited to a formalistic resolution of disputes; 'PAROL EVIDENCE', which stands for the best evidence rule, that contractual terms can only be ascertained from the four corners of the contract, the refusal to read anything into the contract or accept

---

[132] Weiler (n 102) 1.
[133] ibid.
[134] Weiler (n 102) 9.
[135] See text to section 6.4.4.

any extraneous considerations to determine the intentions of the parties; and 'FORMALITY', which stands for law as formal, and all explicit commands of formality in litigation and adjudication. With the exception of 'FORMALITY', for having only appeared in colonial opinions, and even then insignificantly, at only 3%, these values inform the discussion below.

7.4.1.1 *Perfectionism: the Values of Legality*

The ultimate value of legality is a perfect legal system, having rules that are clear, consistent, certain, determinate, and never retroactive.[136] This has been demonstrated as internally motivating formalism in Uganda's commercial adjudication, by illustrating the influence of rule of law values,[137] as well as the judicial perception values of conceiving law as logic[138] and the judges' role as legal mechanics.[139] However, as discussed earlier,[140] such perfectionism has an external dimension, the dimension of being served by the systematic values identified by Fuller[141] and Grey,[142] all of which speak to the desire for rulism[143] and a perfectly formalistic conception of law.[144] The values inform the common law of contract applicable in Uganda,[145] having grown as a necessary reaction to the high levels of disorder and indiscipline amongst the commercial and industrial classes,

---

[136] LL Fuller, *The Morality of Law*, (Yale University Press, 1969, Revised Edition) 41; see also Minda (n 23) 13-14 and See text to section 2.2.
[137] See text to section 7.2.1.
[138] See text to section 7.2.3.1.
[139] See text to section 7.2.3.2.
[140] See text to section 6.4.4.1.
[141] Fuller *The Morality of Law* (n 173) 41-64.
[142] Grey (n 85) 56-57.
[143] Fuller *The Morality of Law* (n 136) 42; F. Schauer 'Formalism' (1988) 97 Yale Law Journal 296, 535.
[144] Grey (n 85) 54-56.
[145] See text to section 5.3.1.

which included refusal to perform contracts, that exists today in most of Africa, Uganda included[146]

One of these values is comprehensiveness, manifested by the centrality of judges as solvers of legal disputes.[147] Secondly, is completeness or clarity of the legal system, manifested by judicial recognition of rules as neutral, autonomous, value-free and logically determinable.[148] Thirdly, is conceptual ordering,[149] or generality of law,[150] manifested by derivation of contract doctrine from general principles and observance of law's categorisation and classification.[151] Fourthly, is the formality of the legal system.[152] Finally is acceptability,[153] or judicial responsiveness,[154] manifested by judicial response to maintaining the legal order as social desire, and viewed by Grey[155] and Weiler as the prime value of legality.[156] The manifestations of these values of legality have been observed during the content analysis of Uganda's commercial judicial opinions, which proves their influence in contributing to the formalism in the tension. However, I do not intend to over-emphasise the influence of perfectionism by re-elaborating its underpinning values, beyond what is covered under sections 6.4.4.4, 7.2.1, 7.2.2, 7.2.2.2, and 7.2.3.1. Instead, being the value that speaks to perfectionism itself, I will only illustrate how these values of legality have influenced formalism using the value of completeness or legal clarity.

---

[146] PS Atiyah, *The Rise and Fall of Freedom of Contract* (Clarendon Press 2008) 395-96.
[147] Grey (n 85) 52.
[148] Minda (n 23) 407.
[149] Grey (n 85) 54-55.
[150] Fuller, *The Morality of Law* (n 136) 46-49.
[151] Grey (n 85) 55.
[152] ibid 52-53.
[153] Weiler (n 102) 14-15, 24-26; Grey (n 85) 56.
[154] See text to section 6.3.3.
[155] Grey (n 85) 56.
[156] Weiler (n 102) 14.

The findings of the content analysis, presented in appendices 1-5 and reflected in Figure 10, illustrate the influence of sub-values and manifestations of completeness or clarity of the legal system in formalistic opinions. The sub-values are judicial deductive reasoning, and a positivist conception of law, coded under 'LOGICAL-MECHANIC' and 'POSITIVISM' respectively.[157] 'POSITIVISM' represents perceptions of law as discoverable fact, determinate and autonomous, and appeared in approximately 50% of colonial opinions, 38% of early post-colonial opinions and 40% of late post-colonial opinions. Relatedly, legal determinism is manifested by the judicial treatment of law as certainty, which has been observed, under the code 'COL', as appearing in 31% of colonial opinions, 13% of early post-colonial opinions, and 29% of late post-colonial ones.

Deductive reasoning has been discussed, in section 7.1, as representing an internal value. However, in this sense it was also found to always correspond with a positivist conception of law as *discoverable fact*, and *determinate*, thereby showing the two sub-values reflecting the judicial recognition of legal system completeness.

These trends were found in sale of goods disputes during colonial,[158] early post-colonial,[159] and late post-colonial judging.[160] In these cases, judges across judging history looked at the strict and literal interpretation of the Sale of Goods Act

---

[157] See Appendix 1: Cases 1, 3, 8, 11, 17, 40, 41, 48, 49, 50, 51, and 69; Appendix 2: Cases 9, 10, 11, 16, 17, 28, 31, 39 and 40; and Appendix 4: Cases 4, 10, 38, 41 and 54.
[158] Vithaldas Haridas & Co. v Valji Bhanji & Co. [1920-29] 3 UPLR 217; Yoweri Musaka v Gulkam Mussein Velji [1920-29] 3 UPLR 255; Douglas v Carr Lawson & Co. [1920-29] 3 UPLR 234; Viram v Chorley (1920-29) 3 ULR 63.
[159] Sekayombya v Uganda Steel Corporation [1984] HCB 42.
[160] Jade Petroleum Ltd v Salim Ramzanli & Another [2017] UGCOMMC 114(18/8/2017).

provisions, or precedents, for guidance in reaching formalistic decisions.[161] The influence of positivist conceptions of law as value-free and determinate were manifested by judicial disregard of the law's purposes and other instrumentalist considerations; and treating non-legal norms like practices as inferior to rules of law.[162] In a number of other cases,[163] judges reached formalistic decisions, which they justified by expressly showing the perception of legal determinism.[164] Such legal determinism would have been difficult without the legal system restraining judicial authority, thereby having the power value that makes judges decide formalistically. Therefore, next is an analysis of the power value's influence in Uganda's commercial formalistic opinions.

7.4.1.2 *Legal Power: Judicial Authority Restraint*

Also found as a key value underlying the formalism in Uganda's commercial adjudication, is the value of legal power, summarised by Posner in the phrase, 'the

---

[161] Completeness was also influential in other types of disputes, as demonstrated by *Commissioner of Income Tax v Jaffer Brothers Limited*.[161] Although the court admitted it was a hard case, it held that since no legal authorities had been cited by counsel to show that payment by a tenant to secure a lease had been a capital and not a contractual expense, it was taxable. Likewise in *Samuel Hawaga v Christopher Bisutu,*[161] the court, enforced a limitation of liability in an insurance contract, reasoning that however unfair a statute is, it had to be read as is, or else be amended by the legislative organ.

[162] Appendix 1: Cases 8 and 40; Appendix 2: Cases 9 and 10; and Appendix 4: Cases 4, 12, 16, 29, 33 and 46. For instance in *Bisutu*,[162] the judge categorically reasoned that what mattered to the court was the wording of a statute, and not its purposes. Likewise in *Suffish International Food processors (U) Ltd & Pan World Insurance Co. Ltd. v Egypt Air Corporation,*[162] the marine insurance practice of proving insurance by means other than tendering the policy was rejected, and instead, the *parol* evidence rule upheld.

[163] Jamba Soita Ali v David Salaam (HCCS 400/2005 (3/7/2006); East African Plans Ltd v Roger Allan Rickford Smith (HCCS No. 426 of 1969); Arim v Stanbic Bank [2016] SCCA 6 (22/12/2016).

[164] For instance, in *East African Plans Ltd v Roger Allan Rickford Smith*[164] and *Arim v Stanbic Bank*,[164] court orders were held as sacred that had to be obeyed even if irregular, null or void. This makes legal imperatives contained in precedents superior to contrary norms as would justify flexibility.

law made me do it'.[165] Ugandan judges have been restrained by a number of legal instruments from being flexible, thereby being compelled to be formalistic by the power legal order. This value was coded as 'JUDICIAL RESTRAINT', later merged with other sub-values having the same implications, under the code 'ROC-NONMAKERS'. Appendix 7 shows that judicial restraint sub-value has manifested as progressively gaining more influence. It has appeared in 10% of colonial opinions, 17% of early post-colonial opinions, and 29% of late post-colonial ones. Such judicial restraints take the form of constitutional and non-constitutional restraints.

In Uganda, constitutional restraint is not in sharp conflict with restraint by the law's commands as suggested by Posner,[166] but part of one legal power value motivating formalism in adjudication.[167] This is because in Uganda, the constitution is not only law, in the sense of regular law that Posner speaks of,[168] but is the supreme law and ultimate criterion for legal validity. Such legal power was cited as the motivation for formalistic decisions, in *Jayuntilal S. Shah v Attorney General*.[169]

Since colonialism, Uganda's successive constitutional regimes have commanded formalism in a number of ways. Firstly is the enactment of the doctrine of separation of powers, under which the judiciary is restrained to application and interpretation of law, and to refrain from law-making, which Posner attributes to the

---

[165] RA Posner 'The Rise and Fall of Judicial Self-Restraint' (2012) 100 (3) California Law Review 519, 524.
[166] ibid 521.
[167] ibid 521.
[168] ibid.
[169] [1970] LDC 47/70

belief that the legislature, made up of people's representatives, is better on policy decisions. [170]

Secondly, Figure 2 demonstrates that under different constitutional regimes, the rate of formalism has varied, pointing to a link between the level of constitutional restraint and the prevalence of formalism in the courts. For instance, it was highest under the colonial regime. It dropped to almost non-existent under the 1962 independence constitution, which restrained judges to exercising judicial power only in the name of the traditional and therefore flexibility-oriented rulers of the different kingdoms.[171]

Formalism rose to very high levels between 1967 and 1995, when Uganda was governed by the 1967 constitution; although this has been branded a hybrid of flexibility and rigidity,[172] it changed the judicial system to being formalistically oriented in design and philosophy.[173] In the current era of the 1995 constitution, formalism has again considerably declined, although not to the 1962-67 levels; this coincides with the constitution's failure to make upholding the rule of law obligatory to judges. What it did instead was to mandate judges to administer justice in the name of the people,[174] and following not only the law, but also the norms, aspirations and values of the people.[175]

---

[170] ibid.
[171] ibid s 91(7).

[172] GW Kanyeihamba, *Constitutional and Political History of Uganda: From 1894 to Present* (LawAfrica 2002) 101

[173] ibid.

[174] Article126 (1).
[175] Article 126 (2) (e).

Although the 1995 constitution does not command unrestrained flexibility, but its coexistence with formalism, it contains no clear and coherent framework on how to achieve that coexistence. This can be inferred from its maintenance of the common law's formalistic spirit, which has translated into the continued prevalence of formalism alongside flexibility, and thus the tension. For instance, the constitution extends equality before the law, earlier understood as non-discrimination on grounds of race, tribe, nationality and political opinion,[176] but now to include economic and social standing.[177]

The legal system exerts non-constitutional judicial restraint on judges through laws that regulate jurisdiction, and court procedures. In this sense, Ugandan judges have largely been restrained from flexibility by the Judicature Act, which provides for the order of precedence of applicable law, written law being at the top of the hierarchy, followed by precedent.[178] This makes formalism the default approach; especially given that flexibility is only possible where formal rules do not exist.[179] However, there is still room for coexistence, as precedents with legal force include common law that existed before 1902, which by nature constituted customs and practices that reflected far-reaching values, ideology and ideals that call for flexibility, but also sometimes very rigid formalism.[180]

---

[176] Articles 24 and 29 of the 1962 Constitution; and Articles 15 and 20 of the 1967 Constitution.
[177] Article 21 of the 1995 Constitution.
[178] The Judicature Acts of September 1962, and 1967(11/1967), as amended, especially section 14 provides for the law applicable in the order of precedence as: (1) written law; (2) the doctrines of equity; (3) the common law; (4) customary law and usage; (5) the procedure and practice of the High court; and (6) the principles of justice, equity and good conscience (in the event that no express law or rule is applicable to any matter).
[179] This is the import of the phrase, "where no written law or rules is applicable" in section 14 (2)() (c).
[180] K Llewellyn, "Institutions and Law Jobs" in M Freeman, *Lloyd's Introduction to Jurisprudence* (Sweet & Maxwell 2014) 828-829, 1551.

The second aspect of non-constitutional procedural restraints is the set of commands in civil procedure and evidence rules, which regulate the process judges follow to arrive at the correct answers.[181] In Uganda's case, they motivate formalism in a number of ways.

Firstly, pleadings must meet the standards of legal formality and certainty, or otherwise be struck out by judges,[182] which has been done in numerous commercial cases throughout judging history.[183] To satisfy such standards, suits and defences must be filed by way of formal documents, called plaints[184] and written defences,[185] respectively.[186] Further, a plaint for a contract suit must contain the documents containing the contract terms in issue,[187] or a pleading as to imply terms if such are alleged.[188] On the defence side, if a contract is alleged, its bare denial can only be construed as a denial of the express contract as a fact, but not denial of the legality or sufficiency in law of the contract.[189] Therefore, once pleaded, contracts are presumed legal and valid, a position that restrains judges from flexibility and commands them to uphold the formalistic values of freedom, autonomy and sanctity of contract.

---

[181] In Uganda, these laws include the Civil Procedure Act, Chapter 71, Laws of Uganda; The Evidence Act (Chapter 6 of The Laws of Uganda), the Civil Procedure Rules, S.ISI 71-1, Laws of Uganda; the Judicature Act (Court of Appeal) Rules, and the Judicature Act (Supreme Court) Rules.
[182] Order 6 Rule 30 of the Civil Procedure Rules, S.I. SI 71-1, Laws of Uganda.
[183] Appendix 2: Cases 2; Appendix 4: Cases 1, 8, 35.
[184] Order 4 Rule1 of the Civil Procedure Rules, S.I. SI 71-1, Laws of Uganda.
[185] Order 8 Rule1 of the Civil Procedure Rules, S.I. SI 71-1, Laws of Uganda.
[186] Order 8 Rule1 of the Civil Procedure Rules, S.I. 71-1, Laws of Uganda
[187] Order 7 Rule18 of the Civil Procedure Rules, S.I. SI 71-1, Laws of Uganda.
[188] Order 6 Rule 7 of the Civil Procedure Rules, S.I. SI 71-1, Laws of Uganda.
[189] Order 6 Rule 11 of the Civil Procedure Rules, S.I SI 71-1, Laws of Uganda.

Secondly, judges must make written and formal orders,[190] or decrees,[191] as final decisions from adjudication.[192] The decree must conclusively determine the rights of parties to the dispute, which it's taken to include the formalistic rejection of the plaint or writ.[193] The determinacy of rights is formalistic, because the same rule is a rider that such a decree may be final or preliminary, implying that the issue is not substantive determination of rights but procedural justice.

Thirdly, reasoned elaboration of decisions, one of the tools by which legal systems restrain judges from unprincipled subjectivity,[194] is a legal requirement in Uganda.[195] The influence of this restraint is demonstrated in Figure 10, by cardinal doctrines, freedom and sanctity of contract being cited as grounds for formalistic decisions, in the majority of such opinions.

Evidence rules have also contained judicial restraints thereby motivating formalism. The most outstanding restraint, which at the same time points to judicial objectivity and individualism as a value of doctrine, is the *parol* evidence rule; otherwise known as 'the best evidence' rule.[196] It is a default rule for judicial interpretation of contracts that requires judges to be formalistic, in that if terms are written or required to be written, no evidence except the document itself or its secondary evidence (such as photocopies) is admissible to prove, clarify or contradict them.[197] Denning notes that, this restraint is derived from the market individualism freedom

---

[190] Sections 2 (o) and 91 of the Civil Procedure Act, Chapter 71, Laws of Uganda.
[191] Section 2 (c) of the Civil Procedure Act, Chapter 71, Laws of Uganda.
[192] Section 2 (c) of the Civil Procedure Act, Chapter 71, Laws of Uganda
[193] Section 2 (c) of the Civil Procedure Act, Chapter 71, Laws of Uganda.
[194] Minda (n 23) 37-48; See also text to section 3.3.1.4.
[195] Order 21 Rules 4&5 .
[196] Sections 91-94 of the Uganda Evidence Act.
[197] A Schwartz and R Scott 'Contract Theory and The Limits of Contract Law', (2003) John M. Olin Center for Studies in Law, Economics and Public Policy Working Papers. Paper 273, 55.

of contract value, that requires parties' intentions to be understood from the words spoken or written, not the adduced evidence or other external aids.[198] This makes judicial adherence to *parol* evidence also indicative of the doctrinal value of individualism, which is discussed in the next section.

During the content analysis this restraint was coded as 'PAROL EVIDENCE', and found to have been insignificant during colonial judging, at 3%, but rose above the threshold to 13% and 11% during early post-colonial and late post-colonial judging, respectively. In terms of contributing to a tension-management regime, this rule is already a check against unprincipled flexibility. However, its near-borderline prevalence indicates that judges have to a large extent ignored and overridden it to find space for policy and other considerations extraneous to the four corners of the contract. Beyond values of laws on judging – procedural, evidential and jurisdictional laws – conceptual formalism has also been found to underlie formalistic adjudication.

7.4.1.3 *Conceptual Formalism*

Conceptual formalism refers to formalism being the nature or command of sources of substantive law applicable to contracts. According to Freeman, [199]such legal sources are the raw material of the judicial process.[200] Judicial approach is therefore largely dependent on the nature of contract's legal sources, in which case, orthodox formalist scholars,[201] especially pre-Hart positivists and Langdallians, viewed the nature of legal sources as discoverable normative

---

[198] LJ. Denning, *The Discipline of Law* (Buttherworths 1979)
[199] M Freeman, *Lloyd's Introduction to Jurisprudence* (Sweet & Maxwell 2014) 1550.
[200] ibid.
[201] See text to section 4.2.

imperatives in printed texts.[202] The prevalence of formalism as part of the tension has in this sense been influenced by conceptual formalism being at the heart of the nature of contract doctrine and many laws on judging. The content analysis has revealed manifestations of conceptual formalism, as listed by Tamanaha, such as laws having predetermined content, and implications; as well as a logical, coherent, internally consistent and interconnected body of contract rules and principles.[203]

Coded as 'CONCEPT-FORMAL', Figure 10 reveals that conceptual formalism was found influential, and increasingly so, throughout Uganda's judging history, even when formalism has been on a constant decline. It appeared in 28% of colonial opinions, 30% of early post-colonial ones, and sharply rising to 43% during late post-colonial judging. Therefore, it is one of the key values underlying formalism being at tension with flexibility; although, that it is the kernel underlying formalism, as claimed by Tamanaha,[204] is not supported by the findings in this study.[205] By comparison, legal perfectionism, manifested by sub-values coded under 'LOGIC-MECHANIC', although on the decline overall, scored higher than conceptual formalism in both colonial and early post-colonial judging.

The influence of conceptual formalism manifested in a number of ways. Firstly, is the interconnection and consistency of all laws, effected by constitutional supremacy clauses,[206] which have always made the constitution the supreme law,

---

[202] Langdell (n 115) Preface.
[203] Tamanaha (n 66) 71.
[204] ibid.
[205] ibid.
[206] Article 1 of the 1962 Uganda Constitution; Article 1 of the 1966 Uganda Constitution; Article 1 of the 1967 Uganda Constitution; and Article 2 of the 1995 Uganda Constitution. This shows that since

and any other laws inconsistent to it being invalid, to the extent of their inconsistency[207] The use of the word 'consistency' in the supremacy clauses points to Uganda's adjudication happening in a formalistically-ordered legal system, being conceptually ordered, coherent and logical, with a Kelsenian philosophy of criteria for norm validity, where higher norms validate lower ones, as the default judging norm.[208] Although Kelsen was arguably not a formalist, and did not support logical deduction and mechanical enforcement of law,[209] in Uganda the findings reveal that such conceptual formalism as results from his model has guided judges towards formalistic decisions in a number of cases.[210] For instance, in *Jayuntilal S. Shah v Attorney General*,[211] the court refused to give effect to legislation that declared certain contracts void, and enforced them, reasoning that due to the supremacy clause, the constitutional right to property would override any legislation to the contrary. The other case is *Burma Oil Co. Ltd v Advocate,*[212] in which compensation for war losses, ordered by the court were later declared unrecoverable by Parliament using retrospective legislation. However, the legislation was held to be irrelevant, as Uganda was different from Britain, because its constitution was supreme, and not its Parliament.

---

independence, successive constitutions have provided that the constitution is the supreme law of Uganda, and all other laws inconsistent with it shall be void to the extent of the inconsistency.

[207] Article 1 of the 1962 Uganda Constitution; Article 1 of the 1966 Uganda Constitution; Article 1 of the 1967 Uganda Constitution; and Article 2 of the 1995 Uganda Constitution. This shows that since independence, successive constitutions have provided that the constitution is the supreme law of Uganda, and all other laws inconsistent with it shall be void to the extent of the inconsistency.

[208] See text to Section 1.7, and 4.7.2; H Kelsen, *General Theory of Law and State*, (Harvard University Press 1949) 115, 206 .

[209] See text to Section 4.7.2.

[210] See Semu Kiseka Mukwaba & Others v Daudi Musoke Mukubira (1952-56) ULR 74); Jayuntilal S. Shah v Attorney General [1970] LDC 47/70, P.53; Amis Olaboro t/a Lopai Hardware v Kumi District Local Government Council (HCMA 479/2005).

[211] [1970] LDC 47/70.

[212] [1965] AC 75.

Secondly, although the strict observance of legal classification appeared in less than 10% of cases and during only one judging period,[213] the finding indicates that judges have been influenced by it as an element of conceptual formalism.[214] As was the case in *David Dungu v East African Posts & Telecommunications*,[215] parties to contracts have been denied benefit of the duty of care concept in negligence, formalistically citing law's classification, that distinguishes contract from tort. Thirdly, Ugandan laws on judging and contract doctrine contain fundamental rules and principles that judges put to general application. That way, they formalistically reach similar decisions in cases with varying sets of facts.

Relatedly, Uganda has detailed regulation of contract,[216] leaving little room for judicial flexibility; which as indicated by Denning,[217] Chen-Wishart[218] and Goode,[219]is a recipe for formalism, as contract law content is spelt out and not left to judges during adjudication. For instance, the role of equity and other considerations of fairness have been rejected, to uphold freedom of contract, and the conceptual formalism in the statutes.[220] In one such case, *Dr Syedna Mohamed Burhannudin Saheb & 2 Others v Jamil Din & Others,*[221] significantly, the judge noted but disapproved the decisions of Judges Somerville and Denning in

---

[213] See text to Section 6.1.1 and Figure 9.
[214] See text to Section 6.1.1 and Figure 9.
[215] HCCA No. 84 of 1973.
[216] Both the Indian Contract Act, used to transplant English contract law to Uganda, and the current 2010 Contract Act.
[217] Denning (n 198) 9.
[218] M Chen-Wishart, *Contract Law* (Oxford University Press 2010) 16.
[219] R Goode, *Commercial Law in the New Millennium,* the Hamlyn Lectures (Sweet & Maxwell 1998) 16.
[220] Dr. Syedna Mohamed Burhannudin Saheb & 2 Others v Jamil Din & Others [1973] 1 EA 254; and Samuel Hawaga v Christopher Bisutu (HCCS No. 839 of 1973).
[221] [1973] 1 EA 254.

Stockloser v Johnson.[222] If approved, the effect would have been that where the relevant terms of contract were harsh, unconscionable or of a penal nature, the court would intervene, irrespective of whether the other party was guilty of any fraud, sharp practice or other unconscionable conduct.

Finally, formalistic judges have also indulged in a quest for principles, and even in cases where none clearly applied, avoiding making decisions based on pure flexible instrumentalism, as was the case in *Kurji Anandji & Co. v Sojpal Punja Shah and Others,*[223] and *Syedna's case.*[224] In *Syedna*,[225] the judge was clearly motivated by conceptual formalism towards formalism and certainty when he reasoned that he could not find the bargain unconscionable and interfere with it. The judge's reasoning was that no principle appears to exist to determine what is unreasonable or unconscionable or unjust; these are emotive, rather than precise terms; and so, it is presumably a question of what shocks the conscience of whoever is trying the case; leaving equity to vary with the length of the judge's foot.[226]

Besides conceptual formalism, such judicial reasoning also indicates that, another external systematic value is at play. This is neutrality, practicality manifested by the presumptive equality and equal treatment of parties before the law.

---

[222] [1954] 1 ALLER 630.
[223] [1964] 1 EA 3. In this case, the High Court had allowed the plaintiffs to succeed in a suit on bills of exchange, where several had been issued, and only a few dishonoured, the appellate court categorically stated that, the question should not be whether the judge reached the right decision or conclusion on the principles applied, but whether he applied the right principles.
[224] [1973] 1 EA 254, 443.
[225] Ibid.
[226] ibid 246.

7.4.1.4 *Equalitarianism: Neutrality of Law*

Equalitarianism is a key value of the formalist understanding of the nature of contract law,[227] having grown out of the market demand that the law should not discriminate between people, such as the insolvent.[228] It stands for law as neutral, manifested by a perception that parties to contracts are equal at the time of contracting, and enjoy equal protection of the law during adjudication. Coded as 'EQUALITY', the results in Appendix 1 and Figure 10 reveal its absence in colonial opinions, its insignificant at 4% during early post-colonial judging, but also its sharp rise to high significance at 18% during late post-colonial judging.[229] The absence of equalitarianism in earlier years appears to be due both to the social context and law being underpinned by inequality as a value.[230] The formalism represented by equality being made a condition of adjudication, in the colonising agreements that served as the constitution, was therefore the conspiracy'' sense of formalism that is in an actual sense instrumentalist.[231]

By way of illustration, in employment contracts the courts were more willing to accept informality and flexibility with regard to formation. As was the case in *Gulam Mohammed v E. Ethel*,[232] as 98% of Africans were illiterate local labourers, predominantly poor peasantry, working for the 2% Europeans and Asians who

---

[227] M Chen-Wishart, (n 218) 12-18.
[228] Atiyah (n 146) 397.
[229] See for instance Appendix 2: Cases 23 & 27; Appendix 4: Case 11; Appendix 5: Case 42.
[230] By virtue of the Uganda Agreement/Constitution, 1955, Article 26(1),) there had to be equal treatment before the law by native courts, as long as the Europeans were not subject to their jurisdiction, for the Europeans as a commercial and industrial class reality had to have their interests guaranteed by special treatment within the law and adjudication. At the same time, flexibility would always be resorted to and parties to a contract treated unequally if it served the underlying social and economic interests of that dominant class.
[231] Tamanaha (n 66).
[232] See *Gulam Mohammed v E. Ethel* (1932-35) UPLR Vol. 5 ULR 290.

controlled the commercial economy of the country.[233] It would defeat the market structure of the economy if such employment were to be declared illegal by the courts in the name of chasing formalism and legal certainty. In early post-colonial judging, the 4% prevalence included two prominent cases, *Yokana Sekandi v Yafesi Semakula*,[234] and *Aloysius Kakande v Edward Nsimbi*,[235]in which judges cited formalistic equality opportunistically by rejecting ignorance as a defence to breach of contract.

Comparatively, in late post-colonial judging equalitarianism's significant influence on formalism's prevalence has manifested in two ways. Firstly, there is the continued presumption of literacy, or intellectual and cognitive capacity of the contracting parties, as was the case in *Kenya Airways Ltd v Ronald Katumba,*[236] and *Aloysius Kakande v Edward Nsimbi.*[237]

Secondly, there is the more common presumption that contracting parties had equal bargaining powers, and thereby justifying the refusal to intervene in the freedom of contract guaranteed by formalistic judging.[238] For instance, in *Damba's*

---

[233] RW Cannon, 'Law, Bench and Bar in the Protectorate of Uganda' (International and Comparative Law Quarterly, (1961) Vol. 10) 877.
[234] HCCS 152/70, LDC-Case 181/70.
[235] [1984] HCB 37.
[236] [2006] HCB 106.
[237] [1984] HCB 37. In this case, the defendant, an illiterate challenged validity of the contract he had signed on ground that although translated in the local language, it did not contain a certification of translation and explanation as to meaning, in accordance with s. 4 of the Illiterates Protection Act. The court upheld the formalistic sanctity of contract principle, reasoning that the defence only applied if the illiterate had not acted negligently, by not asking the contract to be read to him in a language he understood. Further, that the section created a presumption that the contract had been read to the defendant and he understood, which once alleged was up to him to rebut.
[238] See Ruhemba v Skanka Jensen (U) Ltd [2002] 1 EA 25; Uganda Telecom Ltd v Tanzanite Corporation [2005] 2 EA 331; and Thunderbolt Technical Services Ltd v Apedu Joseph & K.KKK Security (U) Ltd (HCCS No. 340 of 2009, Unreported).

case,[239] where disparity in social-economic class of the parties was considered, but treated as unhelpful to the weaker party, this led to a formalistic decision.

Such equalitarianism being invoked instrumentally tallies with the whole 'mish-mash' that defines the tension, especially given that, as Holmes, noted, many times such reasons anchored in the social, economic or political realities surrounding a case are left inarticulate, and yet are the very root and nerve of the whole proceeding.[240]Although necessary to investigate, the full range of such forces is beyond the scope of this study. The positive part is that the value's appearance at 18% in recent times qualifies it to be on the list of formalism values to be weighed and balanced with flexibility ones. The relativism of values thesis propounded by interests jurisprudence considers the scheme of values or interests to be balanced, as made up only those values with a high prevalence at the particular time.

The above discussion demonstrates that legal values of a systematic nature have been influential in the prevalence of formalism as part of the tension over the years. In the next section, the chapter demonstrates that besides the systematic values, contract doctrine also contains values that motivate judges in deciding formalistically. These values too need proper understanding for one to ably find ways of balancing them with the flexibility values they compete with, to manage coexistence.

---

[239] [1964] 1 EA 3
[240] Holmes, OW Jnr, 'The Path of Law' 10(8) Harvard Law Review (1897) 457, 465-466

7.4.2 Doctrinal Values

Doctrinal values are some of the most influential legal values underlying formalism in Uganda's commercial adjudication. The findings market individualism, manifested by freedom, autonomy, and sanctity of contract are the dominant set of doctrinal values. Under the values of judicial objectivity,[241] rationality,[242] non-constitutional restraints[243] and conceptual formalism,[244] I have already demonstrated the influence of freedom and autonomy, as well as sanctity of contract, as internal motivations for formalism.

In the following sections, I demonstrate that alongside other sub-values, freedom and sanctity of contract have also influenced formalism as part of the external higher values, market conformism and individualism. Also articulated is the influence of external doctrinal values, promise, and consentualism.

7.4.2.1 *Market Conformism*

Market conformism refers to the value embedded in classical contract law – the desire to facilitate the free market economy, by maintaining the components that determine its proper functioning, exchange and competition. Atiyah[245] relates that such conformism underpinned formalistically-oriented classical contract law. This is through values like contract law being derivable from general principles;[246] certainty and predictability being superior to equity, fairness and substantive

---

[241] See text to section 7.2.1.2
[242] See text to section 7.2.1.3.
[243] See text to section 7.4.2.2.
[244] See text to section 7.4.3.
[245] Atiyah (n 146) 399.
[246] ibid 398.

justice;[247] and judges' role being mere umpires to ensure procedural fair play.[248] That brew of contract law is what was transplanted to Uganda, and has regulated the country's commercial transactions until the recent 2010 Uganda Contract Act. Therefore, during adjudication, judicial market conformism will manifest by adherence to market-oriented values of predictability and certainty; the superiority of positive law over practice and experience; security of transactions; and reciprocity in contract.[249] Apart from reciprocity, all these values have been illustrated as prevalent in Uganda's formalistic commercial opinions across judging history.

The findings on predictability and certainty's influence have already been discussed as a rule of law value,[250] as they underpin both the internal criteria of judging in that regard as well. Further, as a sub-value of such certainty, the judicial recognition of law as conceptually ordered by deriving contract law from general principles, is already discussed under non-constitutional restraints[251] and conceptual formalism;[252] as well as procedural justice, already discussed under non-constitutional restraints.[253]

However, certainty as a legal value in the market conformism sense equally refers to contractual certainty, adherence to which will move a judge to declare uncertain bargains invalid. This strand of the value only appeared in about 5% of early post-colonial opinions, therefore its role in formalism is insignificant. However, the other

---

[247] ibid 399-400.
[248] ibid 404.
[249] See text to section 6.4.2.
[250] See text to section 7.2.1.4.
[251] See text to section 7.4.2.2.
[252] See text to section 7.4.3.
[253] See text to section 7.4.2.2.

indicative value of certainty in doctrine is market conformism, which although revisited under external values, appeared in over 30% of colonial, dropped to about 13% of early post-colonial but has again risen to almost 30% of late post-colonial judging. Therefore, with exception of its not being contract behaviour oriented, it is a key value reflecting the higher value of market conformism, as underlying formalism; and therefore part of those to be balanced with flexibility values, to manage the tension.

The other constitutive value of market conformism, security of transactions, is a strand of sanctity of contract.[254] Its findings will be discussed in the next section under that main category. This leaves us with reciprocity, or what Barnett calls the bargain theory, the value of mutuality of bargain.[255] In contract doctrine, it is represented by the requirement that contracts are only valid if supported by consideration, however inadequate.[256] During the content analysis, reciprocity was hardly found the subject of judicial reasoning, which points to its being insignificant and disqualified from the values weighing scale, as with the other non-legal values underpinning market conformism discussed above.

However, it could be a case of such values being so settled and leading to such straightforward answers, that cases in which they appeared did not qualify as hard ones, to be analysed in this study. The answer to this doubt cannot be arrived at without widening the type of cases reviewed in this study, and this constitutes one of the study's weaknesses. The findings are clearer with regard to the second component of market individualism.

---

[254] JN Adams and R. Brownsword, *Understanding Contract Law* (Thomson Sweet & Maxwell, 2007) 193-194; JN Adams and R Brownsword, 'Ideologies of Contract', (1987) 7:2 Legal Studies 207.
[255] RE Barnett, 'A Consent Theory of Contract', (1986) 86 Columbia Law Review 269, 287-289.
[256] Goode (n 219) 12-13.

7.4.3 Individualism to Non-interventionism

As earlier indicated,[257] existing literature points to individualism as a key motivator of formalism, manifested by judicial adherence to the values of freedom and autonomy of contract, sanctity of contract, promise, and consentualism. The content analysis sought to test the prevalence of these indicative sub-values, and weigh their influence in Uganda's commercial formalistic opinions, the results of which inform the discussion below.

7.4.3.1 *Freedom and Autonomy of Contract*

Freedom and autonomy of contract is the notion of classical contract, that only the parties should determine the terms of contract they agree to, and the courts are restrained from interference.[258] It is a value embedded in contract doctrine, and in this study's categorisation, an external judging criterion that the legal system imposes on judges. Both statute and precedent constrain judges to recognise that the parties have freedom of choice, and only their will determines contractual terms, thus the title will theory. Therefore, its indicative judicial practices in hard cases are courts refusing to fill gaps in terms, or interfere to find fairness, justice, efficiency, or otherwise.

The findings in Figure 10 reveal that freedom and autonomy of contract, represented by the code 'FOC', manifested as the single most influential legal value in formalistic judicial opinions.[259] It appeared in approximately 38% of colonial judging, and sharply increased to 54% of early post-colonial judging. Since

[257] See text to sections 6.4.3; 6.4.3.1-4.
[258] Atiyah (n 146) 389.
[259] See its appearance in Appendix 1: Cases 4, 25, 29, 37, 47, 49, 50, and 67; Appendix 2: Cases 5, 67, 9, 13, 21, 22, 23, 24, 35, 41; and Appendix 4: Cases 3, 9, 14, 19, 23, 24, 27, 28, 39, 43, 47, 48, 49, and 50.

then, it has reduced, although it remained the strongest formalistic legal value, at 46% of late post-colonial judging.

Earlier in section 6.4.3.1, illustration of its influence in formalism is made using *Thunderbolt*,[260] *Tight Securities Ltd*[261] and Photo *Production Ltd,*[262] which demonstrate how it has contributed to the tension. Further, in cases like *National Industrial Credit Uganda Ltd v PM Nsibirwa,*[263] where vitiating factors appeared to be proved or argued, as would loosen the strain on judges and allow a flexible approach, judges adhered to freedom and autonomy of contract and still decided formalistically.

Another manifestation of its influence in formalism is the rejection of equity, as would allow intervention in some cases, as already demonstrated in *Dr Syedna Mohamed Burhannudin Saheb & 2 Others v Jamil Din & Others,*[264] in which the learned Ugandan judge refused to follow the flexible reasoning by celebrated English judges Somerville and Denning in *Stockloser v Johnson.*[265] In litigation, my experience is that citing Lord Denning will normally assure counsel of victory in a case, therefore such a departure points to the high value the judge attached to individualism in Uganda, as underpinned by freedom, autonomy, and sanctity of contract.

---

[260] HCCS No. 340 of 2009.
[261] HCCA No. 16 of 2014 (UG COMMC 135/2015).
[262] (1980) 1 ALL ER 556.
[263] HCCS No. 735 of 1971. The defendant raised a defence of mistake, having signed the agreement without reading through. The judge maintained freedom of contract, holding that mistake must be construed as non-existent unless a reasonable one. Further, that a stranger could not have misrepresented to a man of the class, education and experience of the defendant.
[264] [1973] 1 EA 254.

However the findings do not support Denning's metaphor in *George Mitchell (Chesterhall) v Finney Lock Seeds Limited,*[266] the metaphor of freedom and autonomy of contract as an idol formalistic judges worship, implying uncompromising faith in, and practice of adherence to it. Although the most influential formalism value, it has barely made it past 50% prevalence, which is by no means a sign of absolute dominance, even amongst formalism-engendering values. The better way to perceive freedom and autonomy of contract, is a key value at competition with others for representation in judging criteria, and therefore one that needs to be put into consideration when constructing commercial judging guidelines, that can create coexistence between formalism and flexibility.

7.4.3.2 *Sanctity of Contract*

The second indicative value to individualism, sanctity of contract or contract solidarity,[267] refers to the notion directly resulting from freedom of contract, that in absence of vitiating factors like fraud, mistake, undue influence and the like, contracts as made, must be strictly enforced by courts.[268] Judicial adherence to it is manifested by judicial non-interventionism in contracts, such that pleas of fairness, equity, reasonableness or other sympathy will be rejected. Further, a party will not be released from a bargain freely entered, and legally permissible vitiating factors allowed cautiously. In the same way, courts will not readily give legal force to implied terms.[269]

---

[266] (1983) 2 AC 803; (1983) QB 284, 297.
[267] IR Macneil, 'Values in Contract: Internal and External', (1983-84) 78 New York University Law Review 347-349.
[268] Goode (n 219) 12-13.
[269] See text to section 6.4.3.2.

In the findings, as its by-product, whenever sanctity of contract appeared, so did freedom of contract. Sanctity of contract was coded and presented in Figure 10 as 'SANCTITY', and amongst formalistic opinions, appeared in 34% of colonial judging, 42% of early post-colonial judging and 43% of late post-colonial judging. It has therefore been consistently growing, and a significant value underlying formalism throughout judging history, as the operative value to market individualism. It is operational in the sense that after judges recognise the value of freedom of contract, as well as other market conformism values, sanctity is what guides formalistic judges to strictly enforce the terms, to secure the other values.

Therefore, as part of the external judging criteria, the formalism in the tension is significantly influenced by both systematic and doctrinal legal values. Figure 10 reveals that these legal values outweigh extra-legal values numerically, and in prevalence during adjudication. This is not surprising, considering that under formalist theory judges regard the law as containing all they need to be guided by. Then the question is whether the alternative proposals of judges being motivated by promise on one hand and consentualism on the other are reflected in the reality of actual judicial opinions.

7.4.3.3 *Contract as Promise*

Contract as promise is supposed to be manifested by the judicial recognition of a promissory obligation to make the defendant perform a promise, or pay its money's worth, or otherwise compensate the plaintiff for the value of reliance on such a promise.[270] During the content analysis, it was coded as 'PROMISE', and was observed only during colonial judging, in about 7% of cases. Therefore, much as it

[270] See text to section 6.4.3.3.

forms the basis of a plausible theory for coexistence, during the formalism that is at tension with flexibility in Uganda's commercial adjudication, promise is not an influential value worth considering for balancing in a framework for coexistence. This leads to analysis of results for the other proposition, consentualism, as the ultimate value.

7.4.3.4 *Consentualism*

Consentualism refers to the value of contractual rights and obligations being determinable by existence of the consent of rights holders transfer or otherwise to deal with their entitlements. It is represented by a manifestation by a party to be legally bound, therefore during adjudication judges will recognise it not only from the wording of contractual terms, but also from the parties' conduct and general context surrounding the contract.[271] This can motivate judges to flexibility as well, thus a plausible theory to guide efforts towards coexistence. In the analysis of formalistic opinions, it was coded under 'EXPECTANCY'. Figure 9 presents its findings as only having appeared in less than 5% of colonial formalistic judging. Therefore, its role in the prevalence of formalism is so insignificant as to disqualify it from balancing when formulating the proposed commercial judging guidelines. Further, the content analysis has also revealed some extra-legal values as responsible for the formalism at tension with flexibility, the findings for which the following section discusses.

7.5 Extra-Legal Values

With regard to extra-legal values, the institutional theory of law is relevant, particularly Carl Schmitt's rejection of the normativity conviction that formal norms

[271] See text to section 6.4.3.4.

already contain all that judges need in order to interpret and enforce them.[272] Instead, he put forward the view that the legal order is a product of social conditions and realities.[273] Further, the findings indicate that although Dworkin rightly rejected the positivists' undervaluation of the normativity of principles in hard cases, he also wrongly termed extra-legal judging values as 'dishonourable'.[274] Figure 10 demonstrates that the extra-legal values discreteness, and accuracy as the nature of commercial contracting, as well as expediency, are part of the reality underlying formalism in the tension across judging history. They cannot be regarded as dishonourable when one of them, discrete contracting, has even had more frequency and therefore influence than some legal values.

7.5.1 Discreteness in Contracting

Discreteness in contracting refers to the classical nature of contracting, where parties are detached from each other, only connected by the assertion of contract rights.[275] Their relationship is therefore based on self-interested individualism,[276] such that the terms agreed at the time of completion, and not future events or relations, will guide the judicial allocation of rights and obligations. This value's influence appeared in a significant number of contracts that were the subject of formalistic opinions analysed,[277] making up 24% of colonial judging, and

[274] R Dworkin, *Taking Rights Seriously* (Duckworth & Co. Ltd 1977) 39.
[275] Chen-Wishart (n 218) 15; IR MacNeil, 'Contracts: Adjustment of Long-Term Economic Relations under Classical, Neoclassical and Relational Contract Law' (1978) 72 Northwestern University Law Review 854.
[276] Chen-Wishart (n 218) 12-18
[277] Appendix 1: Cases 4, 25, 29, 31, 46, 49, 53, 60; Appendix 2: Cases 3, 5, 13, 14, 21, 32, 34, and 35; Appendix 3: Case 29; Appendix 4: Cases 3, 6, 10, 11, 14, 15, 19, 23, 25, 27, 36, 41, 42, 44, 49, 50, 54; and Appendix 5: Cases 50 and 87.

continuously growing to 33% and 43% of early and late post-colonial judging respectively.

In many formalistic decisions, judges have refused to recognise relations beyond that of the two contracting parties as defined by the express terms. For instance, liability was not found from actions of third parties like agents of the parties,[278] or relations that appeared to develop after and from the contract, although not explicitly provided for by the terms.[279]

Further, contracts antecedent to others have been treated as discrete, such that the legality of the parent contract would not affect the sanctity of the resultant one. Such was the reasoning in *Rwakatooke Muchope v Caltex Oil (U) Ltd*,[280] where a mortgage was enforced notwithstanding the illegality of the loan agreements; *Mirembe Wire Products Ltd v Goldstar Insurance Co. Ltd*,[281] where the insurance policy was treated as distinct from the cover notes; and *Greenland Bank Ltd (In Liquidation) v Express Sports Club Ltd,*[282] where a pre-incorporation contract was treated as discrete in relation to the memorandum and articles of association of the company.

---

[278] Ms Peter SS Kirumira Oil Millers v American Insurance Company [1976] HCB 56; Jubilee Insurance Co. Ltd v John Sematengo [1965] 1 EA 233; Amosh. S. Ghata v Tarbhain Haji Jamal & Co. Limited HCCS 354/68, LDC 82/70.
[279] National industrial Credit (Uganda) Limited v C.D Patel t/a Western Transport Co (1972) ULR 85; National trading Corporation v Moses Kityo (1972) ULR 63; George Hall v Chas O.F. Drani [1972] ULR 65; Mohamed Azim v Ladha Kassam (1932-35) UPLR Vol. 5 130, 133; Pyarali Kuverji v the British India General Insurance Co. Limited [1952-57] ULR 194; Ali j. Dhanji v William O'Swald & Company [1920-29] 3 UPLR 191; KB Parekh v F. Mahomed and J. Esmail (Objector) [1920-29] 3 UPLR 224; Establishments L. Besson De L' Est Africa v F.C. Holmes (1920-29) 3 ULR 220; Jade Petroleum Ltd v Salim Ramzanli & Another [2017] UGCOMMC 114(18/8/2017); Osapil v Kaddu [2000] 1 EA 193; and See Appendix 4: Cases 3, 6, 10, 11, 14, 44, 15, 19, 25, 27, and 36.
[280] HCCS 809/1999(Judgment of 21/10/2004).
[281] HCCS 54/2002 (Judgment of 18/7/2007.
[282] (1920-29) 3 ULR 220.

Finally, courts have also treated the rights and obligations from contracts as being defined at completion of the contract, in many cases rejecting the effect of vitiating factors such as frustration, mistake and equity. Such factors would otherwise call for considerations like trust, cooperation-,and the futuristic relations.[283] For instance, in *Monas (U) Limited v Benzene (u) Limited*,[284] the defendant was obliged to supply bitumen 'immediately', and upon failure pleaded frustration of the contract by payments being blocked due to sanctions on Iran, the source of goods.[285] The judge noted that the doctrine of frustration, and its effect of loss staying where it is, had been solidified under section 66 (1) and (2) of the 2010 Contract Act as a defence to contractual obligations; however he formalistically decided that the frustration pleaded must have been the subject of contract, and not an extraneous occurrence. Similarly, in a number of other cases,[286] where frustration was raised as a defence, formalistic decisions were made, contractual obligations being treated as sealed at contracting, no matter what happened afterwards.

With regard to mistake and misrepresentation, in *National Industrial Credit Uganda Ltd v PM Nsibirwa*,[287] the defences were raised, but the judge held that they would be construed as non-existent and the words in the contract read 'as is'. He reasoned that misrepresentation could not have been made by a stranger to the man of a class, education and experience as the defendant. By use of the word 'stranger', the judge was clearly mindful of relations that could be recognised as

[283] Appendix 1: Cases 25, 49; Appendix 2: Cases 3, 13, 14; Appendix 4: Cases 23, 42, 54; and Appendix 5: Case 50.
[284] HCCS 88/2013 [2017] UGCOMMC 92 (5/9 2017)).
[285] HCCS 88/2013 [2017] UGCOMMC 92 (5/9 2017)
[286] See Appendix 1: Case 25; Appendix 2: Case 32; and Appendix 4: Case 54.
[287] HCCS No. 735 of 1971.

accompanying the process of contracting, but was instead motivated to be formalistic by the discreteness nature of the contract.

Discrete contracting is known to follow the growth and dominance of private property in society, a value that motivates formalism in law and adjudication.[288] In Uganda, discrete contracting inevitably followed the colonial introduction of the value of private property and the attendant classification of society, in place of pre-colonial common property and classless societies.[289] *Nsibirwa's case* reveals that judges recognised this socio-economic aspect of contracting and sought to judge formalistically, as a way of upholding the discreteness of contract and protection of economic interests, in this case the insurer's business, which would otherwise be eroded by treating contract as relational. The fact that the judge highlighted the defendant's strong education and economic class and used them to determine the rights and obligations of the parties supports the MacNeil claim that discrete contracting prevails to serve and protect private property interests.[290] Such interests behind that nature of contracting also need attention if one is to fully understand why formalism has stayed at tension with flexibility.

Unfortunately cases like *Nsibirwa's*[291] are the exception, as the content analysis of judicial opinions in the study could not reveal the social-economic forces that caused discrete contracting in all the cases, since they were very rarely articulated by the judges. Nevertheless, for the purposes of this study, it is worth noting that

---

[288] IR MacNeil, 'Relational Contract: What we do and do not know', (1985) Wisconsin Law Review, 483, 491, 519.
[289] This was the effect of Article 15, 18 and 19 of the Uganda Agreement and The Distribution and Price of Goods Act (No. 9 of 1952, Cap 104); and the Marketing of Produce Act (No. 1 of 1953, Cap 243); R Mukherjee, *Uganda: A Historical Accident? Class, Nation and State Formation* (Berlin 1956) 177-78, 231 & 257-58;
[290] Macneil 'Relational Contract: What we do and do not know', (n 288).
[291] HCCS No. 735 of 1971.

discrete contracting has been the most dominant extra-legal value influencing formalism, making it one of the values to be taken into account in formulating ultimate judging guidelines as a way to manage the tension. Other extra-legal values, although not as prominent, that underlie formalism, include accuracy in commercial contracting and litigation.

7.5.2 Accuracy in Contracting and Adjudication

Accuracy as a value of contracting and adjudication is realised using money as the measure for benefits and compensation in case of breach. Money is a social institution and psychological symbol of standardised value for goods and services,[292] with an accurate, quantifiable and determined value, which informs rules and the attendant formalism judging.[293] The study has in this regard tested the Dworkin[294] v. Farber,[295] debate as to whether wealth, represented by money, is a value competing in adjudication universally, so as to form an end to be pursued by judges. The results indicate accuracy, represented by money as a value, in support of Farber[296] and Proctor's claims.[297] However, it is the most dominant value in the Farber sense, but one of many that should form the cocktail for coexistence.

---

[292] V Hal, 'Why is That Dollar Bill in Your Pocket Worth Anything", (2004) The New York Times, January 15.
[293] The Sale of Goods Act, Chapter 82 Laws of Uganda, s 2
[294] R Dworkin 'Is Wealth a Value?' (1980) 9 J. Legal Studies 191.
[295] DA Farber, "Efficiency and The Ex Ante Perspective"," in J.S. Kraus & S.D. Walt (eds), *The Jurisprudential Foundations of Corporate and Commercial Law,* (Cambridge University Press, 2000), 54, 64.
[296] ibid.
[297] C Proctor 'Change in Monetary Values and The Assessment of Damages', Djakhongir Saidov & Ralph Cunnington (eds), Contract Damages: Domestic and International Perspectives, (2008) Hart Publishing, 459, 461

In Uganda, one of the fundamental changes introduced by colonialism was the establishment of money as a medium of exchange, which changed court awards as well, from flexible restitution to monetary,[298] as a more realistic way to satisfy commercial purposes and expectations.[299] This came to be reflected in statutes on contract.[300] All this would in turn motivate formalism in place of the previous flexibility paradigm.[301] In the findings, a comparison between Figures 1 and 11 reveals that, although formalism has been declining, accuracy, coded as 'ACCURACY', was at its peak during colonial judging, appearing in 14% of formalistic opinions; had a sharp decline in early post-colonial judging at 4%; but is on the rise in late post-colonial judging at 7%. Its prevalence has been against the bedrock of the conceptual formalism discussed above,[302] because the procedural justice represented by strict application of procedural and evidential rules is partly informed by the pursuit of accuracy as a value and goal of adjudication.[303]

---

[298] ibid.
[299] ibid.
[300] Under the Sale of Goods Act (1932), S.2 (1) and 6, money formed the legality of consideration and enforceability of contracts as transactions exceeding 200 shillings were not enforceable by courts unless part performed by a party chargeable by acceptance or payment of a commitment or such contract was formally reduced into writing; the sale of goods unpaid seller's remedy in personam being payment of the money price (S.48); the buyer can recover damages for non-delivery of the goods (S.50 (1); damages are measured by way of the difference between the market price and the one at the time of breach (S.50 (2).
[301] GW Kanyeihamba, *Constitutional and Political History of Uganda: From 1894 to Present* (LawAfrica 2002) 18, quotes Kawalya Kaggwa, the former Prime Minister (*Katikilo*) of Buganda, when addressing the Legislative Council, thus "the introduction of cash economy has disturbed the African society and shaken it to its very foundation-our custom", that included jurisprudence.
[302] See text to section 8.2.2.3; Many of the Commercial laws contain conceptual formalism directly commanding money driven accuracy in contracting and adjudication. These include, Money Lending laws; the Securities law (including the law of sales, mortgages law and the law on debentures); Banking law and the law of Negotiable Instruments; and the law of Sale of Goods.
[303] L Kaplow 'The Value of Accuracy in Adjudication: An Economic Analysis' (1994) 23 (1) Journal of Legal Studies 307.

Lord Carswell of the House of Lords confirmed this, in *Golden Strait Corporation v Nippon Yusen Kubishka,* when he declared that in commercial cases considerations of certainty and finality have to yield the greater importance of accuracy in assessing damages.[304] This was not only recognising the value of accuracy, but also treating it as the top of the hierarchy, which again the findings in this study refute; the highest prevalence it has had being 14%. Further, the courts have used accuracy as the guide in deciding cases relating to the conditions for granting injunctive reliefs,[305] specific performance,[306] special damages,[307] exemplary damage[308] and claims for loss of expectations.[309]

Therefore, money has motivated formalism by enabling the practice of Langdalle's role of the judge as a legal mechanic.[310] Further, contrary to Lord Carswell's ranking, the above cases support Weber and Stinchcombe's view that accuracy, like other formalism-engendering values, aims for certainty, as is therefore far from the prime value.[311] However, one would also be right to argue that Llewellyn's flexibility efficiency thesis is now applicable in Uganda because of the accuracy brought by money, which points to money having a role in the search for

---

[304] [2007] UKHL 12
[305] Noormohamed Janmohamed v Kassamali Virji Madhani (1953) E.A.CA.EACA 8.
[306] Hassan Merali v Nanji khimji (UHCA 4/1917).
[307] Grindlays Bank (U) Limited v Kayondo (1976) HCB 147, 148; Robbialac Paints (U) Limited v K.BKB Construction Limited;.
[308] Esso Standard (U) Ltd v Opio (1992-93) HCB 107.
[309] Akkermans Industrial Engineering Ltd v Attorney General HCCS 333/2004(19/01/2009); Appendix 1: Cases 32, 46, 60 and 69; Appendix 2: Cases 26 and 28; and Appendix 4: Case 13.
[310] Minda (n 23) 13-16.
[311] A Stinchcombe, *Certainty of Law: Reason, Situation-Types, Analogy, and Equilibrium* (1999) 7(3) The Journal of Political Philosophy 209.

coexistence, as it serves higher values on each side.[312] Related is the value of expediency in contracting, as well as in adjudication.

7.5.3 Expediency

Expediency, coded as 'EXPEDIENCY', is the other outlier identified, having appeared in less than 10% of cases analysed overall. However, unlike other outliers, it can neither be merged with any dominant value, nor appear enough to form a key value on its own. However, its small frequency could be deceptive The reality is that the country is constantly trying to reduce a big case backlog in the courts, which by 2015 stood at 37,827 cases – these being cases that have stayed pending for more than two years.[313]

Such a backlog calls for judges, the disputing parties and lawyers in litigation to attach high value to expediency as a motivation for formalism in adjudication, achievable through technical means and invocation of other formalistic quick fixes to dispose of cases. It is therefore not surprising that 'expediency during adjudication' is mentioned as a value of the commercial court, a division of the High Court of Uganda.[314] This further confirms that expediency motivates formalism as a fundamental value of Uganda's commercial justice system, dictated by the judging environment in late post-colonial Uganda. However, following the

---

[312] DA Farber, "Efficiency and The Ex Ante Perspective", in J.S. Kraus & S.D. Walt (eds), *The Jurisprudential Foundations of Corporate and Commercial Law,* (Cambridge University Press, 2000), 54-86 and A Schwartz, 'Karl Llewellyn and The Origins of Contract Theory', in JS Kraus & SD Walt (eds), *The Jurisprudential Foundations of Corporate and Commercial Law* (Cambridge University Press, 2000), 12-53, 16.

[313] Chief Justice B. Katuurebe in an interview published in the Daily Monitor News Paper of 30/01/2019, Page 7, indicated that the Judiciary Case census of 2015 revealed a backlog of 37,827-these being cases that have stayed pending for more than two years.

[314] The Uganda Judiciary, *The Uganda Commercial Court Users Guide* (February 20015), 4. One of the court's objectives is to deliver fast justice to the business community and expediency is part of its mission statement.

10% threshold, its low frequency denies expediency an immediate place on the balancing table.

7.6 Conclusion

In conclusion therefore, the formalism in the tension is motivated by a number of values, which are both internal and external to the judicial institution and its players. The values vary in character, manifestations as well as weight. The dominant values include the internal values of rule of law – justice being conceived as legality, predictability and certainty of law and contract, objectivity, and rationality. Internally, formalism has also been motivated by the perception of law as discoverable fact from text, determinate, neutral, formal, certain, value-free and definable by logical deduction; judges' perceptions of their role as legal mechanics and contract police; judicial perception values, and responsiveness. At the same time, the dominant external values, both legal and extra-legal, have motivated the formalism in the tension. They include *perfectionism* of the legal system, defined by clarity, certainty, and consistency, constituted by the values of legality; legal power or judicial restraint; conceptual formalism; and equalitarianism or legal neutrality. They also include doctrinal values-market conformism and individualism/non-interventionism; and discrete contracting as an extra-legal value.

The above values are the ones to be balanced with those underlying flexibility, which also need to be discovered. The next two chapters seek to ascertain such flexibility-engendering values, which will complete the answer to why the tension has prevailed and further contribute to showing the logicality and viability of coexistence. Specifically, chapter eight revisits the values advanced by other scholars as underlying flexibility, demonstrating the logicality of coexistence from such literature, and identifying the value postulates to guide the coding and content analysis for values underlying flexibility in Uganda.

Chapter 8: The Value Postulates Underlying Flexibility

8.1 Introduction

This chapter examines both internal and external values different scholars have articulated to justify flexibility as the antithesis and alternative to formalism.[1] It articulates values other scholars have advanced as responsible for the flexibility in the tension, demonstrating that such presumptive values mainly arise out of perceptions that formalism's foundations are unrealistic, unjustifiable or can be served while judging flexibly – without judges being bound to rules or strict enforcement of contract terms. Further, the nature of law; the dynamism in the commercial world, represented by the marketplace; and the role judges play, especially in real hard cases, combine to produce values that make flexibility inevitable.

Secondly, the chapter further advances arguments that justify finding a way towards coexistence. In this regard it seeks to further show that hardly any scholar advances flawless arguments for a total judicial rejection of formalism-engendering values, such as certainty and predictability. Instead many of them, consciously or otherwise, support a coexistence-judging paradigm. The analysis of flexibility theory is also used to render more support to Eisenberg,[2] Trebilcock[3] and Schwartz & Scott,[4] in saying that none of the single-norm or pluralist theories,

---

[1] JN Adams and R Brownsword, *Understanding Contract Law* (Thomson Sweet & Maxwell, 2007) 190; JN Adams and R Brownsword, 'Ideologies of Contract', (1987) 7:2 Legal Studies 215.
[2] M Eisenberg 'The Theory of Contract', in P.Benson, ed. *The Theory of Contract Law*: *New Essays* (Cambridge University Press 2001) 243-244.
[3] MJ Trebilcock, *The Limits of Freedom of Contract*, (Harvard University Press, 1993) 248.
[4] A Schwartz and RE Scott, 'Contract Theory and the Limits of Contract Law' (2003) John M. Olin Center for Studies in Law, Economics and Public Policy Working paper, Paper 275, 2-3.

formalism or flexibility-oriented, articulating internal or external values, fully accounts for and should be the ultimate guide to judicial choice.

Thirdly, this chapter further contributes to filling the knowledge gap on how to manage the tension, by elaborating presumptive values that could explain flexibility, and thereby compete with formalism-engendering values, in Uganda's commercial adjudication. The internal and external presumptive values advanced by other scholars inform the coding and resultant content analysis of judicial opinions, whose findings are analysed in chapter nine, to earmark the key values underlying flexibility in Uganda, that need to be balanced with formalistic values in managing the tension.

8.2 The Internal Criteria

Internally, flexibility is motivated by major values underpinning judicial perception of the nature of law and its sources,[5] as well as the judge's role in contract disputes.[6] In summary, flexible judges subscribe to the determinate critique,[7] which holds views similar to Holmes,[8] Pound[9] and James;[10]namely that the law is not determinate, not objective or neutral and cannot produce determinate results. Further, that it is unclear, not conceptually ordered or coherent, but rather, inherently uncertain; and that formalistic certainty is an illusion.[11] Law's sources are commercial practices, experience, morality and public policy, all ultimately

[5] See text to section 3.3.1; 3.3.2

[6] See text to section 3.3.3.
[7] SJ Burton, *Judging in Good Faith* (Cambridge University Press 1992) 4.
[8] OW Holmes, *The Common Law* (Little Brown and Company 1963) 5.
[9] R Pound, 'Mechanical Jurisprudence', (8 Columbia Law Review, 1908) 605.
[10] W James, *Pragmatism and the Meaning of Truth* (Harvard University Press, 1975).
[11] BZ Tamanaha, *Law as a Means to an End: Threat to the Rule of Law* (Cambridge University Press 2006) 65.

determinable by judges' preferences and intuitions as lawmakers. Rules are dead letters only capable of gaining life upon being articulated and applied during adjudication, therefore the judge always has discretion and uses the law as an instrument to achieve purposes and results – a set of ends, of which the ultimate is social welfare. On the side of the judge's role in disputes, judicial law making, judicial interventionism and judging by hunch emerge as the values underlying flexibility. All of these will be briefly elaborated in the following sub-sections.

8.2.1 Values of Law's Perception

During adjudication, judges who operationalise the determinate critique perceptions of law's nature serve an internal set of values, that need to be weighed and if found above the threshold, balanced with competing formalism values, to arrive at coexistence. The values of flexibility perceptions of law include adaptability and elasticity of law, retroactivity of law, realistic certainty, and instrumentalism. Each of them is elaborated, to understand how they motivate and manifest during flexibility judging, as well as their amenability to coexistence theory.

8.2.1.1 *Adaptability and Elasticity of Law*

Adaptability means the desire and belief that part of the law's character and role lies in its fluidity and pliancy, achievable through dispensing justice during adjudication, by adapting to the ever-changing social, economic and political conditions.[12] Related is the value of the elasticity of law, which implies the law

[12] Frank J, *Law and the Modern Mind* (Stevens, 1949) 6-7; R Jukier, 'Flexibility and Certainty as Competing Contract Values: A Civil Lawyer's Reaction to the Ontario Law Reform Commission's Recommendations on Amendment to the Law of Contract', (1988) 14 Canadian Business Law

having the character of stretching to meet new demands as they appear during adjudication from time to time. This is achieved by the law containing normative standards like commercial reasonableness,[13] merchantability, marketability, or practicability.[14] Further, the law can give normativity to commercial practices,[15] such as trade custom, practices, or course of dealing, all of which speak to having regard for changing realities.

The basis for this is that during the making of law, there cannot be prediction of all possible legal disputes so as to provide for their settlement. Judges and lawyers are used to continuously help adapt the law to changing realities.[16] In the *High Trees* case,[17] Lord Denning was for instance motivated by this value to judge flexibly, when he extended the rule that 'promises should be kept', to cover promises that were not supported by consideration and the fact could not fit the description of estoppel, thus the notion 'promissory estoppel'. In reaching his decision, he referred to developments that had taken place in the fifty years leading to *High Trees*, noting that there had been a fusion between law and equity in English law.

Therefore, judges deem themselves to be acting within the law's province if they venture to stretch its meaning or fill gaps when faced with grey areas, in case of legal uncertainty, or otherwise if the circumstances a rule was meant to regulate

---

Journal 31; R Goode, *Commercial Law in the New Millennium,* the Hamlyn Lectures (Sweet & Maxwell 1998) 3-8.

[13] Such as the Uniform Commercial Code in the United States.

[14] Both the Sale of Goods Act, 1932 and the Sale of Goods and Supply of Services Act, 2017.

[15] Section 54 of the Sale of Goods Act, 1932 provided such practice to be superior to any right, or duty created by implication of law, although tgisthis has since been reversed by section 67 of the Sale of Goods and Supply of Services Act, 2017.

[16] Frank *Law and the Modern Mind* (n 12) 6-7.

[17] *Central London Property Trust Ltd v. High Trees House Ltd* [1947] 1 KB 130.

have changed. However, coexistence is still possible, for, adaptability does not have to translate into unprincipled flexibility; Frank himself admits that law should not be changed lightly, even though adaptability in law is vital, and uncertainty is not an accident but a social value.[18] A middle way can be found, using judging guidelines that will contain certainty on when, and following which variable, the law can be stretched to suit changed circumstances.

8.2.1.2 *Retroactivity of Law*

Retroactivity of law was articulated by Fuller, as a value of legality, in the sense that to advance legality there is need for the law to speak to the future.[19] It justifies the filling of gaps and other flexibility judging tools, on the ground that no legislation or rule can be perfect. Because of this, laws have to and do leave room for dispute resolution using adjudication as the best mechanism – what Frank calls the social value of legal uncertainty.[20] However, both Frank[21] and Fuller[22] water down their arguments, when they add that under legality, people should not only know the rules, but also a reliable method should be available for resolving disputes, the best being judicial discretion. Leaving it to judges cannot be called such a predictable and certain method, for it implies an open licence to unprincipled flexibility and judicial absolutism. Instead, the two scholars should have gone further to articulate the possibility of a rational and coherent mechanism for balancing formalism and flexibility, as is being done in this study.

---

[18] Frank *Law and the Modern Mind* (n 12) 7.
[19] LL Fuller, *The Morality of Law*, (Yale University Press, 1969, Revised Edition) 51-63.
[20] Frank (n 12) 7.
[21] ibid 6.
[22] Fuller *The Morality of Law* (n 19) 56-60.

8.2.1.3 *Utilitarianism to Instrumentalism*

Instrumentalism is the value of viewing the law as only alive when acted upon by judges and the community, as well as being judged by its practical utility – utilitarianism. The law is in this sense a means to an end – an instrument available to judges for achieving ends like social policy, determined during adjudication. This is manifested by judicial practices like *relation-back judging* – the practice of starting with the solution and finding a way to make the law validate it.[23] Similarly, there are cases where judges will appear to satisfy ends not reflected within the meaning of rules, such as business efficiency, but use those rules to justify the decision; as well as unexplainable decisions where the judge appears simply to have found a way to grant certain remedies.[24]

The prevalence of judges perceiving law as a means to ends, articulate or otherwise, implies the existence of instrumentalism as a judicial philosophy, where legal certainty is satisfied by rules being articulable to particular ends, or their grounds being explainable.[25] The philosophy explains judicial law making through the circumvention or stretching of existing rules, and legality being completely ignored or subjected to contextual findings based on commercial practices or experience. This brings us to the values that underlie flexibility, that are informed by the role judges perceive themselves as having to play in disputes.

---

[23] See text to Section 3.3.1.
[24] As was the case in Jane Bwiriza v Osapil [2001-2005] HCB 52, Case No. 11 in Appendix 5; H Collins, *Marxism and Law* (Oxford University Press, 1982) 2;Tamanaha (n 11) 66.
[25] See Text to Section 3.3.1.

8.2.2 Values of the Judicial Role

Scholars have advanced values that underlie flexibility as a result of judicial perceptions of court's role in commercial disputes, as well as judging culture with regard to it. The key values proposed are judicial interventionism, judicial law making, and judging by hunch.

8.2.2.1 *Interventionism in Contract: The End of Idol Worship*

The value of judicial interventionism connotes the devaluation of freedom of contract that Lord Denning referred to in *George Mitchell (Chesterhall) v Finney Lock Seeds Limited.*[26] He opined that traditionally, freedom of contract was a doctrinal idol, worshipped by judges, which had begun to lose its status. Interventionist courts could now interfere with agreed terms to do fairness and justice in particular cases, and not in the classical sense, where courts interfered only in cases of fraud, illegality, and duress or where one's freedom was rendered nugatory, like slavery cases.[27] Judicial interventionism will usually manifest in two ways.

The first mode of interventionism is when judges interfere with freedom of contract, to find fairness, justice or equity, for instance when they deem the terms unworthy, unreasonable or inequitable to a party, especially the weaker one. By way of intervention, in *Central London Property Trust Ltd v High Trees House Ltd,*[28] Lord Denning recommended that there was need to consider fairness of contracts, and fuse law with equity, for instance by accepting promissory estoppel over settled

---

[26] (1983) 2 AC 803; (1983) QB 284, 297.
[27] Chen-Wishart M, *Contract Law* (Oxford University Press, 2010) 13.
[28] [1947] KB 130.

principles, such as contracts only being valid if supported by consideration.[29] Following this, today equity is a key normative criterion that underpins flexibility in contracts, emphasising fairness and compassion over certainty, and even utilitarianism.[30]

However, despite enduring controversy about fairness in contract, and international demand, little has been done towards constructing a standardised judging criterion or general doctrine of commercial fairness.[31] Instead, using the lens of the formalism-flexibility divide, there are two divergent senses in which judges are viewed as motivated by its existence or the lack of it.

The formalistic view is that judges have no business with substantive fairness, or matters like efficiency. They should perceive an exchange as fair, if the procedure of contracting was fair, that is to say, there was equality in bargaining, voluntary consent, and the freedom to choose the other party, and the terms.[32] On the other hand, under flexibility, judges are concerned with the substantive fairness of contract terms,[33] the absence of which, according to Fuller,[34] Gordley[35] and

---

[29] LJ. Denning, *The Discipline of Law* (Butterworths 1979) 199.
[30] EL Sherwin 'Law and Equity in Contract Enforcement', (1991) 50 (2) Maryland Law Review, 272, 276; Cardozo J, in Jacob & Young Inc. v Kent, 129 NE 8898 (NY 1921).
[31] R Dorfman, 'The Regulation of Fairness and Duty of Good Faith in English Contract Law: A Relational Contract Theory Assessment', (2015) The New Jurist, newjurist.com/fairness-in-english-contract-law.html/, accessesaccessed on 03/09/September 3, 2018.
[32] Epstein RA, 'Unconscionability: A Reappraisal' (1975) 18 Journal of Law and Economics, 293, 297; H. Collins, 'Distributive Justice Through Contracts', (1992) 45 Current Legal Problems, 49, 58-63.
[33] SA Smith, 'In Defence of Substantive Fairness', (1996) 112 L. Q. Rev 138, 156; Sherwin E.L 'Law and Equity in Contract Enforcement', (1991) 50 (2) Maryland Law Review,(n 39) 276; BN Cardozo, 'The Nature of the Judicial Process' (Yale University Press 1921) 44, 113; and Di Matteo LA, 'The Norms of Contract: The Fairness Inquiry and The Law of Satisfaction ---A Non-unified Theory of Contract' (1995) 24 (2:8) Hofstra Law Review, 452.
[34] LL Fuller, 'The Forms and Limits of Adjudication', (1978) 92 Harvard Law Review, 353, 364.
[35] J Gordley, 'Equality in Exchange', (1981) 69 California Law Review, 15, 87.

Benson,[36] will invalidate a contract, the freedom of contract notion notwithstanding. In this sense, a contract is fair only if a judge deems its contents just,[37] fair and good faith dealing;[38]or corresponding with the common usage, since in an ordinary competitive market parties agree on fair terms;[39] or the consequences of the contract and court's decision are deemed fair.[40]

Although some law and economic theorists propound a substitute to formalism's certainty, and flexibility's fairness values—'efficiency as a means to the common good' thesis;[41] the consequentialist understanding of fairness has been viewed by others as including the efficiency normative criteria. Looking at fairness as efficiency is said to produce the best results, since it will be about assessing the end result of a contract.[42] The judicial criteria for fairness are therefore dictated by what is 'good for society';[43] as measured by the gain from a decision being bigger than the aggregate loss; and its meaning in judicial opinions always loaded with social, economic and behavioural norms.[44]

---

[36] P Benson, 'The Unity of Contract Law', in Benson P (ed.) *The Theory of Contract Law: New Essays,* (Cambridge University Press 2001) 118.
[37] F Rodl, 'Contractual Freedom, Contractual Justice, and Contract Law Theory', (2013) 76 Law and Contemporary Problems, 57, 64; Rosenfield M, 'Contract and Justice: The Relation between Classical Contract Law and Social Contract Theory', (1985) 70 Iowa Law Review, 769.
[38] Dorfman (n 31); and per the decision of Kainamura J, in Kavuma v First Insurance Co. Limited HCCS No. 442/2013 (Unreported-Judgement of 16/5/2018).
[39] Rodl (n 37).
[40] FH Buckley, ' Three Theories of Substantive Fairness', (1990) 19 Hofstra Law Review, 33.
[41] DA Farber, "Efficiency and The Ex Ante Perspective"," in J.S.JS Kraus & S.D.SD Walt (eds),) *The Jurisprudential Foundations of Corporate and Commercial Law,* (Cambridge University Press, 2000),) 54, 58-59; and See the text to Section 5.1.1.4.
[42] Buckley (n 40) 37.
[43] Beerman JM, 'Contract law as a System of Values', (1987) 67 Boston University Law Review, 553, 556.
[44] Di Matteo LA, 'The Norms of Contract: The Fairness Inquiry and The Law of Satisfaction ---A Non-unified Theory of Contract' (1995) 24 (2:8) Hofstra Law Review 376-7; J Devenney and M Kenny, 'Unfair Terms and the Draft Common Frame of Reference: the role of non-legislative

This study does not offer room for a detailed theoretical analysis of what Ugandan judges should properly refer to as fairness, but it suffices to note that, it should reflect the historical, social, political and economic contexts that combine to shape judicial institutional and individual reasoning. For example, u*buntu* is the traditional ideal of justice and fairness prevalent in many African cultures,[45] including Uganda.[46] In essence, this is a value connoting compassion, reciprocity, dignity, harmony, humanity, humanity being interconnected, creating a community of justice, in which people are caring for and being responsible to each other, and have a consciousness of natural desire for the common good.[47] According to a South African judge, Lamont J, in *Afri-Forum & Another v Mulema & Another,*[48] during adjudication, judicial motivation by ubuntu is manifested by placing a high value on and respect for the life of a human being, compassion, dignity and humanness, promotion of reconciliation, harmonious relationships, good attitude, shared concerns and win-win judgements.

Ubuntu has therefore been recognised as a sense of fairness applicable not only in Africa but also worldwide.[49] Judges use it to justify flexible commercial adjudication, to counter the common-law legal traditions, as did *Yacoob J, in*

---

harmonisation and administrative cooperation? (2012), In: Devenney, J. and Kenny, M. (eds). *European Consumer Protection* (Cambridge University Press, 2012), 99-120, 101.

[45] CBN Gade, 'The Historical Development of the Written Discourse on Ubuntu' (2011) South African Journal of Philosophy, 303, 303-329; TW Bennett, 'Ubuntu: An African 'Equity' (2011) 14(4) Potchefstroom Electronic Law Journal, 4.

[46] ibid 303-329; Nassbaum B, 'African Culture and Ubuntu: Reflections of a South African in America' (2003) 17 (1) World Business Academy; www.ugandatravelguide.com/bantu-people.html/, accessed on the 16th September 16, 2018.

[47] Nassbaum B, 'African Culture and Ubuntu: Reflections of a South African in America' (2003) 17 (1) World Business Academy; www.ugandatravelguide.com/bantu-people.html/, accessed on the September 16, 2018.

[48] [2011] ZAEQC 2, Para 18.

[49] Gade (n 45).

Everfresh Market Virgina (PTY) Limited, v Shorprite Checkers.[50] He opined that ubuntu had to be relied on to interfere with freedom of contract in cases, such as where a contract was between a powerful and more resourced party, and a weak, poor and vulnerable one.

However, in this study, ubuntu does not act as the presumptive Ugandan sense of fairness and justice. Instead, the different theoretical perceptions of fairness have guided the content analysis, to enable an objective search for what the underlying values of fairness and justice meant in cases of Uganda's commercial flexible judging.

However, it's worth noting that from inception, Lord Denning's appeal was as much for coexistence as for flexibility, when he called for interference only with unreasonable terms,[51] implying a measured interventionism that has since become part of Uganda's commercial judging.[52] Interventionism is mainly resorted to in protection of the weaker party Lord Denning talked about, a reaction against inequality in contracting.[53] This in turn explains the development of contract vitiating principles,[54] not only in judge-made law but also contract legislation.[55]

The second mode of intervention is by way of gap filling in contract terms that is mainly done by judges implying terms, a practice that has been prevalent

---

[50] (2012) (1) SA 256 (CC).
[51] *Central London Property Trust Ltd v High Trees House Ltd* [1947] KB 130.
[52] Thunderbolt Technical Services Ltd v Apedu Joseph & K.K Security (U) Ltd (HCCS No. 340 of 2009, Unreported).
[53] Chen-Wishart (n 27) 14.
[54] Such as Sections 14 and 15 of Uganda's Contract Act providing for undue influence and fraud as vitiating factors respectively
[55] Such as Sections 14 and 15 of Uganda's Contract Act providing for undue influence and fraud as vitiating factors respectively

throughout Uganda's judging history.[56] In *Ernest Windt v Gordon Parrot*, [57]Allen J clarified that implied terms were not necessarily derived from predictable sources like statute, but were often the product of social-economic conditions. The uncertain and indeterminate nature of such conditions will result in flexibility, uncertainty and the tension. Gap filling does not stop at contractual terms but also extends to the law, which brings us to the value of judicial law making, discussed in the next sub-section.

8.2.2.2 *Judicial Law-making*

Underlying the flexibility in the tension is also the value of the judges being the main players in making, sourcing and defining the law, thus the famous pronouncements by Holmes,[58] Frank[59] and Llewellyn,[60] that what judges do about rules and cases is the law itself. The parties' rights and duties are to be understood through predictions of judicial behaviour.[61] In practice, laws are dead letters, only qualifying to be called law after being verified and declared applicable to concrete disputes during adjudication.

Such judges will not be declaring law from abstract rules and principles, but build it from their weighing of competing interests and social choices, informed by the continuous changes in social policy, practices and other matters of human

---

[56] See Appendix 1: Cases 34, and 55; Appendix 3: Cases 4, 23 and 44; and Appendix 5: Cases 7, 87 and 91.
[57] [1976] HCB 30.
[58] OW Holmes, 'The Path of the Law', Collected Legal Papers (Harcourt, Brace and Howe, 1920)167-202, 173.
[59] Frank (n 12) 110.
[60] K Llewellyn, *The Bramble Bush* (Oceana 1951) 3.
[61] OW Holmes, 'Law in Science and Science in Law', Collected Legal Papers (Harcourt, Brace and Howe, 1920) 210-43, 229.

experience and reality.[62] Both this value of judicial law making and the extra-legal grounds relied on should be openly articulated as the motivations behind judicial opinions, for they are part of the law's province.[63]

However, even within flexibility jurisprudence, leading scholars like Pound[64] and Fuller,[65] have expressed scepticism about judges playing the role of absolute lawmakers, and promoted coexistence. Fuller for instance proposes a coexistence view, that legality should be respected; but seen as including the standards of common sense and other effects of judicial deliberation and consultations that the law leaves room for.[66] Related to such judicial law making is the value of judging by hunch.

8.2.2.3 *Judging by Hunch*

Judging by hunch is a reference started by Hutcheson[67] and supported by Frank as a correct description of the judges' role in the legal system.[68] It speaks to an attitudinal judging culture, where flexible judging is motivated by judges' personal intuitions and preferences as normative criteria. The real judicial opinion and lawmakers, which lawyers should learn about, are the hunch-producer, the judge's personality, informed by his or her dispositions, biases and habits.[69] By way of manifestation, judges' personal cognitive attributes and sense of indeterminate

---

[62] Tamanaha (n 11) 67.
[63] ibid 65.
[64] R. Pound, 'Mechanical Jurisprudence', (1908) 8:8 Columbia Law Journal, 625.
[65] Fuller 'The Forms and Limits of Adjudication' (n 34) 41-63.
[66] ibid 50, 56, 63.
[67] JC Hutcheson Jr, 'The Judgment Intuitive: The Function of the Hunch in Judicial Decision', (1929) Cornell Law Quarterly, 274, 285.
[68] Frank (n 12) 110-2
[69] ibid 111.

standards, like fairness and reasonableness, as well as the implications of the facts before them, underlie flexibility judging. The extreme is Frank's claim that the law keeps changing from case to case, following the particular judge's personality.[70]

However, this value is not a social value, nor does it appear to be one embraced by a wider community, let alone the institution of judges generally, as Frank wants us to believe. It will be investigated for, it nevertheless speaks to reality in Uganda's case. But from the onset, judging from the recent declaration by Uganda's Chief Justice, that judges are required to realise the rule of law, and while doing so are constrained by legal instruments like the constitution; [71] judging by hunch appears at best a random value held by a few judges. What is more plausible is flexibility judging being motivated by the value of judicial responsiveness.

8.2.3 Judicial Responsiveness

In the sense proposed by Sourdin & Zariski,[72] flexibility commercial judging in Uganda appears to have had, as one of its foundations, judicial responsiveness to the desire for justice by members of society. Such society, according to initial cases analysed,[73] is the commercial community, to which judges have appeared to be sensitive and at times accountable.

These preliminary findings tell us that what Eisenberg regarded as a process of social ordering, besides adjudication, in which the value of responsiveness is

---

[70] ibid.
[71] The Chief Justice of Uganda B. Katureebe's speech to the 18th Annual Judges Conference, on 20/01/2016, in Kampala Uganda
[72] Sourdin T & Zariski A, *The Responsive Judge*, (Springer, 2018) ix-x, 1-38.
[73] See Appendices 1-5

absent;[74] is in reality a form of adjudication in Uganda. In this form, the decision maker consults the parties affected and attends to their arguments and proofs, but does not necessarily base his decision on them. Sometimes judges respond to evidence collected, institutional and personal preferences, and to rules neither addressed nor adduced by the parties.

Likewise, Eisenberg wrongly claimed that there would be a conflict between strong responsiveness and the rulemaking function of judges.[75] This fear certainly emanated from the formalistic perception of responsiveness, and would have the opposite implication, were responsiveness perceived in the flexibility sense. Nevertheless, in Uganda, even with strong responsiveness, judicial rulemaking actually appears to be freely going on, especially given that it has a green light from Article 126 of the constitution, which obliges judges to decide not only in accordance with the law, but also the norms, aspirations, and values of the people. Responding to it amounts to formalistic responsiveness, and therefore an element of coexistence.

Further, amenable to coexistence theory, Eisenberg warns of the conflict that could arise from issues, calling upon judges to be responsive to the needs of the disputants, as well as distant persons in society to whom judge-made laws would apply.[76] The cases he refers to fit the description of hard cases, in resolution of which judges have used different criteria including both formalistic and flexibility responsiveness, again the latter being the responsiveness to values, institutions and other circumstances peculiar to the dispute. The fact that a court may be

---

[74] MA Eisenberg, 'Participation, Responsiveness, and the Consultative Process: An Essay for Lon Fuller', 92 Harvard Law Review (1978),) 410, 414.
[75] ibid 413.
[76] ibid

called upon to be responsive to both formalistic and flexibility institutions simply confirms there are cases in which the tension between formalism and flexibility clearly manifests – hard cases that call for a way to manage the coexistence of the two.

Beyond such internal judging criteria, legal and extra-legal values external to the judiciary are also responsible for the flexibility in the tension and need to be articulated. This will guide the content analysis in search of external values underlying flexibility in Uganda and help to understand how coexistence can be managed. The following section undertakes this task.

8.3 The External Criteria: Legal Values

As Macneil argues, with regard to flexibility values like those underpinning relational contracting; the divide between internal and external is arbitrary and only partial.[77] This caveat also applies to the legal v extra-legal divide, because the essence of flexibility philosophy is to disregard such boundaries. But for ease of reading, and organisation, the values advanced by scholars are categorised as such. First, I elaborate the legal values underlying the flexibility in the tension, which are of both a doctrinal and systematic nature.

8.3.1 Doctrinal Values

Flexibility jurisprudence has advanced consumer welfarism, economic efficiency, and wealth maximisation as sets of values that are embedded in contract doctrine, motivating flexibility during adjudication. The judge applies rules, principles, concepts and standards that command flexibility judging as the natural approach

[77] IR Macneil, 'Values in Contract: Internal and External', (1983-84) 78 New York University Law Review, 340, 350, 367.

for serving these values, whether implicit or expressed, resulting in flexibility staying at tension with formalism. I proceed to briefly elaborate each, arguing that each of them, or their constituent lower values, can be satisfied using formalism, or that their satisfaction is not in conflict with a coexistence judging paradigm.

8.3.1.1 *Consumer Welfarism*

Friedman,[78] Adams & Brownsword[79] have advanced consumer welfarism as the prime higher doctrinal value underlying flexibility in commercial adjudication. It stands for legal and judicial protection of consumers, in the form of close regulation of and intervention in contracts, as opposed to the values of formalist market-individualism.[80] Consumer welfarism is manifested by the normative recognition of its following underpinning lower values.

Firstly is *fairness of exchanges*, a value classical contract adjudication had no room for,[81] but which has been recognised by neo-classical, modern and postmodern contract theory as one underlying flexibility judging.[82] Fairness of exchanges is represented by a bundle of judicial practices and sub-values that

---

[78] LM Friedman 'Contract Law and Contract Research' (Part 1) (1968) 20 Journal of Legal Education, 452, 456-457.
[79] Adams and Brownsword, *Understanding Contract Law* (n 1) 197, 205-206; Adams and Brownsword, 'Ideologies of Contract', (n 1) 210, 221-222.
[80] Adams and Brownsword, *Understanding Contract Law* (n 1) 197; Adams and Brownsword, 'Ideologies of Contract', (n 1) 210; M Kenny and J Devenney 'A Comparative Analysis of Bank Charges in Europe: OFT v. Abbey National Plc through the looking glass', in J Devenney and M Kenney (eds), *Consumer Credit, Debt, and Investment in Europe* (Cambridge University Press, 2012) 212-213; 232.
[81] PS Atiyah, An Introduction to the Law of Contract, 4th Edn, (Oxford University Press 1989) 1.
[82] ibid 4; Gordley J, 'Equality in Exchange', (1981) 69 California Law Review, 15, 87; Benson P, 'The Unity of Contract Law', in Benson P (ed.), *The Theory of Contract Law: New Essays,* (Cambridge University Press 2001) 118; Sherwin (n 30) 272, 276; Smith (n 33) 138, 156; and Dorfman (n 31).

form the end of law that flexibility judging seeks to satisfy.[83] These include protection of consumers from sharp practices, misrepresentations or fettering of their contractual rights.[84]

However, fairness is compatible with coexistence theory. It has received general acceptance by formalist theory as well, leading to Llewellyn,[85] Cardozo,[86] Collins[87] and DiMatteo,[88] calling for coexistence, by balancing of its flexible sense with formalism. Phang goes a step further by proposing that we ignore the difference between procedural fairness and substantive fairness, by for instance looking at defects in bargains, like duress and mistake, as procedural unconscionability, or unfairness.[89]

Secondly is the value of *reliance or constancy,* which stands for not allowing parties to act inconsistently with their having led others into certain expectations or actions, such as the belief that certain rights and obligations exist.[90] This is irrespective of there being a contract, legally so-called, as was the case with Lord Denning's justification of promissory estoppel.[91] However, in essence, the

---

[83] EW Thomas 'Fairness and Certainty in Adjudication: Formalism v Substantialism' (1999) 9 Otago Law Review, 459, 460; R Dworkin, *Taking Rights Seriously* (Duckworth & Co. Ltd 1977) x-xi and 22; Rawls J, *A Theory of Justice* (Harvard University Press, 1971), 85-86.
[84] Adams and Brownsword, 'Ideologies of Contract', (n 1) 212; Adams and Brownsword, *Understanding Contract Law* (n 1) 200.
[85] K Llewellyn, The Common Law Tradition: Deciding Appeals, (Little, Brown & Company 1960) 36-7: Llewellyn called for a return to the grand style of decision making practised by earlier judges like Mansfield. He looked at the grand style as a reconciliation of tradition with creativity and judicial vision, continuity with growth, machinery with purpose, and measure with need.
[86] BN Cardozo, 'The Nature of the Judicial Process' (Yale University Press 1921) 113.
[87] H Collins, 'Distributive Justice Through Contracts', (1992) 45 Current Legal Problems, 49, 58-63.
[88] Di Matteo (n 44) 349.
[89] A Phang, 'The Uses of Unconscionability,' (1995) 111 L.Q.R, 559, 561.
[90] Adams and Brownsword, *Understanding Contract Law* (n 1) 198; Adams and Brownsword, 'Ideologies of Contract', (n 1) 210
[91] *Central London Property Trust Ltd v High Trees House Ltd* [1947] 1 KB 130.

underlying spirit of reliance and the formalistic, but also coexistence compatible values of consent and promise are the same. They all speak to not allowing parties using adjudication to escape from their promises, express or implied. Lord Denning's High Trees opinion, which Adams & Brownsword use to justify reliance, clearly talks about promise; not just reliance, but promise with or without a contract.[92] In that sense, it also points to the gist of Barnett's coexistence theory of consent.[93] This nexus indicates room for the coexistence of formalistic and flexibility values, the only question being how to achieve it.

Thirdly, consumer welfarism is underpinned by the value of *good faith,* which stands for parties entering and performing contracts without intending to take advantage of legal niceties. The value therefore extends to disputes, such that one should not invoke a rule or principle, such as uncertainty of contract, to justify withdrawing from the contract.[94] According to Kull, good faith speaks to fairness, order, justice and reasonableness, [95] thereby occupying an important place in motivating flexibility, which includes influencing new and old doctrine. This is especially because it is derived from constitutional provisions like Uganda's,[96] which allow the invocation of equity by requiring courts to decide in accordance with justice, public norms and commercial values (morality), practice, as well as judging laws.[97] Therefore, judicial invocation of equity to flexibly find remedies in

---

[92] ibid.
[93] RE Barnett, 'A Consent Theory of Contract' (1986) 86 Columbia Law Review 305, 309-312.
[94] Adams and Brownsword, *Understanding Contract Law* (n 1) 199; Adams and Brownsword, 'Ideologies of Contract', (n 1) 211.
[95] I Kull, 'Principle of Good Faith and Constitutional Values in Contract Law', (2002) 7 Juridica International 142-143, 146-147.
[96] Article 126 (2) (e).
[97] Section 14 of the Judicature Act of Uganda; Devenney and Kenny (n 44) 102.

contract also manifests adherence to good faith,[98] as well as equity being a value underpinning consumer welfarism in its own right.

Fourthly, there is the *value of equity*, which Adams & Brownsword have expressed by advancing a number of equitable principles as underpinning and manifesting consumer welfarism, making it a motivator for flexibility during adjudication.[99] The principles they express are: proportionality, which connotes parties being awarded remedies proportionate to the effects of the breach; good faith; baring parties from profiteering from their own wrongs; the principle against unjust enrichment; having the stronger party bear the loss in cases it has to be shared. Others are: the principle against exploitation; ensuring that parties at fault are held responsible; and paternalism—which relates to relieving from bargains, parties that entered into imprudent or unfair contracts. Besides consumer welfarism, efficiency, informed by wealth maximisation, having been advanced as a doctrinal value underlying flexibility, also needs elaboration.

8.3.1.2 *Economic Efficiency*

Law and economics scholars articulate efficiency, expressed through wealth maximisation, as the prime value underpinning contract doctrine, whose satisfaction guides judges in choices regarding validity, interpretation and enforcing both the law and terms of contract.[100] As discussed earlier, economic efficiency is

---

[98] R Jukier, 'Flexibility and Certainty as Competing Contract Values: A Civil Lawyer's Reaction to the Ontario Law Reform Commission's Recommendations on Amendment to the Law of Contract' (1988) 14 Canadian Business Law Journal 18-21.
[99] Adams and Brownsword, *Understanding Contract Law* (n 1) 198-201; Adams and Brownsword, 'Ideologies of Contract', (n 1) 210-212
[100] RA Posner, *Economic Analysis of Law* (3d ed.) (Little, Brown & Co. 1986); T Zywicki and E P Stringham, 'Common Law and Economic Efficiency' in Paris F and Posner R (eds), *Encyclopaedia of Law & Economics*, (Mason University Law and Economics Research Paper Series 2010).

one of the prescriptive theories advanced for managing the tension.[101] Its character is not methodical, but a social value that has influenced contract doctrine and judicial choices, in the sense that laws and adjudication are viewed as aimed at achieving the most efficient allocation of resources to the optimal use to achieve the law's end – wealth maximisation.[102] Judges are guided by what actions or results will allocate resources to a higher value in determining rights and obligations in contract, a cost-benefit analysis otherwise called *Kaldor-Hicks efficiency.*[103] Llewellyn suggests judicial elaboration of commercial practice in the form of custom, usage of trade, course of dealings, as servants of efficiency.[104] Therefore, judicial reliance on such practice, alongside open or indirect reference to efficiency, will be used to observe the value during the content analysis. However, efficiency theory has supported coexistence;[105] for instance, Posner's[106] justification of the value's influence in contract, using his 'presumed consent to

[101] See text to section 5.2.2.2.
[102] RP Malloy, *Law and Economics: A Comparative Approach to Theory and Practice*, (West Publishing Company, 1990) 60-68; DJ Brion, 'Norms and Values in Law and Economics', (1999) Encyclopedia of Law and Economics, 1041,1046 (https://reference.findlaw.com/lawandecomonics/0800_norms_and_values_in_law_and_economics.pdf, accessed on 1/3/, 2018); M Kenny and J Devenney 'A Comparative Analysis of Bank Charges in Europe: OFT v. Abbey National Plc through the looking glass', in J Devenney and M Kenney (eds), *Consumer Credit, Debt, and Investment in Europe* (Cambridge University Press, 2012) 212, 217.
[103] A Schwartz, 'Karl Llewellyn and The Origins of Contract Theory', in JS Kraus & SD Walt (eds), *The Jurisprudential Foundations of Corporate and Commercial Law* (Cambridge University Press, 2000), 12, 16; DA Farber, "Efficiency and The Ex Ante Perspective", in JS. Kraus & SD Walt (eds) *The Jurisprudential Foundations of Corporate and Commercial Law,* (Cambridge University Press, 2000) 54, 59; Devenney and Kenny (n 107), advance the judge's need to avoid the consequencies of the then banking crisis and its threat to sink the banking industry, as underlaying the decision in *OFT v. Abbey National Plc. [2009] UKSC 6*. In this case, the UK Supreme Court declared the requirement to that assessment of fairness of contract terms should exclude price, to extend to barring investigation into the unfairness debts arising from bank charges for unauthorised debts and similar transactions.
[104] Schwartz, (n 103) 16.
[105] See text to sectionSection 3.2.2.2.
[106] RA Posner, 'The Ethical and Political Basis of the Efficiency Norm in Common Law Adjudication', (1980) 8 Hofstra Law Review 487, 492-93.

efficiency thesis,' implies that efficiency does not contradict, but supports and can coexist with autonomy of contract, defined by consentualism.

8.3.1.3 *Wealth Maximisation*

The influence of efficiency as the prime value is watered down by Posner's claim that instead, wealth maximisation is the ultimate value,[107] which is not only different from but also superior to efficiency and utilitarianism. It is a value that balances the individual autonomy behind efficiency, as well as pure utilitarianism, without attracting the practical limitations of, for instance, measuring and justifying the basis of efficiency.[108] Therefore court decisions, including the rules they make in precedents, are efforts – conscious or otherwise – to achieve wealth maximisation.[109] Relatedly, courts also try to redistribute wealth, by judging based on which side should receive more resources; although this is a role courts are not really competent to perform.[110]

Kronman strongly attacks Posner's claim that wealth maximisation balances efficiency and utilitarianism, for being devoid of practical utility.[111] Further, to portray it as the prime value underlying law and adjudication is hyperbole. Nevertheless, wealth maximisation is certainly part of the motivations of the flexibility in the tension, but one that requires a coherent set of normative

---

[107] R Posner, 'Utilitarianism, Economics and Legal Theory', (1979) 8 Journal of Legal Studies 103, 127-136.
[108] ibid 114, 117-119, 130.
[109] R Posner, 'Some Uses and Abuses of Economics in Law' (1979) 46 University of Chicago Law Review 281, 287-294.
[110] R Posner, 'Wealth Maximisation and Judicial Decision-Making' (1984) 4 International Review of Law and Economics, 131,132.
[111] AT Kronman, 'Wealth Maximisation as a Normative Principle', (1980) 9:2, The Journal of Legal Studies, 227, 228-229.

guidelines for balancing with other competing values. That it can be part of such a coexistence regime is supported by the fact that from conception, it is accommodative to formalistic interests of market conformism as well. Besides doctrinal values, systematic legal values – key among which are substantive justice and legal pluralism – have also contributed to influencing the flexibility in the tension.

8.3.2 Systematic values

Systematic values underlying flexibility judging are the ones judges adhere to, not as internal judicial criteria, but because they are embedded in the legal system generally; such as the substantive conception of justice and legal pluralism. They are external to the institution and person of the judges, because they stand independent of the two, although by virtue of judges being integral to any country's legal system, there is a crossover of values between internal and external categories.

8.3.2.1 *Substantive Justice*

Substantive justice has been cited as the key systematic value produced by the legal system that motivates judges towards flexibility. It is a conception of justice that has been presented by leading scholars on justice,[112]as an alternative to procedural justice but without a detailed articulation that can convey any commonly acceptable definition. As observed by Herman, earlier legal scholars, especially positivists, failed to articulate the connection between the basis of any legal system

[112] DL Schaefer, *Procedural Justice Versus Substantive Justice: Rawls and Nozick* (Social Philosophy Foundation, 2007) 166.

and the requirement for substantive justice.[113] Instead, scholars across the theoretical spectrum have held the view that the formalistic procedural justice, which merely defines justice as the outcome of a certain procedure;[114] is the prerequisite to, and acts as a safeguard for substantive justice.[115] Their ground is the defeatist argument that as human beings, we cannot agree to principles and concepts of substantive justice or values that can be formulated into general laws applicable to all similar cases with certainty.[116]

However, Herman rightly proposes a theory of substantive justice for contemporary societies; in which shared values are emerging and can be discovered.[117] The shared values should be grounded in human existence and the sense of community and common human nature. During adjudication, using reflection and justification, these shared values should be elucidated and used as standards for the infusion of practical judgement and subjective attitudes, thereby creating coexistence between the formalistic procedural and flexible substantive justice.[118]

Herman's theory is limited by leaving the discovery of shared values to mere reflection by judges, without safeguards against unprincipled subjectivity defining shared values. It is however persuasive to one seeking to understand substantive justice as a constitutionally set judging criterion in Uganda,[119] where the concept

---

[113] DHJ Herman 'The Fallacy of Legal Procedure as Predominant Over Substantive Justice: A Critique of "The Rule of Law" in John Rawls' 'A Theory of Justice,' (1974) 23:4 DePaul Law Review, 1408, 1419.
[114] Schaefer (n 112) 171.
[115] Herman (n 113) 1413, 1419.
[116] ibid 1413.
[117] Fuller (n 34) 159; Herman (n 113) 1419, 1422, 1432-6.
[118] Herman (n 113) 1435-6.
[119] The National Objectives and Directives of State Policy that are part of the constitution oblige judges to decide cases, giving consideration to the history, social, economic and political context of Uganda and its people; Article 126 (1) obliges judges to follow the law, plus the norms, values and

has defined the apex of the constitutional mandate of judges in adjudication, during colonial Uganda, under the Order in Council;[120] since its re-enactment in the 1995 Uganda constitution;[121]and section 4 of the Judicature (Amendment) Statute, 2002.

No constitutional regime has clearly defined the principles, standards, concepts or values that make up substantive justice in Uganda, and how they can be recognised. The nearest combination, although still very indeterminate and not exhaustive, is the rule that adjudication shall be performed without undue regard to technicalities,[122] along with the National Objectives and Directives of State Policy.[123] These two are however far from being an exhaustive set of guidelines courts can follow, especially with regard to what constitutes substantive justice, or the shared values from which such guidelines can be formulated. The national objectives and directives merely recognise Uganda's pluralistic society, legal pluralism aspirations for an independent jurisprudence, distributive justice, the country's experiences, social, political and economic contexts, plus the aspirations for libertarianism (democracy, freedom and justice), and instrumentalism.

Besides aspirations for independent jurisprudence and libertarianism, the rest are indeterminate bottomless vessels in which judges can justify dumping an endless list of considerations to aid flexibility. This study therefore contributes to knowledge not only by identifying substantive justice as a value underlying flexibility, but also by revealing how judges have viewed it in commercial hard cases. Its manifestations and sub-values are identified, extrapolated and explained following

---

aspirations of the people; and Article 126 (2) (e) obliges them to pursue substantive justice during adjudication, with undue regard to technicalities.

[120] Article 20.

[121] Article 126.

[122] Proviso to Article 126 (2) (e) of the 1995 Constitution

[123] The 1995 Constitution, Objective and Directive No.1, III (ii), IV (ii), XI (I), XI (iii) & XIV and XXIV

an objective content analysis of texts of judicial opinions. Its attributes also point to legal pluralism as the other value at play during flexible judging.

8.3.2.2 *Legal Pluralism*

As explained earlier,[124] legal pluralism arises when the state recognises that there is law beyond law, in the sense that non-state normative orders are as much a source of normativity as are state ones. Uganda is one of the societies in which, according to Griffiths, legal pluralism is a factual state of affairs.[125] The formalist account of law as hierarchically ordered normative propositions, or otherwise systematically ordered and unified, determinate and discoverable fact, that resides within the texts of statutes and precedents, is inapplicable. But so is the purely instrumentalist account of law as always indeterminate, a matter of experience, purposive and utilitarian; otherwise termed as law being a means to an end.

Instead, the Ugandan legal system validates the observation by Minda, that post-modern jurisprudence reflects a course of thinking where a more pluralist, contextual and non-essential explanation of law and legal decision-making is developed for multicultural societies.[126] To say 'more' means without discarding the value of normativity of positive law, which is still at the core of judicial criteria, but rather infusing it with other sources of norms to find justice. Legal pluralism is a source of judicial flexibility as it justifies, and renders acceptability to, otherwise improper decisions; decisions that are not responsive to rules of law, by which the judges ordinarily expected to be guided. It is therefore not surprising that key

---

[124] See text to Section 3.7.4.
[125] J Griffiths, 'What is Legal Pluralism', (1986) 24 Journal of Legal Pluralism, 4.
[126] G Minda, *Postmodern Legal Movements: Law and Jurisprudence at Century's End* (New York University Press 1995) 20-21.

flexibility schools of thought have embraced it.[127] This study uses the manifestations listed above, to examine whether it is one of the key values behind flexibility, that qualify for balancing with formalistic ones to achieve coexistence in the Ugandan context.

Further, flexibility is also motivated by values of an extra-legal nature, values created by the body politic that has surrounded commercial adjudication over the years. As is the case with formalism values, understanding many of such flexibility values requires a social legal inquiry, which is beyond the methodology and scope of this study. Therefore, the following section merely offers a brief insight into the key of such values.

8.3.3 Extra-Legal Values

Because of its philosophical basis of accommodating extra-legal considerations in the meaning and nature of law, as well as adjudication, flexibility judging is motivated by extra-legal external values. However, many of these cannot be uncovered or fully understood using content analysis of judicial opinions alone, as they require examination of the contractual and judging environments. Therefore the following part only reviews literature on the few that can be understood by way of inferences from the results of a content analysis, the relational nature of contracting, and judicial absolutism.

8.3.3.1 *Judicial Absolutism*

Absolutism is a value of political culture, where the rulers are deemed to have final authority on all matters including law and adjudication, and are not answerable to

---

[127] ibid.

anyone, not even the subjects.[128] According to Wells, such authoritarianism breeds judicial absolutism, which in turn motivates flexibility judging, as judges do not respect legal boundaries that would otherwise restrain them to a single answer in all similar cases.[129] For instance, as noted earlier, in medieval France, flexibility thrived, because of such absolutism,[130] and the same has continued in the French High Court, for over eight hundred years.[131]

Uganda's history reveals minimal periods of democratic governance, as the country has been largely ruled under constitutional and political instability, insecurity, outright authoritarianism and dictatorships,[132] following successive presidents having taken power by force, accompanied by illegitimate and illegal constitutional amendments,[133] abrogation, and creation of new constitutions.[134] Such absolutism has resulted in a perpetual normativity crisis, being the uncertainty as to what organ, between the president and parliament, was the sovereign,[135] as well as the usurpation of judicial authority by the executive.[136]

---

[128] M Wells 'French and American Judicial Opinion' (1994) 19 (1) (3) Yale Journal of International Law 81, 106-107.
[129] ibid 106-108
[130] ibid 107-108.
[131] ibid.
[132] PM Mutibwa, *A History of Uganda: The First 100 Years 1894-1995* (Fountain Publishers 2016) 188-210.
[133] The 1962 was abrogated by the 1966 Pigeon Hall Constitution, following a military attack and overthrow of the Kabaka as President and abolition of the Constitutional Kingdoms and Monarchs; the 1966 Constitution was replaced by the 1967 one, after Obote consolidated his position as President; Parts of the 1967 Constitution were suspended by Legal Notice No. 1 of 1971, among others to give Idi Amin's military coup legality and give him law making powers, and later in 1979, and 1986 to legalise other military governments and create legislatures not elected by the people; the 1967 Constitution was abrogated in 1995, and a new constitution promulgated, which has since been amended several times to extend and consolidate the current President Museveni's NRM rule.
[134] GW Kanyeihamba, *Constitutional and Political History of Uganda: From 1894 to Present* (LawAfrica 2002) 99.
[135] ibid.

According to Wells,[137] Holmes[138] and Oloka-Onyango,[139] that political culture should have influenced judges to flexibly adjudicate disputes, as they have to serve the political ideology of the time.

In other words, according to Oloka-Onyango,[140] courts in Uganda have since 1966 done politics, instead of defending the rule of law.[141] Oloka-Onyango focused on constitutional and political cases, where the influence of absolutism in judging was more readily evident,[142] which may not necessarily hold in commercial cases. Therefore, absolutism is coded and its presumed influence examined during the content analysis.

However, it has to be noted that the influence of authoritarianism as a political philosophy, and absolutism, cannot be fully appreciated from a mere content analysis of judicial opinions. Two aspects demonstrate that doing so leaves the actual inner relationship between the executive and the bench, and its impact on judicial approach, inarticulate.

---

[136] R Okumu-Wengi, *Founding the Constitution of Uganda: Essays and Materials* (LawAfrica 2011) 54-55.
[137]Wells (n 128) 106-108.
[138] Holmes (n 8) 5.
[139] J OLoka-Onyango, *When Courts Do Politics: Public Interest Law and Litigation in East Africa,* (Cambridge Scholars Publishing, 2017),) 76-112.
[140] ibid.
[141] ibid.
[142] See text to Sections 7.2.1.2 for the discussion on Uganda v Commissioner of Prisons *Ex parte* Matovu [1966] EA 514; Opolot v. Uganda (1969) E.AEA 613; Uganda v. Alfred James Kasubi (1975) HCB 173; *Semu Kiseka Mukwaba & Others v Daudi Musoke Mukubira* (1952-56) ULR 74); *Bakulu-Mpagi Wamala v The Electoral Commission (*HCCS No. 606 of 1980 (Unreported); and *Kiiza Besigye v Yoweri Museveni* (Supreme Court Electoral Commission No. 1 of 2006, and Supreme Court Electoral Commission No. 1 of 2011); recently *Mabirizi and others v Attorney General*(Consolidated Constitutional Petitions 49 of 2017, 3 of 18, 5 of 2018, 10 of 2018 and 13 of 2018) [2018] UGCC 4 (26/7/2018).

Firstly, this study's preliminary findings, presented in Figure 2, do not support the authoritarianism-judicial absolutism-flexibility birth chain. Periods of extreme authoritarianism did exhibit an increase in formalism and not flexibility. For instance, as Figure 2 demonstrates, during 1967-95 when the country was ruled by the dictatorships of Milton Obote and Idi Amin's, that had power over all matters including the constitution and other laws, formalism in commercial adjudication grew and flexibility reduced.

Secondly, both Chief Justice (emeritus) SW Wambuzi[143] and Justice Kanyeihamba,[144] claim that the authoritarianism and militarism of past governments did not have a direct effect on adjudication, or judicial independence. Moreover, a review of other literature on the impact of Uganda's political history indicates that the issue is more complex than the two former justices of the Uganda Supreme Court make it appear. Further, Uganda has recently experienced the best illustration of how judicial absolutism is a major influence on judging, in the form of a letter from Court of Appeal judge Bamugemereire, now heading a commission of inquiry on land administration.

In a letter to the Chief Justice,[145]dated 26th October 2018, she complained of a mafia in Uganda's judicial system (which for the purposes of this study includes the commercial justice system), that is responsible for the issuance of bogus judgments, rulings and court orders, contrary to the law and evidence before court, following connivance between land grabbers and judges to evict *bonafide* tenants

---

[143] SWW Wambuzi, *The Odyssey of a Judicial Career in Precarious Times: My Trials and Triumphs as a Three-Term Chief Justice of Uganda* (Cross House Books 2014) 8-9.
[144] Kanyeihamba (n 134) 95.
[145] The Letter was reported in The Monitor News Paper of 28th October 2018.

and grab forest land.[146] She therefore called for judicial practice to be managed by setting criteria for decision-making and reviewing all decisions made in that manner, which implies a mechanism to manage the tension. Therefore, the question of whether Uganda's commercial adjudication has been affected by judges doing politics remains to be investigated, as Oloka-Onyango did with political and constitutional adjudication.[147]

It suffices for this study to highlight evidence that adjudication did not remain a protected island when authoritarianism and militarism took over the social, political and economic institutions of Uganda. Therefore, in this study, notwithstanding the nonconformity with the common view on political culture being the cause of judicial absolutism, and whatever its social-political foundations, the content analysis is intended to reveal if judicial absolutism is one of the values behind the flexibility judging trends. In that sense, it is manifested by judges exercising unrestrained authority and exhibiting a lack of accountability by reaching decisions based on extra-legal and at times unarticulated considerations, or mere hunch.

8.3.3.2 *Relational Contracting*

MacNeil's claims that court decisions in East Africa indicate that contracts are relational, and that they even act as instruments of social change.[148] The wider claim, as put by MacNeil[149] and Barnette,[150] is that underlying the modern era's

---

[146] The Letter was reported in The Monitor News Paper of 28th October 2018.
[147] Oloka-Onyango (n 139).
[148] IR MacNeil, *Contracts, Instruments for Social Cooperation, East Africa: Text, Cases, Materials* (South Hackensack, N.J.: F. B. Rothman, 1968)
[149] Macneil, 'Values in Contract: Internal and External' (n 77) 340-418; IR Macneil, 'Relational Contract: What we do and do not know', (1985) Wisconsin Law Review, 483-525; and IR Macneil, 'Relational Contract Theory: Challenges and Queries' (2000) 94, Northwestern University Law Review, 877-907.

flexibility in adjudication is the relational nature of contracting. In this sense, contracts are non-simultaneous, non-discrete but futuristic exchanges, the parties to which expect to have long-term relationships;[151]and they create a network of relations in the community.[152]

During adjudication, the courts give effect to such relationships, the end goal being built on trust and cooperation-as opposed to strict definition of legal rights. Therefore, courts allocate rights and obligations based on the need to satisfy lower values underpinning such relational contract, namely: reliance and expectations—thus enforcing pre-contractual preferences, visible from the contract and its performance, all types of damages for intangible losses like inconvenience, being deemed primary and fully recoverable, as opposed to formalistic principles like remoteness and the arbitrary public policy;[153] preservation of relations, manifested by contractual solidarity;[154] peace, which relates to a harmonious resolution of conflicts;[155] and procedural propriety.[156]

---

[150] RE Barnette 'Conflicting Visions: A Critique of Ian Macneil's Relational Theory of Contract' (1992) 78 Virginia Law Review, 1175-1206.
[151] Chen-Wishart (n 27) 15.
[152] IR Macneil, 'Relational Contract Theory as Sociology: A Reply to Professors Lindenberg and de Vos' (1987) 143 Journal of Institutional and Theoretical Economics, 272, 274-75.
[153] IR Macneil, *The New Social Contract*: *An Inquiry into Modern Contractual Relations*, (1980) Yale University Press: New Haven, 38; IR. Macneil, 'Values in contract: internal and external', (n 77) 340-418; A Chandler and J Devenney, 'Breach of Contract and the Expectation Deficit: Inconvenience and Disappointment', (2007) 27 (1) Legal Studies 126-154, 129—viewing this as the new trend in the UK, as opposed to the traditional position in cases like Hadley v. Baxendale (1854) Ex 341; Koufos v. C. Czanikow Ltd, The Heron II [1969] 1 Ac 350 HL, that intangible damages are not recoverable on grounds of public poilcy, unless they are very direct, i.e. the contract was for pleasure and things like convenience, or the breach caused foreseable physical inconvenience, and the like.
[154] Macneil, 'Values in Contract: Internal and External' (n 77) 362.
[155] ibid.
[156] ibid.

From a coexistence perspective, a balance of formalism and flexibility can serve the value of relational contracting, for, the value demands both. This is demonstrated by the fact that formalistic interests underpinned it as well, such as the desire for procedural propriety. Further, is Macneil's claim, that there are values commonly underpinning both relational and discrete contracting, such as reciprocity, planning, contract solidarity and restraint of power; [157] which implies the possibility of coexistence. At the same time, Macneil argues that relational is better than discrete contracting at articulating and serving the individual autonomy on which formalism theory is based, as individualism connotes the collectiveness of an individual as part of society, rather than the selfish misconception.[158]

The influence of relational contract in adjudication is dependent on the peculiar aspects of such societies, as is the nature and survival of contractual relations. Macneil cites Uganda – before, during and after Amin's era (1971-1979)– as an excellent example of contractual relations disappearing, as the nation and its economy fall apart. However, he does not base his claim on a detailed study, and in any case, not of commercial adjudication in the country. Nonetheless, the claim should trigger an investigation like this one to understand the values underlying the tension, including those created by contractual behaviour.

The following chapter discusses the findings from the content analysis of judicial opinions, guided by an examination of the claims of the scholars discussed above, of values that underlie formalism and flexibility in the tension. It therefore contributes to making a case for the viability of the interests jurisprudence model of managing the tension-by helping to identify and understand the dominant values

---

[157] ibid 347.
[158] ibid 409.

behind the flexibility in Uganda's commercial adjudication; which values will then need balancing with the formalistic ones explained in chapter seven.

Chapter 9: The Values Underlying Flexibility in Uganda

9.1 Introduction

This chapter further contributes to understanding why the tension has prevailed, a necessary step towards coexistence. It discusses research findings for values underlying flexibility, throughout Uganda's judging history. The findings reflect the relevance to Uganda of the value postulates as presumptive values, and their indicative lower values or manifestations discussed in chapter eight; the content analysis having used them to code for and objectively uncover the real values underlying flexibility in Uganda.

The chapter articulates such values uncovered by the content analysis, elaborating the sub-values found to have underpinned them, and how judges have adhered to them during adjudication. This brings better understanding to the theoretical and practical foundations of flexibility within contexts like Uganda's. It also demonstrates how the identified flexibility values compete with formalistic ones, as well as amongst themselves in an interweave that contributes to the tension. This is meant to further prove that under Uganda's reality, both formalism and flexibility have been necessary, and practised at the same times; that the tension results from competing values underlying such judicial choices; and that the tension can be managed by finding rational and coherent ways of balancing the multiple competing values.

During the discussion, the values, frequencies and trends observed are used to further support three key arguments. Firstly, flexibility theory is relevant in

explaining the flexibility judging contributing to the tension in Uganda.[1] However, the space occupied by such flexibility judging and the values underlying it are exaggerated, the findings instead manifesting that coexistence of formalism and flexibility is both necessary and possible.

Secondly, scholars like Friedman[2] and Adams & Brownsword,[3] who attribute flexibility to purely doctrinal values, as well as MacNeil[4] and Barnette,[5] who attribute it to contract behavioural values like relational contracting, mistakenly focus on only contract theory. Rather, they should have paid attention to other perspectives like adjudicatory theory. This limitation leads them to leave unarticulated some of the values motivating judges towards such choices. Through this study focusing on adjudication, which includes but is not limited to contract theory, the findings reveal internal values underlying flexibility, informed by Uganda's judging culture and developed from the judges' practices and traditions over the years. They also reveal external values, informed by the legal contexts surrounding adjudication, including contract doctrine and theory; and the extra-legal contexts, that include the nature of contracting.

---

[1] For such flexibility theory see text to section 3.3 and chapter eight.
[2] LM Friedman 'Contract Law and Contract Research' (Part 1) (1968) 20 Journal of Legal Education, 452, 456-457.
[3] JN Adams and R. Brownsword, *Understanding Contract Law* (Thomson Sweet & Maxwell, 2007) 197, 205-206; JN Adams and R. Brownsword, 'Ideologies of Contract', (1987) 7:2 Legal Studies 210, 221-222.
[4] IR Macneil, 'Values in Contract: Internal and External', (1983-84) 78 New York University Law Review, 340, 340-418; IR Macneil, 'Relational Contract: What we do and do not know', (1985) Wisconsin Law Review, 483-525; and IR Macneil, 'Relational Contract Theory: Challenges and Queries' (2000) 94, Northwestern University Law Review, 877-907.
[5] RE Barnette 'Conflicting Visions: A Critique of Ian Macneil's Ralational Theory of Contract' (1992) 78 Virginia Law Review, 1175-1206.

Thirdly, Posner,[6] Llewellyn,[7] Farber,[8] Eisenberg,[9] MacNeil,[10] Trebilcock,[11] Trakman[12] and Schwartz & Scott,[13] rightly propose that monist prime-value conceptions do not fully account for the reality in adjudication. Instead, managing the tension requires studies this one, on how coexistence can be reached, against the backdrop of weighing and balancing multiple values both within flexibility theory, and across the formalism-flexibility divide.

Therefore, in line with interests jurisprudence,[14] the values observed from the content analysis across the different historical epochs are weighed, using their relative rates of prevalence. The findings are indicated in Figures 11 and 12. The dominant ones are earmarked for balancing, articulated and elaborated in this chapter; while the outlier values, consistently appearing in less than 10% of opinions, are forsaken but briefly expanded as well to give clarity.

---

[6] RA Posner, *Economic Analysis of Law* (3d ed.) (Little, Brown & Co. 1986); T Zywicki and EP Stringham, 'Common Law and Economic Efficiency' in Paris F and Posner R (eds) *Encyclopaedia of Law & Economics*, (Mason University Law and Economics Research Paper Series 2010).

[7] A Schwartz, 'Karl Llewellyn and The Origins of Contract Theory', in JS Kraus & SD Walt (eds) *The Jurisprudential Foundations of Corporate and Commercial Law* (Cambridge University Press, 2000) 12, 16.

[8] DA Farber, "Efficiency and The Ex Ante Perspective", in JS Kraus & SD Walt (eds) *The Jurisprudential Foundations of Corporate and Commercial Law,* (Cambridge University Press, 2000) 54, 59.

[9] M Eisenberg 'The Theory of Contract', in P. Benson, ed. *The Theory of Contract Law*: *New Essays* (Cambridge University Press 2001) 243-244.

[10] Macneil, 'Values in Contract: Internal and External' (n 4) 340-418; IR Macneil, 'Relational Contract: What we do and do not know', (1985) Wisconsin Law Review, 483-525; and IR Macneil, 'Relational Contract Theory: Challenges and Queries' (2000) 94, Northwestern University Law Review, 877-907.

[11] MJ Trebilcock, *The Limits of Freedom of Contract*, (Harvard University Press, 1993) 248.

[12] L Trakman, 'Pluralism in Contract Law', (2010) 58 Buffalo Law Review, 1031, 1031-1041.

[13] A Schwartz and RE Scott, 'Contract Theory and the Limits of Contract Law' (2003) John M. Olin Center for Studies in Law, Economics and Public Policy Working paper, Paper 275, 2-3.

[14] R Pound 'A Survey of Social Interests' (1943) 57 Harvard Law Review 1; R Pound, *Outline of Lectures on Jurisprudence* (Harvard University Press, 1943),) 97-112; F Powers 'Some Reflections on Pound's Jurisprudence of Interests' (1953) 3:1 Catholic University Law Review 10,15; and See text to section 3.5.1.

9.2 The Internal Judging Criteria

The findings for the internal judging values behind flexibility are presented in Figure 11 below, and discussed in the following sections. However, because flexibility connotes recognition of normativity beyond rules, some values cross over the internal/external boundary, as well as the legal/extra-legal one. Otherwise, the findings support much of the literature on value postulates,[15] validating their presumptions−as internal values, both of law's perception and of the judicial role, were found to be motivators of flexibility in Uganda. Therefore, the discussion below follows the categorisation used in chapter eight, to articulate the presumptive values, their indicative sub-values, and other manifestations underpinning them.

[15] See text to sections 8.2.1 and 8.2.2.

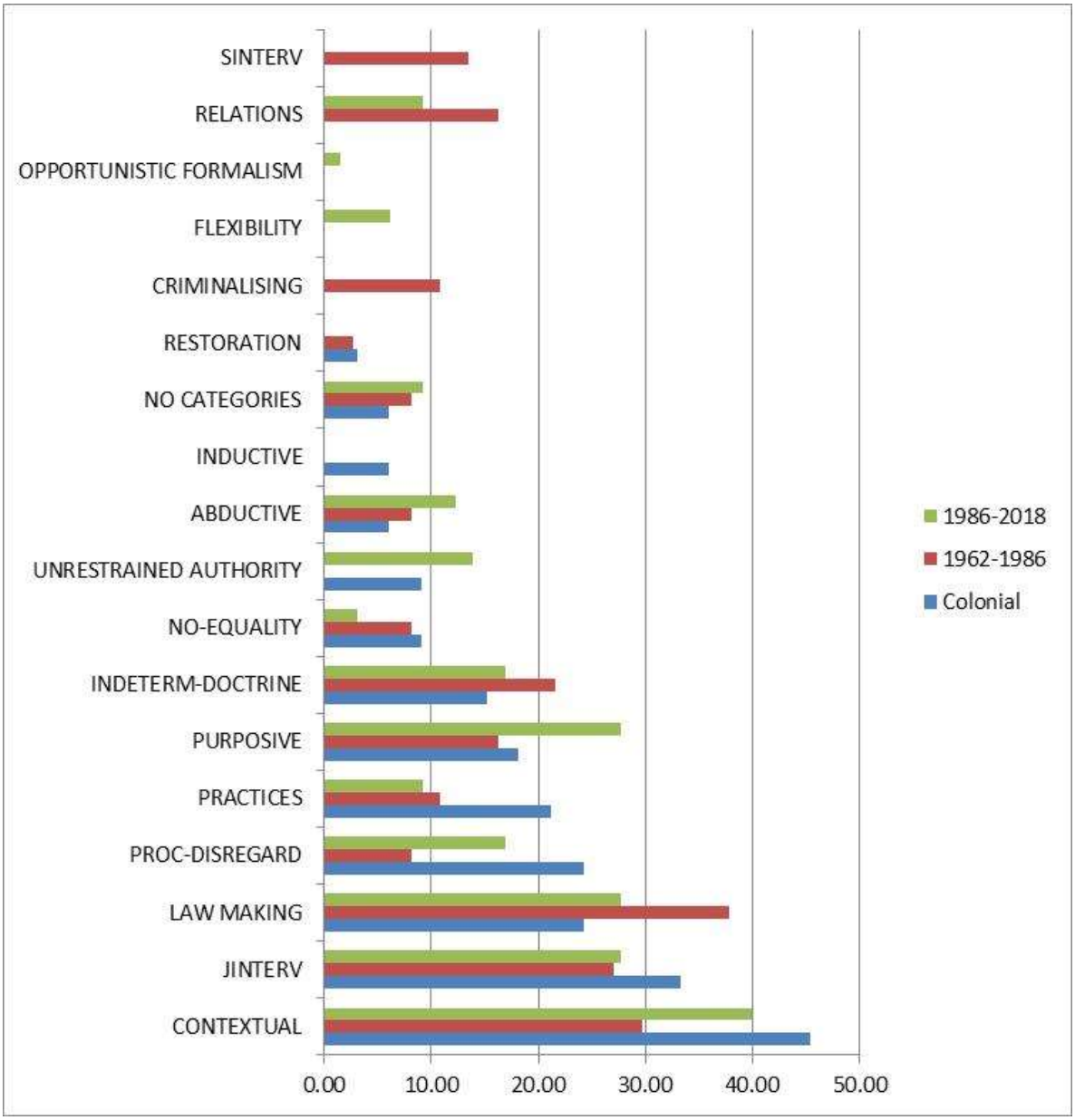

Figure 11: Judging Cultural Values in Flexible Judicial Opinions

9.2.1 Values of Law's Perception

During adjudication, judges who operationalise flexibility perceptions of law's nature serve an internal set of a value, which includes adaptability and elasticity of law, retroactivity of law, realistic certainty and instrumentalism.[16]The following sub-sections discuss findings to illustrate that in Uganda, such presumptive values have, but only to an extent, been underlying the flexibility at tension with formalism in commercial hard cases. I begin by articulating judicial adherence to the desire for the law to be fluid, elastic and adaptable to changing circumstances.

9.2.1.1 *Adaptability and Elasticity*

The desire for law to have a fluid and elastic character that enables it to adapt to changing realities in particular markets is a key motivator for flexibility judging.[17] Its influence manifests by judges recognising normativity in standards expressed or implied in rules, as well as in commercial practices like trade custom, usage, or course of dealings between the parties. However, even without the law itself exhibiting such elasticity, judges have, during flexibility judging, sought to serve its perceived adaptability, and have ended up making law. Such judicial law making will be discussed in the next section, as a value of judicial role perception, which it speaks to as well. In this section, the phenomenon of judges recognising normativity in standards and commercial practices is illustrated and elaborated.

---

[16] See text to section 8.2.1.

[17] Frank J, *Law and the Modern Mind* (Stevens, 1949) 6-7; R Jukier, 'Flexibility and Certainty as Competing Contract Values: A Civil Lawyer's Reaction to the Ontario Law Reform Commission's Recommendations on Amendment to the Law of Contract', (1988) 14 Canadian Business Law Journal 31; R Goode, *Commercial Law in the New Millennium,* The Hamlyn Lectures (Sweet & Maxwell 1998) 3-8.

Commercial practices are a major source of normativity in flexibility jurisprudence, as a pillar of Llewellyn's theory of contract; the other one being the historical and contractual context.[18] Efficiency as the end of law judges should pursue in interfering with contracts is derived from practices like trade custom, usage,[19] and commercial reasonableness.[20] In this case, the findings in Figure 11 reveal that commercial practices, coded as 'PRACTICES', have been used by Ugandan judges to serve law's adaptability, at the expense of positive law. This code appeared in 21% of colonial cases, and 11% and 9% of early and late post-colonial judging, respectively. The influence of practices normative recognition in flexibility manifested in a number of ways.

Firstly, was the recognition of the parties' ordinary course of business, as a determinant of rights and duties, notwithstanding the terms of the contract or relevant legal doctrine, as in *United Garment Industry Limited v Notco,*[21] *and Busongola Stores Limited v Barclays Bank D.C.O.*[22] In this *case,* the displaying of a bank's working hours was held as overridden by the practice of customers handing over money to a member of staff outside banking hours, and the bank was found liable for breach of contract due to its misappropriation. Further, in early post-colonial Uganda, Sir Charles Newbold expressly declared in *Patel & Others v National & Grindlays Bank Ltd,*[23] that terms of contracts should always be

[18] Schwartz and Scott (n 14) 13.
[19] ibid, 15-17.
[20] ID Abyad, 'Commercial Reasonableness in Karl Llewellyn's Uniform Commercial Code Jurisprudence' 83:2 (1997) Virginia Law Review 429.
[21] [1977] HCB 151.
[22] (1956-57) 8 ULR143.
[23] [1970] 1 EA 121.

interpreted, guided by the course of dealings and the nature of the contract. The trend has continued in late post-colonial judging.[24]

Secondly, the practices of trade usage, custom and commercial reasonableness have been given normative recognition, at the expense of freedom of contract, or legality. In the opinions analysed, neither trade usage nor custom was commonly expressed as a motivator of flexibility, but it could be inferred from wording that pointed to their being viable and alternative explanations of the legal norm.[25] However, in some cases, these practices were directly treated as superior to positive law, as happened in *Amosh. S. Ghata v Tarbhain Haji Jamal & Co. Limited*[26] and *Kabona Brothers Agencies v Ugandan Metal Producers & Engineering Company Limited.*[27] In *Amosh*, Dickson, J, flexibly decided that there is normativity beyond legality, as he reasoned that there was no contract between the parties, '*not even a void one'*. By calling 'a void contract' 'a contract', the judge was flexibly stretching the rule in *N.R. Lakhani v H.J. Vaitha & Another Limited,*[28] that a void contract is not capable of producing any legal consequences. Likewise, in Kabona, reasonable commercial contemplation was treated as superior to the contractual parties' rights.

---

[24] See Huq v Islamic University In Uganda [1995-98] 2 EA 117; Sugar Corporation Uganda Ltd v Lawsam Chemicals (U) Ltd [2003] 2 EA 679; and British American Tobacco (U) Ltd v Francis Mulindwa & Others (HCCS 767/2004 (24/4/2013).
[25] Christopher Sekimpi v Uganda Breweries Limited [1972] HCB 216; Kintu v Kyotera Coffee Growers Limited [1976] HCB 362; Amosh.S. Ghata v Tarbhain Haji Jamal & Co. Limited (HCCS 354/68, LDC 82/70); Kabona Brothers Agencies v Ugandan Metal Producers & Engineering Co. Limited [1981] HCB 75; and AM Jabi v Mbale municipal Council [1975] HCB 190.
[26] HCCS 354/68, LDC 82/70.
[27] [1981] HCB 75.
[28] [1965] EA 452.

Accordingly, trade usage/custom normativity was recognised during colonial days,[29] and is still continuing in late post-colonial judging,[30] where it has been acknowledged and glorified by Ogoola J, in *Tobacco and Commodity Traders International Inc. v Mastermind Tobacco (U) Ltd.*[31] A case was filed on behalf of a company, using documents that offended procedural and technical rules against hearsay. The judge observed that the case represented the battle between flexibility and formalism, and chose to be flexible, reasoning that in commercial cases the intricacies of modern commercial intercourse dictated that no one person in a company knew all the facts, as directors could be all over the world.

The judge thereby decided flexibly, motivated by the desire to make the rules adaptable to the changes and realities of modern business, which he operationalised using trade usage and custom, plus their twin value of commercial reasonableness. Relatedly, the latest apparent reduction of 'PRACTICES' below the 10% threshold is deceptive, considering that adherence to commercial reasonableness, observed frequently as part of normative standards, is actually part of practices normative recognition as well. In any case, standards and practices combine to make law's adaptability qualify amongst the values to be weighed and balanced to arrive at coexistence.

Coded as 'NORMATIVE STANDARDS', Figure 11 shows that judicial recognition and invocation of normative standards were found in 15% of colonial cases, 22% of early post-colonial cases, and 17% of late post-colonial cases. This frequency, especially added to the one for commercial practices, makes law's adaptability and elasticity one of the dominant values underlying flexibility, which should be part of

[29] *R. Rouge v L. Besson & Company* (1920-29) 3 ULR 90.
[30] See Appendix 5: Cases 44, 49, 55, 58, 69, 75 and 88.
[31] HCC C 18/2002(9/5/2003).

the weighing and balancing in finding ways for coexistence. The normative standards found to underpin law's adaptability included a number of sub-values: commercial reasonableness; contractual terms not being harsh or unconscionable; decisions having to conform to public interest; and substantiality of justice or performance.

Firstly, commercial reasonableness was the most dominant throughout history, until 1995, after which substantiality rose to challenge its dominance. During colonial judging, for instance, in *Bloedow v Renton*[32], implying terms in contracts was held by King Farlow J to be acceptable if doing so was reasonable in view of the nature of the contract, in this case nature of employment, and the local circumstances surrounding the dispute. In early post-colonial judging, commercial reasonableness became more practiced,[33] with judges using what they considered to have been reasonably expected or contemplated by the parties to give effect to standard terms,[34] and refusal to award lost profits;[35] and in determining whether agents had ostensible authority.[36] In late post-colonial judging, it has continued to be given normativity, in all types of commercial contract hard cases.[37]

That commercial reasonableness has been applied to serve the perceived adaptability of law in hard cases was expressly declared in *Edmund Schluter & Co.*

---

[32] (1910-20) 2 UPLR 44.
[33] See Appendix 3: Cases 4, 17, 20, 25, 32, 34, 38, and 42.
[34] Jupiter General Insurance Co. v Kasanda Cotton Company Limited [1966] 1 EA 252; AM Jabi v Mbale Municipal Council [1975] HCB 190.
[35] United Garment Industry Limited v Notco [1977] HCB 151; Kabona Brothers Agencies v Ugandan Metal Producers & Engineering Co. Limited [1981] HCB 75.
[36] Credit Finance Corporation Ltd v Alalani*,* *and*; Ian Peters Limited *v* House of Novelties Limited (1968) EA 19
[37] See Appendix 5, Cases 1, 13, 15, 30, 41, and 59.

(Uganda) Ltd v Patel.[38] The judge declared it the 'general principle', informed by reasonable assumptions from the circumstances surrounding the contract, to be applied, where no cases or rules were relevant to the issue. Therefore, commercial reasonableness has been used to find justice, not by looking at the rules of law, but at the demands of the contractual context, and the circumstances surrounding its performance or adjudication.

It was also found dependent on what commercial men and women in the work place would ordinarily be deemed to have expected or done. As such, in *Magezi & Another v Ruparelia*,[39] Karokora, JSC, reasoned that in commercial contracts, it is certainly right that courts should know the purpose of the contract, which presupposes knowledge of the genesis of the transaction, the background, and the market in which the parties are operating. More fundamentally, he declared the rule on determining intention of the parties as 'what reasonable people would have had in place in the situation of the parties.' It is not clear what the judge meant by 'situation of the parties.' However, if coexistence-oriented judging guidelines were in place, this could be declared with certainty, for instance as implying commercial people, and not the non-trading bystander, such that what the business community see from their practices as the standard of commercial reasonableness, the courts will use to decide rights and duties of contract.

Secondly, judicial intolerance, to harsh and unconscionable bargains, as a normative standard, has been used to make the law adaptable and elastic. It mainly flows from the statutory discretion to interfere with contracts, that provides

---

[38] [1969] EA 239.
[39] [2005] 2 EA 156

for interests judges may deem harsh and unconscionable.[40] The courts have exercised such discretion to interfere with and rewrite contractual terms on interest,[41] notwithstanding freedom and sanctity of contract pleas.[42]

Thirdly, recognising and reliance on the normativity 'public interest' is the other sub-value, by adherence to which law's adaptability has been served. Indeterminate in meaning and scope as it is, public interest has been found to be part of the internal judging criteria underlying flexibility. It has prevailed since early post-colonial judging,[43] and continues during late post-colonial judging.[44] For instance, in Attorney *General v Afric Cooperative Society Ltd,*[45] the public was at risk of losing money to the respondent, if the rules barring the calling of fresh evidence in the Supreme Court were adhered to. The contracts, as well as orders of the lower court were thereby interfered with, in the service of public interest.

Finally, substantiality has since 1995[46] become one of the major sub-values and manifestations of law's adaptability and elasticity. The findings reveal this change in judging culture post 1995, because substantiality does not appear in any of the analysed hard cases prior to the 1995 constitution, but became common

---

[40] Section 26 of the Civil Procedure Act; and 12, 89 (1)(c) of The Tier 4 Microfinance Institutions and Money Lenders Act.
[41] Bagoka v Kibwaijana [1976] HCB 364; Highland & Agriculture Export Ltd & Another *v* Alpha Global 21st Joint Venture & 5 Others [2017] UGCOMMC113 (18/8/2017); and R.L Jain *v* Kamugisha [2015] UGCOMMC 77 (Dated 14/4/2015).
[42] R.L Jain *v* Kamugisha [2015] UGCOMMC 77 (Dated 14/4/2015).
[43] Aniello Ciella v Cassman Brown & Co. Limited [1973] E.A. 358.
[44] See for example SDV Transami (U) Limited v Agrimag Limited & Jubilee Insurance Co. of Uganda, HCT-00-CC-AB-002-2006 [2008] UG COMM. 33; and Attorney General *v* Afric Cooperative Society Ltd (SCMA 6/2012).
[45] SCM.A 6/2012.
[46] The promulgation of Article 126 (2)(e) of the 1995 Uganda Constitution, that obliges judges to decide cases with regard to not only the law, but at a parallel level, substantive justice and not technicalities.

thereafter.[47] Further, apart from *NEC Health World Pharmaceuticals Ltd v Engineering Construction Co. Ltd,* [48]in which the court held that where a contract is substantially performed, minor faults will be ignored and the contractor awarded the full price under the doctrine of substantial performance, in the rest of the cases, substantiality was derived from the provisions of article 126 (2) (e) of the constitution.

Substantiality's value in law's adaptability is mainly highlighted by cases where the courts have used it flexibly to cure defects in what would otherwise be illegal and untenable contracts or court proceedings.[49] In all these cases, defects that would make a formalistic judge dismiss a case or declare it unjusticiable were held as mere technicalities and cured for not going to the substantive justice of the disputes. Therefore, the desire for law's adaptability and elasticity has been a key internal value underlying flexibility and the tension. However, it does not account for all the flexibility judging across history, not even from the internal perspective. Retroactivity of law has also been observed as one of the other values competing to influence judges.

9.2.1.2 *Retroactivity of Law*

Closely related to its adaptability, is the value of law having to be retroactive, by speaking to the future.[50] Retroactivity of law is underpinned and manifested by

---

[47] See Appendix 5: Cases 28, 33, 39, 43, 44, 61 and 66.
[48] HCCS 809/2012(24/4/2013).
[49] Pan African Insurance Co. (U) Ltd *v* International Air Transport Association HCCS 667/2003 (25/01/2008); Attorney General *v* Afric Cooperative Society Ltd (SCM.A 6/2012); Eclipse Edil Soil JVC Co. Ltd *v* Kampala City Council (HCCS 256/2005 (9/2/2007); Tobacco and Commodity Traders International Inc. *v* Mastermind Tobacco (U) Ltd (HCCC 18/2002(9/5/2003).

[50] LL Fuller, *The Morality of Law*, (Yale University Press, 1969, Revised Edition) 51-63.

judicial recognition of normativity in standards, and ever-changing commercial practices, as well as directly filling gaps in law. As illustrated in section 9.2.1.1, normativity of standards and practices has had high prevalence, which renders evidence to law's retroactivity being a value underlying the country's flexibility judging, and the resultant tension.

However, we are yet to see the effect of the 2017 change to judicial choice – in contracts for sale of goods and supply of services, the normativity commercial practice has been subjected to positive law.[51] The findings and conclusions in this regard are therefore weakened by the law having changed, from being overtly retroactive to having legality as the front-stop for commercial practices normativity. Nevertheless, for now, the findings on adherence to law's retroactivity, that include filling gaps in law, illustrated in the next section, hold because they represent judging culture up till today. The value is therefore worth weighing and balancing as one of the key internal values of law's perception underlying flexibility. The others include utilitarianism and therefore an instrumentalist judicial perception of law.

9.2.1.3 *Utilitarian Instrumentalism*

Instrumentalism has been a part of flexibility judging, not only as a value intrinsic in the country's legal order, but also part of the internal judicial culture. That the legal order is based on an instrumentalist perception of law is evidenced by Uganda's laws on judging, including the constitution,[52] the Judicature Act[53] and the Code of

[51] Section 67 of the Sale of Goods and Supply of Services Act, 2017, replacing section 54 of the Sale of Goods Act, 1932; section 54 which provided for supremacy of commercial practice over rights and duties implied by law, was re-enacted as section 67 but the word 'not', was added, to reverse the precedence of these norms.
[52] The 1995 Constitution, Articles 126(1), 126 (2)(e) and 132 (4).

Judicial Conduct,[54]all of which oblige judges to follow an instrumentalist conception of law, including the pursuit of substantive justice and contextual in normative recognition. For instance, Article 126 (2) (e) of the constitution obliges judges to pursue substantive justice, and the National Objectives and Directives of State Policy, command them to judge while taking into account Uganda's pluralistic society, aspirations for an independent jurisprudence, distributive justice, the country's unique experiences, social, political and economic contexts, plus the aspirations for libertarianism (democracy, freedom and justice).[55]

Armed with such an instrumentalist-oriented legal order, the findings reveal that flexible opinions have been motivated by instrumentalism, manifesting through judicial adherence to a number of instrumentalist sub-values. These are: the law being used as 'a means to ends', which in the content analysis was coded as 'LMEANS'; the conception of 'law being the predictions of what judges will do about rules and disputes', coded as 'LPREDICTIONS'; the conception of 'law as experience', coded as 'LEXP'; and economic efficiency and wealth maximisation as the ends of law and judging, jointly coded as 'EFFICIENCY'. Efficiency and wealth maximisation are discussed later, as doctrinal values underlying flexibility. Likewise, law as experience is discussed under external values, where it is more relevant, and law as predictions is later tackled under perceptions of the judges' role. Therefore, in this part only law as means to ends is elaborated.

---

[53] The Judicature Act of Uganda (Laws of Uganda, 2000, V 1), Sections 14(2)(c), 14(3), 33, 39 (2) and Section 4 of the Judicature (Amendment) Act, 2002 operationalising the substantive justice norm in Article 126 (2) (e) of the Constitution.

[54] Section 1 of the Uganda Code of Judicial Conduct 2003.

[55] The 1995 Constitution, Objective and Directive No.1; Objective and Directive III (ii); Objective & Directive IV (ii); Objective & Directive XI (iii) & XIV; and Objective & Directive XXIV

The most dominant of instrumentalist sub-values observed is the conception of *law as a means to an end*, which appeared in 24% of colonial judging, 32% of early post-colonial judging and 43% of late post-colonial judging. The findings partly support the claim by the instrumentalists Pound[56] and Holmes,[57] that flexible judging is motivated by the jurisprudence of ends as opposed to conceptual jurisprudence,[58] or the niceties of law's internal structure.[59] Utility, and not the logical and rational deduction of principles, is the source of and will override legality,[60] as judgments are treated as more rational if the rules they produce can be articulated and definitely referred to particular ends they serve, and the grounds for those ends can be or have been clearly stated.[61]

However, the claim by both Pound[62] and Holmes that the ultimate end of judging is social policy, is insufficient to explain the ends in all or even a majority of the cases in which LMEANS was observed.[63] Beyond social policy, a detailed understanding of the ends and grounds flexibility serves, requires a more extensive uncovering of the interaction between judicial criteria, the judging environment and law's purposes. From the findings in appendices 1-5, Figure 11 and Figure 12, this study makes a contribution by revealing that the flexibility in the tension was partly motivated not by social policy-oriented instrumentalism, but by utilitarian instrumentalism, represented by the perceived purposes of the law[64] or the

---

[56] R Pound, 'Mechanical Jurisprudence', (1908) 8:8 Columbia Law Journal, 611.
[57] OW Holmes, Jnr, 'The Path of Law' 10(8) Harvard Law Review (1897) 457,466-9.
[58] Pound 'Mechanical Jurisprudence' (n 56) 611.
[59] ibid 609.
[60] ibid 609-10.
[61] Holmes, 'The Path of Law' (n 57) 469.
[62] Pound, 'Mechanical Jurisprudence' (n 56) 609
[63] Holmes, 'The Path of Law' (n 57) 466-67
[64] See Appendix 1: Cases 7, 10, 12, 20, 36, 58; Appendix 3: Case 14; and Appendix 5: Cases 13, 17, 45, 72, 75, 80, 81, 93, and 94.

contract[65] and the functionality or practicality of decisions;[66]many times unrelated to social policy.

By way of illustration, normativity of the law's purposes was recognised during colonial judging in *Semu Kiseka Mukwaba & Others v Daudi Musoke Mukubira,*[67] where the dispute was whether the colonising agreements were constitutional instruments. The judge declared them so, while acknowledging a vacuum in the law. He used the purpose and practical utility of the regulations made under the agreements to recognise them as law. Further, in the *Bhimjani case*,[68] the judge declared that in hard cases, judicial discretion should be guided by 'the general scheme and purpose of the Act.

Similarly, courts interfered with exorbitant interest rates, to avoid borrowers failing to repay loans.[69] The trend continued in early[70] as well as late post-colonial judging, as the Supreme Court declared in *Postbank (U) Ltd v Ssozi,*[71] that the criterion for deciding cases under the summary procedure rule was its purpose, of expeditiously handling financial and commercial contract disputes, and avoiding any obstructions to adjudication.[72]

Utilitarianism as adherence to contractual purposes was also observed, although mainly in post-colonial judging. It has been prevalent in sale of goods cases, where

---

[65] See Appendix 1: Cases 56 and 63; Appendix 3: Cases 21, 41, 42, 43; and Appendix 5: Cases 1, 5, 11, 14, 15,16, 18, 21, 25, 31, 41, 46, 51, 59, 77, 82 and 93.
[66] See Appendix 1: Cases 56, 58 and 63; Appendix 3: Cases 41, 42 and 43; and Appendix 5: Cases 1, 5, 11, 14, 18, 25, 31, 41, 46, 51, 59, 77, 80, 82, 93 and 94.
[67] (1952-56) ULR 74.
[68] (1956-57) 8 UPLR 164.
[69] SK Ndugwa, Gulu v The Buganda Butchers Limited (1936-51) UPLR 150.
[70] See Kayanja v India Assurance Company Ltd [1968] EA 295.
[71] [2017] SCCA 1(9/1/2017)
[72] Order 36 of the Civil Procedure Rules

courts would be called upon to determine whether implied terms such as fitness for purpose were proved to have existed. In *Magezi & Another v Ruparelia,*[73] the Supreme Court's Karokora JSC's declared that in commercial contracts it is certainly right that courts should know the purpose of the contract, from the genesis of the transaction, through the background, the contract itself and the market in which the parties are operating. By the word 'operating', the judge indicated motivations from ends defined by the circumstances surrounding both formation and performance of the contract.

Further, in late post-colonial judging, it is illustrated by the Supreme Court reasoning in *Goustar Enterprises Ltd v Oumo,* that mere knowledge of the purpose of a contract for sale of goods is adequate proof that the buyer relied on the seller's skills and judgement, to trigger an implied condition that the goods would be fit for purpose.[74] Contractual purposes as criteria were also found in other types of disputes, such as those over the passing of property in the goods, where normativity was given to commercial purposes,[75] and cases like *SDV Transami (U) Ltd v Nsibambi Enterprises Ltd,* [76]where the applicability of exemption clauses was treated as subject to the purposes of the contract.

Finally, practicality and functionality of either the rules or contractual interpretations also motivated flexibility judging. It was observed under the code 'PRACTICAL**'**, appearing since colonial judging at 18%, 16% in the early post-colonial era, and 28% in late post-colonial Uganda. Amongst colonial opinions,[77] it is demonstrated

---

[73] [2005] 2 EA 156
[74] [2006] 1 EA 77
[75] See Jane Bwiriza v Osapil [2001-2005] HCB 52.
[76] [2008] HCB 93.
[77] See Appendix 1: Cases 56 and 63.

by *H. White Wilson & Co. v the Barnet Soda Factory.*[78] In this case, the court held that standard terms printed on the indent were not binding, because it 'would be too strong to expect a Goanese (one of the Asian groups in Uganda at the time) to have taken note of such terms printed by the British seller'.

A number of post-colonial opinions also reveal adherence to practicality and functionality, as a sub-value of law as a means to ends.[79] This sub-value has been more prevalent in late post-colonial judging, becoming one of the most motivational values for flexible judging.[80] For instance, in *Eden International School Ltd v East African Development Bank Ltd,*[81] the court rejected a claim that the interest of ½% per annum compound was harsh and unconscionable. The reason was that the purpose of interest was to protect the defendant against economic vagaries and compensate her for the consequences of delayed payment, such as loss of opportunity cost, depreciation of currencies, inflation and risk.

The other manifestation of practicality and functionality as key sub-values was judges not recognising the conceptual ordering of contract law, as is otherwise reflected by the categorisation of law,[82] which was coded as 'NO CATEGORIES'. This practice follows Lord Denning's suggestion in *Central London Property Trust Ltd v High Trees House Ltd,*[83] and later *Esso Petroleum Co. Ltd v Mardon,*[84] that

---

[78] (1920-29) 3 UPLR 56
[79] See Appendix 3, Cases 41, 42, 43 and 44.
[80] See Appendix 5: Cases 1, 5, 11, 14, 18, 25, 31, 41, 46, 51, 59, 77, 80, 82, 93 and 94.
[81] HCCS271/2015 (7/2/2017)
[82] TC Grey, *Formalism and Pragmatism in American Law*, (Koninklijke Brill, NV, 2014) 54-55.
[83] [1947] 1 KB 130.
[84] (1976) EWCA 4, where after finding that the appellant was liable under an action for misrepresentation as she made promises of a futuristic nature, found that the respondent was entitled to damages for negligent misstatement or under a warranty of collateral contract.

courts should end the idol worship of freedom of contract, and instead find fairness by overriding such categorisations.

In Uganda, judges have declassified law to flexibly find remedies, with *Mardon's* case for instance specifically quoted with approval as a source of normativity, in *Hope Mukankusi v Uganda Revenue Authority.*[85] The findings in Figure 11 indicate that such declassification of law has mainly been practised by negligence being applied to resolve contract's hard case, since the colonial days where it appeared in 6% of opinions. It grew to 8% in early post-colonial, and 9% in late post-colonial judging respectively.

For instance, economic negligence has commonly been treated as part of contract in carriage and other bailment cases,[86] in which courts have generally interfered with clear contractual terms under which the carrier or other bailee would not be liable, to flexibly find liability under negligence. In one such case the author handled, *SDV Transami (U) Limited v Agrimag Limited & Jubilee Insurance Co. of Uganda*,[87] the judge, citing fairness and justice, upheld the award by the arbitrator, Chief Justice Wambuzi (emeritus), under which although he had found no negligence proved, he invoked the doctrine of *res ipsa loquitor* to infer gross negligence and make an award. However, the contract expressly stated that goods were carried at the owner's risk, and the carrier would only be liable if there was evidence of gross negligence. Such flexibility however points to other values of perceptions, besides those relating to law's nature – values of perceptions of the judicial role.

---

[85] HCCS 438/2005(19/7/2010)
[86] See Appendix 1: Cases 16, 26; Appendix 3: Cases 9, 18, 33; Appendix 5: Cases 6, 21, 23, and 65.
[87] HCT-00-CC-AB-002-2006 (2008) UG COMM. C33.

9.2.2 Perception Values of the Judicial Role

Flexibility has also been motivated by judges perceiving their role as lawmakers, guarantors of contractual fairness and justice (interventionists), and settlers of disputes through 'judging by hunch'. These perception values speak to a tension with the formalist value of 'the judge as a mechanic', already also found to have prevailed during the same judging periods.[88] The following part elaborates the findings for each of these flexibility-engendering values.

9.2.3 Judicial Law-making

As discussed earlier,[89] instrumentalists like Holmes[90] and Frank,[91]claim that judges make and change law. Figure 11 however reveals that the higher value of judicial law-making has had a more significant influence on flexibility, appearing in 24% of colonial flexible opinions, 38% of early post-colonial judging and 28% of late post-colonial judging. The other ways it manifested are by judges filling gaps[92] and sidestepping, or stretching the meaning of,[93] existing rules of law.

9.2.3.1 *Rule Gap Filling*

Gap filling was for instance done during colonial and late post-colonial judging.[94] In the colonial *Bhimjani case,*[95] the reasonableness provision judges invoked to refuse a landlord possession in other jurisdictions was found non-existent under

[88] See text to Section 7.2.3.2.
[89] See text to chapters one, three and eight.
[90] OW Holmes, The *Common Law* (Little Brown and Company 1963) 5.
[91] J Frank, 'Say it With Music' (1948) 61 Harvard Law Review 952 at 953.
[92] See Appendix 1 Cases 9, 12, 20, 36 and 57 and Appendix 5 Cases 6, 10, 19, 30, 35, 40, 74, 80 and 83.
[93] See Appendix 3 Cases 5, 6, 13, 14, 18, 27, and 21; Appendix 5 Case 81.
[94] See Appendix 1 Cases 9, 12, 20, 36 and 57 and Appendix 5 Cases 6, 10, 19, 30, 35, 40, 74, 80 and 83.
[95] (1956-57) 8 UPLR 164.

Ugandan law. The judge exercised discretion to presume it was part of the law, pending his recommendation for such amendment. Likewise, in *Hamud Bin Suleman v Visinji Ganji,*[96] section 49 of the English Sale of Goods Act was deemed part of Ugandan law, although it was not, since the purpose of the Indian Contract Act was to codify English law.

During early post-independence judging, the trend appears to have died out, but the sub-value has resurged in late post-colonial judging. Justice Irene Mulyagonja acknowledged this, in her declaration that, 'in a jurisdiction where legal reform by amendment and enactment of statutes is slow, case law becomes a most valuable source of law which will set precedents that will guide law students, legal practitioners and the Magistrates Courts'.[97] Further, the sub-value's influence is illustrated by two notable cases on statutory gap filling. One is Nipunnoratiam *Bhatia v Crane Bank Ltd*,[98] where the judge declared as illegal and unenforceable contracts where goods had third party encumbrances, contrary to lighter remedies under the Sale of Goods Act. The other is *Karangwa v Kulanju,*[99] where different sections of the Contract Act appeared to contradict one another as to whether a guarantee contract has to be in writing; the judge reasoned that he had to harmonise the Act and gave the word 'may' in section 68 the same mandatory effect as the word shall 'shall' in section 10 (6) of the Act.

Gap filling has also extended to changing rules settled by precedents. A classic example is *Steam Aviation FZC v Attorney General,*[100] where a High Court judge

---

[96] (1920-29) 3 UPLR 46.
[97] Justice Irene Mulyagonja, then a Judge of The Commercial Court made this declaration in an article published in E-News Letter of the Commercial Court, 2011.
[98] [2013] HCB 76.
[99] HCCA 3/2016 [2017] UGCOMMC 91(24/8/2017)).
[100] HCCS 9/2010 (25/1/2015)).

contradicted a rule in *United Assurance Co. Ltd v Attorney General [1995] VI KALR 109,* a Supreme Court precedent, whereby even without a resolution a company can authorise an act. Such has been the courage exhibited by flexible judges in law-making, that even without gaps being observed, in many cases clear rules have been simply sidestepped, thereby creating new rules with alternative or modified normativity.

9.2.3.2 *Rule Sidestepping*

Rule sidestepping has throughout judging history been constantly used to arrive at normativity, by declaring legal positions besides known rules.[101] For instance with regard to formalities of mortgage contracts, in the colonial case of *Harshad Limited v Globe Cinema Limited and Others,*[102] the rules on formalities of mortgages were sidestepped, by holding as valid an unsigned mortgage deed. Sidestepping continued in the early post-colonial, as demonstrated by *Olinda De Souza Figueiredo v Kassamali Nanji.*[103] In this case, the judge was faced with a choice between the Mortgage Act, which provided that for a mortgage to be valid, it was enough that only the mortgagor had signed the deed; and the Registration of Titles Ordinance, which provided that for any registrable instrument to be valid it had to be signed by both parties. The judge sidestepped the latter rule, reasoning that the precision required was not that of a court order, and lack of signature was a mere procedural technicality and not a matter of substance.

---

[101] See Appendix 1 Cases 5, 23, 24 and 45; Appendix 3 Cases 1, 10,12, 36 and 38; and Appendix 5 Cases 2, 3, 9, 13, 22, 27, 33, 39, 41, 44, 45, 47, 50 and 64
[102] [1960] 1 EA 1046.
[103] [1963] 1 EA 381.

In late post-colonial judging, in *Belex Tours & Travel v Crane Bank Ltd & Another,*[104] Byamugisha, J. A held that the rule requiring pleadings to mention and particularise was old law. She reasoned that in such ('hard') cases, the courts had to stand firm at the gates of justice. The metaphor of judges as 'gatekeepers' used by the judge speaks to the flexibility-engendering value of judicial law-making having become an integral part of judicial culture, with judges deciding when to open or close the province of the law, the only guiding tool being the search for what a judge would take to be fair and just. With such quests for fairness, justice, and judges taking themselves as gatekeepers, it is not surprising that they have, alongside law-making, played an interventionist role in contract.

9.2.4 Judicial interventionism

Judicial interventionism in contract is one of the key internal values that scholars claim to motivate the flexibility in the tension.[105] Judges are authorised to correct and fill gaps in contracts by implying terms, as well as by intervening in contracts in search for substantive fairness, justice, equity, or otherwise, replacing 'what was agreed with what would have been agreed in the circumstances.'[106] Contracts deemed unconscionable or unworthy are written into and replaced with terms that would guarantee ends like substantive fairness.[107] As such, the formalistic 'worship of the freedom of contract idol' will be defied.

The findings in this study support judicial interventionism being a key value underlying flexibility in Uganda, that needs to be weighed and balanced with

---

[104] [2013] CACA 13 (24/10/2013)).
[105] See text to Section 8.2.2.2.
[106] Schwartz (n 7) 15; EL Sherwin 'Law and Equity in Contract Enforcement', (1991) 50 (2) Maryland Law Review, 272, 276; and See text to Section 8.2.2.2.
[107] ibid.

formalistic values to achieve coexistence. Figure 11 reveals that it featured in 33% of colonial, 27% of early post-colonial, and 28% of late post-colonial flexible opinions. However, these findings do not support Lord Denning's claim in *the George Mitchell case,*[108] that commercial judges intervene using '*the true construction notion'* as a secret criterion. The notion points to flexibility judging being a matter of interpretation, such that even considerations external to the contract would have to be justified using a form of construction of contractual terms. This claim by Denning is contradicted by this study's findings, as Ugandan courts have been found often to override contractual terms, substituting the parties' intentions with what they perceived a fair[109] or equitable.[110] Judicial interventionism has also been manifested by judges playing the role of filling contractual gaps, thereby writing into or rewriting the contract.[111] To better understand how interventionism has motivated flexibility, one needs to elaborate how these sub-values and manifestations have influenced judging choice.

9.2.4.1 *Justice as Fairness and Fairness as Ubuntu*

In Uganda, although the formalist/procedural sense of fairness has guided judges in some cases,[112] commercial judges have often been motivated by the competing instrumentalist sense of fairness; [113]thus the tension. For instance, in *Mohanlal*

---

[108] (1983) 2 AC 803.
[109] See Appendix 1: Cases 42, 44, 56, 58, and 62; Appendix 3: Cases 16, 17 and 27; and Appendix 5: Cases 2, 27, 48, 52, 57, 65, 70, 78, 84, 85, 86, 90, and 92.
[110] See Appendix 1: Cases 5, and 39; Appendix 3: Cases 13, and 35; and Appendix 5: Cases 2, 3, 29, 47, 48, 49, 63, 74, 78, 92 and 93.
[111] See Appendix 1: Cases 6, 34 and 55; Appendix 3: Cases 4, 23, 41 and 42; and Appendix 5: Cases 7, 87 and 91.
[112] See text to section 6.1.3.2.
[113] See Appendix 1: Cases 5, 42, 44, 56, 58, and 62; Appendix 3: Cases 16, 17, and 27; and Appendix 5: Cases 2, 27, 29, 48, 52, 57, 65, 70, 78, 84, 85, 90 and 92.

Gandhi v Suleman Mithah,[114] the court interfered with contract, reasoning that it was unfair and 'a hard bargain', although there was no proof of fraud, trickery, pressure, mental or other incapacity or undue influence.

In *S.K Ndugwa, Gulu v The Buganda Butchers Limited*,[115] the judge acknowledged the contribution to the tension brought by the two senses of fairness, and tried to reconcile them using interpretation and logic. The judge reasoned that section 26 of the Civil Procedure Act, which permitted courts to interfere and reduce harsh and unconscionable rates, was a codification of equity, but did not strike at the hardness of the bargain, rather the means employed to reach the bargain. Further, that the hardness of a bargain was evidence of unscrupulous use of power not of itself ground for relief, which meant that the end justified the means, and therefore substantive unfairness would have to imply procedural unfairness. This attempt at reconciliation did not bring certainty to the values of fairness and justice, but rather put flexibility fairness in a dominant position, leaving the tension unmanaged. To arrive at a balance of the two, one needs first to understand how the values have been perceived and used in Uganda.

The dominant flexibility-engendering sense of fairness practised by Ugandan judges is what is known as u*buntu*, which fits the common instrumentalist fairness narrative.[116] The content analysis has revealed that a number of flexible decisions across the judging periods were motivated by the ubuntu sense of fairness, as sub-values that combine to form ubuntu were either directly or indirectly invoked to justify judicial choice. During colonial judging, Smith J was evidently motivated by

---

[114] (1932-35) UPLR Vol. 5 193.
[115] (1936-51) UPLR 150.
[116] See text to Section 8.2.2.1.

compassion, an ubuntu value, in the *H. White Wilson & Co. case,* [117] by rejecting the applicability of exemption clauses on the basis that a person from a particular community that was backward could not have been expected to take note of and perceive them as contractual terms.

Its influence has grown in post-colonial judging, accounting for the majority of decisions based on fairness. For instance, during early post-colonial judging, humanness and compassion as aspects of fairness under ubuntu was used as a criterion for normativity. This was in cases judges decided on grounds such as the reasonableness[118] or soundness,[119] of the decision's consequences. In *Grayson & Co. Ltd v AH Wardle (Uganda) Ltd and Others,*[120] such humanness was employed to declare the words 'we undertake to guarantee' as fairly conceivable to mean that there was a binding guarantee from the onset. Likewise, in *Muwema & Mugerwa Advocates v Shell (U) Ltd*,[121]humanness motivated the judge's invocation of the principle, 'Justice should not only be done but be seen to be done, in that the right-minded people should not go away thinking, the judge was biased.' Further, that all circumstances should be looked at 'in the eyes of a reasonable man',[122] a notion that on its own speaks to the connectedness of ubuntu as a criterion for normativity responsible for flexibility.

During late post-colonial judging, 'fairness as ubuntu' has become most prevalent, especially under the 1995 constitution, which promulgated the ideal as part of

---

[117] (1920-29) 3 UPLR 56.
[118] Credit Finance Corporation Ltd v Alalani [1964] EA 317; and Bagoka v Kibwaijana [1976] HCB 364.
[119] Credit Finance Corporation Ltd v Alalani [1964] EA 317.
[120] [1963] EA 582.
[121] (CA 18/2011).
[122] Muwema & Mugerwa Advocates v. Shell (U) Ltd (CA 18/2011).

Uganda's law on judging.[123] Humanness and compassion continue to be a means of arriving at what is fair and just in flexible judging;[124] for instance, the judge allowing a plaintiff to recover in *Construction Engineers and Builders Limited v Attorney General,*[125] on the grounds that she rightly abandoned work, as no one would have been expected to work during war.

The ubuntu sub-values of 'good attitude and dignity' have also motivated flexible judging in *Highland & Agriculture Export Ltd & Another v Alpha Global 21st Joint Venture & 5 Others*,[126]where they were referred to as 'prudence and justice'. Likewise, reciprocity as a sub-value of ubuntu has also been observed as influential in flexibility, such as was the case in *Sendege, Senyondo & Co. Advocates v Kampala Capital City Authority*,[127] where services having been consumed, court invoked it to decide that even if a contract was void, the consuming party should pay a *quantum meruit*.

Human attributes and senses have also been relied on in place of the contract or statute's language, as was done in *Kitayimbwa Salongo v Peggy Garments Ltd,*[128] where the judge held that in a sale of goods by sample, the eye is the best test to check differences and resolve imperfections, as language cannot fully describe the

---

[123] Under National Objective & Directive XXIV, the Courts are obliged to decide cases while protecting the cultural and customary values and practices/norms, part of which "Ubuntu" is; and Article 126 (1) is to the effect that judicial power is to be exercised in the name of the people, and in conformity with the law, the values, norms and aspirations of the people. The word 'people' gives normativity to the humanity element of "Ubuntu,", while values, norms and aspirations directly import Ubuntu as a traditional norm and ideal of fairness and justice.
[124] As was the case in NIS Protection (U) Ltd v Nkumba University (HCCS 604/2004(16/5/2006); Construction Engineers and Builders Limited v Attorney General (SCCA 24/94, (2/9/95)..
[125] SCCA 24/94, (2/9/95).
[126] [2017] UGCOMMC 113(18/8/2017).
[127] [2017] UGCOMMC 22(3/3/2017); The same decision was made in Finishing Touches Ltd v. Attorney General, HCCS 144/2010.
[128] HCCS 345/2003(22/5/2009).

particulars of the goods. Another attribute similarly invoked is convenience of all concerned, not of a commercial but human nature.[129]

However, even with such dominance, ubuntu is nowhere near an ultimate judging philosophy that can provide certainty in hard cases. Instead, its growing popularity makes it more pertinent that a mechanism for coexistence be sought. This is not only because of the competition from the prevalence of the formalistic value of fairness, but also the tension created by ubuntu itself, as a measure of fairness and justice. In a heterogeneous society like Uganda, ubuntu's underpinning sub-values will not only vary from community to community, but are also inherently flexible and ever-changing, [130]which will always be a recipe for legal uncertainty. This was acknowledged by Okumu-Wengi J, in *East African Development Bank v Ziwa Horticultural Exporters Ltd,* where having been motivated by ubuntu, he further declared that, although it may not be court's desire to intervene in contract, circumstances arise when it is essential, such as to stop hardship or delays, and *the list is endless*.[131]

Besides the ubuntu, other theoretical perspectives of fairness appear to be at play in motivating flexibility and therefore the tension. Fairness as common commercial usage has motivated judges who interfered with interest rates charged by lenders, on grounds of unfairness, notwithstanding the freedom of contract.[132] However, even in such cases, judges used fairness, not as a commercial efficiency value, but one that permits *ubuntu* to be the internal judging criterion. The only other

---

[129] Eastern and Southern African Trade and Development Bank v Hassan Bassajjabalaba & Aisha Basajja [2007], UGCommC 30.
[130] TW Bennett, 'Ubuntu: An African Equity' (2011) 14(4) Potchefstroom Electronic Law Journal 4.
[131] HCMA 1048/2000
[132] See Bagoka v Kibwaijana [1976] HCB 364; and Shine Pay (U) Ltd v Kiyonga Francis (HCCS 547/2004(27/3/2006); Shine Pay (U) Ltd v Kiyonga Francis (HCCS 547/2004(27/3/2006).

observed key perception sub-value amongst alternative senses of fairness and justice, is judges treating fairness in commercial disputes as coextensive with equity, which I proceed to elaborate.

9.2.4.2 *Justice and Fairness as Equity*

In Uganda, equity is part of the law formally applicable to contract in Uganda, having been received as part of the English law transplant[133] and later incorporated by the judicature Act.[134] This puts Ugandan jurisprudence at the level Lord Denning described in the *High Trees* case, [135]as the fusion of law and equity – a counter to the rigours of freedom of contract. This way, the law on judging creates the platform for equity's role as a normative criterion during flexible judging.

The opinions analysed reveal that judges have not only used the equitable platform to fill gaps in written and common law as commanded by the enabling laws, but also to make new rules and intervene in contracts by filling gaps in their terms. Judges have been motivated towards flexibility, by adherence to interventionism, to find fairness, perceived as equity.[136] In all these cases, judges did not draw a line between relevancies of either criterion but rather treated the two as part of a single criterion, the yardstick for justice. The three values have motivated judges in an interdependent way, as justice and fairness have also been used to mean equity.[137] English law equitable principles were used to reach flexible decisions in

---

[133] Article 20 of the Uganda Order in Council, 1902.
[134] Section 14.
[135] Central London Property Trust Ltd v. High Trees House Ltd [1947] 1 KB 130.
[136] See Appendix 1: Case 5; Appendix 3: Case 13; Appendix 5: Cases 2, 48, 49, 78, 85 and 94.
[137] See Appendix 1: Case 39; Appendix 3: Cases 13, and 35; and Appendix 5: Cases 3, 47, 49, 63, 70, 86, and 93. ,

the face of freedom of contract, such as estoppel,[138] avoiding unjust enrichment,[139] money had and received,[140] avoiding harshness and unconscionableness[141] and substantiality of performance in building contracts.[142]

Therefore, perceiving fairness and justice as equity, in the common-law sense, is one of the perception values, which in a significant way underlie flexibility being part of the tension, values that should be balanced with formalistic ones to find coexistence. In another sense, such influences speak to judges playing a central role in the justice system not only in an institutional sense, but also, as the next sub-section will show, in the sense of their individual attributes being key in the survival and growth of flexibility.

9.2.5 Judging by Hunch: Law as Predictions

Coexistent with the perception value of judges as lawmakers is the ideal held by flexibility judges and its other proponents, which is that, in reality laws are mere prophecies of what judges will do about rules and disputes. Parties' rights are determined by the predictions of judicial behaviour,[143] and rules of law are deemed

---

[138] Coffee Works (Mugambi) Limited v Coffee Marketing Board [1963] 1 EA 148; and Edward Makubuya t/a Edward Engineering Works v Kampala City Council, Kawempe Division HCCS 59/2003 (1/3/2004).
[139] Obed Tashobya v DFCU Bank Ltd (HCCS 742/2004 (9/5/2007); and Bank of Africa Uganda Ltd v Clive Mutiso & Others (HCCS 152/2007(28/7/2009).
[140] Bank of Africa Uganda Ltd v Clive Mutiso & Others (HCCS 152/2007(28/7/2009); and Damas Mulagwe v Lanex Forex Bureau Ltd & others (HCCS 358/2006(10/01/2011).
[141] National Social Security Fund & Sentoogo v Alcon International Ltd, (SCCA 15/2009, decision of 8/2/2013); Highland & Agriculture Export Ltd & Another v Alpha Global 21st Joint Venture & 5 Others [2017] UGCOMMC 113(18/8/2017) and other cases on intervention in interest rates.
[142] Hydro Engineering Services Co. Uganda Limited v Thorne International Boiler Services Limited (HCCS No. 818/ 2003 (Unreported); and NEC Health World Pharmaceuticals Ltd v Engineering Construction Co. Ltd (HCCS 809/2012(24/4/2013).
[143] OW Holmes, 'Law in Science and Science in Law', Collected Legal Papers (Harcourt, Brace and Howe, 1920) 210-43, 229

dead letters, that only come alive once enforced by courts or acted upon.[144] During the analysis, manifestations of law as predictions of judicial behaviour, however, were originally independently coded as 'LPREDICTIONS'. The cases used to infer its existence are those in which the judges determined normativity by means of individual prejudices, policy preferences or other values brought to bear by intuition and abductive reasoning. Therefore, it equally connotes the acceptance and desire to maintain in the judge the discretion to decide cases by mere hunch. Accordingly, although coded differently, findings for the two analytical units are discussed together as evidencing 'judging by hunch', which Hutcheson[145] and Frank claim to be the best perception of the judges' role during adjudication.[146]

According to the findings presented in Figure 12, *law as predictions* motivated flexibility in 28% of colonial cases, 10% in early post-colonial judging and 28% of late post-colonial judging. Further, Figure 11 reveals that judging by hunch has been prevalent across all the deferent judging periods, continuously increasing in weight. It appeared in 6%, 8% and 12% of colonial, early post-colonial, and late post-colonial opinions respectively. The findings render limited support for Frank's claim that judges decide disputes and make law, motivated by their personality, as informed by their dispositions, biases and habits.[147] The support is limited because Frank viewed those hunch-producers as the sole motivations behind all judicial decisions,[148]a monist perspective to values underlying the tension, which the discussion in chapter seven and in this chapter disprove. Otherwise, in line with

---

[144] BZ Tamanaha, *Law as a Means to an End: Threat to the Rule of Law* (Cambridge University Press 2006) 66.
[145] JC Hutcheson Jr, 'The Judgment Intuitive: The Function of the Hunch in Judicial Decision', (1929) Cornell Law Quarterly, 274, 285.
[146] Frank, *Law and the Modern Mind* (n 17) 110-2
[147] ibid 111.
[148] ibid.

Frank's claim,[149] the influence of judging by hunch in flexible opinions manifested in two ways.

Firstly, Uganda's commercial judges have often relied on personal intuitions as normative criteria for allocation of rights and obligations.[150] In extreme cases, judges found a contract, where none had been proved;[151]and openly relied on personal knowledge of the circumstances surrounding contract performance, or the dispute, to flexibly grant or deny remedies otherwise provided by freedom of contract.

Uganda Wildlife Authority v Hon. Francis Mukama[152] is a good example, where the issue was whether becoming a member of parliament qualified as alternative employment, as would mitigate loss from unlawful dismissal. Twinomujuni, JA, found in the negative, reasoning that in Uganda members of parliament spend a lot of money to win and often never recover it due to social expenses they incur to help constituents. The judge determined contractual rights using his personal knowledge and intuition regarding the institution and office of a member of parliament within Uganda's specific context, apparently informed by the commonly-known costs and bribery that people engage in during campaigns.

Secondly, judging by hunch took the form of flexible judging being motivated by judges' personal cognitive attributes, such as personal emotions[153] and

---

[149] ibid.
[150] See Appendix 1: Case 2; Appendix 3: Cases 4, 27, and 32; and Appendix 5: Cases 21, 22, 26, 30, 44, 65, 84, 91, 93, and 94.
[151] Dr. Vincent Karuhanga t/a Friends Ployclinic v. National Insurance Corporation and Uganda Revenue Authority [2008] HCB 151; and Graphic Systems (U) Limited v. SDV Transami (U) Limited HCCS No. 468 of 2012 (Unreported-Judgment dated 15/10/2014).
[152] CA 78/2002; (2/2/2010)).
[153] Muwema & Mugerwa Advocates v Shell (U) Ltd (CA 18/2011).

sentiments,[154] and senses of indeterminate standards like fairness[155] and reasonableness.[156] To this extent, the results validate Frank's claims that: judges apply personal idiosyncratic biases and prejudices, and that the experiences they have gone through will influence how they view other people, and therefore judicial choice; in turn leading to flexible judging.[157]

Therefore, underlying judging by hunch is what the scholars Tuzet[158] and Frank,[159] referred to as abductive judicial reasoning, being covered by explanations inferred from the pursuit of non-legal but rarely declared ends. The real reasons for the decisions are values personal to the judge, or influenced by the body politic surrounding judging, to which judges have perceived themselves as having to respond. This leads me to analysing the influence of responsiveness in Uganda's flexibility judging.

9.2.6 Judicial Responsiveness

In the sense proposed by Sourdin & Zariski,[160] the findings in Figure 11 reveal that flexibility commercial judging in Uganda is also motivated by judicial responsiveness to the desire for justice by members of society. These findings to an extent support Holmes' declaration that law is not logic, but prejudices of judges

---

[154] Tobacco and Commodity Traders International Inc. v Mastermind Tobacco (U) Ltd (HCCC 18/2002(9/5/2003).
[155] Appendix 1: Case 2; Appendix 3: Case 27; and Appendix 5: Cases 21, 30, 44, 65, 84, 91,
[156] Tota Ram v Mistry Waryam Singh [1933] 5 ULR 76; Bagoka v Kibwaijana [1976] HCB 364; Aniello Ciella v Cassman Brown & Co. Limited [1973] E.A. 358; Barclays Bank of Uganda v Geofrey Mubiru (S.C.C.A 1/ 1998 (judgement of 24/2/1999); and Post Bank (U) Limited v Abdu Ssozi (S.C.C.A 8/2015 (Judgement of 19/1/2017).
[157] Frank, *Law and the Modern Mind* (n 17), 111, 115.
[158] Tuzet G 'Legal Abductions', Bourcier D (ed) Legal Knowledge and Information Systems, (Juri, 2003), The 6th Annual Conference, (2003) 105 Press, 41-50.
[159] Frank, *Law and the Modern Mind* (n 17) 133-4.
[160] Sourdin T & Zariski A, *The Responsive Judge*, (Springer, 2018) ix-x, 1-38.

and other men, as well as experience, the felt necessities of the time, the moral and political theories, and the stories of a nation's development.[161] Underlying the flexibility at tension with formalism is evidence of judicial responsiveness to Uganda's social, economic and political experiences, as well as contractual contexts. Likewise are the manifestations of responsiveness to the policies or purposes underlying the contract or rule of law in dispute.

During the content analysis, two analytical units were used to trace judicial responsiveness as a values underlying flexibility; revealing that it qualifies to be considered for balancing with formalistic values in finding coexistence. The first was the judicial perception of law as experience, coded as 'EXP', which was observed in 24% of colonial opinions, 30% of early post-colonial, and 20% of late post-colonial ones. Secondly was contextual responsiveness, coded as 'CONTEXTUAL' and observed in 46% of colonial cases, 30% of early post-colonial and 40% of late post-colonial ones. It is important to note here that the number of hard cases found, and therefore analysed in the late post-colonial judging era, was almost double the number in each of the earlier periods. Therefore, the 40% in reality represents an unprecedented frequency of contextual responsiveness.

That flexibility judging has been motivated by contextual responsiveness is evident from the colonial case of *Moulvi Shah v Farley & Tranter*;[162] Barrett-Lenard J declaring that, in such hard cases, the intention of the parties can only be derived from the totality of the evidence and no secondary principles can be universally true. Another example is the late post-colonial judging case of *Magezi & Another v*

---

[161]OW Holmes, *The Common Law* (n 90) 5.
[162] (1910-20) 2 UPLR 189.

Ruparelia.[163] The appellant had sold their contract to supply roadside parking meters, and paid a deposit, the balance payable 'upon commencement of the business', a phrase whose meaning became contentious. Karokora, JSC, held that to understand the meaning and intention of the parties, ambiguity in the wording of the terms should be resolved following the intention reasonable people would have agreed in the circumstances, guided by Lord Wilberforce's reasoning in *Reardon Smith Line Ltd v Hansen Tangen*.[164] That is to say, the ultimate guide was the 'circumstances surrounding', which included the purpose of the contract, its background, and the market in which the parties operated.

A number of contextual elements to which courts have responded and given normative criteria are revealed by the Ruparelia case,[165] and further elaborated by the content of other legal opinions in Uganda's commercial judging history. Firstly, is market responsiveness, which can be inferred from judges having made decisions based on 'commercial sense'.[166] For instance, in the Ziwa case,[167] decided in the early post-colonial days, the judge was even bolder than others in manifesting motivation by contractual or judging contexts. The judge reasoned that being a commercial transaction, the owner of goods should have been expected to accompany his goods carried on a pick-up vehicle, and therefore should be deemed an insured. The judge was appealing to the sense of commercial men and women in Uganda at the time, thereby using the context of contract performance as a normative criterion by which to judge flexibly. Further, in *Ernest Windt v*

---

[163] [2005] 2 EA 156.
[164] [1976] WLR 995.
[165] ibid.
[166] See Appendix 1: Cases 35 and 36; Appendix 3: Cases 11, 23, 30 and Appendix 5: Cases 89.
[167] [1974] 1 EA 161.

Gordon Parrot[168] and *Shenoi & Another v Maximov*,[169] whether equity would be relied on to resolve the disputes, was based on commercial sense.

Secondly, is responsiveness to 'business reality'.*[170]* This is another inference one gets from the *Shenoi* case,*[171]* and the practice also appeared in the early post-colonial case of *East African Plans Ltd v Roger Allan Rickford Smith*,[172] where the judge interfered with a contract made and confirmed by endorsement of court, increasing the amount agreed as payable by the judgment debtor, reasoning that in equity and reality it was fair to do so.

Thirdly, is responsiveness to circumstances, surrounding the making and performance of the contract, which were not necessarily represented in the terms agreed.*[173]* For instance, many sale of goods decisions were motivated by their peculiar circumstances. It often appeared where the issue was whether there had been an implied condition as to fitness for purpose, and the buyer relied on the seller's skill and judgement.*[174]* Others included cases in which courts dealt with imputation of a party's agent's authority to transact,*[175]* or buyers becoming

---

[168] [1976] HCB 30.
[169] [2005] 2 EA 280.
[170] See Appendix 1: Cases 13, 32, 33, 34, 35 and 36; Appendix 3: 11, 26, 30; and Appendix 5: Cases 15, 16 and 44.
[171] [2005] 2 EA 280.
[172] HCCS No. 426 of 1969.
[173] See Appendix 1: Cases 13, 28, 32, and 39; Appendix 3 Cases 19, 24, 25, 31, 32, 37, 38, 39, 43, and 44; and Appendix 5: Cases 15, 55, 86 and 89.
[174] Section 15 (2) of the Sale of Goods Act, 1932; and now Section 15 (2) (a) of the Sale of Goods and Supply of Services Act, 2017.
[175] Ian Peters Limited v House of Novelties Limited (1968) E.A 19.

insolvent and sellers taking steps to protect their interests.[176] A similar trend exists in employment cases,[177] as well as insurance and bailment cases.[178]

Finally, judges have been found responsive to the judging environment, represented by the political, social and economic context in which the contract or adjudication took place.[179] An example is the colonial case of *Bhimjani v Patel*,[180] where a tenant having defaulted to pay rent, sued the landlord to challenge his right to get possession. The court found no law applicable in Uganda, specifically on the norm of 'reasonableness of grounds' as used in other jurisdictions. He reasoned that in such cases, courts had to be guided by special conditions, including matters of so domestic and social a character, per McCardie, J. in Chiverton *v* Ede;[181] all relevant circumstances as at the hearing date; and a broad common-sense way as a man of the world, per Lord Greene, M.R. in Cumming *v* Danson;[182] and courts must consider, not whether the landlord's desire for possession is reasonable, but whether it is reasonable to make an order for possession, for 'because a wish is reasonable it does not follow that it is reasonable in a court to gratify it'.

The judge in this case used phrases so wide in meaning as to constitute the entire body politic surrounding adjudication as an internal judicial criterion for normativity, responsible for flexible judging in hard cases, thereby contributing to its being at tension with formalism. The words 'common sense way as a man of the world',

---

[176] Patel and 2 Others v Budaka Ginners Limited (1968) E.A. 104.
[177] Bloedow v Renton (1910-20) 2 UPLR 44); S. Kiggundu v Barclays Bank of Uganda Limited (1972) ULR 169.
[178] Lewis Ralph Dodd v Chanirakant M. Nandha (HCCS 8/70, LDC 180/70).
[179] See Appendix 1: Cases 10, 12, 16, 20, 35,36 and 39; Appendix 3: Case 32; and Appendix 5: Cases 15, 27, 38, 40, 44, 55, 86.
[180] (1956-57) 8 UPLR 164.
[181] [1921] 2 KB at 44-45.
[182] [1942] 2 ALLER at 655.

even took the judge's source of normativity recognition beyond circumstances in Uganda, to encompass whatever might be happening in the world generally; matters like globalisation, free trade, the international nature of modern corporations and the like.

The trend continued in post-colonial judging, as in the *Lewis Ralph case,*[183]where the judge is seen declaring that although there was no bailment law in Uganda, common law was only applicable, as far as the circumstances of Uganda permit, meaning that English authorities had to be relevant, reasonable and applicable to the circumstances of Uganda. Further, post-colonial judges are giving normativity to the changing social attitudes of Ugandans, as was done in the *British American Tobacco case.*[184]

They have also given normativity to changes in economic conditions, attitudes and policies, as demonstrated by Ogoola, J, in *Amrit Goyal v Hari Chand Goyal & Others.*[185] In this case, a contract was signed in India under the Exchange Control Act of 1951, which required prior ministerial consent to transfer shares and was meant to be enforced in Uganda. The judge held that the requirement in the statute had been overtaken by the government policy of liberalism in foreign exchange trading, and the liberalism allowed a free transfer of shares. Further, that 1951 was very long ago, and the law had to be updated to match the changing times. The judge boldly referred to the tension, and used contextual responsiveness to justify flexibility over formalism, reasoning that, as article 126 of the constitution required, technicalities should not defeat litigants in 2013 Uganda, when in England courts

[183] HCCS 8/70, LDC 180/70.
[184] HCCS 767/2004 (24/4/2013).
[185] HCMA 649/2001 (25/9/2003).

held against this 116 years previously, *per Pearce, L.J in Pontin v Wood,* who wrote that this was not possible even in 1887 England.[186]

Such judicial responsiveness to changing conditions also explains why in some flexible opinions judges have used government policy, personal intuition, preferences, and sense of what surrounds their role, as normative criteria. This can be inferred from the fact that no case was found where litigating parties were found to have led evidence of such changes, to justify such normative recognitions. Instead, in the Amrit *Goyal case*,[187] the judge clearly referred to changing government policy as a normative value. But most evident was the *Traces SA case,*[188] where such public policy was not only used as a normative criterion, but also used to give normativity to the political wishes of the country's president, communicated at a political rally.

Therefore, judges have relied on contextual responsiveness as motivation for judging flexibly, which together with responsiveness to purposes and personal attributes of the judges, all sub-values of an external nature, has maintained the strength of flexibility in the tension. However, a deeper understanding of some of the external values cannot be achieved in this study, as it requires a social-legal investigation. Therefore, only findings for the legal and extra-legal external values the content analysis could reveal are discussed in the next section, elaboration being made to the extent allowed by inferences from them.

---

[186] [1962] 1 QB 5940
[187] HCCS 767/2004 (24/4/2013)).
[188] HCCS No 525 of 2006.

9.3 The External Judging Criteria

This section discusses the external values underlying flexibility, both legal and extra-legal. However, that legal/extra-legal divide is in this case merely for ease of reading and not as a strict theoretical divide, as flexibility theory holds that judges' extra-legal considerations, like shared community values, are part of the law,[189] that define its indeterminate character.[190] In turn, such flexibility in law's nature enables judges to use it instrumentally to serve ends like social welfare.[191] Judges do so by adherence to rule utilitarianism, public policy as informed by human needs,[192]or always having discretion to find normativity and fairness without limitations from contractual terms and black-letter law.

Judges instead draw motivation from values of culture, defined by experiences, social policy and realities,[193] thus Holmes's famous declarations that the life of the law embodies the stories of a nation's development, its experiences, the law's purposes, the extra-legal considerations judges take into account such as economic efficiency, morality like consumer welfarism, and political ideology as well as their personal prejudices.[194] Further, that real laws are the prophecies of judicial conduct and nothing more.[195]

---

[189] See text to section 3.3, especially 3.3.1 and 3.3.2; and Gary Minda, *Postmodern Legal Movements: Law and Jurisprudence at Century's End* (New York University Press 1995) 17-18, 29.
[190] SJ Burton, *Judging in Good Faith* (Cambridge University Press 1992) 4.
[191] Tamanaha (n 144) 65.
[192] G Minda, *Postmodern Legal Movements: Law and Jurisprudence at Century's End* (New York University Press 1995) 18.
[193] ibid, 18; Tamanaha (n 144) 65.
[194] OW Holmes, *The Common Law* (n 90) 5
[195] OW Holmes, 'The Path of the Law', (n 57) 167-202, 173; and Karl Llewellyn, *The Bramble Bush* (Oceana 1951) 3

Guided by these theoretical attributes,[196] and the presumptive values articulated in chapter eight, the external values underlying flexibility's role in the tension were coded and the results of the content analysis presented in appendices 1-5 as well as Figures 11 and 12. The following sub-sections discuss the legal and extra-legal values inferred from such preliminary findings.

[196] Further elaborated in section 3.3.

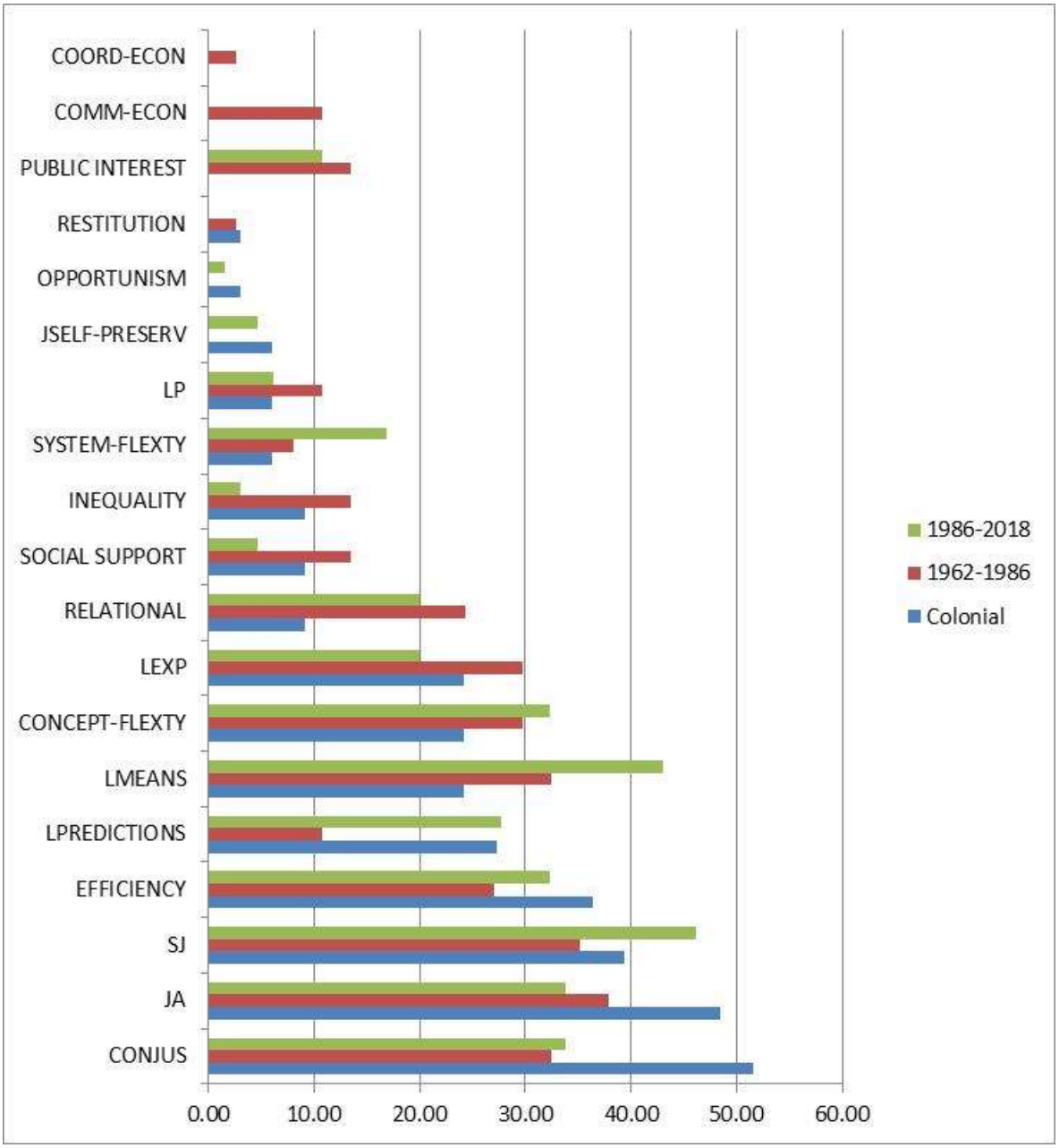

Figure 12: External Values behind Flexibility in the Various Periods

9.4 Legal Values

The legal values that have been found to underlie flexibility are categorisable under doctrinal values, and systematic values. However, the values from the nature of law, which would ordinarily be part of systematic values, are already discussed under values of judicial perceptions about law's nature,[197] and need no further elaboration. This leaves the rest of doctrinal values, and systematic values as the subjects of this section.

9.4.1 Doctrinal Values

Consumer welfarism, economic efficiency and wealth maximisation are proposed by other scholars as doctrinal values underlying judicial flexibility, [198]and have been made the focus of the content analysis for this category of flexibility values competing with formalistic ones. The findings with regard to each of them guide the discussion in the following sub-sections, the exception being that economic efficiency and wealth maximisation are discussed together under subsection 9.4.1.2. Their joining arises is because the coding structure of the content analysis, which was informed by the literature on value postulates, treated them as part of the same phenomena.

9.4.1.1 *Consumer Welfarism*

Consumer welfarism is the doctrinal value of flexibly protecting consumers, by statutes and adjudication, effected through regulation and intervention in contracts.[199] This section demonstrates that the Ugandan experience supports

---

[197] See text to Section 9.2.1.
[198] See text to Sections 8.3.1.1, 8.3.1.2, and 8.3.1.3.
[199] Friedman (n 2) 452, 456-457; Adams and Brownsword, *Understanding Contract Law* (n 3) 197, 205-206; Adams and Brownsword, 'Ideologies of Contract', (n 3) 210.

claims by Friedman[200] and Adams & Brownsword, [201] that it is a key value underlying flexibility, but not the prime value as those scholars claim it is. Rather, it is part of a cocktail of flexibility values at competition with formalistic ones that need to be understood, weighed and balanced to achieve coexistence.

During adjudication, consumer welfarism is known to manifest through adherence to four lower values that underpin it, namely: fairness in exchange; reliance or constancy; good faith; and equity.[202] During the content analysis, the above manifestations were observed by searching for their indicators, considered as direct statutory intervention in contracts to protect consumers, judges exercising discretion created by normative standards to protect disadvantaged parties, as well as the wider judicial pursuit of contractual justice.

Contractual justice covers cases where judges were motivated by the four sub-values of fairness, reliance, good faith, and equity, as well as other connotations of interventionism, to help the weaker or disadvantaged party. Coded as 'CONJUS,' findings on judicial pursuit of contractual justice reveal that overall, it represents the most dominant set of values underlying flexibility in Uganda's commercial adjudication. It appeared in 52% of colonial, 32% of early, and 34% of late post-colonial opinions. Appearing at such high frequencies qualifies contractual justice's higher value consumer welfarism for balancing with formalistic values, as a way towards coexistence.

---

[200] Friedman (n 2) 452, 456-457.
[201] Adams and Brownsword, *Understanding Contract Law* (n 3) 197, 205-206; Adams and Brownsword, 'Ideologies of Contract', (n 3) 210, 221-222.
[202] See text to Sections 8.3.1.1

The influence of these contractual justice sub-values has already been discussed under judicial interventionism,[203] and there is no need to make further illustrations of it being a motivator of flexibility. What is vital here is to note the sub-values as manifesting judicial individualism, as well as consumer welfarism, and recognise the latter as a key value underlying the tension, that needs consideration in efforts towards co-existence. However, to appreciate consumer welfarism as a doctrinal value, one needs to further examine its influence in flexible opinions, from the other two dimensions. That is, consumer welfarism as a result of direct statutory intervention in contracts, as well as the exercise of discretion created by normative standards in rules.

As shown in Figure 11, one way in which judges exhibited consumer welfarism was by adherence to direct statutory intervention in contract to protect consumers, using statutory implied terms. However, coded as 'SINTERV', this only appeared in 14% of early post-colonial opinions, when the country was regulated by a command economy, a sub-value coded as 'COMM_ECON' as opposed to a free market economy; with the state corporations and two Asian families monopolising key business activities.[204]It manifested in three ways.

Firstly, were cases involving judicial enforcement of statutory criminalisation of contractual wrongs,[205] as contained in statutes regulating the sale of essential goods. The other category also related to government interference with the market. Essential cash crops were not freely exportable, as statutory bodies were charged with the buying and exporting of cash crops like coffee. As demonstrated in *Coffee*

---

[203] See text to Section 9.2.4.
[204]PM Mutibwa, *A History of Uganda: The First 100 Years 1894-1995* (Fountain Publishers 2016) 201, 265, 351.
[205] See Appendix 2: Case 10, and Appendix 3 Cases: 5, 6, 7 and 8.

Works (Mugambi) Limited v Coffee Marketing Board,[206] courts used such regulation to interfere with the parties' freedom of contract, by implying the price of goods payable.[207] Similarly, in other key commercial sectors, statutes regulated contractual terms, which motivated courts to interfere with the formalistic freedom of contract and enforce the purposive nature of the terms so implied. Such judicial decisions include those involving third party liability insurance,[208] leasing of land from an African by a non-African,[209] and Gaming.[210]

The appearance of judicial adherence to consumer welfarism through statutory intervention in only early post-colonial opinions points to the judging environment having a role in flexibility judging. The trend supports scholarly claims that political dictatorships and interference with the free market economy, as happened in Uganda during the late 1960s and 1970s, are not fertile soils for formalism, which is facilitated by the free market values of market individualism.[211] However, although such external influences could not be fully investigated in this study, its findings point to contract having been alive during the period, albeit not built on the basis of will and individualism theories. This contradicts Macneil's claim, that contract in Uganda disappeared as a result of the dictatorships and market interventionism.[212]

---

[206] [1963] 1 EA 148
[207] See Appendix 3: Cases 3 and 5 and Appendix 2: Case 10.
[208] Samuel Hawaga v Christopher Bisutu (HCCS No. 839 of 1973), which related to insurance terms regulated by the Traffic and Road Safety Act of 1970.
[209] Mistry Amar Singh v Serwano Wofunira Kulubya [1963] 1 EA 408.
[210] N.R. Lakhani v H.J. Vaitha & Another Limited [1965] EA 452.
[211] Adams and Brownsword, *Understanding Contract Law* (n 3) 197; Adams and Brownsword, 'Ideologies of Contract', (n 3) 210.
[212] Macneil, 'Values in Contract: Internal and External' (n 4) 409.

Further, although it appears in one judging historical epoch, adherence to direct statutory intervention is significant when treated as just one of the manifestations of sub-values underpinning consumer welfarism. Completion of the puzzle calls for discussion of the other dimension of manifestation, the judicial use of discretion from normative standards.

The influence of normative standards in flexibly was discussed earlier, under the value of law's elasticity.[213] What this section adds is emphasis that the attribute speaks to consumer welfarism as a doctrinal value. Therefore besides such standards being internal criteria, their invocation to protect consumers speaks to a value of the legal framework judges find themselves obliged to follow. In all judging epochs, judges have been motivated by the discretion given, in open-textured rules in statutes, to interfere with the formalistic freedom of contract.[214]

In line with the claim by Frank,[215] the discretion left to the judges to determine conditions that would trigger normativity of rules resulted in flexible judging, to protect consumers.[216] The trend was observed more in opinions that had to apply rules relating to defining the intention and rights of parties under a sale of goods contract;[217] the constitutional substantiality doctrine;[218] and the court's discretion to interfere, with interest rates deemed as harsh and unconscionable.[219]

---

[213] See text to Section 9.2.1.1.
[214] See Appendix 1: Case 26, 34, 36; Appendix 3: Cases 27, 42, and Appendix 5: Cases 11, 28, 33, 38, 41, 43, 44, 54 and 59.
[215] Minda (n 192)115.
[216] Minda (n 192)115.
[217] See Appendix 1: Case 26; Appendix 3: Cases 9, 36, and Appendix 5: Cases 11 and 54.
[218] Appendix 5: Cases 28, 33, 43, and 44.
[219] Appendix 3: Case 27; and Appendix 5: Cases 41, 70, and 90.

By way of illustration, in Bwiriza *v* Osapil,[220] the parties' intention', as an exception to implied terms on passing of property in the good,[221] was invoked by the judge to hold that the seller's retention of a logbook, insurance certificate and road licence signified a contrary intention. Without doubt, another judge could have interpreted the fact differently, especially given that a logbook had at the time been declared not a document of title, in Matayo Musoke *v* Alibhai Garage.[222]

In Uganda, consumer welfarism has not been appreciated at as high a level as Adams & Brownsword perceived it, [223]a level that defines it as the prime value underpinning flexibility. For instance, the country does not have legislation specifically protecting consumers, as do countries like the United Kingdom.[224] Until the recent 2010 Contract Act, and the 2017 Sale of Goods and Supply of Services Act, whose impact in adjudication is too early to judge, judges seeking to protect consumers mainly relied on the transplanted pre-1902 common law, and scattered provisions in statutes regulating commercial contracts like sale of goods. However, these legal sources were not embedded with full consumer welfarism, as consumers have no legal right to quality or safe goods or services, and the common-law judges favoured the sellers and suppliers who controlled the

[220] [2001-2005] HCB 52 (Appendix 5: Case 11).
[221] Sections 19 and 20 of the Sale of Goods Act, 1932.
[222] [1960] EA 31. The decision which relied on Newbury Car Auctioneers Ltd v United Finance Ltd & Another, [1956] 3 ALLER 905.
[223] Adams and Brownsword, *Understanding Contract Law* (n 3) 197, 205-206; Adams and Brownsword, 'Ideologies of Contract', (n 3) 210, 221-222.
[224] MA Khan, 'The Origin and Development of Consumer Protection Laws in the United Kingdom', (2017) 3:3 Journal of Asian and African Social Science and Humanities, 38, 44.

market.[225] The motivation for protectionism was safeguarding honest traders against unfair competitors.[226]

Nevertheless, these statutes contain a number of normative standards like reasonableness and good faith, which emit the discretion that judges use to protect consumers.[227] I do not subscribe to the nightmare legal realists' club instituted by scholars like Frank Jerome.[228] However, the reality spoken by the 2017 Sale of Goods and Supply of Services Act, is that apart from section 67, which subjects commercial practice to legal norms, the increase in conceptual flexibility implies judges having discretion not only to determine the facts, but ultimately to protect consumers by having a final say on the validity of legal norms.

Relatedly, contract doctrine has, among its values economic efficiency and wealth maximisation, which flexibility judging seeks to serve. Findings relating to the two are discussed together in the next section, because they were coded together as 'EFFICIENCY', and the content analysis did not reveal a clear divide between them.

---

[225] ibid 42.
[226] ibid 41.
[227] For instance, the 1932 Sale of Goods Act had reasonableness as the normative standard in 22 provisions, while in the 2017 Sale of Goods and Supply of Services Act has increased it to 48; Under the said 2017 Act, Sections 15 (4) and (5) the standard of quality of the goods is more indeterminate, being defined as 'satisfactory quality', measured by the goods meeting the standard of a reasonable man, who would have taken into account the description, price and 'all other relevant circumstances; Under Section 65, the 2017 Act also recognise the right to recover both incidental and consequential damages, based among other standards, on what is commercially reasonable.
[228] CL Barzun, 'Jerome Frank, Lon Fuller and a Romantic Pragmatism', (University of Virginia School of Law; Public Law and Legal Theory Research Paper Series, 2016-6, Jan. 2016) 1.

9.4.1.2 *Wealth Maximisation and Efficiency as Commercialism*

Jointly coded as 'Efficiency', the findings in Figure 12 reveal that, economic efficiency and wealth maximisation appeared in 37% of colonial judging, reducing to 27% of early post-colonial judging, and again experiencing resurgence to 32% of late post-colonial judging. Although such influence is significant, these findings show that efficiency is not the prime value underlying adjudication, let alone flexibility as claimed by Llewellyn.[229] Rather, it is one of the key flexibility values competing with formalistic ones to produce the tension, whose management resides in achieving their coexistence.

However, the findings point to flexibility in Uganda being underpinned by commercialism, as a sense of efficiency narrower than is articulated by the economic analysis theory. Commercialism is the emphasis on profit maximisation, at the expense of any other value;[230] even social welfare, that realists deemed the end of wealth maximisation.[231] In this case, judges adhere to it without being motivated by proof of unconscionability of terms, the consumer welfarism sub-value realists see as the trigger to efficiency.[232]

Such commercialism motivated the British colonising Uganda and transplanting the English contract law, which has regulated commercial transactions and guided judging since. They aimed at commercial benefits for Britain's businesspeople,[233] by the opening up of trade opportunities, creating markets for their goods, and

---

[229] Schwartz (n 7) 12, 16.
[230] https://en.oxforddictionaries.com/definition/commercialism (Accessed on the April 27, 2019).
[231] R Posner 'Wealth Maximisation and Judicial Decision Making', (1984) 4 International Review of Law and Economics, 131-135
[232] Schwartz (n 7) 12, 16.
[233] R Mukherjee, *Uganda: A Historical Accident? Class, Nation and State Formation* (Berlin 1956 119.

securing a source of raw materials for manufacturers.[234] Accordingly, in making a case for the colonisation of Uganda, Lugard,[235] the chief architect of the project, supported the London Chamber of Commerce, in the contention that the investment of colonising Uganda would invariably pay off in the long run.[236] Therefore, right from colonial times, the efficiency and wealth maximisation pursued during adjudication has been the individualised quest for commercialism and not a wider social welfarism.

Adherence to this narrower, individualised sense of efficiency and wealth maximisation needs articulation, not only to understand how it manifests and contributes to flexibility, but also to understand how the two are perceived in Uganda. Further, that they are part of values that qualify to be balanced with values competing in adjudication to achieve coexistence, and not the prime or ultimate values.

As indicated earlier,[237]judges expressly revealing economic or business efficiency, as well as wealth maximisation, manifest adherence to efficiency, which in Uganda's case reflected commercialism. However, it is also manifested in the indirect way Llewellyn indicated,[238]with judges giving normativity to commercial practices like trade custom, usage, ordinary course of business, and commercial reasonableness. Both these manifestations of commercialism have been observed in the opinions analysed, with the direct manifestation being coded as part of 'EFFICIENCY', while the indirect manifestation is the set of results revealed under

---

[234] ibid 117 & 119-20.
[235] FD Lugard, The Rise of Our East African Empire: Early Efforts in Nyasaland and Uganda, Vol. 1 (Routledge 1893) 379-380.
[236] In its Annual Report of 20th April 1893.
[237] See text to Section 8.3.1.2.
[238] Schwartz (n 7) 16.

the code ‘PRACTICES’, already discussed under the internal value of law’s adaptability.[239]

No further elaboration is necessary, save that judicial recognition of normativity in commercial practices points to the value of law’s adaptability, equally as well as commercialism, as a value underlying flexibility. In the latter sense, the value connotes judges recognising normativity in the perspectives, needs and business culture of the contracting parties, as well as the wider business community. Besides doctrinal values, the findings on legal values behind Uganda’s flexibility judging reveal motivation by systematic values, which are discussed in the next section.

9.4.2 Systematic Values

Systematic values have also been at play in motivating flexibility. This section discusses these systematic values, identifying the key ones to balance with formalistic ones. It also seeks to further support the multivalued theory of understanding the tension, and the possibility of its management through coexistence. The systematic values observed include conceptual flexibility; substantive justice as the conception of justice; and legal pluralism.

9.4.2.1 *Conceptual Flexibility*

Conceptual flexibility relates to flexibility in the form of indeterminate normative standards, being an intrinsic feature of the rules and principles contained in the law. In Figure 12, and appendices 1-5, it is reported under the code ‘CONCEPT-FLEXTY’. It appeared significantly, in 24% of colonial flexible judging, and has

[239] See text to Section 9.2.1.1.

since been on the rise, reaching 30% and 32% in early and post-colonial judging respectively. Conceptual flexibility has motivated flexible judging as a requirement of the laws on judging and sources of contract law. Regarding the nature of contract law sources, the above discussion of flexibility having been motivated by efficiency, law's adaptability and consumer welfarism partly render support for the claim that uncertainty and the tension exist because by nature, rules are capable of multiple judicial interpretations.[240]For example normativity of standards gives judges the discretion to determine not only the true facts as is the case in formalistic judging, but also what is permissible under the law,[241] derived from what Frank rightly viewed as influenced by non-legal considerations in the mind of the judge.[242]

For its part, conceptual flexibility as a rule of recognition appeared as a motivating value in a number of cases throughout history.[243] As discussed in chapter four, colonialism brought a dual legal system, with both the formalistically dominated, but flexibility accommodating common law system and the native flexibility. Such conceptual flexibility became a motivator in a number of the flexible decisions, including those on jurisdiction of courts;[244] and the content and mode of determining normativity in contract cases.[245] For instance purposive judging was used in *Chatabhai M. Patel v Chaturbhai M. Patel & Another.*[246] Further, conceptual flexibility influenced flexibility judging, by reasonableness being used as

---

[240] Minda (n 192)135.
[241] Chen-Wishart M, *Contract Law* (Oxford University Press, 2010) 17.
[242] Frank, *Law and the Modern Mind* (n 17).
[243] See Appendix 1: Cases 7, 10, 20, 21, 36 and 55; Appendix 3: Case 27; and Appendix 5: Cases 28, 33, 43, 44, 60, 81, 84, 94, 90.
[244] See Appendix 1: Cases 10, 21, and 55.
[245] Alibhai Virji v R. Merryweather (1932-35) 5 ULR 363 (Appendix 1: Case 7); Chatabhai M. Patel v Chaturbhai M. Patel & Another [1958] 1 E.A.EA 743 (Appendix 1: Case 20).
[246] [1958] 1 EA 743 (Appendix 1: Case 20).

a rule of recognition, as declared by the judge in *Bhimjani v Patel,*[247] that reasonableness had to be implied in the law and the general scheme of a statute.

In post-colonial Uganda, the incorporation of English common law in, and law merchant being applicable alongside, the 1932 Sale of Goods Act,[248] watered down the legal certainty Sir Chalmers's codification of sale of goods law had brought. It has since given room to judges to wriggle out of legal provisions using what should have been non-legal norms, by virtue of their having been made pre-codification.[249] Further, following the conceptual flexibility in the 1995 constitution, and more recently in the Contract Act 2010, it has already started motivating judges to decide flexibly. In *Senoga J, in Tamp Engineering Consultants Ltd v MacDowell Ltd,*[250] the judge justified measuring damages using the opinion of reasonable men, invoking Section 61 (4) of the Contract Act. It provides that circumstances and means that can help remedy inconveniences caused by breach are relevant consideration during adjudication.

The other aspect relates to the notion of substantialism epitomised by the 1995 constitution. It being a normative value forming an internal criterion of judges, as discussed in chapter eight, is just part of the story. The value is further discussed below because it is anchored in the constitution as the supreme law of Uganda,[251]which elevates its value beyond values in subordinate laws. It also forms the engine of the wider conception of justice as substantive justice, which

---

[247] (1956-57) 8 UPLR 164 (Appendix 1: Case 36).
[248] Section 58 of the Act.
[249] Were Fred v Kaga Ltd (HCCS 530/2004(23/12/2005) (Appendix 5: Case 54).
[250] HCCS 224/2010(25/01/2016 (Appendix 5: Case 59).
[251] Article 1 of the 1962, 1967 and 1995 Constitutions.

forms one of the principle values of the Ugandan legal system that have guided judges towards the flexibility in the tension.

9.4.2.2 *Substantive Justice*

Substantive justice and its operational doctrine of substantiality have been articulated as a sub-value of both law's adaptability[252] and utilitarianism,[253] both internal values underlying flexibility. Additionally, the findings reveal that it is an external value of a systematic nature, as it constitutes the constitutional conception of justice courts are obliged to administer, not only in pre-colonial Uganda, but also during colonial[254] and post-1995 judging.[255]

After enactment of Article 126 (2) (e) of the 1995 constitution, litigants sought courts' recognition of the value's superiority over the formalistic procedural justice.[256] However, in *Kasirye*[257] and *Utex*,[258] the Supreme Court showed support for the view that procedural justice was a guarantor and pre-condition to realisation of substantive justice, as propounded by Rawls[259] and Fuller.[260] This was by declaring that substantive justice meant looking at all circumstances surrounding a case, but unless it is proved otherwise necessary, was subject to the law, including the handmaidens of justice, procedural rules. In *Dr J. Rwanyarare v Attorney*

---

[252] See text to Section 9.2.1.1.
[253] See text to Section 9.2.1.3.
[254] Article 20 of the Uganda Order in Council.
[255] Article 126 (2) (e) of the constitution; section 4 of the Judicature (Amendment) Statute, 2002
[256]Utex Industries Limited v Attorney General (S.C.C.Application 52/1995); Kasirye Byaruhanga & Company Advocates v Uganda Development Bank (SCCA 2/1997).
[257] (SCCA 2/1997).
[258] (S.C.C.Application 52/1995)).
[259] DL Schaefer, *Procedural Justice Versus Substantive Justice: Rawls and Nozick* (Social Philosophy Foundation, 2007) 166.
[260] Fuller, *The Morality of Law*, (n 50) 51-63.

General,[261] the constitutional court relied on *Kasirye* and *Utex*, adding that all the constitution did was to enact an old common-law doctrine of substantiality.

However, the findings further reveal that the initial cautious approach did not last long, as substantive justice has been a key influence behind flexibility throughout judging history. Coded as 'SJ', it appeared in 40% of colonial flexible opinions, 35% of early post-colonial and 46% of late post-colonial ones, where it has been invoked to recognise the normativity of extra-legal considerations, and ignore procedural rules.

Although it's below 50% average frequency dispels any claims to the value being the ultimate or prime value behind flexibility, substantive justice as a conception of justice has been used to justify instrumentalism and other forms and values of judicial flexibility, legal and extra-legal. Ugandan courts have thereby adapted the theory of substantive justice propounded by Thomas, [262]viewing it as requiring adherence to 'substantialism', a natural law value that simply means anti-formalism, or better termed, instrumentalism and a licence for judicial flexibility.

The above understanding manifested in three ways. Firstly, in a number of cases[263] substantive justice took the form of basing decisions on the cases' merits, at the expense of procedural and other technical rules of law, while using Article

---

[261] Constitutional Petition No. 11 of 1997
[262] EW Thomas 'Fairness and Certainty in Adjudication: Formalism v Substantialism' (1999) 9 Otago Law Review 459.
[263] See Appendix 1: Cases 15, 22, 45, 54, 62 and 65; Appendix 3: Case 10 and Appendix 5: Cases 6, 13, 24, 28, 32, 33, 39, 53, 72, 76, 79 and 89.

126 (2) (e) to cure defects, to serve higher values like public interest,[264] or otherwise.

Secondly, judges invoked equity and fairness to help litigants escape the rigours of legalism, the concept of fairness in such cases being exhibited as the ***ubuntu.***[265] Finally, and most commonly,[266] as declared by the Supreme Court in *Attorney General v Afric Cooperative Society Ltd,*[267] substantive justice has motivated flexibility by means of courts giving consideration to circumstances peculiar to a particular contract, or dispute, or the wider judging environment.[268]

In *Commodity Traders International Inc. v Mastermind Tobacco (U) Ltd,*[269] the judge, having acknowledged that it was a hard case, and that the tension between formalism and flexibility was at play, invoked Article126 (2) (e) to declare that there is superiority of substantive justice over technicalities. Such is realisable by taking into account 'intricacies of modern commercial intercourse', over rules of law, informed by demands of the market place and the ends of law being superior to positive law. Further, in *Magezi & Another v Ruparelia,*[270] Karokora, JSC clarified that although the surrounding circumstances from which substantive justice is derivable are impossible to define, they can be illustrated as contracts are not made in a vacuum. The court should always consider the contract's purposes,

[264] Attorney General v. Afric Cooperative Society Ltd (SCM.A 6/2012).
[265] Appendix 3: Cases 13, 15, and 35; Appendix 5: Cases 2, 47, 48, 61,63, 68, 92, 88, and 78
[266] See Appendix 1: Cases 15, 32, 34, 36, 42, 44, 45, 55, 62; Appendix 3: Cases 2 and 17; and Appendix 5: Cases 1, 2, 12, 13, 15, 16, 17, 21, 26, 29, 32, 44, 45, 49, 50, 56, 58, 65, 67, 68, 70, 72, 78, 82, and 88.
[267] (SCM.A 6/2012).
[268] Other notable cases include; Moulvi Shah v Farley & Tranter (1910-20) 2 UPLR 189; Olinda De Souza Figueiredo v Kassamali Nanji [1963] 1 EA 381; Commodity Traders International Inc. v Mastermind Tobacco (U) Ltd (HCCC 18/2002(9/5/2003); and Magezi & Another v Ruparelia [2005] 2 EA 156.
[269] (HCCC 18/2002(9/5/2003).
[270] [2005] 2 EA 156.

informed by its genesis and the market, all ultimately guided reasonable people's expectations in such circumstances.

Therefore, substantive justice which has been elevated to being superior to, and the pre-condition for, the validity of procedural justice, has motivated judges in many of the flexible opinions analysed, making it one of the key values to inform balancing and coexistence efforts. At the same time, its enactment into law and judicial adherence means that in Uganda, legal pluralism is not only a value motivating flexibility, but also a constitutional and legislative mandate.

9.4.2.3 *Legal Pluralism*

Legal pluralism refers to the value of a community's normativity being derivable from more than one order, usually the state legal order and non-state normative orders.[271] During the content analysis, although it was coded as 'LP', legal pluralism was treated as also represented by 'SYSTEM-FLEXTY'. 'SYSTEM-FLEXTY' stood for systematic flexibility, which in this sense is the set of flexibilities resulting from the rule of law's internal attributes and the interrelationship between the legal system and extra-legal forces.[272] The normative aspect of this interrelationship is part of the legal pluralism Uganda's constitution requires judges to give due regard.[273] In the findings, legal pluralism appeared minimally, in 6% of the colonial opinions, but increased to about 11% of early post-colonial judging and 17% of late post-colonial judging. This is above the 10% threshold used by this study; therefore it qualifies to be in the scheme of values to be balanced towards achieving coexistence.

---

[271] See text to section 3.5.3.
[272] Minda (n 192)32.
[273] National Objectives and Directives of State Policy, No. XXIV and Article 126 (1).

Legal pluralism manifested by judges being guided by the normativity of business practices,[274] the history and other experiences of Ugandans[275] and public interest.[276] Particularly, as earlier discussed,[277] legal pluralism has influenced flexibility by judges using assumptions from experience, represented by the circumstances surrounding a case;[278] using circumstances surrounding a contract to determine what is acceptable and legitimate;[279] and taking judicial notice of and adhering to the non-legal norms.[280]

Therefore, legal pluralism is a reality of the Ugandan legal system, recognised by the law, and increasingly motivating flexibility judging, with enough to be considered a competing value in adjudication, to be balanced. However, like its sister value substantive justice, legal pluralism opens the legal floodgates for instrumentalism, and other judicial practices based on extra-legal considerations, which calls into question the external extra-legal values underlying flexibility. Therefore, discussion in the following part of the chapter focuses on articulating those extra-legal values the content analysis could uncover as needing attention in the value balancing.

9.5 Extra-Legal Values

This section brings understanding to key extra-legal values that have motivated flexibility in Uganda's commercial judging. Such values include public interest,

---

[274] See Appendix 1: Case 13; Appendix 2: Case 12; Appendix 3: Cases 22 and 28; and Appendix 5: Cases 55, 78.
[275] See Appendix 1: Case 23; Appendix 3: Cases 19, 20, 29 and 31; and Appendix 5: Cases 15, 63.
[276] Appendix 5: Cases 55 and 86.
[277] See text to Section 3.5.3.
[278] Edmund Schluter & Co. (Uganda) Ltd v Patel [1969] EA 239 (Appendix 3: Case 20).
[279] Magezi & Another v Ruparelia [2005] 2 EA 156 (Appendix 5: Case 15).
[280] Mbale United Transporters Ltd v Town Clerk, Mbale Municipal Local Government Council & Others HCCS 267/2004(30/9/2005), Appendix 5: Case 55.

relational contracting, judicial absolutism, and inequality between contracting parties. However, according to the content analysis, class struggle, represented by inequality as a basis for allocation of rights and obligations has been insignificant, other than in early post-colonial Uganda. This disqualifies it from the final scheme of values to be weighed and balanced towards achieving coexistence. Therefore, only findings relating to the other two are discussed below.

9.5.1.1 *Relational Contracting*

This section validates, but only in part, MacNeil's claim that court decisions in East Africa indicate relational contracting, contracts being instruments of social change.[281] The findings in Figure 12 reveal that relational contracting was not recognised by courts during colonial judging of hard cases, but appeared in 16% of the early post-colonial and 9% of late post-colonial opinions. The reasons for the decrease in influence of relational contract recognition are beyond the scope of this study. What is vital is the value's prevalence and manifestations. It has manifested in three ways.

Firstly, judges recognised long-term relations that appeared to flow from contracts, and flexibly made decisions to give them normative effect.[282]Secondly, trust, cooperation-, and therefore the norm of reliance, have been recognised by judges as having a normative effect, and flexibly used to intervene in contracts.[283] Finally, in support of Macneil's claim,[284] courts have recognised social relations as arising

---

[281] IR MacNeil, *Contracts, Instruments for Social Cooperation, East Africa: Text, Cases, Materials* (South Hackensack, N.J.: F. B. Rothman, 1968)
[282] See Appendix 3: Cases 9, 11 and 44; and Appendix 5: Case 93.
[283] See Appendix 3: Cases 11, 16, 17, 18 and 19; Appendix 5: Cases 14, 17, 48, 58, 62 and 69;
[284] MacNeil, *Contracts, Instruments for Social Cooperation* (n 282)

from contract, and flexibly made decisions to give such relations normative effect.[285]

Probably, no judicial opinion illustrated contract as a social instrument more than *British American Tobacco (U) Ltd v Francis Mulindwa & Others*,[286] a suit challenging the legality of summary dismissal of an employee on grounds of alleged misconduct causing financial loss. Kiryabwire, J, found for the employer, but most importantly reasoned that, whether the misconduct was sufficiently grave to amount to a repudiation of the employment contract depended on the circumstances of each case, the nature of employment and possibly the terms of the contract; further, that society's attributes are dynamic and honouring them is incompatible with the rigidity of formalism, thus precedents being of limited value.

However, even with such manifestations, relational contracting is not the prime value-underlying flexible judging, as claimed by MacNeil[287] and Barnette,[288] generally and more so in East Africa,[289]but one competing with formalistic ones alongside other flexibility values. Compared to other flexibility values, its sub-value recognition of relationships has had equal influence with the normativity of

---

[285] For instance, Jayuntilal S. Shah v Attorney General [1970] LDC 47/70, P. 53; British American Tobacco (U) Ltd v Francis Mulindwa & Others (HCCS 767/2004 (24/4/2013); Uganda Revenue Authority v Wanume [2012] 1 HCB 43; Central Purchasing Corporation v Hon. Major General (RTD) Kahinda Otafiire (HCCS 627/2003(31/08/2007); Hope Mukankusi v Uganda Revenue Authority (HCCS 438/2005(19/7/2010); and Belex Tours & Travel v Crane Bank Ltd [2013] CACA 13 (24/10/2013).

[286] HCCS 767/2004 (24/4/2013).

[287] Macneil, 'Values in Contract: Internal and External' (n 4) 340-418; IR Macneil, 'Relational Contract: What we do and do not know', (1985) Wisconsin Law Review, 483-525; and IR Macneil, 'Relational Contract Theory: Challenges and Queries' (2000) 94, Northwestern University Law Review, 877-907.

[288] RE Barnette 'Conflicting Visions: A Critique of Ian Macneil's Relational Theory of Contract', 1175-1206.

[289] MacNeil, 'Values in Contract: Internal and External' (n 4).

commercial practices and the absence of legal categorisation, and sub-values like normative standards appeared much higher. Secondly, relational contracting does not pass the threshold to qualify as a key value for balancing with formalism values, especially having appeared in less than 10% of late post-colonial flexible opinions.

Turning to the other extra-legal value behind flexibility, in *American Tobacco,*[290] the judge putting little value in precedents and contractual terms, having referred to the terms as 'possibly' important, speaks not to an isolated and wild act of a rough judge, but to a deeper feeling of absoluteness of judicial power. The following section discusses such judicial absolutism's influence in judicial flexibility, to the extent that the findings in the study are informative.

9.5.1.2 *Judicial Absolutism*

As discussed earlier, judicial absolutism is the value of judges exercising unrestrained authority in ways that negate any form of value of judges exercising unrestrained authority, and showing no form of accountability.[291] Coded as JA, and merged with the trend earlier coded as 'ROC-NONLAWMAKERS' the findings for which,[292] presented in appendices 1-5 and Figure 12, support the proposition by Wells,[293] Holmes[294] and Oloka-Onyango,[295] that judicial absolutism breeds judicial

---

[290] HCCS 767/2004 (24/4/2013).
[291] See text to Sections 4.2.1.2 and 8.3.3.1.
[292] See Appendix 1: Cases 2, 9, 19, 23, 24, 26, 28, 33, 39, 42, 44, 45, 56, 58, and 62; Appendix 3: Cases 1, 4, 14, 34, 36, 38, and Appendix 5: Cases 2, 4, 10, 12, 22, 23, 27, 29, 30, 34, 35, 37, 45, 47, 57, 64, 68, 71, 72, 75, 84, 86, 89, and 90.
[293]M Wells 'French and American Judicial Opinion' (1994) 19 (1) (3) Yale Journal of International Law 81, 107-108.
[294] Holmes, The Common Law (n 90) 5.
[295] J OLoka-Onyango, *When Courts Do Politics: Public Interest Law and Litigation in East Africa,* (Cambridge Scholars Publishing, 2017),) 76-112.

flexibility, as judges are motivated by the ruling political ideology not to respect legal boundaries that would otherwise restrain them to a single answer in all similar cases. In Uganda, flexible opinions influenced by judicial absolutism appeared in 49% of flexible colonial opinions, 38% of early post-colonial and 34% of late post-colonial ones. This makes it one of the dominant ones to be part of the balancing equation in the search for coexistence.

Judicial absolutism has manifested through judges making decisions without citing any law, evidence or reasoning in the line of pursuing substantive justice, but rather grounds which point to a sheer sense of judicial absolutism, such as common sense,[296] business or social realities,[297] political realities[298] or just convenience.[299] By way of illustration, as far back as colonial times, in Tota Ram *v* Mistry Waryam Singh,[300] the judges, while referring to the common law regulating contracts, declared that our law was rapidly degenerating into common sense. Much more recently, in *East African Development Bank v Ziwa Horticultural Exporters Ltd*,[301]the judge declared that the list of instances when a court can interfere with contracts is endless, but it included there being a need to stop hardships or delays, otherwise here taken to mean inconvenience.

---

[296] Tota Ram v Mistry Waryam Singh [1933] 5 ULR 76 (Appendix 1: Case 2); and Appendix 1: Case 36; Appendix 5: Cases 46, 50 and 51.
[297] See Appendix 1: Cases 9, 19, 23, 24, 26, 28, 33, 39, 42, 44, 45, 56, 58, 62; Appendix 3: Cases 34, 36, and 38; and Appendix 5: Cases 4, 22, 29, 34, 35, 37, 45, 47, 57, 64, 68, 71, 75 84, 89, and 90.
[298] Uganda Wildlife Authority v Hon. Francis Mukama (CA 78/2002; (2/2/2010) (Appendix 5: Case 26) and Traces SA v Attorney General (HCCS No 525 of 2006) (Appendix 5: Case 86).
[299] East African Development Bank v Ziwa Horticultural Exporters Ltd (HCMA 1048/2000) (Appendix 5: Case 27); Eastern and Southern African Trade and Development Bank v Hassan Bassajjabalaba & Aisha Basajja [2007] UGCommC 30 (Appendix 5: Case 57); Tamp Engineering Consultants Ltd v MacDowell Ltd (HCCS 224/2010(25/01/2016) (Appendix 5: Case 59).
[300] [1933] 5 ULR 76 (Appendix 1: Case 2).
[301] HCMA 1048/2000 (Appendix 5: Cases 27).

However, the role absolutism has played in flexibility cannot be fully appreciated from mere content analysis of judicial opinions, for there is support for Holmes, that at times, other extra-legal interests consciously or otherwise influenced judges' minds.[302] Elements of the country's history point to a judging environment where judges would be constrained to instrumentalism, or if they decided formalistically, they would be constrained to opportunistic formalism.

Firstly, there have been incidents of direct interference in commercial justice by the executive directing judicial decisions,[303] especially during the 1971-79 Idi Amin military dictatorship,[304] when the judiciary was militarised and its traditional system left spent and impotent.[305] The militarisation was meant to circumvent rule of law-based decisions.[306] The military tribunals, the Military Police and the State Research Bureau (an Intelligence organ)[307] became the overseers and enforcers of flexibility in commercial adjudication, as acknowledged by the High Court in *Uganda v Gerald Ngulumi.*[308] These adjudicators neither understood nor respected the law, formality, or due process,[309] as unprincipled flexibility ruled, without them following any rules of law.[310]

Secondly, there have been intimidation and coercion of judges to influence against making rule of law formalistic decisions;[311] this included the murder of Chief Justice

---

[302] Holmes (n 143) 457, 465-466
[303] ABK Kasozi, *The Origins of Violence in Uganda* (Fountain Publishers Ltd 1994) 86-87.
[304] ibid 88-97.
[305] EM Aseka, *Transformational Leadership in East Africa: Politics, Ideology and Community* (Fountain Publishers 2005) 323.
[306] ibid.
[307] ibid 324.
[308] (Crim. Rev No. 175 of 1975).
[309] Aseka (n 306) 324; and Kasozi (n 304) 114.
[310] Aseka (n 306) 324.
[311] Kasozi (n 304) 114-115.

Ben Kiwanuka, and the president of the Industrial Court.[312] The epitome happened in what the former Principal Judge has described as the darkest days in Uganda's history and the rape of the temple of justice.[313] On the 16th of November 2005 and 1STst of March 2007 the military besieged the High Court during hearings, in *Kiiza Besigye and others v Attorney General*,[314]to influence the decisions of the court. Although a political case, this demonstrates the judging environment in Uganda, as the effects could not have stopped with judges handling similar cases. To expect the events to help the executive tame the judiciary and extend absolutism and service of political ideology to all manner of judging is not wild imagination.

Thirdly, the executive has made issuance of court orders they do not agree with futile. For instance, during Amin's regime,[315] Obote's regime (December 1980 to July 1985),[316]and the current government (since 1986),[317] even lawyers involved have been harassed and at times reportedly killed, as in the *Samson Ddungu case.*[318] Relatedly, and fourthly, accession to the office of a judge has in many cases depended on one's degree of support for the ruling government and ideology,[319] with each change of president coming with a change of the chief

---

[312] ibid 115; SWW Wambuzi, *The Odyssey of a Judicial Career in Precarious Times: My Trials and Triumphs as a Three-Term Chief Justice of Uganda* (Cross House Books 2014) 3.
[313] J Ogoola 'The Rape of the Temple' (2006) The New Vision Daily, www.newvision.co.ug/new-vision/news, accessed on 15th November 15, 2018
[314] Constitutional Petition No. 7/2007
[315] Kasozi (n 304) 115.

[316] Ibid 153

[317] For instance on the 17th December 2018, the Minister of Lands, Housing and Urban Development issued a letter, directing all authorities concerned not to enforce court orders that require evictions from land, including those resulting from sales under mortgage, unless approved by the executive arm of government.
[318] Kasozi (n 304) 115.
[319] ibid.

justice.[320] This phenomenon and its status as a foundation of flexibility adjudication was recently confirmed by Tsekoko, Justice of the Supreme Court (emeritus),[321] thus:

> Yes, that thing [cadre judges] is there. It seems to be increasing …you get some judgments and you can't understand if they are from judges who are supposed to be independent… some judges consult some politicians when they have cases with political implications to get a shape of the ruling. This is terrible! It is not proper.[322]

Accordingly, the increasing trend of cadre judges is meant to increase the influence of absolutism and promote flexibility by judges who can represent the wishes of the executive during adjudication. It is therefore not surprising that judges have made decisions bearing the hallmarks of judicial absolutism. The case of *Traces SA v Attorney General*[323] appears to be one of such results, where the wishes of the same President, expressed at a political rally, were invoked by court as public interest and policy that overrode the rules of law in legislation and terms of the contract between the foreign investor and the government.

Another example of this is far back as colonial days, in *Tota Ram v Mistry Waryam Singh*.[324] While referring to the common law regulating contracts, the judge declared that our law was rapidly degenerating into common sense.[325] A plain reading of such decisions will tell a story of judges being incompetent, for failure to

---

[320] SWW Wambuzi, *The Odyssey of a Judicial Career in Precarious Times: My Trials and Triumphs as a Three-Term Chief Justice of Uganda* (Cross House Books 2014) 134.
[321] Interview published in the Monitor Daily News Paper of Saturday 30th April 2016
[322] ibid.
[323] (HCCS No 525 of 2006) (Appendix 5: Case 86).
[324] [1933] 5 ULR 76 (Appendix 1: Case 2).
[325] [1933] 5 ULR 76

make decisions justifiable from the law, evidence led or otherwise within the known boundaries of adjudicatory acceptability.

However, the high frequency and persistence of the practice disqualifies the theory of incompetence. Besides, a preliminary reading of the judicial opinions reveals no evidence of any particular judge having consistently exhibited absolutism, as well as incompetence. Rather, the trend speaks to flexibility being founded on a higher value – judicial absolutism, which could have motivated judges alongside other factors like the nature of legal training, or religious and cultural beliefs, which are beyond the scope and methodology of this study. Nevertheless, besides such indefinable considerations, courts have also been motivated by social support, which has of late translated into public interest.

9.5.1.3 *From Social Support to Public Interest*

Social support, a value behind flexibility in pre-colonial law and adjudication, continued to have relevance and motivate flexibility after the transplant of the English common law system. In *National Social Security Fund & Sentoogo v Alcon International Ltd*,[326] Odoki CJ defined being contrary to public interest as being contrary to public policy; anything against the constitution, national interests, justice or morality. Likewise, in *Attorney General v Afric Cooperative Society Ltd,*[327] *Katureebe, JSC* invoked the need for court to make decisions in public good as the end of law and justice. These decisions, being made at the highest level of judicial

[326] (SCCA 15/2009 decision of 8/2/2013) (Appendix 5: Case 32).
[327] (SCM.A 6/2012, Appendix 5: Case 33).

precedence, amongst many others,[328] also serve to demonstrate social support having been a moral value motivating Ugandan judges towards flexibility.

In the findings, social support has been treated as coextensive with public interest, because public interest was often used to connote social support. However, because the latter could be articulated as a related but independent value, the two were coded separately and only merged here in the discussion. Social Support was coded and presented in appendices 1-5 and Figure 12 as 'SOCIAL SUPPORT', appearing in 10% of colonial flexible opinions, 14% of early post-colonial, and 5% of late post-colonial ones. Public Interest was coded and presented as 'PUBLIC INTEREST', and not observed in colonial opinions; but appeared in 14% of early post-colonial flexible opinions, and 11% of late post-colonial ones.

The appearance of both codes in Figure 12 with the same frequency during early post-colonial judging makes one think that there has been duplication of the same value. However this is not the case; as Appendix 3 shows, both public interest and social support were simultaneously observed in only one case. In other cases, each code appears without the other, implying that the greatest influence of social support was in early post-colonial judging at about 27% (adding the two codes). Further, again adding the two, as public interest grew to replace references to social support, the value has since dropped to about 16% of late post-colonial judging.

The influence of social support in flexibility judging manifested through adherence to a number of sub-values. Firstly, judges gave due regard to community

[328] See Appendix 1: Cases 2, 9, 36; Appendix 3: Cases 5, 6, 7, 8, 15, 17, 27, and 32; and Appendix 5: Cases 1, 13, 25, 33, 40, 46, 50, 51, 55, 78, 82, 83, and 86.

perceptions of the meaning of rules. For instance, in *Bhimjani v Patel,*[329] amongst the judging criteria in hard cases, the judge used what he called the relevant 'special conditions of a social character, as well as broad common sense.'

Secondly, judges gauged the validity or enforceability of contractual terms, on common standards like reasonableness, especially in early post-colonial judging,[330] unconscionability,[331] common sense[332] or sensibleness.[333] Such common standards represented the support of the community as a ground for acceptability and validity of flexible decisions. Thirdly, public interest was directly cited as the sub-value providing criteria for allocation of obligations in contract.[334]

However, as noted earlier,[335] the use of public interest as a sub-value of social support at times smelt of a wider and unarticulated political agenda. This proposition is supported by the different senses in which the courts invoked it. In the *Alcon case*[336] it was taken to mean constitutionalism, morality and justice; and in the *Afric case*,[337] common good; but then it was taken to mean state policy in *Concorp International Ltd v East & Southern African Trade & Development Bank,*[338] *and the Traces SA case.*[339] Therefore it is not surprising that public support has increasingly been served by public interest being invoked to justify

---

[329] (1956-57) 8 UPLR 164 (Appendix 1: Case 36).
[330] Appendix 3: Cases 15, 17 and 32.
[331] Appendix 3: Case 27
[332] Appendix 1: Cases 2, 36; Appendix 5: Cases 46, 50 and 51.
[333] Appendix 5: Case 1.
[334] Appendix 3: Cases 5, 6, 7, 8, and 32; and Appendix 5: Cases 13, 25, 33, 40, 55, 78, 82, 83, and 86.
[335] See text to section 9.3.5.
[336] (SCCA 15/2009 decision of 8/2/2013) (Appendix 5: Case 32).
[337] (SCM.A 6/2012, Appendix 5: Case 33).
[338] [2010] 1 HCB 12 (Appendix 5: Case 25).
[339] HCCS No 525 of 2006 (Appendix 5: Case 86).

flexibility judging, as the judges hide behind it the pursuit of different agendas, at the cost of legal certainty.

However, once again, the real agenda behind each use of the value could not be investigated in this study, as it would call for methodology that can investigate the judges' minds beyond the reasons articulated in the texts of the opinions analysed. Factors like corruption, which has been reported as rampant in the Ugandan judiciary,[340] could be the real reasons behind a decision, but indeterminate values like public interest were being cited and given a convenient sense. Nonetheless, what is clear is that social support is a key value underlying flexibility, and should be part of the balancing towards coexistence. As demonstrated throughout this study, and demonstrated in the next chapter, these efforts are better served by devising ultimate judging guidelines made up of rules, principles and standards that can make the two approaches coexist, thereby achieving realistic legal certainty.

9.6 Conclusion

My conclusion is that, the flexibility in the tension has been motivated not by any single value as the prime, but a number of values, which are also both internal and external to the judicial institutions and its accompanying players. The most frequent of these values should be part of the scheme of values to inform the balancing that judging guidelines will aim to achieve, as a way towards coexistence. Foremost amongst such internal values are the perception of law as elastic and adaptable to a changing market and other realities, coextensive with its retroactivity; utilitarian

[340] For instance in the Monitor News Paper of 13Th13th April 2017, the lead story was that the Inspector General of Government, who acts as the ombudsman, and a judge herself wrote to the Chief Justice, indicating that corruption in the judiciary was a systematic problem and no amount of intervention from outside would reduce it, and that the problem had to be tackled from within. She accordingly refused to prosecute a magistrate who had been caught taking bribes, protesting that she was tired of prosecuting 'small fish' while the crocodiles were left swimming.

instrumentalism—purposiveness, practicality and functionality of the law and contractual terms; the concept of justice as fairness and fairness as being ubuntu, as well as equity; judges' perceptions of their role as lawmakers, guarantors of fairness and justice, and absolute settlers of disputes, including judging by mere hunch; and judicial responsiveness. On the other hand, legal and extra-legal external values include values of a systematic nature, legal pluralism, a substantive conception of justice, and conceptual flexibility. Others are doctrinal values like consumer welfarism, as well as efficiency and wealth maximisation, which as however perceived as commercialism. Finally, are extra-legal external values; judicial absolutism and social support, relational contracting having appeared insignificantly.

The next chapter proceeds to complete the puzzle. It not only summarises the study, but also makes recommendations on how the competing values can be balanced, as the end goal of judging guidelines, that could in turn bring coexistence, and management of the tension.

.

Chapter 10: Towards Management of the Tension

10.1 Introduction

This chapter concludes the study, as well as making recommendations on how the tension can be managed. It demonstrates that the research question and objectives of the study have been answered and attained respectively, and completes the main thesis of the study – that formalism and flexibility can and should coexist. The chapter first makes a recapitulation of the study's theoretical framework, research process and key findings, and ends by proposing that balancing the key competing values identified should be done during the construction of possible commercial judging guidelines.

The guidelines should be made up of rules, principles and standards providing for rational and coherent criteria for when and how judges can practise formalism and flexibility, thereby acting as a mechanism for their coexistence and a way to manage the tension. Examples of principles and standards that should be part of Uganda's commercial judging guidelines are proposed. Finally, this chapter highlights the study's major contributions to knowledge, its limitations, and areas for further research.

10.2 Recapitulating the Subject of Study

Using a content analysis of Uganda's commercial contract hard cases, this study makes a contribution to literature that searches for legal certainty, through managing the age-old tension between formalism and flexibility in adjudication.

Both approaches serve vital values in jurisdictions like Uganda; as such they have been concurrently practised throughout judging history and are therefore both needed at the same time. However, the Ugandan legal system lacks, as do many common-law systems, a coherent and rational mechanism to guide judges hearing commercial hard cases on when to decide formalistically or flexibly, or use a mixture of both.[1] This is worsened by the insufficient knowledge on how a mechanism can be formulated, or the tension otherwise managed, [2] a gap this study contributes to filling.

Many of the scholars in this field have concentrated on making a case for either formalism or flexibility judging, leading to the dominant irreconcilable view, that the two cannot coexist.[3] Contrary to that irreconcilable school of thought, this study's central argument contributes to knowledge by expanding the validity of the thesis that formalism and flexibility can and should coexist,[4] through advancing four propositions.

---

[1] BZ Tamanaha, *Law as a Means to an End: Threat to the Rule of Law* (Cambridge University Press 2006) 233.

[2] JW Evans and AL Gabel, 'Legal Competitive Advantage and Legal Entrepreneurship: A Preliminary International Framework', (2014) 39 (2) North Carolina Journal of International Law, 7; Tamanaha (n 1) 233; M Zagler and C Zanzottera, 'Corporate Income Taxation Uncertainty and Foreign Direct Investment,' Wien University Taxation Research Paper Series, No. 2012-07, 3; MA Eisenberg, *The Nature of the Common Law,* (Harvard University Press, 1988).

[3] G. Minda, *Postmodern Legal Movements: Law and Jurisprudence at Century's End* (New York University Press 1995) 20-21, 28-29; Tamanaha (n 1) 66; Wolff LC, 'Law and Flexibility –Rule of Law Limits of Rhetorical Silver Bullet' (2011) 11 The *Journal of Jurisprudence 549;* M Zuckert, 'Hobbes, Locke, and The Problem of The Rule of Law', in Shapira I (ed) The Rule of Law (New York University Press 1994) 1; HMS Botoshi, 'Striking the Balance Between the Considerations of Certainty and Fairness in the Law Governing Letters of Credit' (PhD Thesis, University of Sheffield 2000) 100-01.

[4] Olfer R, 'The Fallacy of Legal Certainty: Why Vague Legal Standards May Be Better for Capitalism and Liberalism', (2010) 19, Boston University Public Interest Law Journal, 175-190; SJ Burton, *Judging in Good Faith* (Cambridge University Press 1992) 15; Evans and Gabel (n 2) 333, 349-50;

Firstly, in Uganda the tension is a reality, informed by a history of concurrent but incoherent practice of both formalism and flexibility. Secondly, underlying the tension are multiple internal and external competing values served by each approach, as opposed to there being a single 'prime' value accounting for all adjudication, formalistic or flexible. Thirdly, the competing values are not irreconcilable, but rather they are compatible, and their coexistence, and therefore that of formalism and flexibility, requires that they are uncovered from actual judicial opinions, weighed and the dominant ones balanced.

Finally, the balancing of values should not be left to judicial discretion, but independently done, and used to formulate ultimate judging guidelines, as a way towards managing the tension and enhancing certainty.

Therefore, the main question of the study is, 'How can the tension between formalism and flexibility in Uganda's commercial contracts adjudication be managed?' The answer has been sought using three sub-questions, namely:

(a) What is the nature of Uganda's commercial judging paradigm?

(b) Why has the tension between formalism and flexibility prevailed in Uganda's commercial adjudication?

(c) How can formalism and flexibility coexist?

To answer the research question, the study has pursued four objectives.

F Schauer, 'Formalism' (1988) 97 Yale Law Journal 1109; HLA Hart, *The Concept of Law (Clarendon Law Series),* (Oxford University Press 1994) 127 (to an extent with regard to what he termed the penumbra part of a rule); R Dworkin, *Law's Empire* (Fontana 1986); M Zagler and C Zanzottera, 'Corporate Income Taxation Uncertainty and Foreign Direct Investment' Wien University Taxation Research Paper Series No 2012-07 3; MA Eisenberg, *The Nature of the Common Law,* (Harvard University Press, 1988); PS Atiyah, *The Rise and Fall of Freedom of Contract* (Clarendon Press 2008) 388; R Goode, *Commercial Law in the New Millennium,* the Hamlyn Lectures (Sweet & Maxwell 1998); Tamanaha (n 1) 232-233.

Firstly, it set out to ascertain Uganda's commercial judging paradigm across judging history, to verify if the tension is a problem and reality and understand its roots in a general sense.

Secondly, the study aimed at making a case for the coexistence of formalism and flexibility, as part of the theoretical foundation for finding a way to manage the tension. Thirdly, it aimed at understanding the foundations for the tension not by seeking the reasons for lack of coherent and rational tension management mechanisms, but rather, why the formalism and flexibility competing in the tension have prevailed.

Therefore and fourthly, the study also aimed at finding ways to manage the tension. It sought to do this by working towards a mechanism for coexistence between formalism and flexibility, contributing to filling a knowledge gap left not only by the sceptics, but also scholars who support coexistence, without offering proposals for how it can be done.[5] Tamanaha,[6] Zagler & Zanzottera[7] and Evans & Gabel[8] all admit the existence of this knowledge gap, with Tamanaha conceding to not being sure if such a mechanism can actually be formulated.[9]

Accordingly, the study also aims to expand on knowledge regarding how the tension can be managed. The few scholarly attempts at answering this question, such as by Burton,[10] Cardozo,[11] Dworkin[12] and Posner,[13] have mainly proposed

---

[5] PS Atiyah, *The Rise and Fall of Freedom of Contract* (Clarendon Press 2008) 388); Evans and Gabel (n 2) 7; R Goode, *Commercial Law in the New Millennium,* the Hamlyn Lectures (Sweet & Maxwell 1998); Tamanaha (n 1) 232-233;
[6] Tamanaha (n 1) 233.
[7] M Zagler and C Zanzottera, 'Corporate Income Taxation Uncertainty and Foreign Direct Investment,' Wien University Taxation Research Paper Series, No. 2012-07, 3.
[8] Evans & Gabel (n 2).
[9] Tamanaha (n 1) 233.
[10] SJ Burton, *Judging in Good Faith* (Cambridge University Press 1992) 15; and SJ Burton, *An Introduction to Law and Legal Reasoning* (Little, Brown & Co. 1985) 95-98, 136, 138-43 & 205-08.

entrusting the task to judicial discretion, which is deemed to make no difference. On the other hand, scholars like Eisenberg,[14] who have proposed autonomous guidelines, as is done in this study, have not based their findings on analysis of real judging practice, informed by judicial opinions. Further, no literature has been found on how the tension can be managed in underdeveloped former British colonies like Uganda.

10.3 The Research Process

The research has employed the content analysis methodology, analysing the texts of three hundred and three hard commercial contracts decisions. The key indicative values ascertained from both formalism and flexibility legal theory in chapters three, six and eight acted as value postulates in informing the coding for units of analysis. After deriving the primary findings, further coding and analysis was done using the researcher's legal knowledge, and inferences from the primary findings, guided by legal theory and the judging environment, as could be ascertained from the existing literature. This helped in identifying elaborating, and articulating categories of values behind both formalism and flexibility, and the higher values they speak to, as well as the ways in which they have manifested during adjudication. The dominant of those higher values were weighed using their respective frequencies to arrive at the proposed scheme of values.

The study thereby operationalised the proposition from interests jurisprudence, that the tension results from a competition of interests and values, which should be

---

[11] BN Cardozo, 'The Nature of the Judicial Process' (Yale University Press 1921) 141.
[12] R Dworkin, *Taking Rights Seriously,* Duckworth & Co. Ltd 1977) 81-130; R. Dworkin, *A Matter of Principle*, (Harvard University Press 1985) 119-180; and R Dworkin, *Law's Empire* (Fontana 1986).
[13] RA Posner, *Economic Analysis of Law* (3d ed.), (Little, Brown & Co. 1986).
[14] MA Eisenberg, *The Nature of the Common Law,* (Harvard University Press, 1988) 8-13.

discovered, weighed, and articulated. The dominant ones identified for balancing as a way towards certainty,[15]are those that prevailed in more than 10% of cases analysed overall and continued to be so influential in late post-colonial judging.

The higher values were then analysed and at the third level, wider and more abstract categories of values, such as rule of law values, values of perception of the judicial role, responsiveness, systematic values, and doctrinal values. Finally, further analysis was made to reveal institutional and structural categorisation of values, revealing internal vis-à-vis external judging criteria, as well as legal vis-à-vis extra-legal values as underpinning the tension in Uganda.

The above steps were used in presenting the results of the study in chapters five, seven and nine, but also the values were further discussed, elaborated and articulated to explain their meaning, manifestations, and how they influenced the respective judging approaches. From the further analysis and discussion of findings in chapters seven and nine, the dominant competing values representing both sides have been identified for balancing during the formulation of ultimate judging guidelines, as indicated in the following summary of findings.

10.4 Key Research Findings

This part recaps the study's findings in chapters five, seven and nine, that have provided answers to the sub-questions of what Uganda's judging paradigm is; and which values manifest the tension as a real problem. The findings in chapter seven and nine specifically answer why the tension has prevailed.

---

[15] M.M Schoch, (translator and editor), *The Jurisprudence of Interests: Selected Writings of Max Rumelin, Philipp Heck, Paul Oertmann, Heinrich Stoll, Julius Binder & Hermann Isay (Harvard University Press, 1948)* 31; F. Powers 'Some Reflections on Pound's Jurisprudence of Interests' (1953) 3:1 Catholic University Law Review 10, 15-16.

10.4.1 The Tension in Uganda

Chapter five examined Uganda's commercial judging paradigm, laying the foundation and demonstrating the justification for the study. It established that, as in other common-law jurisdictions,[16] the tension has been a persistent problem facing the country's commercial justice system. However, expanding such knowledge, the way the tension has manifested in Uganda has reveals five fundamental findings.

Firstly, that Uganda's commercial judging paradigm is characterised by a concurrent practice of both formalism and flexibility, throughout post-colonisation political and legal judging periods, albeit incoherently and irrationally, leading to uncertainty, supporting Evans & Gabel's declaration,[17] that both formalism and flexibility are needed at the same time. Further, the paradigm supports Klabbers, in saying that where neither side emerges the winner, we need to find coexistence.[18] The courts have seldom followed one approach predominantly, and those few trends have been countered by the ever-rising patterns of mixed-approach judging. Therefore, although a gap in knowledge is admitted by Tamanaha,[19]that in the west, it is not evidentially clear whether formalism or flexibility dominated different

---

[16] Evans and Gabel (n 2) 333, 349-50; A Phang, 'A Passion for Justice: The Natural Law Foundations of Lord Denning's Thoughts and Work' (2006) (2) Global Journal of Classical Theology; WC Whitford, 'Faculty Perspectives: The Rule of Law', (2000) Special Issue, Wisconsin Law Review 723, 726; R Goode, *Commercial Law in the New Millennium,* the Hamlyn Lectures (Sweet & Maxwell 1998) 9, 16, 31.

[17] Evans and Gabel (n 2) 7, 26-33.

[18] Klabbers J, 'Towards A Culture of Formalism', Martti Koskenniemi and The Virtues', (2013) 27:2, Temple International & Comparative Law Journal, 415.

[19] Tamanaha (n 1) 26-27.

historical epochs; the conclusion he shared with Horwitz,[20] and Kenny, and Devenney;[21] that the tension is defined by periodical swings between formalism and flexibility, is not applicable to Uganda. Instead, the findings render support to Duxbury's statement that the alleged constant pendulum swing of competing formalism and flexibility theories is exaggerated.[22] However, the findings in chapter four challenge his addition, that the merely practicing the two concurrently amounted to their coexistence. Such concurence merely evidences the tension, beyond which, this study has sought for a way towards genuine and principled coexistence.

Secondly, contrary to the irreconcilable view that the tension is as old as adjudication[23] and will always be there,[24] in Uganda the tension started with the transplant of the English legal system, which was already affected by it. The judging paradigm in the pre-colonial era was purely flexible, which points to the possibility of a tension-free paradigm, and a contextual explanation to its foundations.

---

[20] Horwitz M, *The Transformation of American Law, 1780-1860* (Harvard University Press, 1977) 1-2, 253-255.

[21] M Kenny and J Devenney 'A Comparative Analysis of Bank Charges in Europe: OFT v. Abbey National Plc through the looking glass', in J Devenney and M Kenny (eds), *Consumer Credit, Debt, and Investment in Europe* (Cambridge University Press, 2012) 212, 222.

[22] N Duxbury N, *Patterns of American Jurisprudence* (Clarendon Press, 1997), 2.

[23] Evans & Gabel (n 2) 2-3.

[24] LC Wolff, 'Law and Flexibility –Rule of Law Limits of Rhetorical Silver Bullet' (2011) 11 The *Journal of Jurisprudence 549*

Thirdly, the judging paradigm in Uganda supports the interests jurisprudence view of competing values underpinning the tension.[25] For every dominant formalistic value, there is an equally strong value or set of values motivating flexibility, although each value is not necessarily the reverse of the other.

Fourthly, ascertaining and understanding the competing values should be guided by the legal and general contexts in which adjudication took place, as judging phenomena changed with changing political and legal/constitutional contexts; and by evidence of internal judging culture's influence, as the patterns and trends varied in the different court levels' history. Accordingly, the search for foundations to the tension followed the internal/external, as well as legal/extra-legal dimensions.

Finally and fifthly, domestic and international attempts at coexistence and tension-management mechanisms were identified as being part of the commercial justice system. However, besides their inadequacy, the international ones have been ineffective. On the other hand, domestically, no coherent or rational mechanisms have been found. Rather, lone judges have infrequently, declared what they consider to be ultimate judging principles. Such principles include: the rule of law and its attendant formalism being viewed as the default approach; while in exceptional cases the totality of circumstances, backed by proof of public support and business practices, would be used to guide flexibility.[26] Further was

---

[25] R Pound, *Interpretation of History* (Harvard University Press, 1946) 142-151; R. Pound, *New Paths of the Law* (University of Nebraska Press, 1950) 24-27; M.M Schoch, (translator and editor), *The Jurisprudence of Interests: Selected Writings of Max Rumelin, Philipp Heck, Paul Oertmann, Heinrich Stoll, Julius Binder & Hermann Isay (Harvard University Press, 1948)* 31.

[26] Kibalama v Alfasan Belgie CVB [2004] 2 EA 146.

substantive justice being subjected to procedural justice;[27] the judicial ethical norms like civility, professionalism and good manners as limits to flexibility;[28] assumptions from general circumstances surrounding a case—as experience as a guide in recognising normativity of non-legal orders;[29] the legitimacy of circumstances surrounding contract formation as a determinant to flexible judging;[30] using the 'taking judicial notice of notorious facts' rule to decide flexibly;[31] utilitarianism as the ultimate guide;[32] judicial consensus as the ultimate guide to acceptability and rule of recognition;[33] and international best practices as a guide to judicial choice.[34]

However, there has been no consistency, as no evidence of replication of these principles was observed. Nevertheless, both formalism and flexibility having been practiced concurrently throughout judging history speaks to both being indispensable. The incoherent judging choice criteria were in that case an attempt at coexistence of the two, which leads me to the second key finding; the theoretical possibility of coexistence.

---

[27] Tobacco and Commodity Traders International Inc. v Mastermind Tobacco (U) Ltd (H, C.C. CHCCC 18/2002(9/5/2003)).
[28] Muwema & Mugerwa Advocates v Shell (U) Ltd, (CA 18/2011 (Appendix 5: Case 30); Highland & Agriculture Export Ltd & Another v Alpha Global 21ST21st Joint Venture & 5 Other [2017] UGCOMMC 113(18/8/2017) (Appendix 5: Case 70).
[29] Edmund Schluter & Co. (Uganda) Ltd v Patel, [1969] EA 239 (Appendix 3: Case 20).
[30] Magezi & Another v Ruparelia [2005] 2 EA 156 (Appendix 5: Case 15).
[31] Mbale United Transporters Ltd v Town Clerk, Mbale Municipal Local Government Council & Others (HCCS 267/2004(30/9/2005),) Appendix 5: Case 55.
[32] Atom Outdoor Ltd v Arrow Centre (U) Ltd (HCCS 448/2003 (17/12/2004) (Appendix 5: Case 46); Karangwa v Kulanju (HCCA 3/2016 [2017] UGCOMMC 91(24/8/2017).

[33] Belex Tours & Travel v Crane Bank Ltd & Another [2013] CACA 13 (24/10/2013) (Appendix 5: Case 5).
[34] Commodity Export International Ltd & Another v MKM Trading Co. Ltd [2015] CACA 81(6/10/2015) (Appendix 5: Case 80).

10.4.2 The Theoretical Possibility of Coexistence

In pursuance of objective two, the study has made out a case for coexistence of formalism and flexibility, in a number of ways. Firstly, as indicated in the proceeding section, both have been concurrently practiced, but incoherently and irrational; with sole judges making attempts to find coexistence, pointing to its possibility. Secondly, the values underlying the tension are both internal and external, including legal and extra-legal considerations, and this has been so for generations, many times in the same case (mixed approach cases).

Thirdly, a review of descriptive theory in chapter three shows more room for convergence of the seemingly divergent views than meets the first eye. Fourthly, there is significant direct scholarly support for a coexistence-judging paradigm on both sides.

Fifthly, a review of contract theory in chapters six and eight points to no single monist theory fully accounting for formalism, flexibility, or the tension. Instead, many of the proponents of monist theories indicate support for the values they propound being capable of satisfaction by the other judging approach, as well as the influence of other values. Finally, singular explanations to adjudication, those that attribute judicial approach to purely doctrinal or contract behavioural values, leave many other values, inarticulate.

This has not only shown that coexistence is a necessity and theoretically possible, but also demonstrably viable. What is lacking to actualise it, is constructing a contextual, source based and practically responsive adjudicatory theory, as is done in this study. The competing values underlying the tension have been ascertained using content analysis of judicial opinions, guided by value postulates identified from the existing literature, the results for which are summarised in the next sections.

10.4.3 Foundations to the Tension: Value Postulates

Against the above background, the values proposed by other scholars as underlying formalism and flexibility have been revisited in chapters six and eight, helping to identify presumptive values to inform the coding and content analysis of values underlying the two judging phenomena. This was in line with content analysis and interests jurisprudence, both of which require that such a search for values is informed by *jural postulates*, hypotheses or presuppositions.[35] These should be informed by the relevant the theoretical and social context. In this case, Uganda being part of the global commercial village, such a society being the commercial law community, whose presuppositions are, as well as theoretical hypotheses, represented by the views of the different scholars in the field. Therefore, the working hypotheses to guide the content analysis have been the value postulates appearing in existing literature on values underlying the tension; discussed in the two chapters−chapter six with respect to formalism, and eight with respect to flexibility.

Besides, the two chapters served to further make a case for coexistence, in the sense that hardly any value propounded by other scholars as justifying formalism or flexibility was found incapable of serving the opposing approach. Relatedly, arguments by scholars, who advanced monist approaches to understanding the values underlying commercial adjudication, were found wanting, if not generally, to account for the tension in Uganda. These include the efficiency, utilitarianism, fairness, market-individualism, relational, discreteness, responsiveness and

---

[35] R. Pound, *New Paths of The Law* (University of Nebraska Press, 1950) 32; F Powers (n 16) 'Some Reflections on Pound's Jurisprudence of Interests' (1953) 3:1 Catholic University Law Review 14, 15; J. Stone, 'A Critique of Pound's Theory of Justice', (1935) 20:3 Iowa Law Review 537 (Interests jurisprudence); Krippendorff K, *Content Analysis: An Introduction to its Methodology,* (Sage Publications Inc., 2004) 33 (Content Analysis).

predictability and certainty theories of contract adjudication. Instead, further opportunity was observed, in chapters three, six and eight, for both sides of the formalism-flexibility divide acknowledging the necessity and possibility of coexistence. Therefore, in line with the mechanics of interests jurisprudence,[36] guided by the presumptive values, a scheme of interests (in this case values) to be balanced was identified in chapters seven and nine. These chapters have revealed the dominant competing values in Uganda's commercial adjudication, the details of which are summarised in the next section.

10.4.4 Foundations to the Tension: The Scheme of Values

Pound proposed that the categorisation in the scheme of values, or interests as he termed them, should have individual, public and social interests.[37] However, such categorisation does not account for all the values revealed from the content analysis. Therefore, the internal/external categorisation has been used to report and articulate findings in this regard. Chapters seven and nine reveal that underlying the tension are sets of key competing values that combine to define the internal and external judging criteria, competing in two ways.

In the first place, neither formalism nor flexibility is fully or even substantially accounted for by any single value. Rather, their underpinning values have always competed amongst themselves for dominance. No single value has been observed as the ultimate or prime one influencing decisions in actual judicial practice, at least not in Uganda. Therefore, this study contributes to knowledge by supporting

---

[36] See text to section 2.5.1; R. Pound 'A Survey of Social Interests' (1943) 57 Harvard Law Review 1; R. Pound, *Outline of Lectures on Jurisprudence* (Harvard University Press, 1943),) 97-112.
[37] R Pound 'A Survey of Social Interests' (1943) 57 Harvard Law Review 1; R. Pound, *Outline of Lectures on Jurisprudence* (Harvard University Press, 1943), 97-112

Posner,[38] Llewellyn,[39] Farber,[40] Eisenberg,[41] MacNeil,[42] Trebilcock,[43] Trakman[44] and Schwartz & Scott,[45] who argue that the way to manage the tension does not lie in monist approaches.

Relatedly, the study contributes to knowledge by validating Eisenberg's claim, in demonstrating that singular theories, such as those that view judging phenomena as motivated by purely doctrinal values, leave many values underlying judging approach unarticulated.[46] Instead, the pluralist approach, [47] that enables looking for

---

[38] RA Posner, *Economic Analysis of Law* (n 13); T Zywicki and EP Stringham, 'Common Law and Economic Efficiency' in Paris F and Posner R (eds), Encyclopaedia of Law & Economics, (Mason University Law and Economics Research Paper Series 2010).

[39] A Schwartz, 'Karl Llewellyn and The Origins of Contract Theory', in JS Kraus & SD Walt (eds), *The Jurisprudential Foundations of Corporate and Commercial Law* (Cambridge University Press, 2000), 12, 16.

[40] DA Farber, "Efficiency and The Ex Ante Perspective", in J.S. Kraus & SD Walt (eds) *The Jurisprudential Foundations of Corporate and Commercial Law,* (Cambridge University Press, 2000) 54, 59.

[41] M Eisenberg 'The Theory of Contract', in P. Benson, ed. *The Theory of Contract Law*: *New Essays* (Cambridge University Press 2001), 243-244.

[42] IR Macneil, 'Values in Contract: Internal and External' 78 Newyork University Law Review 340-418; IR Macneil, 'Relational Contract: What we do and do not know', (1985) Wisconsin Law Review, 483-525; and IR Macneil, 'Relational Contract Theory: Challenges and Queries' (2000) 94, Northwestern University Law Review, 877-907.

[43] MJ Trebilcock, *The Limits of Freedom of Contract*, (Harvard University Press, 1993) 248.

[44] L Trakman, 'Pluralism in Contract Law', (2010) 58 Buffalo Law Review, 1031, 1031-1041.

[45] A Schwartz and RE Scott, 'Contract Theory and the Limits of Contract Law' (2003) John M. Olin Center for Studies in Law, Economics and Public Policy Working paper, Paper 275, 2-3.

[46] Eisenberg, *The Nature of the Common Law* (n 14) 3-4; This doctrinal based group of scholars includes; JN Adams and R Brownsword, *Understanding Contract Law* (Thomson Sweet & Maxwell, 2007) 192-207; JN Adams and R Brownsword, 'Ideologies of Contract', (1987) 7:2 Legal Studies, 205, 206-222; A. Hutchinson, 'Reciprocity in Contract' (2013) 24 Stellenbosch law Review, 3; M Chen-Wishart, *Contract Law* (Oxford University Press, 2010) 11, 16-17; C. Fried *Contract as Promise: A Theory of Contractual Obligations* (Oxford University Press, 2015) 1-8; C.J. Goetz & R.E. Scott, 'Enforcing Promise: An Examination of the Basis of Contract' (1980) 89:7 Yale Law Journal 1261, 1264-65; R. Barnett, 'A Consent Theory of Contract', (1986) 86 Columbia Law Review 269; A. Schwartz, 'The Case for Specific Performance' (1979) 89 Yale Law Journal 271, 284.

[47] This group of scholars includes: MS McDougal, 'Jurisprudence for a Free Society' (1966) 1 Georgia Law Review 15,16; I.R. Macneil, 'Values in Contract: Internal and External', (n 43) 340; Atiyah (n 5) 390-391, 650-652; R Goode, *Commercial Law in the New Millennium,* the Hamlyn

answers to the tension's prevalence from within judging cultures, doctrine and the external judging environment is demonstrated as more exhaustive, viable and realistic.[48] Therefore, this study helps in developing a multivalued and pluralist approach, with a scheme of the dominant competing formalism and flexibility values.

This bring us to the second level of competition, a level where the dominant values underpinning formalism and flexibility compete with each other to influence the judge's choice, thereby resulting in the tension. In this sense, the study contributes to knowledge, by validating and expanding the applicability of the interests jurisprudence view that underlying the tension are competing interests,;[49] in this case observed under the wider notion of values, as appears in the tabulated scheme of values below.

Table 1: **Scheme of Competing Values**

No.	Values Underlying Formalism	No.	Values Underlying Flexibility
1.	Non-Interventionism	1.	Interventionism in Contract

Lectures (Sweet & Maxwell 1998) 12-14, 23-24, 26-29, 31-32; TC Grey, *Formalism and Pragmatism in American Law* (Koninklijke Brill, NV, 2014) 51-56; Denning LJ, *The Discipline of Law* (Butterworth 1979); L.M.LM Friedman 'Contract Law and Contract Research' (Part 1) (1968) 20 Journal of Legal Education, 452; Tamanaha (n 1).

[48] This includes: McDougal (n 46) 15,16; I.R. Macneil, 'Values in Contract: Internal and External', (n 43) 340; Atiyah (n 5) 390-391, 650-652; R Goode, *Commercial Law in the New Millennium,* the Hamlyn Lectures (Sweet & Maxwell 1998) 12-14, 23-24, 26-29, 31-32; TC Grey, *Formalism and Pragmatism in American Law* (Koninklijke Brill, NV, 2014) 51-56; Denning LJ, *The Discipline of Law* (Butterworth 1979); L.M. Friedman 'Contract Law and Contract Research' (Part 1) (1968) 20 Journal of Legal Education, 452; Tamanaha (n 1).

[49] Minda (n 3) 33; Holmes, OW Jnr, 'The Path of Law' 10(8) Harvard Law Review (1897) 457, 465-466; R. Pound 'A Survey of Social Interests' (n 37) 97-112.

2.	Judges as Legal Mechanics	2.	Judicial Law making
3.	Perception of law as logic	3.	Utilitarian Instrumentalism
4.	Justice as Legality (including procedural justice) and legal perfectionism	4.	Substantive Justice
5.	Judicial Objectivity	5.	Adaptability, Retroactivity and Elasticity of Law
6.	Judicial Rationality	6.	Legal Pluralism
7.	Predictability and Certainty	7.	Social Support
8.	Judicial Responsiveness to the legal order	8.	Judicial Responsiveness to society's desires
9.	Legal Power: Judicial Authority Restraint	9.	Law as Predictions and judging by hunch
10.	Conceptual Formalism	10.	Conceptual Flexibility
11.	Market Conformism	11.	Consumer Welfarism
12.	Individualism	12.	Efficiency as Commercialism
13.	Discreteness of contracting	13.	Ubuntu and perceptions of judges as guarantors of justice, fairness and dispute settlers.
14.	Equalitarianism	14.	Judicial Absoluteness

The competing values in the above scheme represent the varying demands on the legal system, which adjudication needs to satisfy in Uganda's commercial adjudication. They have been arrived at by making inferences from sub-values and practices observed during the content analysis of words, phrases and themes in real judicial opinions. The competing values identified have been weighed, and the

dominant ones, which are proposed for balancing to achieve coexistence, have been elaborated, as summarised below.

10.4.4.1 *The Internal Judging Criteria*

As part of Uganda's internal commercial judging culture, judicial perception values of law's nature, the judicial role and responsiveness are the key internal sets of competing values identified as underlying the tension in Uganda. In the first place, there was the competition between the formalistic *rule of law values* and the flexibility perceptions of law's nature.

The rule of law values found dominant are: justice being conceived as legality, especially manifested by treating procedural justice as superior to all other considerations, as well as formality and logic being the rules of recognition of legal validity; predictability and certainty of law but not as contractual terms; objectivity, especially manifested by judicial adherence to the logical deduction of law, literalism in contract interpretation, and the notion of sanctity of contract; and rationality, signified by the derivation of contract law from general principles. Relatedly, formalistic judging has been motivated by the Langdallian perception of law,[50] which views it as discoverable fact from texts, determinate, formal, certain, and definable by logical deduction. However, the law is not perceived as value free, as this element hardly surfaced.

Some peculiarities appeared with regard to the role these rules of law values play in motivating formalism in Uganda's case. Notably, rationality had the least frequency, implying that the claim, that the derivation of contract law from general

---

[50] CC Langdell, *A Selection of Cases on the Law of Contract with References and Citations,* (Little, Brown & Company, 1871),) Preface; see text to section 3.2.1; 3.2.2; see text to section 7.2.3.

principles is central to formalism,[51] is exaggeration or not universally applicable. Further, conceptual ordering of law as an indication of rationality in Uganda's case did not include respecting the strict legal categorisation and classification, such as between contract and tort, although the two have not been fused to create 'contort'. Furthermore, contrary to claims by scholars like Frank,[52] certainty is not mere illusion by judges, but one of the key values motivating judges towards formalism, that should be balanced with flexibility values to find coexistence. However, it does not include certainty of contract, but law; as the former was insignificant.

On the other hand, flexibility has been motivated by perception of law as elastic and adaptable to changing market and other realities, coextensive with its retroactivity – being adaptable to accommodate future demands. These manifested by judicial recognition of normativity in commercial practices, as well as standards like reasonableness.

The other key internal flexibility value of law's perception identified is utilitarian instrumentalism, which partly supports claims by Pound[53] and Holmes,[54] that flexibility is motivated by the jurisprudence of ends as opposed to conceptual jurisprudence. It is only partially supported, because in Uganda, such instrumentalism is actually permitted by the law on judging. Further, the social policy indicated by Pound,[55] and Holmes,[56]is not what instrumentalism in Uganda serves. Rather, pure utilitarianism−manifested by adherence to the purposes; as

[51] Atiyah (n 5) 399-400.
[52] CL Barzun, 'Jerome Frank, Lon Fuller and a Romantic Pragmatism', (University of Virginia School of Law; Public Law and Legal Theory Research Paper Series, 2016-6, Jan. 2016, 5; also see Tamanaha (n 1) 65.
[53] R Pound, 'Mechanical Jurisprudence', (1908) 8:8 Columbia Law Journal, 611.
[54] OW Holmes, Jnr, 'The Path of Law' 10(8) Harvard Law Review (1897) 457,466-9.
[55] Pound, 'Mechanical Jurisprudence' (n 54) 609.
[56] Holmes, 'The Path of Law' (n 55) 466-67

well as practicality and functionality of the law and contractual terms, have contributed to motivating the flexibility in the tension.

Judges' perceptions of their role in commercial disputes have also contributed to the tension. In formalistic opinions, judges have perceived themselves as legal mechanics and contract police, who fix bolts in defined holes, and oversee the strict enforcement of rules and contractual terms—freedom of contract and non-interventionism. This is without intervention in contract, no matter the calls for fairness, justice, equity and the like. On their part, flexible opinions have exhibited judges' perceptions of their role as including lawmakers, guarantors of fairness and justice, and absolute settlers of disputes, otherwise interventionists. At times this included judging by mere hunch, fitting the claim by Holmes, that law is merely predictions of what judges will do about disputes.[57] Accordingly, judges have filled perceived gaps in, stretched or sidestepped, rules of law or contract terms, as well as interfered with contractual terms to find fairness and equity as a means to justice. The dominant sense of justice and fairness observed was a continuation of the pre-colonial *ubuntu*–an African traditional ideal that emphasises compassion, interconnectivity of humanity, the common good, and restitution and dispute settlement.[58]

Formalism in the tension has also been motivated by strong judicial responsiveness to the desire that the legal order regulates commercial transactions; otherwise expressed as judicial accountability or acceptability. It was mainly manifested by a value-free and mechanical application of rules, which

[57] OW Holmes, 'Law in Science and Science in Law', Collected Legal Papers (Harcourt, Brace and Howe, 1920) 210-43, 229

[58] See text to section 5.2.1.5, and 9.2.4.1.

remained resilient even after the 1995 constitution commanding courts to administer substantive justice at the expense of technicalities.[59]

For its part, flexibility has been motivated by judicial responsiveness to people's desire for justice, informed not by formal rules and technicalities, but experience, utility and peculiar contexts surrounding contractual formation, performance or adjudication. Accordingly, this study contributes to validating Holmes's declaration, that the life of the law is not logic, but amongst others thing, experience and the felt necessities of the time.[60] However, more validation appears from the study having extended the search to values external to the institution and person of the judge – the external judging criteria.

10.4.4.2 *The External Judging Criteria*

External to internal judging culture, the tension has been motivated by competing key systematic and doctrinal legal values, as well as extra-legal ones. In the systematic legal category, the legal system has been found to produce values that motivate judges towards both formalism and flexibility, but without mechanisms to reconcile the two. In this regard, four key values have been found to underlie formalism.

Firstly, related to the judicial rule of law values, is *perfectionism* of the legal system, defined by clarity, certainty, and consistency[61] constituted by the values of legality.[62] These include comprehensiveness, completeness or clarity, conceptual order, formality, and acceptability or responsiveness. Secondly is the value of legal

[59] Article 126 (2) (e).
[60]OW Holmes, *The Common Law* (Little Brown and Company 1963) 5.
[61] See text to Section 7.4.1.1.
[62] See text to Section 7.4.1.1.

power or judicial restraint, standing for constitutional and non-constitutional compulsion; adherence to which makes judges decide formalistically, in compliance with legal provisions.

Thirdly, conceptual formalism has motivated formalism, although not as the kernel claimed by Tamanaha.[63] Rather, alongside other formalism values, judges have adhered to constitutional interconnectivity and consistency, the legal classification of laws, detailed statutory rules regulating contracts and general contract principles. Fourthly is the growing influence of equalitarianism and legal neutrality, as judges presume equal bargaining power, and ignore social and economic classification; although this trend could have a political agenda, and therefore be instrumentalist.

On the flexibility side, three key systematic values were found to motivate judges in the opposite direction, of anti-formalism practices. Firstly is conceptual flexibility, manifested by normative recognition of indeterminate standards. Secondly is legal pluralism, especially manifested by the normativity of non-legal orders like business practices, experience and circumstances surrounding adjudication and contracting. Thirdly is the superiority of substantive justice over procedural justice, not only as an indication of law's adaptability and utilitarianism, but the constitutionally required ultimate sense of justice, practically perceived as substantialism/anti-formalism, and a licence to instrumentalism.

Besides systematic values, the competing external legal values identified as underlying the tension included those embedded in contract doctrine. First and foremost, the findings do not support scholarly claims that at the heart of

---

[63] Tamanaha (n 1) 71.

commercial adjudication are judicial adherences to contract as promise,[64] reciprocity/bargain[65] or consent.[66] All these values appeared insignificantly in the opinions analysed, which casts doubt on the universal application of the theories propounding each of them as being the ultimate value underlying contract adjudication, formalistic or flexible.

Instead, on the formalist side, the findings support Adams & Brownsword's thesis,[67] that market individualism is the set of values underlying both the nature of contract doctrine, and trends in adjudication.[68] It has been articulated under the sub-categories of market conformism and individualism, otherwise expressed as non-interventionism. Supporting the market through values like predictability and certainty, as well as enforcement of contracts/transaction security, has significantly motivated formalistic decisions. Likewise, the individual will, and autonomy of contracting parties, has been very influential; manifested by, among other things, adherence to freedom and autonomy as well as sanctity of contract or contract solidarity. However, in Uganda, although the most prevalent formalistic values, they still motivated formalism in combination with other key values, having barely accounted for more than 50% of opinions analysed.

---

[64] C Fried *Contract as Promise: A Theory of Contractual Obligations* (Oxford University Press, 2015) 1-8; CJ Goetz & RE Scott, 'Enforcing Promise: An Examination of the Basis of Contract' (1980) 89:7 Yale Law Journal 1261, 1264-65.
[65] IR Macneil, 'Values in Contract: Internal and External', (n 43) 340, 374-375; A. Hutchinson, 'Reciprocity in Contract Law', (2013) 24 Stellenbosch law Review, 3, 24
[66] RE Barnette, 'Contract is not Promise: Contract is Consent', (2012) 45 Suffolk University Law Review, 647, 649; RE Barnett, 'A Consent Theory of Contract', (1986) 86 Columbia Law Review 269, 287-289.
[67] JN Adams and R Brownsword, *Understanding Contract Law* (Thomson Sweet & Maxwell, 2007) 189, 203-207; JN Adams and R Brownsword, 'Ideologies of Contract', (1987) 7:2 Legal Studies, 205, 217-223.
[68] See text to sections 7.4.3 and 7.4.4.

On the other hand, the claim by Friedman[69] and Adams & Brownsword,[70] that consumer welfarism is a major motivator of flexibility, has been supported but not to the extent of being the prime value. It manifested by judges interfering with contracts to find contractual justice, fairness equity, and good faith for consumers, following statutory requirements or in exercise of discretion allowed by doctrinal aspects like normative standards, a phenomenon on the increase.

Flexibility has also been motivated by efficiency and wealth maximisation as values of contract doctrine, but not as means to social welfare, dependent on proof of unconscionability or even the prime values, in the sense in which law and economics scholars like Llewellyn understood them.[71] In Uganda, courts have adhered to these values and their manifestations, in service of commercialism, the individualist quest for maximum profits, as the higher value.

Finally, competing extra-legal values have also motivated the tension. On the formalistic side, the key one has been discreteness in contract behaviour, expediency and accuracy having appeared below the threshold. Courts have predominantly treated contracts as discrete, without recognising the resultant relationships, besides the rights and duties parties defined by rules of law or the agreed terms.

On the other hand, flexibility decisions have not been significantly motivated by recognition of relational contracting, for its relative frequency did not even pass the

---

[69] LM Friedman 'Contract Law and Contract Research' (Part 1) (1968) 20 Journal of Legal Education, 452, 456-457.

[70] Adams and Brownsword, *Understanding Contract Law* (n 68) 197, 205-206; Adams and Brownsword, 'Ideologies of Contract', (n 68) 210, 221-222.

[71] See text to section 9.4.1.2.

10% threshold. However, even without relational contracting, contract has persisted even during the authoritarian regimes, with adjudication being not only formalistic due to the discreteness of contract behaviour. This finding disproves Macneil's singular contract-behaviour explanation to flexibility, which made him claim lack of contract in authoritarian regimes, citing Uganda's 1970s.[72] The key motivating value categories were identified as judicial absolutism and social support. Judges were found to be exercising unrestrained authority, by ignoring not only legality but also professionally fundamental values like accountability. Instead, in such cases, decisions have been based on absolutism-oriented values like common sense, convenience or social-political realities, supporting the proposition that the political ideology of the time influences judging.[73] This is especially because judicial absolutism is a side effect of political absolutism,[74] which has been the dominant political culture in Uganda.[75]

Likewise, social support, sometimes termed public interest, has motivated judges in flexible decisions, in the pre-colonial sense of public acceptability of laws and judicial decisions. However, it has also featured in the political sense of decisions having to conform to 'public policy', understood as 'state policy'. This political sense needs further investigation, like other values whose wider attributes were not readily observable by a content analysis of judicial opinions. Meanwhile, it suffices to acknowledge social support as one of the values underlying flexibility, which

---

[72] Macneil, 'Values in Contract: Internal and External' (n 43) 409.
[73] M Wells 'French and American Judicial Opinion' (1994) 19 (1) (3) Yale Journal of International Law 81, 107-108 Holmes, *The Common Law* (n 59) 5; J OLoka-Onyango, *When Courts Do Politics: Public Interest Law and Litigation in East Africa,* (Cambridge Scholars Publishing, 2017) 76-112.
[74] Wells (n 75).

[75] ibid

need to be balanced with competing formalistic values to arrive at coexistence, as a way to manage the tension.

10.5 Balancing Competing Values for Coexistence

This section makes recommendations on how coexistence between formalism and flexibility can be achieved, as a way to managing the tension. Essentially, efforts should be made towards formulation of ultimate commercial judging guidelines, containing rules, principles and standards that achieve a balance between the competing values indicated in the scheme of values.[76] The content of these guidelines should aim to achieve three tasks.

In the first place, the guidelines should define the ultimate ends Uganda's commercial justice system aims to serve, because although western scholars advance social welfare as the goal legal systems aim to achieve,[77] in Uganda it has been found insignificant as a judging motivator. Instead, the dominant goals seem to be fairness and justice, articulated as both procedural and substantive justice. However, the parameters of substantive justice, which is even a constitutional standard, need to be clearly defined. My recommendation is that *ubuntu*-a traditionally and judicially acceptable conception of justice; should be formally adopted as the measure of substantive justice, and its socially acceptable constituent norms clearly elaborated.

Relatedly, the norms, values and aspirations of the people, which Article 126 (1) of the constitution provides as an alternative source of normativity to the law, should be investigated, synthesised, and clearly defined. Although a starting point, the

[76] See text to section 10.4.
[77] D Brion 'Norms and Values in Law and Economics', (1999) Encyclopedia of Law and Economics, 1044-46.

results of such a project should act as *jural* postulates, and thereby help in further understanding of the values underlying adjudication; and result in a more exhaustive scheme of values than appears in section 10.4 above. Judging with reference to judging guidelines derived from this scheme of values caters for constitutional legal pluralism, while at the same time serving formalistic competing values like predictability and certainty. This is however subject to interests jurisprudence's notion of relativity, which is to the effect that the significance of values depends on acceptability and recognition by a particular society, reflected by its current civilisation.[78] This should be satisfied by the scheme of values being not only elaborated through further research, but also modified periodically, following a content analysis of judicial opinions.

On the other hand, rather than the blind worship of predictability and certainty, the guidelines should aim at achieving realistic legal certainty. This is certainty that is contextual, taking into account the tension as a reality, in which legal certainty as a motivator of formalism has faced strong competition from flexibility, as well as other formalism-engendering values. Absolute certainty can mean unfair rigidity; however, it should not be a matter of case-by-case, rather a deliberate articulation of what realistic certainty should mean in Uganda's legal system, and how it should be secured during adjudication. The goal should be certainty as to what factors, legal and extra-legal, will guide judges in interpreting laws and contractual terms, rather than the actual nature, content and meaning of laws.

---

[78] F Powers 'Some Reflections on Pound's Jurisprudence of Interests' (1953) 3:1 Catholic University Law Review, 15-16.

Guidelines aimed at achieving the above goals will help regulate against both unprincipled flexibility and blind formalism. I make the following propositions, as samples of what could form the content of viable judging guidelines.

Firstly, similar to the mechanism in Articles 31-33 of the Multilateral Vienna Convention on the Law of Treaties,[79] but even more exhaustively, the guidelines should formalise, standardise and make hierarchical sets of norms, for the interpretation and application of contract laws and terms. They should provide for not a single norm, but the rules of law values being the default judging criteria, and clearly define when and how to resort to flexibility as the exception. Such an interpretation and application protocol is in essence the principle laid down by *Byamugisha, J.A* in *Kibalama v Alfasan Belgie CVB,*[80] and supported by US Justice Scalia.[81]

If adopted, the principle will not contravene the constitutional requirement for substantive law being superior to technicalities, because not all laws are mere technicalities. This explains the original support by the Supreme Court for the view by Rawls,[82] and Fuller,[83] that substantive justice should be subject to the law; and procedural justice its guarantor, and requirement for its application during

---

[79] Concluded on the 23/5/1969; see text to section 4.3.2.
[80] [2004] 2 EA 146.
[81] A Scalia, 'The Rule of Law as the Law of Rules', (1989) 56 University of Chicago law Review, 1175, 1186-87.
[82] DL Schaefer, *Procedural Justice Versus Substantive Justice: Rawls and Nozick* (Social Philosophy Foundation, 2007) 166.
[83] LL Fuller, *The Morality of Law*, (Yale University Press, 1969, Revised Edition) 51-63.

adjudication.[84] Further, as indicated in the scheme above, the values of Ugandans that the same constitution obliges judges to adhere to, include values of legality.

Secondly, to resort to flexibility, the guidelines should define triggers for the applicability of experience, utility, and a judge's personal attributes, as well as requiring proof of both the primary and normative facts. Triggering normative facts like impending absurdity from the literal interpretation of the rule, or inadequacy of the law to regulate the dispute, should be clearly defined, and requirement be made that they are proved before courts have authority to invoke flexibility considerations. This will guard against blind formalism, and unprincipled flexibility, by for instance taking care of both certainty and the high dominance of individual will, as values underlying formalism, while leaving room for the normativity of experience and utility.

Beyond the triggering facts, even the flexibility-engendered uncertainty surrounding the content of law will be managed, by defining what extraneous considerations judges can invoke, thereby serving the interests of formalism. This will not be new, as the International Court of Justice (ICJ) has so far tamed the tension; by following the 1969 Multilateral Vienna Convention on the Law of Treaties restrictions on such considerations, to the facts defining the contract's evolution, as well as current and future commercial practices. Similarly, the American Commercial Code has defined the nature of commercial practices judges can invoke to find efficiency.

Thirdly, the parameters beyond which a flexible judge cannot jump should be constructed. This will secure formalistic judicial restraint, as well as acceptability

[84] Utex Industries Limited v Attorney General (S.C.C. Application 52/1995); Kasirye Byaruhanga & Company Advocates v Uganda Development Bank (SCCA 2/1997); and see text to section 9.4.2.2.

and responsiveness, both in the formalistic and flexible senses. For instance, even where judges find themselves having to make law, consistency with existing laws should be a requirement, such that they can only fill gaps to maintain contract doctrine's consistency, rather than side-stepping, or stretching law beyond its province.

Fourthly, in the same vein, is adoption of proof-based discretion. For instance, regarding contract interpretation and enforcement, flexibility-triggering facts like bad faith, impending involuntary significant loss, or other absence of free will, requirement should be made for their proof. The viability of this principle as a judging guideline is supported by its would-be sceptics. The realists have proposed that unconscionability should be proved before judges invoke economic efficiency.[85] Likewise, in the High Trees Case,[86] Lord Denning only called for intervention with unreasonable terms to protect the weaker party; which implies measured intervention, backed by proof of enabling facts. Such a requirement for proof-based discretion will guard against interventionism for sheer hunch or commercialism, observed as underlying the tension in Uganda.

Fifthly, judges should be restricted to flexibly looking for answers within the context of the contract, to avoid absurdities such as happened in *Muwema & Mugerwa Advocates v Shell (U) Ltd.*[87] The judicial code of conducted cited by the Court of Appeal in that case, as forbidding the unprofessional manner in which the case had been decided in the High Court, does guide actual judicial choice in seeking answers to disputes. This principle will check the free ride judges use in judging by hunch or being motivated by inarticulate, but otherwise extra-legal considerations

[85] A Schwartz (n 40) 12, 16.
[86] Central London Property Trust Ltd v. High Trees House Ltd [1947] 1 KB 130.
[87] CA 18/2011 (Appendix 5: Case 30).

like political ideology. Decisions like the one in *Traces v Attorney General*, where the judge treated a President's political pronouncement at a rally as defining government policy and overriding statutory law and contractual terms, would be a nullity and automatically appealable. Therefore, judges would refrain from invoking unpredictable extra-legal considerations, without failing to intervene in unfair contracts, as it would be clear how experience, utility and the like can be used.

Sixthly, the guidelines should bring certainty to key indeterminate standards and concepts, by assigning them Uganda's context-specific meanings. For instance, reasonableness should be defined to mean what is proved to be ordinarily acceptable in the Ugandan marketplace, as opposed to leaving it to judges' whims. Likewise, social support and its coextension of public interest should be interpreted only within the context of the objectives and directives of state policy in the constitution. These are not entirely certain themselves but provide a framework within which courts should understand social support as a basis of normativity.

Finally, another key guideline for adjudication should be responsiveness to both the legal order as the default, and social aspirations as the exception. Responsiveness should be understood as acceptability of judicial decisions, as opposed to the sense proposed by Eisenberg, which requires judicial responsiveness to legality and the discourse from the legal profession.[88] Eisenberg's proposal leaves the ends of public aspirations and acceptability of judicial decisions beyond rules not served and the tension untamed. To achieve coexistence, a decision should be acceptable depending on how strongly it responds to the legal order, which will now include judging guidelines aimed at coexistence goals.

---

[88] Eisenberg (n 14) 6-9.

However, in cases where flexibility-triggering facts will have been proved, then the decision would be acceptable depending on how strongly it also responds to social aspirations, ascertainable not by open-ended judicial discretion, political manoeuvres or hunch. Rather, judges should use reasoning that conforms to the national objectives and directives of state policy forming the preamble to the constitution, as the *grundnorm* proposed by Kelsen, the conformity to which determines the validity of any judge-made laws.[89] A more predictable and certain legal framework will involve resolution of the indeterminacy in those objectives and directives, by for instance defining how they rank amongst themselves, as well as formalising informal normative sources like custom. But even before this refinement is done, formally declaring the objectives as the *grundnorm* will provide certainty to the users of commercial law, as this will become the arena within which flexibility reasoning is justifiable and legally permissible.

Such a view of responsiveness achieves a balance between the formalism-engendering values of conceptual formalism, legal order responsiveness, and rule of law values, on one hand, and the flexibility values of conceptual flexibility, adaptability, retroactivity of law, and social support, on the other. A case in point is *Dr Syedna Mohamed Burhannudin Saheb & 2 Others v Jamil Din & Others,*[90] where the judge was motivated to give service to conceptual formalism, judicial rationality, as well as freedom and sanctity of contract, representing market individualism, refusing to interfere with contract on grounds of failure to find clear principles on unconscionability or justice in bargains.

---

[89] H Kelsen, *General Theory of Law and State*, (Harvard University Press 1949) 115

[90] [1973] 1 EA 254.

However, if the guideline was in force, such formalism values would be served by the guidelines permitting strict adherence to contractual terms and rules of law, but also creating such cases as exceptions in which the judge has to go beyond the existence of principles or what appears on the face of the contract. Accordingly, flexibility values like adaptability, social support, legal pluralism and the relational nature of contracting would also be served. This is because judges would look at whether the terms agreed should be viewed as harsh and unconscionable, taking into account Uganda's history, experiences and customs relevant to the particular community the contracting parties belong to, as required by the national objectives. The guideline on proof of normative facts would in this case combine with responsiveness to manage the tension, and reduce legal uncertainty, as acceptability of judicial opinions based on social responsiveness would still have to be proof-based.

The above examples serve to demonstrate the viability of coexistence of formalism and flexibility, managed by formulation of commercial judging guidelines that target the balancing of competing values in the tension between the two judging phenomena in Uganda. More guidelines can be constructed along this course, and the above examples can be further refined or elaborated, but the time and space in this study could not permit doing so. Nevertheless, it suffices that the sample guidelines support the viability of a mechanism for attaining coexistence between formalism and flexibility, and thereby have the tension managed, towards realistic legal certainty in Uganda's commercial adjudication. Therefore, the study has a lot of relevancy and impact on knowledge and practice relating to commercial justice in Uganda, as well as other common law jurisdictions.

10.6 Relevance and Impact of the Study

The study has contributed to knowledge by expanding on research that supports the possibility of coexistence between formalism and flexibility, as a way towards managing the tension between them. Secondly, it expands the applicability and therefore validates the jurisprudence of interests, to the extent that the theory attributes prevalence of the tension to competing values within adjudication. Thirdly, it operationalises the theory's thesis that the solution to the tension lies in

discovering the competing interests, from court cases, weighing them, and balancing the dominate ones. Fourthly, the study expands knowledge by overcoming the weaknesses of interests jurisprudence, especially the failure to articulate how the competing values can be discovered and elaborated, as well as the way they should be balanced, the approach of leaving it to the judges being self-defeating.

Fifthly, the study contributes to knowledge by applying content analysis methodology to the mechanism for tension management recommended by interests jurisprudence, demonstrating their natural affinity and using it to explain phenomena in real court cases. Therefore, it thereby also validates Hall & Wright's claim that content analysis is the appropriate methodology for understanding what underlies judicial opinions.[91]

Sixthly, the study contributes to knowledge of the tension as a reality in Uganda's commercial adjudication, as well as its foundations, being the values competing for sustaining both formalism and flexibility. It is a rare inquiry into how and why judges reach decisions, not only in Uganda but also globally.[92]

In this case, and seventhly, the study expands the challenge to monist jurisprudence, as well as the exclusive doctrinal understanding of adjudication, by validating a multivalued understanding of the values underlying the tension. A scheme of values is therefore identified, detailing the foundations to the tension.

---

[91] AM Hall and RF Wright, 'Systematic Content Analysis of Judicial Opinions', 96 CAL. L. Rev 63 (2008) 63-124.
[92]TP Spiller and R Gely, 'Strategic Judicial Decision-Making', in Whittington KR and others (eds), The Oxford Hand Book of Law and Politics (Oxford University Press 2008) 34.

Eighthly, the study demonstrates how the tension can be managed, and how the mechanism to do so can be formulated/constructed; hitherto a gap in knowledge admitted by many notable scholars. The recommendations made can be developed further and made the basis for a comprehensive set of commercial judging guidelines for managing judicial choice, thus the tension. Therefore, the study is useful to the Ugandan judiciary, as well as adjudicatory theory generally; in helping to streamline the way commercial cases are decided and help to manage the tension.

Ninthly, it will help enhance certainty in commercial law, if the recommendations are adopted, but even before that, by bringing understanding to what motivates judges in Uganda to decide either flexibly or formalistically. Such certainty will benefit private counsel in advising clients, as well as the business community, including foreign investors, about what to expect in Ugandan courts. Finally, the study has been carried out within certain limits, as well as areas for further research it provokes that I proceed to acknowledge.

10.7 Extent of the study's Contributions

For this study to be accomplished within the time and space permitted, while at the same time attaining research depth, validity and replicability, it has been restricted within certain parameters. Firstly, it has focused on hard cases, which may not be representative of the general commercial justice system; yet judging guidelines cannot be formulated to only work in hard cases. This is especially true when these cases are defined by the difficulty of their resolution, rather than the subject matter, or other legally recognised form of categorisation. But even then, it is in hard cases that the tension can be clearly and easily demonstrated. Further, it is in hard cases that the tension is more likely to manifest, as judges have the legal professional discourse as a compelling guide to what answer is available in a straightforward dispute.

Secondly, the findings from the content analysis were dependent on the researcher's inference capabilities, which on the face of it creates room for different results if another person considered the same observations. The theory and

literature relied on to guide inferences could also be understood differently by different people. However, it is the nature of content analysis methodology that inferences be drawn from words used in texts to arrive at findings. In this case, validation is made by detailing the theoretical premises relied on, as was done in chapters three, four, six and eight.

Thirdly, the research does not investigate or offer a mechanism for ascertaining the role of the wider political, social or economic judging environment in influencing the tension. Doing so would have helped explain the deeper meaning and contextual setting of the values observed during the content analysis. However, that would require a dedicated investigation that employs techniques for eliciting results beyond judicial opinions. But even then, without a prior understanding of what judicial opinions reveal as the values motivating formalism and flexibility, such a wider inquiry would be merely theoretical, without grounding in the reality of adjudication.

Fourthly, in operationalising the interests jurisprudence 'mechanics', a 10% prevalence has been used as the threshold, in weighing and determining the dominant values to discuss and recommend to the scheme of values. One could however argue that this does not guarantee conclusiveness. It for instance fails to guard against the possibility of a value having appeared minimally, or even not appeared at all, but being a strong influence that is simply not being articulated in the opinions. Therefore, suppressive phenomena like judges fearing their decisions being overturned on appeal, or even public backlash, are not catered for. In any case, the 10% threshold may arguably be too high a bar to disqualify a value. However, a bar had to be used for coming up with dominant values, and since the space left to 100% is much higher than the one to 0%, 10% presents a safe bottom line, that ensures a substantial portion of all key values being captured.

Fifthly, the content analysis took into account multiple influences that certain indicative values and manifestations had. Content analysis methodology guarantees reliability and validity of results by treating each analytical unit as having one relevance, subject to the field of study, just as interests jurisprudence

propose to treat all values as equal. The multiple relevance was adapted as such an exception, since in law one variable, be it a value, principle or rule can have multiple implications in the same set of facts, thus the very essence of hard cases. Nevertheless, the values identified can be further tested through a social-legal inquiry, which would involve interviewing judges. Therefore, the study presents material for the further research it may provoke.

10.8 Areas for Further Research

The study invites research into what judges themselves have to say about their motivations, and therefore the foundations to the tension. The results in this study need to be used as the beginning and not the end of the investigation into the competing values in Uganda's commercial adjudication, so as to more exhaustively identify the scheme of values for balancing.

In the same way, the linkage between the values observable from contents of judicial opinions and the wider historical, social, political, and economic contexts surrounding judging needs further investigation. Such an investigation should be guided by exploratory social-legal research methodologies capable of tapping into all relevant sources of data.

Finally, investigation also needs to be done into whether judging guidelines will actually help manage the tension, or simply create another source of judicial restraint engendering further formalism at the expense of justice and fairness. Likewise, which rules, principles and standards should constitute judging guidelines, needs more examination as a deliberate pre-regulation study.

10.9 Final Conclusion

In conclusion, the tension between formalism and flexibility is a problem and reality facing Uganda's commercial adjudication. It has manifested by the two judging approaches having been concurrently practised across judging history, engendered by competing values, without a coherent, certain and rational mechanism that would allow them to coexist. Contrary to the dominant theoretical view, coexistence between the two is not only necessary in Uganda, but also

theoretically, and demonstrably viable, as a way to managing the tension and enhancing legal certainty.

The way to arrive at coexistence is to operationalise interests jurisprudence, to the extent that there is need for discovering the competing values underlying the tension, from judicial opinions; then weigh them, and in relation to the time in issue, balance the dominant ones. The balancing should be done through the construction of hierarchically ordered ultimate judging guidelines, informed by clearly defined goals that should include clarifying Uganda's conception of justice, *jural* postulates, as well as a realistic-contextual and institutionally based conception of legal certainty.

In terms of competing values to be balanced, a content analysis of Uganda's judicial opinions has revealed a scheme of values, demonstrating that both formalism and flexibility have been motivated by values internal and external to judging culture. In the internal category, the tension has been motivated by the conflict between values of perception of law's nature, as well as the judge's roles in disputes, plus judicial responsiveness to legality on the one hand, and socially perceived justice on the other. Likewise, conflicting legal external values of both a systematic and doctrinal nature have been at play, such as the competition between substantive and procedural justice, as well as consumer welfarism and market individualism. In the extra-legal category, formalism has been motivated by discreteness in contracting, while judicial absolutism and social support have competed to maintain flexibility.

It is proposed that the tension can be managed by making formalism and flexibility coexist, through formulation of commercial judging guidelines. These should, among other things, contain rules, principles and standards that help to standardise and formalise law and contract interpretation, while allowing adaptability, utility, fairness and justice to be served, whenever the case qualifies. Also, indeterminate standards like substantive justice, fairness, and reasonableness should be contextually and with certainty defined, as should the parameters and circumstances for invoking extra-legal norms. Such guidelines

should aim at creating realistic legal certainty, while avoiding unfettered formalism or flexibility.

Therefore the study contributes to knowledge by expanding adjudicatory theory. It expands understanding of the tension as a real problem in commercial adjudication, as well as its manifestations and foundations, generally, and particularly in Uganda. The study also demonstrates that management of the tension, through the coexistence of formalism and flexibility, is not only necessary but theoretically and demonstrably viable. This can be achieved by operationalisation of interests jurisprudence's normative prescriptive theory.

The study adds that the judging guidelines should be not only hierarchical, or doctrinally focused, but more importantly, multiple-value and institutionally inspired. The search for and weighing of such multiple competing interests/values proposed by interests jurisprudence can be undertaken, using content analysis methodology; the coding being informed by contract theory; legal theory on formalism, flexibility and management of the tension as well as other existing literature, on both the tension and its foundations. The findings should follow both direct observation, as well as inferences, guided not only by the value postulates; but also the institutional theory of law's thesis of understanding all legal phenomena through their surrounding contexts. Accordingly, the study provides a good foundation for further research into how the tension between formalism and flexibility can be managed, not only in Uganda, but also universally.

APPENDIX 1: Formalism And Flexibility In Hard Cases During Colonial Uganda (1894-1962)

No.	CASE TITLE	CITATION	COURT & JUDGE	CASE SUMMARY	JUDICIAL APPROACH	INTERNAL VALUE (S)	EXTERNAL VALUE (S)
1.	Nasanairi Kibuuka v A.E. Bertie Smith	(1908) ULR Vol. 1 41	HC	The court held that the 1900 Uganda Agreement was a source of rights in law, and as such specific performance could not be ordered where under native law the *Lukiiko* had to give consent before a private transaction like the purchase of land could be made and where such consent was not given.	Formalism	○ Literal and Logical deductive interpretation, or mechanical application of rules (**LOGICAL-MECHANIC**).	○ Positivist Conception of Law (**POSITIVISM).**
2.	Tota Ram v Mistry Waryam Singh.	[1933] 5 ULR 76	HC- Abraham C.J	It was declared that without the need to rely on any legal principles, common sense was enough in interpreting the law, such that where an enactment stated that 'where the principal though disclosed cannot be sued,' it meant that where the principal cannot be sued at the time the contract is made. The Chief Justice reasoned that: 'After all, as a certain distinguished jurist once said, our law is rapidly degenerating into common sense'.	Flexibility	○ Abductive Reasoning in interpretation of statute or precedents (**ABDUCTIVE**): Judge's Prejudices and Intuitions Used to apply law i.e. The judge applied the law with regard to what made sense to him in the circumstances and context.	○ Judicial Absolutism (**JA**); ○ Conception of Law as Predictions (**LPREDICTIONS**); ○ Conception of Law as Experience (**LEXP)**; ○ Social Support as a Rule of Validity and Recognition of Law (**SOCIAL SUPPORT**).

3.	Mwenge v Migadde	(1932-35) UPLR Vol. 5, 98	HC	Notwithstanding the pleas for justice based on customary law, the court held that: If the provisions of any law were repugnant to the continued existence of any custom, that custom must be treated as abrogated and destroyed even if it was not done expressly. The repugnancy test of the validity of customary law was taken as literally understood.	Formalism	○ Literal and Logical deductive interpretation, or mechanical application of rules (**LOGICAL-MECHANIC**); ○ Internal Judicial Guidelines (**JUDGING GUIDE**): Adhering to hierarchy of norms under the Uganda Order in Council and later the Judicature Act.	○ Positivist Conception of Law (**POSITIVISM**); ○ Tension Management Mechanism (**MGT):** with Flexible Native Customary Norms inferior to Largely Formalistic Western Law.
4.	Mohamed Azim v Ladha Kassam	(1932-35) UPLR Vol. 5 130, 133	HC	The words 'in a running condition' describing the quality of goods sold were interpreted to mean that the seller had to supply equipment to the buyer's ginnery and leave it running. Arguments about fairness that would allow the seller to merely supply goods of merchantable quality without regard to the end use by the buyer were rejected.	Formalism	○ Literalism (**LITERALISM**)	○ Freedom and Autonomy of Contract (**FOC**): Judicial Non-Interventionism; ○ Conception of Contract as Discrete (**DISCRETE**).
5.	Mohanlal Gandhi v Suleman Mithah	(1932-35) UPLR Vol. 5 193	HC	No evidence of fraud, trickery, pressure or undue advantage had been adduced and the plaintiff was proved to have been of merchant age with no mental incapacity. The court held that the defendant	Flexibility	○ The judge making law (**LAW MAKING**): Sidestepping the Rules of Law; ○ Judicial Interventionism in Contract (**JINTERV**):	○ Contractual Justice (**CONJUS**), through Judicial Interventionism; ○ Economic Efficacy

				(lender) still had to prove that the borrower was even then, not entitled to relief on the ground that it was "a hard bargain". Therefore, the equitable doctrine of unconscionable bargains had been invoked.		Fairness and equity invoked to Interfere with contract terms.	(**EFFICIENCY**); ○ Law as Experience (**LEXP**).
6.	Gulam Mohammed v E. Ethel.	(1932-35) UPLR Vol. 5 ULR 290	HC	In an employment contract case, the court accepted informality and flexibility by accepting informal terms as binding.	Flexibility	○ Judicial Interventionism in Contract (**JINTERV**): Filling gaps in contracts in Contracts, i.e., Treating written terms as rebuttable and only primafacie; ○ Recorgnising inequality amongst contracting parties (**NO-EQUALITY**).	○ Inequality before The Law amongst Contracting Parties (**INEQUALITY**); ○ Systematic Flexibility (**SYSTEM FLEXTY**): ○ Informal representations as valuable as written terms; ○ Contractual Justice (**CONJUS**), through Judicial Interventionism.
7.	Alibhai Virji v R. Merryweather	(1910-20) ULR 363	HC: Walker Ag. J	Under a contract for the sale of goods, the seller appropriated goods to the contract in a deliverable state but the seller only took delivery of some and refused to take the rest. The seller then sued for the price of the balance. On appeal, the respondent sought the appeal to be dismissed on ground that the point being argued	Flexibility	○ Undue regard to procedural defects to do substantive justice (**PROC-DISREGARD**): insufficient pleadings accepted; ○ Using indeterminate doctrines (**INDETERM-DOCTRINE**);	○ Law as a Means to An End (**LMEANS**); ○ Conceptual Flexibility (**CONCEPT FLEXTY**): Including Legal Indeterminacy.

				was not pleaded in the first place. He also relied on *Hassan Merali v. Nanji khimji UHCA 4/1917* that had decided that the unpaid seller in such cases had no right to bring an action for the price, as that amounted to specific performance, yet damages would suffice. ○ The court held that notwithstanding the Sale of Goods Ordinance, the Indian Contract Ordinance could be invoked to determine a sale of goods dispute; ○ The unpaid seller could exercise the right to bring an action for the price as the most obvious remedy but reserved the right to exercise other subsidiary remedies like lien of the goods, stoppage in transit, rescission and resale of the goods with its contingent right to sue for damages; ○ The sale of goods having been for unascertained goods, they were appropriated to the contract and thereby delivered constructively; ○ In Uganda, unlike England and South Africa, courts were not so strict on pleadings, so the appeal would not be dismissed.		○ Law understood and Applied Purposively (**PURPOSIVE**);	
8.	Daudi Busulwa v	(1933) 5	HC	The court restated the law that in any dispute between natives the	Formalism	○ Literal and Logical deductive	○ Positivist Conception of

	Texas C. (South Africa) Ltd	ULR 55		native courts had exclusive jurisdiction. The court further noted that there was a lot of injustice from delays of the 20 months before a vesting order could be enforced and the inability of native courts to enforce their judgments, but regretted it could not help.		interpretation, or mechanical application of rules (**LOGICAL-MECHANIC**). ○	Law (**POSITIVISM**); ○ Role of Courts as implementers not makers of the law (**ROC-NONMAKERS**); ○ Certainty of Law (**COL**).
9.	Kajubi v Kabali	(1944) 11 EACA 37	EACA-Gray, CJ.	The East African Court of Appeal held that traditionally in *Buganda* no individual or group of individuals could modify the original customs of a native community, not even the court, without the assent of the native community. This had the effect of modifying Buganda's customary law through judicial flexibility, by removing the King's power to amend the law. **Note:** The flexibility of the court here was to introduce formalism in customary law by making its rules fixed and only changeable by a rigorous process of obtaining public support.	Flexibility	○ The judge making law (**LAW MAKING**): Amending law to satisfy public support.	○ Judicial Absolutism (**JA**); ○ Social Support as a Rule of Validity and Recognition of Law (**SOCIAL SUPPORT**); ○ Opportunism (**OPPORTUNISM**); ○ Perception of law as Predictions (**LPREDICTIONS**): The Role of Judges: To Fill Gaps in the Law.

10.	Katate v. Nyakatukura	(1952-56) ULR 47	HC	The court highlighted the uncertainty in the indeterminate law on jurisdiction of the courts by holding that in view of s.8 of the Native Courts Ordinance, business associations like companies, even if wholly owned by Africans, were not deemed African and if an African was party to a dispute, it could be tried by the protectorate courts. Therefore, Africans who traded under corporations would be able to ouster the jurisdiction of native courts.	Flexibility	○ Law understood and Applied Purposively (**PURPOSIVE**); ○ Contextual Interpretation and Application of the words of rules (**CONTEXTUAL**); ○ Exercising Unrestrained Judicial Authority (**UNRESTRAINED AUTHORITY**): Jealously Guarding Jurisdiction.	○ Law as a means to an end (**LMEANS**); ○ Conceptual Flexibility (**CONCEPT FLEXTY**): Including Legal Indeterminacy; ○ Judicial Self Preservation (**JSELF-PRESERV**).
11.	Zakariya Wotoitidde v Patrisi Kivubuka	(1932-35) ULR 138		In commercial matters, the protectorate and African courts had concurrent jurisdiction in provinces outside Buganda and a plaintiff would have a choice of forum, whereas in *Buganda*, the High Court had no jurisdiction to entertain a commercial dispute where all the parties were African. In this case, the High Court held that even a decree of the *Lukiiko* (native legislature and superior court) could not be filed for enforcement in the High Court.	Formalism	○ Literal and Logical deductive interpretation, or mechanical application of rules (**LOGICAL-MECHANIC**); ○ Giving Procedural Justice Sway (**PROCED-SWAY**).	○ Positivist Conception of Law (**POSITIVISM**); ○ Procedural Justice as superior to substantive justice **(PJ).**
12.	Semu Kiseka Mukwaba	(1952-56) ULR 74	HC	In this case, it was considered whether under Article 6 of the Uganda Agreement that acted as	Formalism & Flexibility	○ Literalism in contract interpretation (**LITERALISM**); ○ Literal and Logical	○ Positivist Conception of Law (**POSITIVISM**):

	& Others v Daudi Musoke Mukubira (*N.B. Both Formalism and Flexibility were applied in this decision*)			the colonial constitution, recognition of the native King (Kabaka) was to be guaranteed on condition that the *Kabaka* followed Her Majesty the Queen's laws and cooperated with her. The *Kabaka* opposed British plans to create an East African Federation, and for that reason, he was deposed and exiled. *Mukwaba* challenged the colonial government's actions and partly argued that the Uganda Agreement could not override Buganda's tradition under which the *Kabaka* was the sovereign, and that it was not a source of law. The court: ○ Interpreting the terms of the 1900 Uganda Agreement and its amendments effected by the Laws Agreements of 1910 and 1935, declared them as part of the constitution of Uganda, and thereby a source of law and rights in Uganda. ○ On the question of whether Article 6 of the 1900 Uganda Agreement conferred power on the protectorate to make vague regulations regulating the appointment of Regents, decided to give effect to the intention of the regulations and what it		deductive interpretation, or mechanical application of rules (**LOGICAL-MECHANIC**); ○ Contextual Interpretation and Application of the words of rules (**CONTEXTUAL**): Meaning of Law based on Necessities and Political Interests of the time; ○ The making Law (**LAW MAKING**): Filling gaps in the law; ○ Law understood and Applied Purposively (**PURPOSIVE**); ○ Contract viewed as a network of or other relations (**RELATIONS**).	Kelsenian Pure Conception of validity of norms; ○ Conception of law as a means to an end (**LMEANS**); ○ Perception of law as Predictions (**LPREDICTIONS**): The Role of Judges: To Fill Gaps in the Law; ○ Conception of law as Experience (**LEXP**); ○ Conception of Law as a means to an end (**LMEANS**); Legal Validity and Contractual Obligation judged by Practical Utility; ○ Conception of contract as Relational (**RELATIONAL**).

				considered to be their practical use. ○ Court further reasoned that it had to take a practical view of filling a vacuum because of the underlying interests the law served.			
13.	Iron & Steel Wares Limited v C.W. Martyr & Co	[1956] 23 EACA 175	HC	In a dispute where defective goods had been supplied, the court agreed that the plaintiff was entitled to reject them or treat the breach as a mere breach of a warranty and claim damages. **The court**, however, went on to hold that since the plaintiff had refused to take the goods offered to him in mitigation of the loss, he was not entitled to damages with regard to the loss. This was a resort to what appeared to be just in the case, notwithstanding the black letter of the law.	Flexibility	○ Contextual Interpretation and Application of the words of rules (**CONTEXTUAL)**;	○ Economic Efficacy (**EFFICIENCY**); ○ Conception of Law as Experience (**LEXP**); ○ Legal Pluralism (**LP**);

14.	Alibhai Virji v R. Merrryweather	(1932-35) UPLR Vol. 5 ULR 363	HC	The court held that notwithstanding the Sale of Goods Ordinance, the Indian Contract Ordinance could be invoked to determine a sale of goods dispute.	Flexibility	○ Using indeterminate doctrines (**INDETERM-DOCTRINE**); ○ Legal Classificatory Categories ignored (**NO CATEGORIES**).	○ Conception of Law as a Means to An End (**LMEANS**); ○ Conceptual Flexibility (CONCEPT FLEXTY): Including Legal Indeterminacy.
15.	Kifuse v Binzali	(1952-56) ULR 157, 158	HC	The native court had insisted on having jurisdiction and heard a debt recovery dispute in which the question of the existence or otherwise of a partnership had arisen. This was notwithstanding the law being that native courts could not hear cases that required the application of the Partnership Ordinance. The High Court agreed with the position taken by the native court, both courts looked at the substantive dispute being a debt contract and refused the case to be dismissed on a mere technicality, although this was possible.	Flexibility	○ Inductive Reasoning in interpretation of statute or precedents (**INDUCTIVE**); ○ Undue regard to technical or procedural defects to do substantive justice (**PROC-DISREGARD**).	○ Substantive Justice as superior to procedural justice (**SJ**).
16.	Noormohamed Janmohamed v. Kassamali	(1953) 20 E.A.CA. 8	HC	In an application for injunctive reliefs, it was held that one of the grounds courts would consider was whether the applicant would suffer substantial and irreparable injury,	Formalism & Flexibility	○ Contextual Interpretation and Application of the words of rules (**CONTEXTUAL**);	○ Accuracy in contracting and adjudication (**ACCURACY**); ○ Economic

	Virji Madhani			which meant injury that would not be atoned by way of an award of money as damages.		○ Considering money as the measure of value (**MONEY-VALUE**).	Efficiency (**EFFICIENCY**): Commercialism and Wealth Maximisation;
17.	Mengo Builders & Contractors Limited v Kasibante	[1953] 1 EA 591	HC	The term African had a different meaning in section 3 of the Interpretation and General Clauses Ordinance (Chapter 1), from that contained in section 2 & 3 of the Buganda Courts Ordinance (Chapter 77). The court took the definition in the Buganda Courts Ordinance to hold that the Principal Court of Buganda had no jurisdiction over limited liability companies.	Formalism	○ Literal and Logical deductive interpretation, or mechanical application of rules (**LOGICAL-MECHANIC**).	○ Positivist Conception of Law (**POSITIVISM**).
18.	Nanji Khodabhai v Sohan Singh & Another	[1956-57] 8 ULR 304	HC-Keatinge, J.	Sections 49 (12) and 50(1) of the Bills of Exchange Ordinance required reasonable notice of dishonour of a cheque to be given to the issuer and Section 50(2)(b) provided for waiver as excusing the failure to give notice. According to court: ○ There was evidence of waiver, but it was not pleaded, therefore not available as a defence; ○ It would be unfair and unjust to	Formalism	○ Giving Procedural Justice Sway (**PROCED-SWAY**): Strict adherence to pleadings	○ Procedural Justice as superior to substantive justice (**PJ**); ○ Certainty of Law (**COL**).

				allow the plea of waiver being raised at a late stage, so court would not add the plea.			
19.	Commissioner of Income Tax v Jaffer Brothers Limited	[1957] 1 EA 519	HC-McKisack C.J.	A contract and payment where a taxpayer paid a tenant in order to secure the premises for business was held as unallowable as a deduction. The court reasoned that: ○ No authorities had been cited to show that although this was a borderline case, it was a capital and not a contractual expense; ○ Mitchell v. B.N Noble Limited [1927] 1 KB 719, in which a payment by a company to an employee to get rid of him and avoid a scandal was treated as an allowable deduction was not identical, therefore not applicable.	Formalism	○ Giving Procedural Justice Sway (**PROCED-SWAY**): Strict adherence to pleadings	○ Certainty of Law (**COL**); ○ Positivist Conception of Law (**POSITIVISM**); ○ Conceptual Formalism (**CONCEPT-FORMAL**).
20.	Chotabhai M. Patel v Chaturbhai M. Patel & Another	1958] 1 E.A. 743	HC-Lewis J.	A bill of sale was in issue, having a date that was after the action had commenced and tendered in evidence as evidence of third party rights over the allegedly secured chattels. An issue arose as to the applicability of the English Fraudulent Conveyances Act of 1571 in Uganda.	Flexibility	○ The making Law (**LAW MAKING**): Filling gaps in the law; ○ Contextual Interpretation and Application of the words of rules (**CONTEXTUAL**); (The applicability of English law was	○ Contractual Justice (**CONJUS**), through Judicial Interventionism; ○ Perception of law as Predictions (**LPREDICTIONS**): The Role of Judges: To Fill Gaps in the Law;

				The judge held that although the said Act had been repealed in England and re-enacted in the Law of Property Act of 1925, which was not an Act of General Application received in Uganda in 1902, it was still law in Uganda. The Judge reasoned that since the object of the law was to render avoidable dispositions in fraud of creditors including bills of sales, it would apply in Uganda.		subject to local circumstances of the Protectorate).	○ Conceptual Flexibility (**CONCEPT FLEXTY**): Including Legal Indeterminacy; Economic efficacy (**EFFICIENCY**); ○ Law to be judged by its Practical Utility (**PRACT-UTILITY**).
21.	Fabiano Bukenya v David Mutebi & Another (*N.B. Both Formalism and Flexibility were applied in this decision*)	[1959] 1 EA 366	HC-Lewis J.	In an action for recovery of a liquidated sum between Africans, court held that the Buganda Courts had jurisdiction, reasoning that: ○ In the pleadings, the plaintiff did not mention any particular section of the Sale of Goods Ordinance, and need not invoke one; ○ It was extremely difficult to say with certainty what suits were not triable by African courts, and no general rule could be laid down. **Note:** ○ The formalism was used in the conspiracy sense, as court acknowledged the uncertainty and ambiguity in the law on	Flexibility & Formalism	○ Giving Procedural Justice Sway (**PROCED-SWAY**); Strict adherence to pleadings; ○ Flexibility recognised as a judging paradigm (**FLEXIBILITY**).	○ Systematic Flexibility (**SYSTEM FLEXTY**); ○ Conceptual Flexibility (**CONCEPT FLEXTY**): Including Legal Indeterminacy; ○ Conception of Law as A Means to An End (**LMEANS**).

				jurisdiction, and sought to use it for ends of allowing African courts to determine Africans' affairs.			
22.	Amin Electrical Services v Ashok Theatres Limited	[1960] 1 EA 298	HC-Sheridan, J.	In the plaint claiming consideration for labour and materials supplied, there was no averment that the charges and prices were either agreed upon or reasonable. The court held that the defect in the pleading was curable by amendment and refused to dismiss the suit.	Flexibility	○ Undue regard to procedural defects to do substantive justice (**PROC-DISREGARD**)	○ Conception of Substantive Justice as superior to procedural justice (**SJ**); ○ Perception of law as Predictions (**LPREDICTIONS**): The Role of Judges: To Fill Gaps in the Law; ○
23.	Kanji Naranji Lakhani v Salim Mohamed Bin Name	[1960] 1 EA 358	HC-Sir McKisack CJ.	A claim for the price of goods sold to a Mohamedan (Muslim) minor originally from Kuwait but already married, and whole family had worked and settled in Uganda for a while. The court held and reasoned that: ○ The age of majority should not be looked at under the common law, but the country of the defendant's domicile, which was presumed to be Kuwait, since the law always presumes against change of domicile; ○ Under Islamic law in Kuwait, there are different schools of	Flexibility	○ The judge making law (**LAW MAKING**): Sidestepping rules to justify decisions seen by judge as fair; ○ Inductive Reasoning in interpretation of statute or precedents (**INDUCTIVE**) i.e. Rules and Concepts determined Post, not Pre-decision and Different normative sources used to find the law).	○ Legal Pluralism (**LP**); ○ Judicial Absolutism (**JA**); ○ Conception of Law as a means to an end (**LMEANS**); ○ Perception of law as Predictions (**LPREDICTIONS**): The Role of Judges: To Fill Gaps in the Law;

				thought with different ages of majority, ranging from 15-18; ○ Since the defendant alleged that he did not know his age but was not more than 16 years, he was of majority age and liable.			
24.	Harshad Limited v Globe Cinema Limited and Others	[1960] 1 EA 1046	HC- Sheridan J.	A mortgage deed that was not signed by the mortgagee but registered was held to be enforceable. Court reasoned that: ○ The defendants could not rely on mere technicalities when they acted upon the deed; ○ The requirement under the law that both signatures should be there was merely a matter of form not substance.	Flexibility	○ Undue regard to procedural defects to do substantive justice (**PROC-DISREGARD**); ○ The judge making law (**LAW MAKING**): Sidestepping the Rules of Law (i.e. Prescribed Statutory Formalities waived by court).	○ Substantive Justice as superior to procedural justice (**SJ**); ○ Perception of law as Predictions (**LPREDICTIONS**): The Role of Judges: To Fill Gaps in the Law; ○ Judicial Absolutism (**JA**).
25.	Twentsche Overseas Trading Company Limited v. Uganda Sugar Factory Limited	(1945) 12 EACA 1.	Privy Council Appeal - Lords Thankerton, Wright, Goddard, Sir Madhavan & Sir Beaumont	Under the sale of goods contract, the parties agreed to the appellant selling rails to the respondent, specifying them as Krupp. The specified goods were known to be only manufactured by a Germany company and the appellant alleged a collateral agreement that the rails would be sourced from that company. War broke out between Britain and Germany making it impossible for the appellant to procure the rails from Germany as contemplated by the parties, thus sought to have the contract declared frustrated, impossible to	Formalism	○ Pacta Sunt Servanda Applied (**PACTA**): Treating written terms as sacrosanct; ○ Literalism in contract interpretation (**LITERALISM**).	○ Freedom and Autonomy of Contract (**FOC**); ○ Sanctity of Contract (**SANCTITY**); ○ Conception of Contract as Discrete (**DISCRETE).**

				perform and void. **Court held that**, there was nothing in the contract requiring that the rails would be procured from Germany, so the source did not constitute the basis or foundation of the contract, and the defence of frustration failed.			
26.	Doola Singh & Son v. The Uganda Foundry & Machinery Works	(1945) 12 EACA 33.	EACA-Sir Sheridan, Sir Gray & Manning J	Under a contract for sale of goods, the respondent, a known dealer is saw-benches sold different parts to the appellant, for the latter to construct a saw-bench. Upon construction, some of the parts were discovered unserviceable and therefore not fit for purpose. The lower court awarded a *quantum meruit* for the unserviceable parts, thus the appeal. **Court held that:** ○ Section 16 (2) of the Sale of Goods Ordinance applied to the effect that a contract with a seller who deals in goods of a particular description, has an implied condition that the goods will be of merchantable quality, and the proviso doesn't apply because the buyer had no opportunity to inspect the goods; ○ Merchantable quality means that a reasonable man, acting reasonably would, after full examination accept the goods under the circumstances of the	Flexibility & Formalism	○ Using indeterminate doctrines (**INDETERM-DOCTRINE**): Reasonable Man & Reasonableness; ○ Contract viewed as a network of or other relations (**RELATIONS):** Using Reliance to find contractual obligation; ○ Literal and Logical deductive interpretation, or mechanical application of rules (**LOGICAL-MECHANIC**).	○ Role of Courts as implementers not makers of the law (**ROC-NONMAKERS**); ○ Economic Efficacy (**EFFICIENCY**); ○ Conception of contract as Relational (**RELATIONAL**); ○ Opportunism (**OPPORTUNISM**); ○ Conceptual Flexibility (**CONCEPT FLEXTY**): Including Legal Indeterminacy; Judicial Absolutism (**JA**).

				case, in performance of his offer to buy that article; ○ Without some parts being serviceable and fit, there would be no saw-bench, therefore a *quantum meruit* was not adequate, for the buyer would not get use from the rest of the parts to constitute part performance; ○ The seller was in breach of a warranty, because property in the goods had already passed to the buyer, under section 13 (1) (c) of the Sale of Goods Ordinance.			
27.	Hassan Merali v. Nanji khimji	UHCA 4/1917	HC-Kingdon, Ag. J	Under a contract for sale of goods, four bales of Amerikani clothes were tendered in accordance with the contract. The buyer refused to take delivery of them and the seller sued for the purchase price. **Court held that** an action for the price was not maintainable, and the seller should have claimed damages, since in English law specific performance is not available when damages would adequately remedy, and specific performance is only available where chattels are unique or of peculiar value.	Formalism	○ Literal and Logical deductive interpretation, or mechanical application of rules (**LOGICAL-MECHANIC**); ○ Considering money as the measure of value (**MONEY-VALUE**).	○ Role of Courts as implementers not makers of the law (**ROC-NONMAKERS**); ○ Accuracy in contracting and adjudication (**ACCURACY**); ○ Conceptual Formalism (**CONCEPT-FORMAL**).
28.	Kampala Cycle Trading Co., Limited v.	[1952-57] ULR 193	HC-Bennett, J.	A contract for sale of goods was made and concluded by telephone, and the defendant resided and carried on business in Mombasa Kenya. A dispute arose as to where	Flexibility	○ Contextual Interpretation and Application of the words of rules (**CONTEXTUAL**);	○ Conception of Law as Experience (**LEXP**); ○ Judicial

	Universal traders			it had been made from, and therefore whether the court had jurisdiction. **Court** used analogy with contracting through post, and held that the place of contracting was where the person making the acceptance was.		○ Exercising Unrestrained Judicial Authority (**UNRESTRAINED AUTHORITY**): Jealously Guarding Jurisdiction .	Absolutism (**JA**).
29.	Pyarali Kuverji v. the British India General Insurance Co. Limited	[1952-57] ULR 194.	HC-Sheridan, J.	In a motor insurance policy dispute, court had to interpret the words "consequential loss", that was used in exemption to liability under the terms of the policy. **Court held and reasoned that:** ○ Consequential loss included loss from lack of use; ○ An insured is bound by the policy terms, even if he had not seen it, where a letter from the insurer warned him that he would be bound.	Formalism	○ Pacta Sunt Servanda Applied (**PACTA**): Treating written terms as sacrosanct; ○ Literalism in contract interpretation (**LITERALISM**). ○ Expectancy loss Considered. (**EXPECTANCY**).	○ Freedom and Autonomy of Contract (**FOC**); ○ Sanctity of Contract (**SANCTITY**); ○ Conception of Contract as Promise (**PROMISE**); ○ Conception of Contract as Discrete (**DISCRETE**).
30.	Lint Marketing Board v. Kampala Oil & Soap Manufacturing Co. Limited	(1956-57) 8 ULR 178	HC-Bennett, J.	The defendant agreed to create a debenture over its assets to secure money owed to the plaintiff but did not sign it, to constitute a novation. The plaintiff sued on the original contract. The defendant sought to rely on the novation/debenture to preclude recovery on the original contract. The defendant claimed that she had not signed the debenture because the signatory	Formalism	○ Giving Procedural Justice Sway (**PROCED-SWAY**): Strict adherence to formalities, i.e. signing.	○ Procedural Justice as superior to substantive justice (**PJ**); ○ Formality (**FORMALITY**).

				was ill, but all parties had agreed to its contents. **Court held that,** the defendant could not rely on the debenture to preclude recovery on the original contract, as she had not signed it and it was therefore inoperative.			
31.	Henckell Du Buisson (E.A) Limited v. Twentsche Overseas Trading Co. Limited (T/A Victoria Motors)	(1956-57) 8 ULR 221	HC-Keatinge, J.	Under a written contract for the sale of goods, the plaintiff claimed that the time for delivery had been extended orally, and sought an order to force the defendant to take delivery of the goods. **Court held that,** Where a contract was required to be or evidenced in writing, parol evidence which contradicts, varies or adds to its terms was not admissible.	Formalism	○ Pacta Sunt Servanda Applied (**PACTA**): Treating written terms as sacrosanct.	○ Procedural justice superior to Substantive Justice (**PJ**); ○ Writing as the best evidence of parties' intentions (**PAROL EVIDENCE**); ○ Conception of Contract as Discrete (**DISCRETE**).
32.	Moulvi Shah v. Farley & Tranter	(1910-20) 2 UPLR 189	HC-Barrett-Lenard	During negotiations for the sale of goods (cattle), the defendants asked if the cattle were healthy, the plaintiff replied in the affirmative. Also why the cattle had watery eyes, and the seller relied that it was due to the tall grass affecting them. The cattle later died due to rinder-pest whose symptom were watery eyes. The plaintiff sued for the price, the defendant insisting that no warranty was intended.	Flexibility	○ Contextual Interpretation and Application of the words of rules (**CONTEXTUAL**); ○ Contract viewed as a network of or other relations (**RELATIONS**): Using Reliance to find contractual obligation; ○ Considering money	○ Substantive Justice as superior to procedural justice (**SJ**). ○ Economic Efficiency (**EFFICIENCY**); ○ Conception of contract as Relational (**RELATIONAL**); ○ Accuracy in

				Court held, ○ That affirmations or representations made at any period before the negotiations were concluded amounted to warranties; ○ The test is if the seller assumes to assert a fact of which the buyer is ignorant or merely states an opinion on a matter he has no special knowledge of and on which the buyer may have been expected to have his opinion and make his judgement; ○ The intention of the parties can only be got from the totality of the evidence and no secondary principles can be universally true; ○ In the circumstances of the case, the seller's affirmations were not casual and he was in breach of a warranty and awarded damages to the plaintiff.		as the measure of value (**MONEY-VALUE**).	contracting and adjudication (**ACCURACY**);
33.	Boustead & Clarke Limited v. Ralaram Narandas	(1910-20) 2 UPLR 349	HC-Carey Ag. J.	Under a contract for sale of goods, goods were sold and delivered and it was printed on the receipt that interest of 9% per annum was payable on overdue payments. The plaintiff claimed interest on the unpaid price. **Court held and reasoned that**: In absence of evidence of course of dealings showing interest as payable, or written notice that the debt would attract interest, the claim could not	Flexibility	○ Contextual Interpretation and Application of the words of rules (**CONTEXTUAL**); ○ Contract Law understood as including Practices (**PRACTICES**).	○ Economic Efficiency (EFFICIENCY); ○ Contractual Justice (CONJUS), through Judicial Interventionism; ○ Judicial Absolutism (JA).

				be allowed.			
34.	Bloedow v. Renton	(1910-20) 2 UPLR 44	HC-King-Farlow, J.	In a suit by an employee for wrongful dismissal, the parties had disagreed as to the meaning of a paragraph in the agreement, headed "details of engagement", thus the defendant treating the contract as at an end. **The court held and reasoned that**: ○ The ambiguity was not patent as to render the contract void; ○ A party accepting an agreement on condition that further terms are to be supplied by a third party is bound when they are supplied; ○ The exception is that there is an implied term that the details are reasonable as per the nature of employment and the local circumstances; ○ In the circumstances, the terms imposed by the defendant of specifying acreage to be worked by the plaintiff were reasonable, so the defendant entitled to treat the contract as at an end upon being refused.	Flexibility	○ Contextual Interpretation and Application of the words of rules (**CONTEXTUAL**); ○ Contract Law understood as including Practices (**PRACTICES**); ○ Judicial Interventionism in Contract (**JINTERV**): Filling gaps in contracts i.e., with implied terms; ○ Using indeterminate doctrines (**INDETERM-DOCTRINE**).	○ Economic Efficiency (**EFFICIENCY**); ○ Contractual Justice (**CONJUS**), through Judicial Interventionism; ○ Substantive Justice as superior to procedural justice (**SJ**); ○ Judicial Absolutism (**JA**); ○ Conceptual Flexibility (**CONCEPT FLEXTY**): Including Legal Indeterminacy;.
35.	William Menezes v. Saraswati Gangaram	(1960) EALR 313	HC-Sheridan, J.	Following breach of a hire purchase agreement by the defendant, the defendant gave the plaintiff a personal guarantee in consideration of non-seizure of the car, for any failures to pay. Upon failure to pay the arrears, the plaintiff seized the car and sued on	Flexibility	○ Contextual Interpretation and Application of the words of rules (**CONTEXTUAL**)	○ Economic Efficiency (**EFFICIENCY**)

				the guarantee. The defendant claimed that the guarantee lacked consideration. **Court held and reasoned that:** ○ The consideration for the guarantee was the non-seizure of the car, something she wanted; ○ In the circumstances, the guarantee was construed as covering the arrears of rent.			
36.	Bhimjani v. Patel	(1956-57) 8 UPLR 164	EACA-Worley, P., Sinclair, V.P & Bacon, J.A.	A tenant defaulted to pay rent and on the plaintiff suing for possession, the tenant deposited the arrears arguing that the delay was due to a disagreement as to the terms of contract. The issues were partly whether parol evidence was admissible to prove waiver of some written terms, and whether the court had discretion to refuse the defendant possession, if so should it have been exercised? **Court held and reasoned that:** ○ The Rent Restriction Ordinance is where the defendant could find a remedy against the judge exercising discretion to refuse possession, however the exception of refusal to pay having been reasonable, which is a ground in other jurisdictions was not part of the law; ○ The law required amendment to put the reasonableness provision,	Flexibility	○ The judge making law (**LAW MAKING**): Sidestepping of Rules of Law and Implying new rule to fill gap in law; ○ Law understood and Applied Purposively (**PURPOSIVE**); ○ Contextual Interpretation and Application of the words of rules (**CONTEXTUAL**); ○ Using indeterminate doctrines (**INDETERM-DOCTRINE**); ○ Internal Judicial Guidelines (**JUDGING GUIDE**): discretion to be exercised with regard to purpose of the law, context,	○ Contractual Justice (**CONJUS**), through Judicial Interventionism; ○ Judicial Absolutism (**JA**); ○ Conception of Law as Predictions (**LPREDICTIONS**); ○ Conception of Law as Experience (**LEXP**); ○ Substantive Justice as superior to procedural justice (**SJ**);' ○ Conceptual Flexibility (**CONCEPT FLEXTY**): Legal

				but in the meantime, court would follow principles laid down in precedents to guide discretion, thus discretion must be exercised in a judicial manner having regard to: ***the general scheme and purpose of the Act*** (which in this case implied that the reasonable provision is implied to be part of the law); ***special conditions including matters so domestic and social character, per McCardie, J. in Chiverton v. Ede [1921] 2 K.B. at 44-45***; ***all relevant circumstances as at the hearing date***; and a ***broad common sense way as a man of the world, per Lord Greene, M.R. in Cumming v. Danson [1942] 2 ALLER at 655; and court must consider, not whether the landlord's desire for possession is reasonable, but whether it is reasonable to make an order for possession, for, "because a wish is reasonable it does not follow that it is reasonable in a court to gratify it"*** .		such as social factors, common sense and reasonableness;	Indeterminacy, i.e., Reasonable Man, common sense, reasonableness; ○ Social Support as a Rule of Validity and Recognition of Law (**SOCIAL SUPPORT**); ○ Tension Management Mechanism (**MGT**): Social policy, legislative purposes social support and Ubuntu as the ultimate guide to judging.

37.	Nanji v. Queensland Insurance Co. Limited	[1952-57] ULR 60	HC-Ainley, J.	In an insurance contract, where the insured failed to disclose previous accidents in an application, and signed a form filled by the insurer' agent, **Court held and reasoned that:** ○ When a person signs willingly an application filled by another's agent, he adopts the answers and is bound by them; ○ Failure to disclose the previous accidents entitled the insurer to repudiate liability.	Formalism	○ Pacta Sunt Servanda Applied (**PACTA**): Treating written terms as sacrosanct.	○ Freedom and Autonomy of Contract (**FOC**); ○ Sanctity of Contract (**SANCTITY**).
38.	Mazinga v. Baganda Co-operative Society	[1952-57] UPLR 12	HC-Pearson, J.	This was a suit involving a contract between an African and a partnership where all partners were African, and the issue was whether the High Court or the Buganda Courts had jurisdiction. Court held that an all-African partnership was deemed an African, and in all contracts between Africans, the Buganda Courts had jurisdiction and the High Court had to transfer cases involving simple commercial contracts to Buganda Courts.	Formalism	○ Literal and Logical deductive interpretation, or mechanical application of rules (**LOGICAL-MECHANIC**).	○ Role of Courts as implementers not makers of the law (**ROC-NONMAKERS**); ○ Procedural justice superior to Substantive Justice (**PJ**).
39.	Waswa v. Kikungwe	[1952-57] UPLR 1	HC-Edwards, C.J.	Two Africans entered a transaction resembling a mortgage, and the issue was whether equity was applicable to the contract. **Court**	Flexibility	○ The judge making law (**LAW MAKING**): Implying new rule to fill gap in law; ○ Contextual	○ Perception of law as Predictions (**LPREDICTIONS**): The Role of Judges: To Fill

				held that: ○ Equity was applicable since native law and custom did not know mortgages in Teso 50 years back, therefore the natives' courts had no jurisdiction; ○ Courts would not interfere with the District Commissioner's Order on Appeal from a Native merely because the Native Court had no jurisdiction.		Interpretation and Application of the words of rules (**CONTEXTUAL**); ○ Judicial Interventionism in Contract (**JINTERV**): Equity invoked to Interfere with contract terms.	Gaps in the Law; ○ ○ Judicial Absolutism (**JA**); ○ Contractual Justice (**CONJUS**), through Judicial Interventionism; ○ Systematic Flexibility (**SYSTEM-FLEXTY)**
40.	Chatrubhuj Nagji v. Abdulla Bin Abdulla	[1936-51] UPLR 43	HC-Gamble, J.	The issue was whether the Statute of Frauds of England was applicable to regulate contracts in Uganda. Uganda not having an independent law of contracts, the exception in the Indian Contracts Act, to applicability of s. 4 of Statute of Frauds of England was held as applying to Uganda too, local circumstances notwithstanding.	Formalism	○ Literal and Logical deductive interpretation, or mechanical application of rules (**LOGICAL-MECHANIC**).	○ Positivist Conception of Law (**POSITIVISM);** ○ Certainty of Law **(COL);** ○ Conceptual Formalism (**CONCEPT-FORMAL**).
41.	Damani v. Salim Abid Zangie	[1936-51] UPLR 179	HC-Ainley, J.	A contract was entered with a minor that was over 18 years and therefore of majority age in India, but below 21, the majority age in Uganda at the time. **The judge held and reasoned that**: ○ The burden to prove that minor or his father had changed domicile to Uganda was on the plaintiff, and long stay plus doing business were not enough, as	Formalism	○ Literal and Logical deductive interpretation, or mechanical application of rules (**LOGICAL-MECHANIC**).	○ Positivist Conception of Law (**POSITIVISM);** ○ Certainty of Law **(COL);** ○ Conceptual Formalism (**CONCEPT-FORMAL**).

				those circumstances of the case were not persuasive to support a change of domicile.			
42.	A. H. Kaderbhoy & Co. v. C. Parakah & Co.	[1920-29] 3 ULR 200	HC- Guthrie, Ag. C.J.	Under a contract for sale of goods, the plaintiff was meant to supply a third party with goods, on behalf of the defendant. The third party obtained the goods without acknowledging that he had already received delivery of the full consignment agreed. The plaintiff sued the defendant for the price. Court held that the third party had gone behind the defendant and cheated both parties, therefore the defendant not liable for the price.	Flexibility	○ Contextual Interpretation and Application of the words of rules (**CONTEXTUAL**); ○ Judicial Interventionism in Contract (**JINTERV**): Fairness invoked to Interfere with contract terms.	○ Contractual Justice (**CONJUS**), through Judicial Interventionism; ○ Substantive Justice as superior to procedural justice (**SJ**); ○ Judicial Absolutism (**JA**).
43.	Sanghani & Co. v. Karmali Dharamshi & Co.	[1936-51] 6 UPLR 179	HC- Gamble, J.	The parties entered a sale of goods contract on C.I.F terms. The seller, alleging that the buyer had delayed to pay, without tendering the shipping documents resold the goods and claimed damages for the shortage in value received. The **Court held that:** ○ The seller under a C.I.F contract had to present the documents as a condition precedent to payment; ○ The condition precedent could be waived by proof of some usage of trade peculiar to East Africa, but since none was proved, the general law of C.I.F contracts	Flexibility	○ Contract Law understood as including Practices (**PRACTICES**); ○ Contextual Interpretation and Application of the words of rules (**CONTEXTUAL**).	○ Economic Efficiency (**EFFICIENCY**); ○ Conception of Law as Experience (**LEXP**).

				applied.			
44.	Lalji Naranji & Co. v. Laxman Kanji	[1920-29] 3 UPLR 159	HC-Smith, J.	The plaintiff had advanced the price for buying two vans, on condition that the defendant should work it off by transporting cotton for the plaintiff. The plaintiff instead breached and started working for others thus the suit, seeking interalia an injunction. **Court held and reasoned that** when damages are not sufficient to compensate the plaintiff, especially if a trust is involved, courts would enforce a negative but not a positive covenant by injunction.	Flexibility	○ Judicial Interventionism in Contract (**JINTERV**): Fairness invoked to Interfere with contract terms; ○ Viewing remedies as restoration (**RESTORATION**).	○ Contractual Justice (**CONJUS**), through Judicial Interventionism; ○ Judicial Absolutism (**JA**). ○ Substantive Justice as superior to procedural justice (**SJ**); ○ The Restitution Measure of Damages (**RESTITUTION**); ○
45.	Standish v. Sunderji	[1920-29] 3 UPLR 187	HC-Smith, J.	The testator contracted to supply sugar and was paid the full price. He died before supplying all of it. The executor supplied some sugar but before finishing the estate was declared insolvent. The receiver sued claiming for the sugar delivered and the defendant counter claimed for damages for the undelivered sugar. **Court held and reasoned that**; ○ Under section 10 of the Judicature Act and 54 of the Bankruptcy Act, the receiver could disclaim the onerous contract and the defendant would then be entitled to prove in bankruptcy for the damages;	Flexibility	○ Undue regard to technical or procedural defects to do substantive justice (**PROC-DISREGARD**); ○ The judge making law (**LAW MAKING**): Sidestepping the Rule of Law.	○ Contractual Justice (**CONJUS**), through Judicial Interventionism; ○ Substantive Justice as superior to procedural justice (**SJ**); ○ Judicial Absolutism (**JA**).

				○ The receiver had not disclaimed and technically remained liable; ○ Because had duty to protect the general body of creditors, the judge felt duty bound to allow the receiver to regularise.			
46.	Ali j. Dhanji v. William O'Swald & Company	[1920-29] 3 UPLR 191	HC-Smith, J.	The plaintiff bought goods by sample from the defendant who sent them to his agent in Kampala, Uganda. The agent sold the goods to a third party and informed the plaintiff that his goods had not arrived thus this suit. **The court held and reasoned that**: ○ When the second consignment arrived fitting the sample, the inference is that they were intended to meet the plaintiff's contract; ○ The plaintiff was entitled to treat the agent as having repudiated the contract and sue for damages, the promise to replace the goods not being good enough.	Formalism	○ Pacta Sunt Servanda Applied (**PACTA**): Treating written terms as sacrosanct; ○ Considering money as the measure of value (**MONEY-VALUE**).	○ Freedom and Autonomy of Contract (**FOC);** ○ Sanctity of Contract (**SANCTITY**); ○ Accuracy in contracting and adjudication (**ACCURACY**); ○ Conception of Contract as Discrete (**DISCRETE**).
47.	Jamal Ramji & Company v. Erukana Musoke	[1920-29] 3 UPLR 197	HC-Smith, J.	A plaint in a suit for breach of contract that merely alleged an account between the parties had the suit dismissed for want of a cause of action. On appeal, **Court held that:** ○ When an account is set out showing that one owes the other, a promise is created, therefore it is actionable in contract as an	Formalism	○ Pacta Sunt Servanda Applied (**PACTA**): Treating written terms as sacrosanct; ○ Giving Procedural Justice Sway (**PROCED-SWAY**)	○ Freedom and Autonomy of Contract (**FOC);** ○ Sanctity of Contract (**SANCTITY**); ○ Conceptual Formalism (**CONCEPT-FORMAL**); ○ Certainty of Law

				account stated; ○ The procedure code the Magistrate referred to was procedural law, which could not amend substantive law, especially in a sweeping way.			(**COL);** ○ Conception of Contract as Promise (**PROMISE**).
48.	Vithaldas Haridas & Co. v. Valji Bhanji & Co.	[1920-29] 3 UPLR 217	HC-Smith, J.	Under a sale of goods contract, the plaintiffs were to weigh the cottonseed, bag them and book them. Before they could be booked, the medical officer ordered for their destruction to prevent a plague. **Court held that** since something was left to be done to the goods, the property in the goods had not passed to the defendant and therefore the loss be born by plaintiffs.	Formalism	○ Literal and Logical deductive interpretation, or mechanical application of rules (**LOGICAL-MECHANIC**).	○ Positivist Conception of Law (**POSITIVISM).**
49.	C.M ImamDin v. The Japan Cotton Trading Co.	[1920-29] 3 UPLR 25	HC-Smith, J.	The defendant bought ginneries subject to confirmation by court. In anticipation, they contracted the plaintiff to keep a fleet of vehicles ready to transport for them. The sale was not confirmed and the ginneries sold to third parties. **The court held that**, the contract had not become impossible to perform within the meaning of section 156 of the Contract Act, therefore the defendants were liable in damages.	Formalism	○ Literal and Logical deductive interpretation, or mechanical application of rules (**LOGICAL-MECHANIC**); ○ Pacta Sunt Servanda Applied (**PACTA**): Treating written terms as sacrosanct.	○ Freedom and Autonomy of Contract (**FOC);** ○ Sanctity of Contract (**SANCTITY**); ○ Positivist Conception of Law (**POSITIVISM);** ○ Conception of Contract as Discrete (**DISCRETE);** ○ Conceptual Formalism (**CONCEPT-FORMAL**).

50.	Yoweri Musaka v. Gulkam Mussein Velji	[1920-29] 3 UPLR 260	HC-Smith, J.	Under a contract for sale of goods, it was agreed that one wheel of lorry had to be replaced and the vehicle insured. Before doing these, the seller allowed the buyer to drive the lorry and would return to effect them. It got an accident on the way. **Court held that** the property in the goods had not yet passed to the buyer and therefore the risk and loss was with the seller.	Formalism	○ Literal and Logical deductive interpretation, or mechanical application of rules (**LOGICAL-MECHANIC**); ○ Pacta Sunt Servanda Applied (**PACTA**): Treating written terms as sacrosanct and disregarding fairness of the case.	○ Freedom and Autonomy of Contract (**FOC**); ○ Sanctity of Contract (**SANCTITY**); ○ Positivist Conception of Law (**POSITIVISM**); ○ Conceptual Formalism (**CONCEPT-FORMAL**).
51.	Douglas v. Carr Lawson & Co.	[1920-29] 3 UPLR 234	HC-Hearne Ag. J.	Under a sale of goods contract, a motor vehicle had been bought under a trade name, and the defendant admitted having warranted that the car was suitable for touring purposes and insisted that it was actually suitable. It turned out not suitable. **The court held that**, since the contract was based on the seller's skill of suitability, under s. 14 (1), of the Sale of Goods Act of England, the requirement was not a mere warranty but a condition entitling the plaintiff to rescind the contract.	Formalism	○ Literal and Logical deductive interpretation, or mechanical application of rules (**LOGICAL-MECHANIC**); ○ Pacta Sunt Servanda Applied (**PACTA**): Treating written terms as sacrosanct and disregarding fairness of the case; ○ Contract viewed as a network of or other relations (**RELATIONS**): Using Reliance to find contractual obligation.	○ Freedom and Autonomy of Contract (**FOC**); ○ Sanctity of Contract (**SANCTITY**); ○ Positivist Conception of Law (**POSITIVISM**); ○ Conception of Contract as Relational (**RELATIONAL**): Including contractual obligations being based on Reliance; ○ Conceptual Formalism (**CONCEPT-FORMAL**).

52.	The Busoga Millers & Industries Limited v. P. C. Patel	[1955] 1 EALR 348	EACA-Sir Nihill, Sir Worley & Hooper, j.	This was a claim for delivery-up of shares, Detinue and conversion. Proof was adduced that a constructive trust existed for shares, and that a letter had been posted giving notice. **The Court held that:** ○ A non-party to the case could not be ordered to be removed from the register, even though the constructive trust had been proved; ○ In a service by post, there is no presumption of delivery of notice because there is no evidence of dispatch.	Formalism	○ Giving Procedural Justice Sway (**PROCED-SWAY**); Strict adherence to pleadings	○ Procedural Justice as superior to substantive justice (**PJ**); ○ Certainty of Law (**COL**).
53.	K.B. Parekh v. F. Mahomed and J. Esmail (Objector).	[1920-29] 3 UPLR 224	HC-Smith, J.	Under an agreement for sale of goods, the seller (Objector) was entitled to retake the lorry upon default of payment. It was to remain in the names of the seller until full payment, and if seized, it had to be sold to pay the balance owing. The plaintiff attached the lorry because it was in possession of the defendant, thus the objection. **Court held that**: ○ The contract was a sale out and not a hiring, and the lorry therefore liable for attachment for debts of the buyer; ○ The agreement regarding security for payments was a bill	Formalism	○ Giving Procedural Justice Sway (**PROCED-SWAY**): Formalities superior to intention of parties; ○ Literalism (**LITERALISM**)	○ Procedural Justice as superior to substantive justice (**PJ**); ○ Certainty of Law (**COL**); ○ Freedom and Autonomy of Contract (**FOC**); ○ Sanctity of Contract (**SANCTITY**); ○ Conception of Contract as Discrete (**DISCRETE**).

				of sale and void for want of registration.			
54.	K.B. Kalu v. Ambalal Shankerbhai & Co.	[1920-29] 3 UPLR 27.	HC-Hearne, Ag. J.	The claim was wrongly described in the plaint and the lower court dismissed the suit. **Court held that,** Wrong pleading is not enough to dismiss a suit, if is a primafacie case has been established. The court should examine the parties and frame the issues in dispute, and call the defence to defend the case.	Flexibility	○ Undue regard to technical or procedural defects to do substantive justice (**PROC-DISREGARD**).	○ Conception of Substantive Justice as superior to procedural justice (**SJ**).
55.	Kirparam & Sons v. K.C. Chopra	[1920-29] 3 UPLR 71.	HC-Gray, J.	A contract was made in Kenya, and the defendants appointed the plaintiff's Kenyan agents. The agreement was silent on how and where the payment of commission would be made, although the timber was to be sold in Uganda. The issue was whether the courts in Uganda had the jurisdiction to hear the case. **Court held that,** It was implied that the payment would be effected in Uganda where the timber was to be sold, therefore the courts had jurisdiction.	Flexibility	○ Exercising Unrestrained Judicial Authority (**UNRESTRAINED AUTHORITY**): Jealously Guarding Jurisdiction; ○ Judicial Interventionism in Contract (**JINTERV**): Filling gaps in contracts with implied terms.	○ Contractual Justice (CONJUS), through Judicial Interventionism; ○ Substantive Justice as superior to procedural justice (**SJ**); ○ Judicial Self Preservation (**JSELF-PRESERV**).
56.	H. White Wilson & Co. v. the Barnet Soda	(1920-29) 3 UPLR 56	HC-Smith, J.	In a contract for the sale of goods, the defendant, a farmer in Uganda ordered unascertained goods through an agent in England. There was a clause in the indent form under which the buyer bound	Flexibility	○ Recorgnising inequality amongst contracting parties (**NO-EQUALITY**); ○ Contextual Interpretation and Application of the	○ Inequality before the law (INEQUALITY); ○ Conception of Law as Experience (**LEXP**);

	Factory			himself to take delivery of the goods upon arrival and accept the bill of exchange. Before the goods were appropriated, the buyer gave notice to the agent to cancel the order, but the agent refused, and had the goods shipped to the buyer. The buyer refused to accept the goods, thus the suit. **The Court held and reasoned that:** ○ The buyer was not bound by the special terms printed on the indent, for there was no evidence that the buyer was familiar with the system of the agent, and it would be strong to hold that a Goanese gentleman be expected to have carried in his mind the complicated and involved phraseology of the indent form; ○ The agents failed in their duty to the principal to cancel the order, and therefore would not recover.		words of rules (**CONTEXTUAL**). ○ Judicial Interventionism in Contract (**JINTERV**): Fairness invoked to Interfere with contract terms; ○ Contractual Obligations and rights determined Purposively (**PURPOSIVE**): Practicality and Functionality used guide the applicability and meaning of parties' actions: Business efficacy as a tool of commerce.	○ Contractual Justice (**CONJUS**), through Judicial Interventionism. ○ Judicial Absolutism (**JA**); ○ Conception of Law as a means to an end (**LMEANS**); Legal Validity and Contractual Obligation judged by Practical Utility ; ○ Conception of contract as Relational (**RELATIONAL**);
57.	Hamud Bin Suleman v. Visinji ganji (*N.B. Both Formalism and Flexibility were applied in this decision*)	(1920-29) 3 UPLR 46.	HC-Smith, J.	Under a contract for the sale of goods (hides), the offer and acceptance were communicated by post. Upon the goods being delivered, the buyer rejected them and the seller sued for the price. The buyer argued that the contract was not complete and if so, the seller should have resold the goods, and sued for the loss if any. **The Court held that:** ○ An acceptance by post is	Formalism & Flexibility	○ The judge making law (**LAW MAKING**): Implying new rule to fill gap in law; ○ Pacta Sunt Servanda Applied (**PACTA**): Treating terms as sacrosanct, and disregard fairness; ○ Giving Procedural Justice Sway (**PROCED-SWAY**): Rules of service by post strictly applied.	○ Perception of law as Predictions (**LPREDICTIONS**): The Role of Judges: To Fill Gaps in the Law; ○ Freedom and Autonomy of Contract (**FOC**); ○ Sanctity of Contract (**SANCTITY**); ○ Procedural Justice as

				complete upon being dispatched; ○ Where property in the goods had passed to the buyer, the seller had the right to sue for the price or resell and claim the loss. He was not bound to any. The decision in Virji v. Merryweather, 2 ULR 363 was approved. ; ○ Section 49 of the Sale of Goods Act, 1893 of England grants the right to sue for the price, and even though the Indian Contract Act omitted the right, since it was meant to codify English law, it was assumed to have intended to contain it.			superior to substantive justice (PJ); ○ Certainty of Law (**COL**).
58.	S.K Ndugwa, Gulu v. The Buganda Butchers Limited	(1936-51) UPLR 150.	HC-Ainley, J.	The parties agreed on interest rate of 60% per annum, and the defendant sought court intervention to reduce it under the provisions of s. 26 of the Civil Procedure Ordinance for being harsh and unconscionable. **Court held and reasoned that:** ○ The section is a codification of the English rules of equity as to unconscionable bargain, even ruinous bargains where there has been nothing in the nature of unconscientious use of power by one of the parties; ○ The section strikes not at the hardness of the bargain but the means employed to bring it about, the hardness being mere evidence of unscrupulous use of	Flexibility	○ Contextual Interpretation and Application of the words of rules (**CONTEXTUAL**); ○ Judicial Interventionism in Contract (**JINTERV**): Fairness invoked to Interfere with contract terms; ○ Using indeterminate doctrines (**INDETERM-DOCTRINE**); ○ Law understood and Applied Purposively (**PURPOSIVE**); ○ Contract Law understood as including Practices (**PRACTICES**);	○ Inequality before The Law amongst Contracting Parties (**INEQUALITY**):The Conception of Justice as dependent on Class; ○ Conception of Law as Experience (**LEXP**); ○ Economic Efficiency (**EFFICIENCY**); ○ Conception of Law as A Means to An End (**LMEANS**); ○ Conceptual

				power, but not of itself ground for relief; ○ In the present case, there was no inequitable or unscrupulous behaviour by the plaintiff; ○ The plaintiff was an African in Government service, and though intelligent, had no experience in business, and the defendant company was represented in the transaction by the managing director who was foolish and reckless but with considerable business experience and could not be regarded as a helpless man imposed on by an unscrupulous money lender; ○ In equity, no relief would be granted but section 26 of the Civil Procedure Ordinance granted court a power not given by equity to grant relief against interest rates so exorbitant as to shock the conscience of court, irrespective of the equality or otherwise of bargaining power of the parties; ○ There was need in the protectorate that such powers to be given to the courts, and interest of 60% was found so exorbitant in the circumstances and reduced to 24%, as a butchering was not expected to afford paying back interest of 60% per annum, and remain solvent; ○ Court had no sympathy for the		○ Recorgnising inequality amongst contracting parties (**NO-EQUALITY**): Using economic class as criteria to access justice, in this case, favoring low economic class.	Flexibility (**CONCEPT-FLEXTY**); ○ Contractual Justice (**CONJUS**), through Judicial Interventionism. ○ Judicial Absolutism (**JA**).

				defendant company but could not countenance such a ridiculous rate of interest that was beyond all reason.			
59.	Busongola Stores Limited v. Barclays Bank D.C.O.	(1956-57) 8 ULR143	HC- Sheridan, J.	A customer to a bank deposited money to the cashier when the bank was already closed, and the bank denied liability for the money. **The Court held that,** even though the bank displayed a sign stating its banking hours, it had given the impression that the clerk could receive money after banking hours, therefore, the bank had conferred ostensible authority on the cashier, and therefore the deposit validly made, thus the bank liable to the customer.	Flexibility	○ Contract Law understood as including Practices (**PRACTICES**). ○	○ Economic Efficiency (**EFFICIENCY**); ○ Contractual Justice (**CONJUS**), through Judicial Interventionism.
60.	Establishments L. Besson De L' Est Africa v. F.C. Holmes	(1920-29) 3 ULR 220	HC- Smith, J.	A firm manufacturing lorries published in their catalogue vehicles for sale, and added that they reserved the right to change materials, dimensions, and design and did not guarantee that the vehicles supplied would strictly conform to the specifications. The defendant bought one lorry and ordered another of the same specifications. The second lorry delivered was of different pistons that did not have readily available spares, and the defendant rejected it, thus the suit for the price.	Formalism	○ Pacta Sunt Servanda Applied (**PACTA**): Treating terms as sacrosanct, and disregard fairness; ○ Literalism (**LITERALISM**); ○ Considering money as the measure of value (**MONEY-VALUE**).	○ Freedom and Autonomy of Contract (**FOC**); ○ Sanctity of Contract (**SANCTITY**); ○ Accuracy in contracting and adjudication (**ACCURACY**); ○ Conception of Contract as Discrete (**DISCRETE**); ○ Conceptual Formalism (**CONCEPT-**

				The Court held and reasoned that: ○ The breach of warranty was no defence to the action, for section 117 of the India Contract Act did not create the right to avoid the contract but only claim damages; ○ The defendant had not relied on the plaintiff' skill and judgment, therefore the latter could not be held to have warranted that the two vehicles would be identical.			**FORMAL**).
61.	Budaka Ginners Limited V. Maganlal Kalidas Hathi	(1956) EACA 65.	EACA- Worley, P., Brigg Ag. V.P., & Bacon, J.A.	Under a sale of goods contract, the buyer sold goods to the sub-buyer, who rejected them for not being of merchantable quality. During arbitration, it was agreed that the sub-buyer buys the goods at a reduced price. **Court held that:** ○ In the circumstances of the case, there was no evidence that any sub-buyer would buy the groundnuts at a price higher than the sub-buyer accepted, there fore the buyer was entitled to recover the loss for the original seller; ○ In commercial cases, once an offer to pay is made before the action, it should, for purposes of exercising court's discretion to allow interest be treated as tantamount to tender.	Flexibility	○ Contextual Interpretation and Application of the words of rules (**CONTEXTUAL**); ○ Judicial Interventionism in Contract (**JINTERV**): Fairness invoked to Interfere with contract terms;	○ Economic Efficiency (**EFFICIENCY**): Commercialism and Wealth Maximisation; ○ Contractual Justice (**CONJUS**), through Judicial Interventionism.

62.	British Trading Co. v. The Governor of The Uganda Protectorate	(1910-20) 2 ULR 1.	HC-Ennis, C.J.	In a suit against the government as an entity carrying on the business of transport, **the Court held that:** ○ The government was not a common carrier, and subject to the law on contract of bailment; ○ A notice published in the gazette that goods were carried at owner's risk was not binding on the plaintiff until proved as having been communicated to him; ○ Owner' risk meant that the carrier had to prove that she was not negligent during the course of bailment.	Flexibility	○ Legal Classificatory Categories ignored (**NO CATEGORIES**): Treating Economic Negligence as Contractual and used to justify liability; ○ Undue regard to technical or procedural defects to do substantive justice (**PROC-DISREGARD**); ○ Judicial Interventionism in Contract (**JINTERV**): Fairness invoked to Interfere with contract terms.	○ Contractual Justice (**CONJUS**), through Judicial Interventionism; ○ Conceptual Flexibility (**CONCEPT-FLEXTY**); ○ Substantive Justice as superior to procedural justice (**SJ**); ○ Judicial Absolutism (**JA**); ○ Conception of contract as Relational (**RELATIONAL**).
63.	WalkerBros. Limited v. Norman Godinho & M. Moses	(1920) 3 ULR 149	HC-Smith, J.	A curator of an imprisoned buyer of goods accepted a bill for the value of the goods from the shipper as was the usual practice, but afterwards, the goods never arrived. **Court held that:** ○ The acceptance of the bill was given in the ordinary course of business, so the convict was liable for the price; ○ From the ordinary course of business, it had to be inferred that the curator had had constructive possession of the goods; therefore, he was liable to	Flexibility	○ Contract Law understood as including Practices (**PRACTICES**); ○ Contractual Obligations and rights determined Purposively (**PURPOSIVE**): Practicality and Functionality used guide the applicability and meaning of parties' actions.	○ Economic Efficiency (**EFFICIENCY**); ○ Contractual Justice (**CONJUS**), through Judicial Interventionism; ○ Conception of Law as a means to an end (**LMEANS**); Law to be judged by its Practical Utility; ○ Conception of contract as Relational

				the convict as if the goods were lost in his possession.			(**RELATIONAL**).
64.	R. Rouge v. L. Besson & Co.	(1920-29) 3 ULR 90	HC-Griffin, C.J.	In an employment contract, it was provided that the employee could be dismissed for "grave cause issuing from his action, such as insubordination". **The Court held and reasoned that:** ○ That neglecting to obey important orders amounted to grave cause to justify dismissal; ○ Writing to the head office in France to complain on how the company was being run by management, amounted to an act subversive of all discipline and no business concern that had any regard for the due carrying on of its business would tolerate it, thus grave misconduct too.	Flexibility	○ Contract Law understood as including Practices (**PRACTICES**): Business reality/sense; ○ Contextual Interpretation and Application of the words of rules (**CONTEXTUAL**); ○ Abductive Reasoning in interpretation of statute or precedents (**ABDUCTIVE**).	○ Economic Efficiency (**EFFICIENCY**). ○ Substantive Justice as superior to procedural justice (**SJ**); ○ Judicial Absolutism (**JA**); ○ Conception of Law as Predictions (**LPREDICTIONS**).
65.	I.T.Patel v. R. Noormahomed	(1920-29) 3 ULR 80	HC-Smith, J.	In an action for short landing in a carriage of goods, the defendant only denied the shortage. No issues were framed but court found for the plaintiff. **The High Court then held that,** the neglect to frame issues was immaterial since the parties and the judge knew the question in dispute.	Flexibility	○ Undue regard to technical or procedural defects to do substantive justice (**PROC-DISREGARD**).	○ Substantive Justice as superior to procedural justice (**SJ**).

66.	Child & Joseph v. Damoder & Karsanji	(1920-29) 3 ULR 66	HC-Smith, J.	In an action for sale of goods, the damages were sought to be proved by showing the market using evidence of other dealings in the same commodities and letters from firms in London and Mombasa. **The Court held that**, only experts could prove the market price, and such experts in their work could use the evidence adduced instead.	Formalism	○ Giving Procedural Justice Sway (**PROCED-SWAY);** Strict adherence evidential rules	○ Procedural Justice as superior to substantive justice (**PJ**); ○ Certainty of Law (**COL**).
67.	H. White Wilson & Co. v. Jamal Walji	(1920-29) 3 ULR 61	HC-Smith, J.	An agency agreement contained a clause referring all disputes to arbitration, and the defendant repudiated the contract. On an action by the plaintiff, the defendant objected to court's jurisdiction, arguing that the matter should have been referred to arbitration. **Court held that** since the defendant repudiated the contract, he could not insist on arbitration.	Formalism	○ Pacta Sunt Servanda Applied (**PACTA**): Treating written terms as sacrosanct; ○ Literalism in contract interpretation (**LITERALISM**).	○ Freedom and Autonomy of Contract (**FOC**); ○ Sanctity of Contract (**SANCTITY**).
68.	Uganda Printing & Publishing Co. v. Yokana Kabangala	(1920-29) 3 ULR 77	HC-Griffith, C.J. & Smith, J.	An action was brought for work done over six years, and the issue whether the statute of Limitation applied to Uganda. **The Court held that** as a procedural law, the provision in the Order in Council that the courts in Uganda were bound by the practice and procedure of the courts of England meant that the Statute of Limitation applied to Uganda.	Formalism	○ Literal and Logical deductive interpretation, or mechanical application of rules (**LOGICAL-MECHANIC**); ○ Giving Procedural Justice Sway (**PROCED-SWAY**).	○ Positivist Conception of Law (**POSITIVISM**). ○ Procedural Justice as superior to substantive justice **(PJ);** ○ Conceptual Formalism (**CONCEPT-FORMAL**).

69.	Viram v. Chorley	(1920-29) 3 ULR 63	HC-Smith, J.	Under a contract for sale of goods, the defendant agreed to purchase a second hand lamp and it was agreed that the plaintiff would put it in working order. The court held that ○ There was an implied warranty that the lamp would give light, and on breach of the warranty, because section 114 of the Indian Contract Act imposed a warranty of fitness for purpose if goods were sold for their usual purpose; ○ The remedy was to sue for damages and not rescission of the contract.	Formalism	○ Literal and Logical deductive interpretation, or mechanical application of rules (**LOGICAL-MECHANIC**); ○ Considering money as the measure of value (**MONEY-VALUE**).	○ Positivist Conception of Law **(POSITIVISM**); ○ Accuracy in Contracting and adjudication (**ACCURACY)**; ○ Conceptual Formalism (**CONCEPT-FORMAL**).
70.	E.M. Paul v. The Kenya Trading Corporation Co. Limited	(1920-29) 3 ULR 96	HC-Howes, Ag. J.	In an action for sale of goods, where a breach of a warranty was alleged, the defendant objected to jurisdiction on ground that the breach occurred in Nairobi. **The Court held that** the Ugandan courts had no jurisdiction since the breach occurred in Nairobi.	Formalism	○ Literal and Logical deductive interpretation, or mechanical application of rules (**LOGICAL-MECHANIC**); ○ Giving Procedural Justice Sway (**PROCED-SWAY**)	○ Positivist Conception of Law (**POSITIVISM);** ○ Procedural Justice as superior to substantive justice **(PJ).**

APPENDIX 2: Formalistic Adjudication In Hard Cases (Early Post-Colonial Era 1962-1986)

NO.	CASE TITLE	CITATION	COURT	CASE SUMMARY	INTERNAL VALUES (S)	EXTERNAL VALUE (S)
1.	Pirani Properties & Agencies Ltd v Tajdin Kara	[1962] 1 EA 285	HC	In a suit to enforce guarantees given by an Asian defendant to cover non-payment under three hire-purchase agreements between the plaintiff and Africans, the court denied the defendant a right to avail himself the defence that the plaintiff's attempt to recover consequential damages could not be entertained in an action on guarantees, but one on indemnity.	○ Giving Procedural Justice Sway (**PROCED-SWAY**): Restricting litigant's case to Pleadings.	○ Certainty of Law (**COL**); ○ Positivist Conception of Law (**POSITIVISM**); ○ Inequality before the law (**INEQUALITY**): Class Oriented Conception of Justice; ○ Procedural Justice superior to substantive justice (**PJ**).
2.	AM Dharas & Sons Ltd v Elys Ltd	[1963] 1 EA 573	HC	Having rented out a shop and store, the plaintiff did not give vacant possession of the store to the defendant. The defendant claimed for refund of the rent he had paid. The court agreed with the defendant, but dismissed the claim on ground that, the plaint claimed only part of the rent, without specifying how much.	○ Giving Procedural Justice Sway (**PROCED-SWAY**): Restricting litigant's case to Pleadings.	○ Certainty of Law (**COL);** ○ Role of Courts as implementers not makers of the law (**ROC-NONMAKERS**); ○ Procedural Justice superior to substantive justice (**PJ)**.
3.	Deo Mabiiho v Fred Kaijabwangu	[1972] HCB 176.	HC	In a sale of goods action, the equitable doctrine of unconscionability of the price was raised. The judge held that: ○ It was not the court's province to consider matters of adequacy of consideration; ○ Oral evidence that had been	Pacta Sunt Servanda Applied (**PACTA**): Treating written terms as sacrosanct; and No Filling gaps in Contract terms i.e., Refusal to Interfere with terms deemed harsh and unconscionable.	○ Freedom of Contract; ○ Sanctity of Contract (**SANCTITY**): Judicial Non-interventionism**;** ○ Sanctity of Contract (**SANCTITY)**; ○ Conception of Contract as Discrete (**DISCRETE);** ○ Writing as the best

				adduced in proof is rejected, citing the *parol e*vidence rule, that by virtue of sections 90 to 99 of the Evidence Act of Uganda, written agreements could not be contravened by oral evidence.		evidence of parties' intentions (**PAROL EVIDENCE)**.
4.	The Motor Union Insurance Co. Ltd v Ddamba (N.B. Both Formalism and Flexibility were applied in this decision)	[1963] 1 EA 271	HC	An insurance proposal form that had been filled in by the insurer's agent and accompanied by a signed warranty failed to disclose all material facts. Although the insured proved that he had made full disclosure to the agent, the court allowed the insurer to avoid the policy on grounds of non-disclosure. The judge: ○ Reasoned that only the written contract could be looked at to ascertain the terms of contract; ○ Followed *Newsholme Brothers v Road Transport and General Insurance Co. Ltd* [1929] ALLER 442, 444, refusing to impute knowledge on the insurer, and found the agent to have been an amanuensis of the insurer; ○ Reasoned that the insured defendant was an intelligent man who knew the importance of telling the truth.	○ Literalism in contract interpretation (LITERALISM)	○ Writing as the best evidence of parties' intentions (**PAROL EVIDENCE)**; ○ Freedom and Autonomy of Contract (**FOC**): Judicial non-interventionism; ○ Sanctity of Contract (**SANCTITY**); ○ Conception of Contract as Discrete (**DISCRETE);** ○ Inequality before the law (**INEQUALITY**): Class Oriented Conception of Justice;

5.	Jubilee Insurance Co. Ltd v John Sematengo	[1965] 1 EA 233	CA	In an insurance dispute on imputation of knowledge of the agent, the Chief Justice held against the illiterate insured, and refused to impute knowledge on the insurer. He reasoned that: ○ Illiterates were taken as having a duty to insist that the proposal form is read to them and interpreted; ○ Failure by the illiterate to perform his duty, the proposal form had to be taken as having been read and so interpreted, and the falsehood visited against him.	○ Pacta Sunta Servanda Applied (**PACTA**), i.e. Treating written terms as sacrosanct; ○ Literalism in contract interpretation (**LITERALISM**)	○ Writing as the best evidence of parties' intentions (**PAROL EVIDENCE);** ○ Freedom and Autonomy of Contract (**FOC);** ○ Sanctity of Contract (**SANCTITY**); ○ Conception of Contract as Discrete (**DISCRETE).**
6.	Pioneer General Assurance Society v Mukasa	[1974] 1 EA 165	HC	Where the insurance policy was compulsory under statute, the insurer was held to be entitled to exercise her right to repudiate a contract for breach of a condition. The judge reasoned that; ○ The fact that the contract was required and regulated by statute did not affect the effectiveness of the between the insurer and the insured; ○ Therefore, the insurer could repudiate the contract due to the insured's delay to lodge a claim.	○ Pacta Sunta Servanda Applied (**PACTA**): Rejection of statutory intervention in Contract.	○ Freedom and Autonomy of Contract (**FOC):** Judicial Non-Interventionism; ○ Sanctity of Contract (**SANCTITY**).
7.	Lulume v Coffee Marketing Board (***N.B.***	[1970] 1 EA 155	HC	The plaintiff claimed to have been a permanent employee of the defendant, on account of an implied term arising out of having been made	○ Pacta Sunta Servanda Applied (**PACTA**): Treating written terms as sacrosanct; and No Filling gaps in Contract terms,	○ Sanctity of Contract (**SANCTITY**); ○ Freedom and Autonomy of Contract **(FOC):** Judicial non-

	Both Formalism and Flexibility were applied in this decision)			part of an employee pension scheme. **The court held that** no implied terms could be presumed unless there was evidence that they had been intended by the parties, and necessary to give business efficacy.	i.e., Refusing to imply terms; ○ Contextual Interpretation of Contracts and Application of Rules (**CONTEXTUAL**), i.e. Invoking Necessity for Business Efficacy.	interventionism**;** ○ Economic Efficiency (**EFFICIENCY)**; ○ Commercialism and Wealth Maximisation (**COMM-WEALTH**)); ○ Conception of Law as Experience (**LEXP)**: Commercial Reality as the Rule of Recognition
8.	Uganda v Ali Matovu	Criminal Revision No. 35 of 1974	HC	The accused was charged with an offence under a statute criminalizing breach of contract for sale of essential goods. The case was dismissed by court for a defective charge sheet.	○ Giving Procedural Justice Sway (**PROCED-SWAY**): Strict adherence to form of court documents.	○ Certainty of Law **(COL);** ○ Procedural Justice Superior to Substantive Justice **(PJ).**
9.	Samuel Hawaga v Christopher Bisutu (***N.B. Both Formalism and Flexibility were applied in this decision***).	HCCS No. 839 of 1973	HC	The defendant had insured his car with the government owned National Insurance Corporation (NIC), and the plaintiff, a turn boy on the vehicle was injured in an accident. In a suit between the parties, NIC admitted liability, while the defendant was in prison, but later invoked the statutory limitation of liability under section 32 of the Traffic and Road safety Act, 1970. Allen Ag. J made a strict interpretation of the section and enforced the limitation of liability. He reasoned that: ○ Although the statute was unfair, however unfair a statute was, it	○ Literal and Logical deductive interpretation, or mechanical application of rules (**LOGICAL-MECHANIC**): Disregard of the law's purposes; ○ Giving Procedural Justice Sway (**PROCED-SWAY**); ○ Pacta Sunta Servanda Applied (PACTA): No Filling gaps in Contract terms, i.e. Refusing to imply terms; ○ Applying Formalism with flexible ends in mind (**OPPORTUNISTIC FORMALISM**) i.e. the willingness to strike out contract terms	○ Tension Management Mechanism (**MGT):** Restraint to Judicial Authority; ○ Role of Courts as mechanical deduction, implementers, and not makers of the law (**ROC-NONMAKERS**); ○ Statutory Interventionism (**SINTERV);** ○ Positivist Conception of Law (**POSITIVISM)**; ○ Conceptual Formalism (**CONCEPT-FORMAL**); ○ Opportunism (**OPPORTUNISM**); ○ Sanctity of Contract (**SANCTITY**); ○ Freedom and Autonomy

				had to be read as is, and the only way out was to amend it; ○ The court could not amend the law; ○ Save for cases where statutes regulated the contracts, the courts had power to remove unjust clauses in contracts; ○ The purpose of a statute does not matter, but its wording; ○ Uganda was different from England in the sense that the latter did not have statutory provisions restricting liability of parties to contracts.		of Contract **(FOC):** Judicial non-interventionism**.**
10.	Uganda v Stephen Kafeero	Criminal Revision No. 106 of 1974	HC	The accused was caught overcharging toothpaste, arrested and prosecuted. The judge held that toothpaste was not amongst the commodities, whose over pricing was mentioned in the law as prohibited. The judges reasoned that overcharging was a social evil that public policy intended to fight using the law, but declined to be flexible and extend the premises of the law to cover tooth paste.	○ Literal and Logical deductive interpretation, or mechanical application of rules (**LOGICAL-MECHANIC**): Disregard of the law's purposes; ○ Giving Procedural Justice Sway (**PROCED-SWAY**).	○ Tension Management Mechanism (**MGT):** Restraint to Judicial Authority; ○ Role of Courts as implementers not makers of the law (**ROC-NONMAKERS**); ○ Positivist Conception of Law **(POSITIVISM**).
11.	Ruby General Insurance Co. Ltd v General Land and Insurance	[1963] 1 EA 154	HC-Bennett J.	The defendant was appointed as an agent of an insurer in India and was to be remunerated by way of commission. Bennett J, in finding that Ugandan courts had jurisdiction to hear the case, held the Defendant not to be a commission agent.	○ Literalism in contract interpretation (**LITERALISM**); ○ Literal and Logical deductive interpretation, or mechanical application of rules (**LOGICAL-MECHANIC**);	○ Dehumanization of law (**DEHUMAN)**; ○ Positivist Conception of Law **(POSITIVISM**); ○ Conceptual Formalism (**CONCEPT-FORMAL**).

	Agencies Ltd			The judge reasoned that the words 'commission agent' had to be interpreted strictly and not in the ordinary sense.		
12.	Patel & Others v National & Grindlays Bank Ltd (***N.B. Both Formalism and Flexibility were applied in this decision***)	[1970] 1 EA 121		A managing director of a coffee hauling company guaranteed its indebtedness to the defendant bank. The agreement contained a clause making it a continuing guarantee and circumventing the rule in *Devaynes v Noble* (1816) 1 Mer.529) 35 ER 767 (*Clayton's case),* that would bind the bank to applying any money put on new accounts to the repayment of the old debt, to the prejudice of the plaintiff. The bank opened new accounts after the plaintiff had terminated his engagement with the borrower, and without his consent, on which more money was banked and loans advanced, leaving the old debt unpaid. Upon the borrower's default, the defendant bank went to the plaintiff to recover. The court, although took note of the circumvention of *Clayton's rule*, insisted on enforcing the actual terms of the contract and held the plaintiff liable to repay the debt, reasoning that: The arguments that actions of the	○ Literalism in contract interpretation (**LITERALISM);** ○ Pacta Sunta Servanda Applied (**PACTA**): ○ Disregard of contextual or Business reality; and no filling gaps in Contract terms; **In Dissent**: ○ Contextual Interpretation of Contracts and Application of Rules (**CONTEXTUAL**): i.e. Conformity with Business Reality and /Practice; ○ Recognising inequality amongst contracting parties: Using economic, social or political class as criteria to access justice (**NO-EQUALITY**); ○ Contract Law understood as including Practices (**PRACTICES**).	○ Freedom and Autonomy of Contract (**FOC)**; ○ Positivist Conception of Law (**POSITIVISM);** ○ Sanctity of Contract (**SANCTITY**): Judicial Non-Interventionism; ○ Conception of Contract relations as Discret ○ Inequality before the law (**INEQUALITY):** Class Oriented Conception of Justice, i.e., Protection of the Weaker Party; ○ Conception of Law as Experience (**LEXP**): Commercial Reality; ○ Conception of Contract as Discrete (**DISCRETE);** ○ Conception of Justice: Law as a Means to An End **(LMEANS**); ○ Contractual Justice (**CONJUS**), through Judicial Interventionism.

				bank were unfair were not valid; as such actions had no effect on the guarantees. Dissenting judge Sir Charles Newbold, flexibly reasoned that:		
13.	National Industrial Credit Uganda Ltd v PM Nsibirwa (***N.B. Both Formalism and Flexibility were applied in this decision***)	HCCS No. 735 of 1971	HC	The defendant raised a defence of mistake to a hire purchase agreement claim, maintaining that he had signed it without reading through. The judge held that mistake must be construed as non-existent and the words of a contract enforced strictly even in the face of mistake, unless it is a reasonable one. **The Judge reasoned that**, misrepresentation could not have been done by a stranger to a man of the class, education and experience of the defendant.	○ Literalism in contract interpretation (**LITERALISM**); ○ Pacta Sunt Servanda Applied (**PACTA**): vitiating factors, i.e. Mistake defence rejected and written terms treated as sacrosanct; ○ Recognising inequality amongst contracting parties: Using economic, social or political class as criteria to access justice (**NO-EQUALITY**).	○ Freedom and Autonomy of Contract (**FOC**); ○ Conception of Contract as Discrete (**DISCRETE**); ○ Inequality before The Law amongst Contracting Parties (**INEQUALITY**): Class Oriented Conception of Justice i.e. Access to Justice Determined by Social and Economic Class.
14.	Dr. Syedna Mohamed Burhannudin Saheb & 2 Others v Jamil Din & Others	[1973] 1 EA 254	HC	Under an agreement for sale of property, there was a default in payment and in an addendum, the parties agreed on a deadline, failure of which the plaintiff could forfeit the deposit paid. The court:	○ Literalism in contract interpretation (**LITERALISM**); ○ Recognition of general principles applicable to all manner of contracts (**GENERAL PRINCIPLES**); ○ Pacta Sunt Servanda Applied (PACTA):	○ Freedom and Autonomy of Contract (**FOC)**; ○ Sanctity of Contract (**SANCTITY**): Judicial Non-interventionism**;** ○ Conceptual Formalism (**CONCEPT-FORMAL**): The Conception of Law as Conceptually Ordered**,** i.e., based on

				○ Rejected the claim by the plaintiff to be availed the equity against forfeiture or the defence of unconscionable bargains; and ○ Noted and rejected as inapplicable, the decisions of judges Somerville and Denning in Stockloser v Johnson [1954] 1 ALLER 630, to the effect that where the relevant terms of contract were harsh, unconscionable or of a penal nature, the court would intervene, irrespective of whether the other party was guilty of any fraud, sharp practice or other unconscionable conduct. The judge reasoned that: ○ There were two positions: the rigid (formalistic) common law position making time of the essence; and what he called the softer (flexible); ○ Formalism is preferred because, the terms of the contract had to be strictly enforced; otherwise the court would be substituting the terms agreed with the judge's individual sense of fairness; "No principle appears to exist to determine what is unreasonable or unconscionable or unjust, which are emotive rather than precise terms and so it is presumably a question of what shocks the conscience of whoever is trying the case, leaving equity to vary with the length of the	***Disregard of Vitiating Factors***; ***Disregard of fairness***; and No filling gaps in Contract terms i.e., Equity ***rejected*** as source of remedy;	Precise, Objective, Neural, Universally Applicable and Fundamental Principles; ○ Role of Courts as implementers not makers of the law (**ROC-NONMAKERS);** ○ Conception of Contract as Discrete (**DISCRETE);** ○ Conceptual Formalism (**CONCEPT-FORMAL**); ○ Tension Management Mechanism (**MGT):** Restraint to Judicial Authority.

				judge's foot." ○ Equity could only be allowed if there was evidence of fraud, undue influence, or oppression**.**		
15.	Kurji Anandji & Co. v Sojpal Punja Shah & Others	[1964] 1 EA 3	CA	The High Court had allowed the plaintiffs to succeed in a suit on bills of exchange, where several had been issued, and only a few dishonoured. The Court of Appeal stated that, the question should not be whether the judge reached the right decision or conclusion on the principles applied, but whether he applied the right principles.	○ Recognition of general principles applicable to all manner of contracts (**GENERAL PRINCIPLES**)	○ Conceptual Formalism (**CONCEPT-FORMAL**): The Conception of Law as Conceptually Ordered, i.e., based on Precise, Objective, Neural, Universally Applicable and Fundamental Principles.
16.	David Dungu v East African Posts & Telecommunications (N.B. Both Formalism and Flexibility were applied in this decision)	HCCA No. 84 of 1973	HC	The plaintiff sued the defendant for breach of a contract to reward the plaintiff for giving information that would lead to the arrest of thieves and recovery of stolen wires. The plaintiff had provided the information but the defendant negligently failed to prosecute the thief, and the plaintiff wanted court to find that for that negligence, the defendant was liable for breach of the duty of care. The court refused to find a duty of care and used ingredients of tortious negligence to find that the defendant was not liable.	○ Legal Classificatory Categories ignored (**NO CATEGORIES**): Treating Economic Negligence as Contractual and used to justify liability; ○ Literal and Logical deductive interpretation, or mechanical application of rules (**LOGICAL-MECHANIC),** i.e. Restrictive Interpretation of the Negligence rules	○ Conception of Law as Means to an End (**LMEANS**); ○ Conceptual Flexibility (**CONCEPT-FLEXTY**); ○ Positivist Conception of Law (**POSITIVISM)**.

17.	Mistry Amar Singh v Serwano Wofunira Kulubya (N.B. Both Formalism and Flexibility were applied in this decision)	[1963] 1 EA 408	HC	An illegal contract had been signed between the parties, on account of not having got the government's prior consent for a non-African leasing and taking possession of land from an African. The African wanted to override the contract and have his land back, and the non-African asked court to uphold freedom of contract. The court held in favour of the African by strictly adhering to the words of the statute. In his reasoning, the judge considered public policy as having been to protect a class of people to whom the defendant belonged from the class of foreigners, and that a contract could be defeated by statute protection.	○ Literal and Logical deductive interpretation, or mechanical application of rules (**LOGICAL-MECHANIC**); ○ Giving Procedural Justice Sway (**PROCED-SWAY**); ○ Contract viewed as a network of relations (**RELATIOINS**): Contract used as an Instrument of Social Relations; ○ Contextual Interpretation of Contracts and Application of Rules (**CONTEXTUAL): *Public Policy*** seen as the need to protect a ***class of foreigners*;**	○ Social Support as a Rule of Recognition i (**SOCIAL** SUPPORT); ○ Statutory Interventionism (**SINTERV)**; ○ Positivist Conception of Law (**POSITIVISM**); ○ Inequality before The Law amongst Contracting Parties (**INEQUALITY**): Class Oriented Conception of Justice; ○ Conception of Contract as Relational (**RELATIONAL);** ○ Procedural Justice superior to substantive justice (**PJ)**.
18.	Robbialac Paints (U) Limited v K.B Construction Limited (N.B. Both Formalism and Flexibility were applied in this decision).	[1976] HCB 49-50	HC	The defendant, a building contractor abandoned work and the Plaintiff treated the contract as repudiated, thus the claim for damages. The court awarded damages based on the value of work left undone by the defendant, plus general damages for inconvenience. Court reasoned that damages for inconvenience were foreseeable as a result of the breach.	○ Assessing damages based on actual financial loss from non-performance (**ACTURAL LOSS);** ○ Exercising Unrestrained Judicial Authority (**UNRESTRAINED AUTHORITY**): Jealously Guarding Jurisdiction, i.e., award of general damages i.e. for unquantifiable prejudice; ○ Abductive Reasoning in interpretation of statute or	○ Accuracy in Contracting and Adjudication (**ACCURACY**); ○ Conception of Law as a means to an end **(LMEANS**); Legal Validity and Contractual Obligation judged by ***Practical Utility*** ; ○ Judicial Absolutism **(JA).**

					precedents (**ABDUCTIVE**)**:** Intuition used resolve competing answers.	
20.	Mugumuza v Agip Petrol Station	(1975) HCB 290, 293	HC	An exemption of liability clause was carried on the notice board of a garage. In a suit for breach of duty of a bailee, court held that the exemption was neither part of the contract nor brought to the attention of the plaintiff. Court reasoned that even if the exemption had been part of the contract, it had to be construed very strictly.	○ Pacta Sunt Servanda Applied (**PACTA**): Treating written terms as sacrosanct; ○ Rejection of exemption clauses and ○ Imposing strict standards on exemption clauses	○ Freedom and Autonomy of Contract (**FOC)**.
21.	Ms Peter SS Kirumira Oil Millers v. American Insurance Company	[1976] HCB 56	HC-Nyamuch oncho J	The lender of the plaintiff had insured the plaintiff's machinery held as security machinery against explosion. In this claim for indemnity, court held that: ○ There was no privity of contract between the parties, so the plaintiff could not enforce a contract of insurance; ○ The peril was not covered, because the tank did not explode. Instead, it cracked owing to pressure from the oil inside, leading the tank to burst into an explosion	○ Recognition of general principles applicable to all manner of contracts (**GENERAL PRINCIPLES**): Applying the Privity of Contract Doctrine; ○ Literalism in contract interpretation (**LITERALISM**).	○ Writing as the best evidence of parties' intentions (**PAROL E VIDENCE);** ○ Freedom and Autonomy of Contract **(FOC);** ○ Conception of Contract as Discrete (**DISCRETE).**

22.	Dr. Sydna Burban Nudin Saheb & 2 Others v. Jamil Din & 3 Others	[1972] HCB 260	HC Phadke. J,	In a sale of property transaction, the plaintiff delayed to pay and the defendant refused to take the balance claiming that time was of essence, and he was entitled to retain the deposit. The issue was, whether a court can interfere with a contract if the terms are deemed harsh and unconscionable. Court held that in absence of a contrary intention by the parties, although equity took a less rigid view and court could interfere with the contract, in this case court would strictly construe time as of essence and refuse to interfere. **The reasoning was that**: ○ The tension between formalism and flexibility in these cases appeared in Stockloser v. Johnson (1954) 1 ALLER 630, where Justices Somerville and Denning took the view that once terms are found to be harsh, unconscionable, or punitive, even if the vendor was at the time of the contract not guilty of fraud, sharp practice or other unconscionable conduct, and irrespective of whether the purchaser was ready and willing to perform, courts would interfere	○ Pacta Sunt Servanda Applied (**PACTA**): Treating written terms as sacrosanct: Refusal to Interfere with terms deemed harsh and unconscionable; ○ Literalism in contract interpretation (**LITERALISM**).	○ Freedom and Autonomy of Contract (**FOC):** Judicial Non-Interventionism; ○ Sanctity of Contract (**SANCTITY);** ○ Conception of Contract as Discrete (**DISCRETE);** ○ Conceptual Formalism (**CONCEPT-FORMAL**): indeterminate concepts of harsh and unconscionable ignored for want of evidence of fraud, which was viewed as the condition to equity's assistance to interfere with contract terms; ○ Role of Courts as implementers not makers of the law (**ROC-NONMAKERS**) ○ Positivist conception of law (**POSITIVISM**) i.e. Equity no place in contract.

				and order a refund; o Romer L.J, in *Stockloser v. Johnson (1954) 1 ALLER 630* instead held that no such equity existed as above, unless there had been unconscionable conduct at the time of the contract and the buyer was ready and willing to pay the price; o Romer's view was more acceptable in Uganda; o Court cited as support Holroyd Peace, LJ and Bremen LJ in Campbell Discount Co. v. Bridge (1961) 2 ALLER 97, for the position that it would be a novel extension if courts used equity to interfere with contracts freely entered into with no duress or mistake, merely on ground that in certain circumstances, it turned out harsh or disadvantageous for parties who later wished or were compelled to abandon the contract. o Court held as still true Lord Nottingham's view in Maynard v. Mosley (1676) 3 Swan, 655 that "equity mends no man's bargain", and that mends should be made by legislation, not the judiciary.		

23.	Yokana Sekandi v Yafesi Semakula	HCCS 152/70, LDC-Case 181/70	HC-Sheridan CJ,	Judge noted that the plaintiff may be regretting having entered into the contract, which on the face of it was over generous to the defendant, but still held that: The plaintiff could not resile from the contract because inadequacy of consideration is not a ground for setting aside a contract.	○ Pacta Sunt Servanda Applied (**PACTA**): Treating written terms as sacrosanct, i.e.; no filling gaps in Contract terms; Refusal to Interfere with terms deemed harsh and unconscionable (Inadequacy of consideration not an issue); ○ Presumption of Equality of Contracting Parties (**EQUALITY PRESUMPTION**).	○ Freedom of Contract (**FOC)**; ○ Sanctity of Contract (**SANCTITY);** ○ Equality before the law (**EQUALITY).**
24.	Wapenyi v Kimbowa	CA 53/1970, LDC-Case 84/71, P.79	HC-Sheridan, CJ,	In a claim for the sale goods sold and services rendered, against a claim for failure to complete the contract in time, court held that: The Magistrate's court was wrong to impute its knowledge that the work required a high level of skill and intricacy, and could not be done hastily.	○ Literal and Logical deductive interpretation, or mechanical application of rules (**LOGICAL-MECHANIC**): Refusal to base decision on Court's own intuitions and preferences.	○ Freedom and Autonomy of Contract (**FOC):** Judicial Non-Interventionism; ○ Sanctity of Contract (**SANCTITY**); ○ Conceptual Formalism (**CONCEPT-FORMAL**); ○ Tension Management Mechanism (**MGT):** Restraint to Judicial Authority.
26.	Mainuka & Sons v Abasaija Kyeyamba (***N.B. Both Formalism***	[1982] HCB 50	HC	In a claim for the value of lost goods under contract of carriage, court held that: ○ Where no conversion or mis-delivery is involved, the measure	○ Assessing damages based on actual financial loss (**ACTURAL LOSS);** ○ Legal Classificatory Categories ignored (**NO CATEGORIES**): Treating Economic Negligence as	○ Accuracy in Contracting and Adjudication (**ACCURACY)**; ○ Conception of Law as a Means to An End (**LMEANS**).

	and Flexibility were applied in this decision).			of damages is the value of goods at the point and time of delivery; ○ A common carrier is liable for the loss of non-delivery even where no negligence is proved, and a mere accident without proof of negligence is not a sufficient defence. **Note**: Both formalism and Flexibility applied instrumentally to achieve what the judge perceived as just and fair	Contractual and used to justify liability; ○ Literal and Logical deductive interpretation, or mechanical application of rules (**LOGICAL-MECHANIC**), i.e. Restrictive Interpretation of the Negligence rules.	
27.	Aloysius Kakande v Edward Nsimbi ***N.B. Both Formalism and Flexibility were applied in this decision***)	[1975] EA 195	HC	Section 4 of the Illiterates Protection Act provided that a contract made on behalf of an illiterate had to contain certification that it had been read over to him or her in a language her or she understood. In this case, the contract had been translated to Luganda (the defendant's) language before signing, but the defendant claimed that he had signed the contract in ignorance of its nature. **Court held that**: ○ The defence was not available if the scenario was brought about by the negligence of the signer, in failing to take reasonable precautions by insisting that the contract be read to him in a language he understood;	○ Pacta Sunt Servanda Applied (**PACTA**): Disregard of Vitiating Factors; ○ Presumed equality of contracting parties (EQU ALITY **PRESUMPTION**); ○ Giving Procedural Justice Sway (PROCED-**SWAY):** i.e. evidential rules invoked to deny defence of protection of the weaker party; ○ Literal and Logical deductive interpretation, or mechanical application of rules (**LOGICAL-MECHANIC**); ○ Using indeterminate doctrines (**INDETERM-DOCTRINE**):	○ Procedural Justice superior to substantive justice **(PJ);** ○ Equality before the law (**EQUALITY**); ○ Positivist Conception of Law (POSITIVISM**)**; ○ Conceptual Formalism (**CONCEPT-FORMAL**); ○ Conceptual Flexibility (CONCEPT FLEXTY): Dehumanisation of law;

				○ Section 4 creates a mere presumption that the contract was read once if it states so, to be rebutted by the illiterate, which was not done.	Reasonableness and reasonable man used.	
28.	Sekayombya v Uganda Steel Corporation	[1984] HCB 42	HC-Katinti, J.	The plaintiff bought iron sheets from the defendants, which were not delivered. The receipt got lost during the 1979 war, but the debt acknowledged in the defendant's books. **The Court held that**: ○ Under section 51(1), (2) and (3) of the Sale of Goods Act, Chapter 79, Laws of Uganda, if the seller wrongfully neglects to deliver goods, the buyer is entitled to maintain a suit for damages for non-delivery; ○ The measure of damages is the estimated loss directly and naturally resulting in the ordinary course of business from the seller's breach; ○ Where the market is available, the value is primafacie the difference between the market price and the price when the goods ought to have been delivered, or delivery was refused. **Note**: The rule in section 51 contained conceptual flexibility, obliging judges	○ Assessing damages based on actual financial loss (**ACTURAL LOSS**); ○ Literal and Logical deductive interpretation, or mechanical application of rules (**LOGICAL-MECHANIC**); ○ Giving Procedural Justice Sway (**PROCED-SWAY**).	○ Accuracy in Contracting and Adjudication (**ACCURACY**); ○ Conceptual Formalism (**CONCEPT-**FORMAL); ○ Positivist Conception of Law (**POSITIVISM);** ○ Procedural Justice superior to substantive justice (**PJ)**.

				to consider the ordinary course of business/ practical reality in judging whether a loss qualified to be paid.		
30.	Take Me Home Limited v Apollo Construction Co. Limited ***(N.B. Both Formalism and Flexibility were applied in this decision***)	[1981] HCB 43.	HC-Allen, J.	The plaintiff sued the defendant for breach of contract and damages for non-delivery of a motor vehicle under section 51 (2) of the Sale of Goods Act, the car bought having been delivered damaged. The Managing Director of the plaintiff bought the car before the plaintiff was incorporated, and although damages were claimed, they had not been pleaded. The court held that: ○ Although the defendant company was incorporated after the contract for sale of the motor vehicle was already concluded, the defendant was liable for the debt; ○ Although the law entitles the plaintiff to damages, the same must have been pleaded, and a mere plea for any other relief is not sufficient; ○ The plea for any other relief should not be used as cover-up for sloppy, inadequate and incompetent pleadings.	○ The judge making law (**LAW MAKING**): Sidestepping the Rules of Law, i.e. Rule of law invalidating reincorporation contracts sidelined to find a remedy; ○ Giving Procedural Justice Sway (**PROCED-**SWAY): Rejection of uncertain pleadings.	○ Certainty of Law (**COL**); ○ Procedural Justice superior to substantive justice (**PJ)**; ○ Judicial Absolutism (**JA)**.

31.	Julian Mbalile t/a Julian Mbalile & Family v Transocean (U) Limited	[1985] HCB 82	HC-Odoki, J.	In a contract for carriage of goods, most were delivered damaged. Court held that: ○ The defendant was a common carrier and failure to deliver the goods means she breached the contract of carriage; ○ Primafacie, the common carrier is strictly responsible for all the losses suffered.	○ Literal and Logical deductive interpretation, or mechanical application of rules (**LOGICAL-MECHANIC**); ○ Giving Procedural Justice Sway (**PROCED-SWAY**).	○ Positivist Conception of law (**POSITIVISM**); ○ Procedural Justice superior to substantive justice (**PJ)**; ○ Conceptual Formalism (**CONCEPT-**FORMAL); ○ Conceptual Formalism (**CONCEPT-FORMAL**): The Conception of Law as Conceptually Ordered**,** i.e., based on Precise, Objective, Neural, Universally Applicable and Fundamental Principles.
32.	National industrial Credit (Uganda) Limited v. C.D. Patel t/a Western Transport Co.	(1972) U.L.R 85	HC-Saldanha, J	Under a hire-purchase agreement, the defendant hirer agreed to be responsible for loss or damage to the vehicle, howsoever caused. The vehicle was stolen and the defendant pleaded frustration to a claim for the unpaid installments, alternatively arguing that the insurer was liable for the balance, although the insurance cover had expired, and the defendant had the duty to insurer the vehicle. **The court held that,** frustration by theft was a defence to liability under hire-purchase contracts, but since under the agreement the defendant indemnified the plaintiff, the agreement was not frustrated.	○ Pacta Sunt Servanda Applied (**PACTA**): Disregard of Vitiating Factors; ○ Literalism in contract interpretation (**LITERALISM**)	○ Freedom and Autonomy of Contract (**FOC):** Judicial Non-Interventionism; ○ Sanctity of Contract (**SANCTITY);** ○ Conception of Contract as Discrete (**DISCRETE).**

33.	Pollen (U) Limited v. Associated Match Co. Limited	(1972) U.L.R 111	Russell, Ag. J.	The plaintiff sued for damages for breach of contract, for supply of matches with a **picture of Dictator President Iddi Amin**, for sale on what the judge referred to as 'the first anniversary of the second Republic of Uganda', the 25TH January 1972. This was the first anniversary of Amin's military capture of power. The defendant had written to the plaintiff conditioning performance on availability of labels and the plaintiff bearing their cost. Both condition precedents were not met. Notwithstanding the political element of the contract, **court held and reasoned that**, there was no clear and unqualified offer by the defendant capable of acceptance, therefore no contract existed.	○ Giving Procedural Justice Sway (**PROCED-SWAY**). ○ Pacta Sunt Servanda Applied (**PACTA**): Disregard of contextual or Business reality;	○ Procedural Justice superior to substantive justice (**PJ)**; ○ Positivist Conception of Law (**POSITIVISM).**
34.	National trading Corporation v. Moses Kityo	(1972) U.L.R 63	HC-Musoke, J.	A contract of employment provided for the right of the employer to suspend an employee but was silent on whether salary would be paid during suspension. **The court held and reasoned that:** ○ The natural meaning of 'suspension' was that the workman ceased to be under any duty to work and the employer under a duty to pay (Bird v. British celanese [1954] 1 ALLER 488 cited with approval); ○ There was no custom of	○ Pacta Sunt Servanda Applied (PACTA): Disregard of Vitiating Factors; ○ Literalism in contract interpretation (**LITERALISM**)	○ Freedom and Autonomy of Contract (**FOC):** Judicial Non-Interventionism; ○ Sanctity of Contract (**SANCTITY);** ○ Conception of Contract as Discrete (**DISCRETE).**

				corporation employees receiving half pay; ○ It was the employer's discretion to pay.		
35.	George Hall v. Chas O.F. Drani	[1972] U.L.R 65	HC-Musoke, J.	Under a contract for sale of a bar, the plaintiff seller did not disclose that he only had a tenancy and not a bar; assured the defendant that he would get a licence; and sold a going concern but the furniture later found not justifying the price. The plaintiff was a non-African and not allowed a bar licence. **The court held that:** ○ The buyer never exercised due diligence to know it was a mere tenancy, therefore had no claim; ○ Since as an African, the buyer was entitled to be awarded a licence, there was no misrepresentation; ○ The business was sold as a going concern and no inventory taken, Therefore the claim failed too.	○ Pacta Sunt Servanda Applied (**PACTA**): Disregard of Vitiating Factors; and Disregard of contextual or Business reality	○ Freedom and Autonomy of Contract (**FOC):** Judicial Non-Interventionism; ○ Sanctity of Contract (**SANCTITY);** ○ Conception of Contract as Discrete (**DISCRETE).**
36.	N.R. Lakhani v. H.J. Vaitha & Another Limited ***(N.B. Both Formalism and Flexibility***	[1965] E.A. 452	HC-Benett, J.	A gaming contract was entered, under which security was given. The plaintiff brought a suit to declare the security unenforceable and the debt irrecoverable under the Gaming Act. **The court held and reasoned that:** Under s. 1 of the Gaming Act 1835,	○ Literal and Logical deductive interpretation, or mechanical application of rules (**LOGICAL-MECHANIC**):Illegality overrides all proof and procedural matters/justice.	○ Statutory interventionism (**SINTERV**) i.e. International Treaties regulating contracts have force of law; ○ Positivist Conception of Law (**POSITIVISM**): ○ Formal legality as ultimate rule of

	were applied in this decision)			securities for money lost at a dice were deemed to have been for an illegal consideration, therefore the plaintiff was seeking to set aside an illegal transaction to which he was a party, which he could not do, without proving undue influence or pressure (*per Jones v. Merionethshire Permanent Benefit Building Society [1892] 1 Ch. 173*).		recognition.
37.	Adam Bin Ramadhan v. East African Railways Corporation	[1975] E.A. 195	Butagira, Ag. J.	Under a contract for the transportation of cattle by rail, there was a clause that the carrier was only liable in cases of willful misconduct of its employees. The plaintiff brought the suit without pleading it, argued negligence of the defendant. **The court held that:** ○ Willful misconduct was not pleaded therefore the defendant could not be liable; ○ Even if willful misconduct had been pleaded, the action was misconceived, as it had not been pleaded.	○ Giving Procedural Justice Sway (**PROCED-SWAY**): Restricting litigant's case to Pleadings, and strict observance of rules of evidence; ○ Recognising Law's Classificatory Categories (LCATEGOTIN): Negligence as basis of contractual liability rejected.	○ Conceptual Formalism (**CONCEPT-FORMAL**): The Conception of Law as Conceptually Ordered**,** i.e., based on Precise, Objective, Neural, Universally Applicable and Fundamental Principles; ○ Certainty of Law (**COL**); ○ Procedural Justice superior to substantive justice (**PJ)**.
38.	Ddungu v. East African Posts & Telecommunications	HCCA No. 84/1973 [1974] H.C.B. 290	Ssekandi, Ag.J.	The defendant's goods/wires were stolen and she ran an advert offering to pay however would provide information leading to the arrest and prosecution of the thieves. The Plaintiff provided information in response but the defendant did not follow through to have the thieves prosecuted. The plaintiff sued for breach of contract, and negligence in	○ Giving Procedural Justice Sway (**PROCED-SWAY**): formalities; ○ Literal and Logical deductive interpretation, or mechanical application of rules (**LOGICAL-MECHANIC**):Illegality overrides all proof and procedural	○ Procedural Justice superior to substantive justice (**PJ)**; ○ Positivist Conception of Law (**POSITIVISM).**

				failing to prosecute the thieves and pay his dues**. Court held and reasoned that:** ○ There was no negligence as there was no duty of care to pursue prosecution on the part of the defendant that was breached and damages incurred; ○ Although the advert amounted to an offer, the information provided that led to the arrest was not the exact information in the terms of the advert and all the conditions therein were not satisfied.	matters/justice.	
39.	A. Kambe v. African United Auto Engineers & Another	[1976] H.C.B. 105	HC-Allen, J.	A mechanic repaired a car and the owner disputed the amount charged, thus the mechanic retaining the car. The owner sued, and the court held that the onus was on him to prove that the charges were excessive, and without expert evidence, he had failed to discharge it. Further, that he had a right of retention of the car.	○ Giving Procedural Justice Sway (**PROCED-SWAY**); ○ Literal and Logical deductive interpretation, or mechanical application of rules (**LOGICAL-MECHANIC**):Illegality overrides all proof and procedural matters/justice.	○ Procedural Justice superior to substantive justice (**PJ)**; ○ Positivist Conception of Law (**POSITIVISM).**
40.	Bibonde v. Waiswa	[1974] H.C.B. 120	HC-Kakooza, Ag. J.	In a negligence suit, the defendant pleaded want of majority age to bring action in court. The general majority age was 21, and the plaintiff was 20. The plaintiff pleaded that under s. 3 of the Contract Act, the majority age of 18 in England had been made law in Uganda. The court held that Contract Act did not apply to torts,	○ Giving Procedural Justice Sway (**PROCED-SWAY**); ○ Literal and Logical deductive interpretation, or mechanical application of rules (**LOGICAL-MECHANIC**):Illegality overrides all proof and procedural matters/justice.	○ Procedural Justice superior to substantive justice (**PJ)**; ○ Positivist Conception of Law (**POSITIVISM).**

				therefore the suit was improperly instituted and dismissed.		
41.	Tejani & Another v. Life Insurance Corporation of India	[1968] E.A 242	HC-Sheridan, J.	Under a contract of life insurance, payment of premium was made by cheque, which the evidence proved to be a usage. The cheque was dated before the deceased's death but posted and received after the death. **The court held and reasoned that:** ○ It was the defendant's sanctioned usage to receive payment by cheque; ○ There was no evidence that the defendant had made the post her agent for receiving premium so that upon post it was presumed received; ○ For a debtor to choose to pay by post does so at her own risk; ○ The policy was not existing at the time of death and therefore no liability.	○ Giving Procedural Justice Sway (**PROCED-SWAY**): formalities of payment of premium strictly honoured, and payment by post discounted; ○ Pacta Sunt Servanda Applied (**PACTA**): No Filling gaps in Contract terms, i.e., Refusing to imply terms;	○ Procedural Justice superior to substantive justice (**PJ)**; ○ Positivist Conception of Law (**POSITIVISM);** ○ Freedom and Autonomy of Contract (**FOC):** Judicial Non-Interventionism; ○ Sanctity of Contract (**SANCTITY).**

APPENDIX 3: Flexible Adjudication In Uganda's Commercial Hard Cases (Post Independence-1962-1986)

No	CASE TITLE	CITATION	COURT & JUDGE	CASE SUMMARY	INTERNAL VALUE (S)	EXTERNAL VALUE (S)
1.	MB Nandala v Father Lyding	[1963] 1EA 706	HC	Applicant applied for relief from disability to enforce contracts by firms whose particulars were not registered (S.10 (1) (a), of the Business Names Registration Ordinance). Court held that it was not just and equitable for the respondent to oppose application.	○ The judge making law (LAW MAKING): Sidestepping the Rules of Law, to find fairness and equity	○ Substantive Justice (SJ): Ubuntu concept of justice; ○ Judicial Absolutism (JA).
2.	City Council of Kampala v Mukiibi	[1967] EA 368	HC	A tenancy agreement had been drawn contrary to the statutory form and not registered. The court held that: ○ The agreement could still be enforceable as an agreement to lease and not a tenancy; ○ In the tenancy agreement, since sub-letting was not legally permissible, the third parties that the lessee had allowed to work on the premises for were mere licensees and not sub-tenants.	○ The judge making law (LAW MAKING): Sidestepping the Rules of Law , by interpreting facts	○ Substantive Justice (SJ).
3.	Coffee Works (Mugambi) Limited v Coffee Marketing	[1963] 1 EA 148		The defendant, being a statutory body created by the Coffee Ordinance of 1959, was the one entitled to buy coffee for export and set prices for it. The plaintiff sought to have court interfere with the pricing, on grounds that the contract	○ Statutory Regulation and Intervention in Contract Terms (**SINTERV**)	○ Conception of a Command Economy (**COMM-ECON**);

	Board			for purchase of coffee was a sale of goods contract. The Court: ○ Rejected the plea, holding that it was a statutory contract in which the parties and court had no say regarding the terms, such as price; ○ Found that the contracts were not ones where freedom of contract reigned.		
4.	Jupiter General Insurance Co. v Kasanda Cotton Co.	[1966] 1 EA 252		An insurance contract was made orally to cover cash in transit by an insurer that usually issued written policies for such contracts. The issue was whether the usual exceptions to the insurer's liability embodied in the usually written contracts applied. The court recognised the standard terms usually contained in the insurer's written policies as governing the oral contract. **Court reasoned that:** ○ The insured should have reasonably expected the standard terms as appropriate to the risk; ○ The attitude of the insured not insisting on other terms at the time of making the contract was also seen as justifying the implied standard terms.	○ Judicial Interventionism in Contract (**JINTERV**): Filling gaps in contracts with implied terms, i.e. Honouring standard terms; ○ Using indeterminate doctrines (**INDETERM-DOCTRINE):** reasonableness.	○ Contractual Justice (**CONJUS**), through Judicial Interventionism; ○ Judicial Absolutism (**JA)**; ○ Inequality under the law (**INEQUALITY**); ○ Conceptual Flexibility (**CONCEPT FLEXTY):** Including Legal Indeterminacy;
5.	Uganda v Alafairi	Criminal Revision No.	HC	A contract for the sale of goods was entered when the goods had	○ Criminalising civil wrongs (**CRIMINALISING**).	○ Judicial Absolutism (**JA)**; ○ Public Interest as a Rule of

	Kagezi	21 of 1974.		perished, which would make it void under section 7 of the Sale of Goods Act, implying that the loss would fall where it was. The court instead applied section 7(2) of the Distribution and Prices of Goods (Amendment) Decree (No. 1of 1972), under which the seller's action was criminalised, and held that the seller had to forfeit the goods and the price money to the buyer.	○ The judge making law (LAW MAKING): *Using executive decrees, and Stretching the meaning* and Applicability of a rule; ○ Statutory Regulation and Intervention in Contract Terms (**SINTERV**);	Recognition, the basis of obligation and enforceability of in Private Contracts (**PUBLIC INTEREST**): But State Policy as representing Public Interest; ○ Conception of a Command Market Economy (**COMM-ECON);**
6.	Rashid Reich and David William Rwamafa v Uganda	[1975] HCB 327	HC	The court went beyond the offending employees to extend the imprisonment sanction imposed by a statute criminalizing otherwise a breach of sale of goods, to their employers. The court reasoned that the imprisonment was mandatory and had to so extend, unless there was evidence that the employers tried to prevent overcharging.	○ The judge making law (**LAW MAKING**): ***Stretching the meaning*** and Applicability of a rule; ○ Statutory Regulation and Intervention in Contract Terms (**SINTERV)**; ○ Criminalising civil wrongs (**CRIMINALISING)**.	○ Judicial Absolutism (**JA);** ○ Public Interest as a Rule of Recognition, the basis of obligation and enforceability of in Private Contracts (**PUBLIC INTEREST**): But State Policy as representing Public Interest; ○ Conception of Law as A Means to An End (**LMEANS**); ○ Conception of a Command Economy (**COMM-ECON**) ○ Public Interest as a Rule of Recognition, the basis of obligation and enforceability of in Private Contracts (**PUBLIC INTEREST**).
7.	Avone v Uganda	[1969] EA 129	HC	The charge sheet in a case of fraudulently obtaining credit was defective for citing a non-existent section, as the law under which the	○ Undue regard to technical or procedural defects to do substantive justice (**PROC-DISREGARD**); ○ Statutory Regulation and Intervention in Contract	○ Substantive Justice (**SJ**); ○ Public Interest as a Rule of Recognition, the basis of obligation and enforceability of in Private Contracts (**PUBLIC INTEREST**);

				charge had been preferred. The Court held that there was no miscarriage of justice and proceeded to hear the case.	Terms (**SINTERV**); ○ Criminalising civil wrongs (**CRIMINALISING)**	○ Conception of a Command Economy (**COMM-ECON);**
8.	Uganda v. Kinya and Others	[1975] HCB, Cr. Rev. No. 70 of 1975.	HC	A wrong paragraph had been cited as a basis for a charge under economic crimes law for sale of goods. The judge held that a defective charge sheet was not bad in law, as there was no miscarriage of justice.	○ Undue regard to technical or procedural defects to do substantive justice (**PROC-DISREGARD**); ○ Statutory Regulation and Intervention in Contract Terms (**SINTERV**); ○ Criminalising civil wrongs (**CRIMINALISING)**	○ Substantive Justice **(SJ);** ○ Public Interest as a Rule of Recognition, the basis of obligation and enforceability of in Private Contracts (**PUBLIC INTEREST**); ○ Conception of a Command Economy (**COORD-ECON**);
9.	The Universal Cold Storage Limited v Sabena Belgian World Airlines	1965] 1 EA 418.	HC	The defendant was a carrier that had acted for a disclosed third party as agent to deliver meat, which upon arrival was found unfit for human consumption. The issue was whether the carrier was liable for the unpaid price under section 48 of the Uganda Sale of goods Act. Without finding evidence to prove that the plaintiff had delivered the meat in a merchantable condition to the defendant, the court held that the defendant was liable although the Defendant was proved as an agent of a disclosed principal, that would legally not be liable for the price, pleas of unfairness made, and no evidence of fault was tendered	○ The judge making law (**LAW MAKING**): ***Stretching the meaning*** and Applicability of a rule; ○ Legal Classificatory Categories ignored (**NO CATEGORIES**): Treating Economic Negligence as Contractual and used to justify liability; ○ Contract viewed as a network of or other relations (**RELATIOINS):** Intention to Create a Long Term Relationship of Parties Recognised.	○ Conceptual Flexibility (**CONCEPT FLEXTY):** Including Legal Indeterminacy; ○ The conception of law as a means to an end (**LMEANS**); ○ Conception of Contract as Relational (**RELATIONAL**): Including contractual obligations being based on ***Reliance***; ○ Systeatic Flexibility (**SYSTEM-FLEXTY**).

				against the defendant. The Judge reasoned that: The Defendant was the owner of the goods, although the principle of the defendant had a duty of care to be prudent and inspect the meat before accepting it and ensure that it was merchantable; There was a presumed contract for sale of goods. Presumed, because, the defendant was in any case the carrier, who could not be liable for the price of goods sold, for the buyer was disclosed.		
10.	Olinda De Souza Figueiredo v Kassamali Nanji	[1963] 1 EA 381	HC	Two statutes seemed to lead to contradictory positions. The Mortgage Act required only the mortgagor to sign the mortgage deed for it to be effective, whereas the Registration of Titles Ordinance required every registered instrument to have been signed by both parties it is affecting to be effective. The mortgagee had not signed the deed in issue, and the court held that a mortgage form even in view of the provision in the Registration of Titles Ordinance did not require the formality and precision needed in a court order. The judge reasoned that the issue	○ The judge making law (**LAW MAKING**): Sidestepping the Rules of Law; ○ Undue regard to technical or procedural defects to do substantive justice (**PROC-DISREGARD).**	○ Conception of Justice as Substantive Justice (**SJ);**

				was a minor procedural matter and not one of substance.		
11.	Pioneer General Assurance Society Ltd v Ziwa	[1974] 1 EA 161.	HC	Section 99 (b) of the Traffic and Road Safety Act of 1970 was interpreted flexibly in an insurance claim for the provision for third party motor insurance to cover passengers carried in motor vehicles for hire or reward. The issue was whether the defendant, a businessman who had accompanied his goods in a pickup was covered by the insurance policy. The court held that the defendant was covered by the policy although the pickup was not a passenger vehicle. The judge reasoned that having been a commercial transaction, the owner of goods should have been expected to accompany them.	○ Contextual Interpretation of Contracts and Application of Rules (**CONTEXTUA**L): Invoking Business Reality and Commercial Sense; ○ Contract viewed as a network of or other relations (**RELATIONS):** Using Reliance to find contractual obligation and Cooperation and Trust Recognised as Expected by parties;	○ Economic Efficiency (**EFFICIENCY):** Commercialism and Wealth Maximisation; ○ Substantive Justice (SJ): *Ubuntu concept of justice*; ○ Conception of law as means to an end (**LMEANS)**; ○ Conception of Law as Experience (**LEXP**); ○ Conception of Contracts as Relational (**RELATIONAL**); ○ Social Support as a Rule of Validity and Recognition of Law (**SOCIAL SUPPORT**): Contractual Obligation as based on Communal Control.
12.	Kiirya v East African Railways Corporation	[1976] HCB 229	HC	The court refused to apply the time limitation to actions for wrongful dismissal provided by the East African Railways Corporation Act. The judge's reasoning was that, since the plaintiff, who had been the defendant's yard foreman, was a junior officer; only the terms of contract would apply and not the	○ The judge making law (**LAW MAKING**): Sidestepped the Statutory Rule; ○ Recognising inequality amongst contracting parties: Using economic, social or political class as criteria to access justice (**NO-EQUALITY**): in this case, favoring low economic class.	○ Inequality before the law **(INEQUALITY**): The Conception of Justice as dependent on Class

				statute. The implication here is that the court side-stepped the statute to protect the weaker party, and was motivated by the inequality of contracting parties to allocate rights and obligations.		
13.	East African Plans Ltd v Roger Allan Rickford Smith (***N.B. Both Formalism and Flexibility were applied in this decision***)	HCCS No. 426 of 1969		A deed of settlement had been made in court and confirmed by the endorsement of court. The plaintiff challenged the settlement, pleading mistake. The judge stretched the slip rule of civil procedure that is used to correct inadvertent errors in court orders, to amend the contract between the parties, and ordered the defendant to pay more money than agreed. The judge's reasoning was based on equity, that there was no true accord, and it would be inequitable to enforce the contract as made.	○ The judge making law (**LAW MAKING**): ***Stretching the meaning*** and Applicability of a rule; i.e. Enlarging the Premises and Applicability of Rules; ○ Exercising Unrestrained Judicial Authority (**UNRESTRAINED AUTHORITY**): Jealously Guarding Jurisdiction, i.e., Upholding the ***Sanctity of Court Order***s, i.e.,: Court orders held as sacred and must be obeyed even if irregular, null or void; ○ Judicial Interventionism in Contract **(JINTERV**): ***Equity*** invoked to interfere with Contract.	○ Conceptual Flexibility (**CONCEPT FLEXTY):** Including Legal Indeterminacy; ○ Law as a Means to An End (**LMEANS**); ○ Positivist Conception of Law (**POSITIVISM**): Supremacy of Positive Law; ○ Judicial Self Preservation **(JSELF-PRESERV);** ○ Contractual Justice (**CONJUS**), through Judicial Interventionism in Contract; ○ Conception of Justice as Substantive Justice **(SJ).**
14.	Kayanja v. India Assurance Company Ltd	[1968] EA 295.	HC	An authorized driver was held by court to be an insured party on ground that the indemnity under the policy was given for his benefit. The judge clearly reasoned that:	○ Abductive Reasoning to resolve competing interests or in interpretation of statute or precedents (**ABDUCTIVE)**: Intuition; ○ Law Understood and Applied Purposively	○ Conception of law as means to an end (**LMEANS)**; ○ Judicial Absolutism (**JA)**; ○ Perception of law as Predictions (**LPREDICTIONS**): The Role of Judges: To Fill

				○ In such cases, it was better to be flexible than restrictive in the interpretation of who an insured was; ○ The purpose of the rule in section 104 (1) of the Traffic and Road Safety Act, of 1970 was providing for the insured to benefit from third party insurance policies, and therefore the driver as one of the persons who would benefit from the judgment was an insured.	(**PURPOSIVE)**; ○ The judge making law (**LAW MAKING**): ***Stretching the meaning*** and Applicability of a rule.	Gaps in the Law;
15.	Kabona Brothers Agencies v Uganda Metal Products & Enamelling Co. Ltd	[1981-1982] HCB 74	HC	The Magistrates court had awarded damages to the respondent for non-delivery of goods plus lost profits, without any proof of the latter or guidance on how court had assessed them. The High court upheld the decision, reasoning that to be fair and reasonable, some profits must have been contemplated. But the judge reduced the award by 1/3, quoting interests of fairness.	○ Judicial Interventionism in Contract (**JINTERV**) Considerations of ***fairness*** invoked to interfere with contract terms: Fairness as guide to remedies; ○ Contract viewed as a network of or other relations (**RELATIONS)**.	○ Contractual Justice (**CONJUS)**, through Judicial Interventionism; ○ Conception Justice as Substantive Justice (**SJ**); ○ Social Support as a Rule of Validity and Recognition of Law (**SOCIAL SUPPORT**): Contractual Obligation as based on Communal Control.
16.	Grayson & Co. Ltd v AH Wardle (Uganda) Ltd and Others	[1963] EA 582	HC	The judge construed the words "we undertake to guarantee" to reasonably and fairly conceivably mean that there was a guarantee.	○ Judicial Interventionism in Contract (**JINTERV**) Considerations of ***fairness*** invoked to interfere with contract terms.	○ Conception of Commercial Justice as Substantive Justice (**SJ);** ○ Contractual Justice (**CONJUS)**, through Judicial Interventionism;
17.	Credit Finance	[1964] EA	HC	The issue whether a hire purchase contract had been terminated when	○ Judicial Interventionism in Contract (**JINTERV**) Considerations of	○ Conception of Commercial Justice as Substantive Justice (**SJ**);

	Corporation Ltd v Alalani	317		an agent was appointed to repossess the goods, was decided in the negative by the judge. The Judge based his decision on the grounds of reasonableness and unsoundness.	***fairness*** invoked to interfere with contract terms; ○ Using indeterminate doctrines (**INDETERM-DOCTRINE**): reasonableness.	○ Conceptual Flexibility (**CONCEPT-FLEXTY**); ○ Contractual Justice (**CONJUS**), through Judicial Interventionism; ○ Social Support as a as Criteria for contractual Obligation and Enforceability (**SOCIAL SUPPORT)**;
18.	Julian Mbalule & Family v Transocean (U) Ltd.	[1985] HCB 82		The plaintiff sued for breach of a contract of carriage, on the basis that the defendant had delivered fewer goods than contracted and handed to him. The judge held the defendant to be a common carrier basing on the circumstances of the case, as opposed to a private carrier that the contract between the parties indicated. Further, that whether or not the goods were insufficiently packaged, the defendant as common carrier was liable to compensate the plaintiff under the contract of carriage. The judge selectively and flexibly applied negligence law by reasoning that the defendant's actions had caused the destruction of the plaintiff's goods.	○ Legal Classificatory Categories ignored **(NO CATEGORIES):** Treating Economic Negligence as Contractual and used to justify liability; ○ The judge making law (**LAW MAKING**): ***Stretching the meaning*** and Applicability of a rule; ○ Contract viewed as a network of relations (**RELATIONS).**	○ Judicial Absolutism (**JA**); ○ Conceptual Flexibility (**CONCEPT FLEXTY):** Including Legal Indeterminacy; ○ Conception of law as means to an end (**LMEANS**); ○ Conception of Contract as Relational (**RELATIONAL**): Including contractual obligations being based on ***Reliance***; ○ Systematic Flexibility (**SYSTEM-FLEXTY**);
19.	Patel v Gajjar	[1964] EA 27	HC	An infant brought a suit to recover wages from an illegal contract, his father having collected the wages	○ Contract viewed as a network of relations (**RELATIONS);**	○ Judicial Absolutism (**JA**); ○ Contractual Justice (**CONJUS**), through Judicial

				from the defendant but misappropriated them. The court noted that the employment contract with the infant was illegal but held that accepting the infant to render services was a collateral contract from which the plaintiff could recover wages. The judges further reasoned that: ○ Each case ought to be seen from its peculiar circumstances; and ○ That in this particular case, the infant deserved to recover.	○ Judicial Interventionism in Contract (**JINTERV**): Filling gaps in contracts with implied terms; i.e. Collateral Contracts under which rights could be defined better than the contracts in dispute; ○ Contextual Interpretation of Contracts and Application of Rules **(CONTEXTUAL**).	Interventionism; ○ Substantive Justice (SJ): *Ubuntu concept of justice*; ○ Conception of Contracts as Relational (**RELATIONAL**); ○ Conception of Law as Experience (**LEXP**); Commercial Reality as the Rule of Recognition; ○ Legal Pluralism **(LP).**
20.	Edmund Schluter & Co. (Uganda) Ltd v Patel	[1969] EA 239	HC	In a suit on agency, the possession of a certificate of title by the agent was held by the court as ostensible authority to receive a deposit payment. The judge noted that he had found no cases or rules relevant to the issue and decided the case on the basis of what he called 'general principles', informed by reasonable assumptions from the circumstances surrounding the contract.	○ Contextual Interpretation of Contracts and Application of Rules **(CONTEXTUAL**); ○ Using indeterminate doctrines (**INDETERM-DOCTRINE**): reasonableness.	○ Contractual Justice (**CONJUS**), through Judicial Interventionism; ○ Conception of Law as Experience (**LEXP**): that in absence of rules, use general principles from surrounding circumstances; ○ Conceptual Flexibility (**CONCEPT-FLEXTY);** ○ Legal Pluralism (**LP)**; ○ Tension Management Mechanism **(MGT**): Judging as 'general principles, informed by reasonable assumptions from the circumstances surrounding the contract'; ○ Conception of Contracts as Relational (**RELATIONAL)**.

21.	Universal Cold Storage Ltd v Kenya Co-operative Creameries Ltd	[1964] 1 EA 719	HC	A contract provided that the defendant would not take milk from any other party, but stored milk for the plaintiff's competitor. Court flexibly interpreted the word "take", not to include taking for storage purposes.	○ Purposive Interpretation of Contract Terms (**PURPOSIVE**); ○ The judge making law (**LAW MAKING**): ***Stretching the meaning*** and Applicability of a rule.	○ Contractual Justice (**CONJUS**), through Judicial Interventionism; ○ Conception of Law as A Means to An End (**LMEANS**).
22.	Christopher Sekimpi v Uganda Breweries Limited	[1972] HCB 216	HC	An action challenging the suspension of an employee, yet the contract did not expressly provide for suspension. Court held that in absence of a term in the contract permitting suspension, it would be unlawful, however due to proven practice, this particular suspension was lawful.	○ Contract Law understood as including Practices (**PRACTICES)**.	○ Contractual Justice (**CONJUS),** through Judicial Interventionism; ○ Conception of Law as Experience (**LEXP):** Commercial Reality as the Rule of Recognition**;** ○ Legal Pluralism (**LP)**
23.	Ernest Windt v Gordon Parrot	[1976] HCB 30	HC-Allen J.	The Plaintiff filed a claim for specific performance sixteen years after the defendant had within six days of its making, rescinded a contract for buying shares in a company. Allen J held that the plaintiff couldn't be availed specific performance. He reasoned that: Specific performance is an equitable remedy at the discretion of court, but the party seeking it should act promptly especially if it concerns property like shares with a fluctuating value.	○ Contextual Interpretation of Contracts and Application of Rules (**CONTEXTUAL**): Commercial Sense; ○ Judicial Interventionism in Contract (**JINTERV**): Filling gaps in contracts with implied terms; defined by Social-Economic Relations.	○ Economic Efficiency (**EFFICIENCY):** Commercialism and Wealth Maximisation; ○ Conception of Contracts as Relational **(RELATIONAL**).

24.	Jayuntilal S. Shah v Attorney General (***N.B. Both Formalism and Flexibility were applied in this decision***)	[1970] LDC 47/70, P.53	HC	After the 1966 political crisis that led to the abolition of the Buganda Kingdom using a new forcefully imposed constitution in 1967, Section 2(1) and (2) of the Local Administration Act, 1969 were enacted, making void agreements signed with the former Buganda Government, unless ratified by the Minister. Courts were also bound to dismiss suits commenced to enforce such voided agreements. The Plaintiff claimed under an agreement with the former Buganda Government and obtained judgment, but the defendant treated it as void. Upon reference, the court held and reasoned that: ○ The provisions infringed the constitutional rights to property (choses in action), and equal protection before the law; ○ Article 1 of the Constitution making it the supreme law, meant that its provisions had to prevail over Parliamentary laws; ○ Uganda was different from Britain because it had a Constitution that was, supreme and not Parliament like Britain; ○ The authority of *Burma Oil Co. Ltd v. Advocate [1965] AC 75,* in which compensation for war losses ordered by court were later declared unrecoverable by	○ Conformity with the Constitution as a Rule of Recognition (**CONS-CONFORM)**; ○ Presumption of Equality of Contracting Parties (**EQUALITY PRESUMPTION**) ○ Contextual Interpretation of Contracts and Application of Rules (**CONTEXTUAL**); ○ Contract viewed as a network of relations and (**RELATIONS):** Contract used as an Instrument of Social Relations.	○ Equality Before the Law (**EQUALITY**); ○ Positivist Conception of Law (**POSITIVISM**): Constitutionalism; ○ Judicial Self Preservation (**JSELF-PRESERV**): Resisting foreign legal authorities ○ Economic Efficiency **(EFFICIENCY**): Protection of free market economy **i.e. Sanctity of Private Property;** ○ Conceptual Formalism (**CONCEPT-FORMAL**); ○ Conception of Contract as Relational (**RELATIONAL**).

				Parliament using retrospective legislation, was not relevant as Parliament was not superior to the Constitution in Uganda.		
25.	United Garment Industry Limited v. Notco (***N.B. Both Formalism and Flexibility were applied in this decision***)	[1977] HCB 151	HC	Court found the defendant liable as a bailee, and the issue was whether the Plaintiff could recover lost profits. Court held that in breach of contract the aggrieved party is only entitled to recover actual loss that was foreseeable at the time of the contract as resulting from a breach. Court reasoned that: ○ What was foreseeable depends on the knowledge of the parties, and where no actual knowledge exists, the question is whether a reasonable man could foresee or conclude that in the ordinary course of business one would lose profits; ○ The defendant knew that the plaintiff's business was making garments, so should have foreseen loss of profits.	○ Expectancy loss Considered (**EXPECTANCY**); ○ Contextual Interpretation of Contracts and Application of Rules (**CONTEXTUAL**): Intention gauged from actual knowledge at time of the contract and Standard of a Reasonable man; ○ Using indeterminate doctrines (**INDETERM-DOCTRINE**): reasonableness; ○ Contract Law understood as including Practices (**PRACTICES**): Ordinary Course of Business determined rights, duties and remedies.	○ Economic Efficiency (**EFFICIENCY):** Commercialism and Wealth Maximisation: ***i.e., ex-ante perspective;*** ○ Accuracy in Contracting and Adjudication (**ACCURACY**); ○ Conception of Law as Experience **(LEXP**); ○ Conceptual Flexibility (**CONCEPT FLEXTY):** Including Legal Indeterminacy; ○ Conception of Contractual Obligation as based on Promise (**PROMISE**); ○ Conception of Contract as Relational (**RELATIONA**L).
26.	Grindlays Bank (U) Limited v Kayondo (***N.B. Both Formalism and Flexibility were applied in***	(1976) HCB 147, 148	HC-Sekandi Ag. J	The Appellant bank unjustifiably dishonoured a cheque issued by the respondent, a lawyer. He brought a claim for special damages for breach of contract. Court held that the lawyer was only entitled to nominal damages, reasoning that: ○ Without proof of special damages, bank customers who are not	○ Assessing damages based on actual financial loss (**ACTUAL LOSS**); ○ Contextual Interpretation of Contracts and Application of Rules (**CONTEXTUAL**): Invoking Business Reality; ○ Recognising inequality amongst contracting	○ Economic Efficiency (**EFFICIENCY):** Commercialism and Wealth Maximisation; ○ Conception of Law as Predictions (**LPREDICTIONS**); ○ Conception of contractual Obligation as based on Promise **(PROMISE**);

	this decision)			traders are only entitled to nominal damages from wrongful dishonor of cheques; ○ A trader is a person in commercial business whose credit would be injured if he fails to pay for goods in trade, during his commercial dealings; ○ A practicing lawyer is not such trader and can only recover nominal damages.	parties: Using economic, class as criteria to access justice (**NO-EQUALITY**), i.e., that non-trader only entitled to nominal damages.	○ Inequality before the law (**INEQUALITY**): The Conception of Justice as dependent on Class; ○ Opportunism (OPPORTUNISM**)**; ○ Accuracy in adjudication (**ACCURACY)**;
27.	Bagoka v Kibwaijana	[1976] HCB 364	HC-Allen J,	An appeal from a decision of a Magistrate's court that interfered with the agreed interest rate of 48% per annum, and reduced it to 4%. Court held that: ○ Under section 26 of the Civil Procedure Act, courts had the discretion to determine what rate of interest was harsh and unconscionable, and reduce it, irrespective of the practice of the people lending money in the country; ○ The normal court rate was 6%, and there was no good reason for going below it, so the magistrate wrongly exercised his discretion; ○ In the instant case, 10% was fair, reasonable and proper.	○ Judicial Interventionism in Contract (**JINTERV**) Considerations of ***fairness*** invoked to interfere with contract terms; ○ Using indeterminate doctrines (**INDETERM-DOCTRINE**): Unconscionable; ○ The judge making law (**LAW MAKING**): ***Stretching the meaning*** and Applicability of a rule; ○ Abductive Reasoning to resolve competing interests or in interpretation of statute or precedents (**ABDUCTIVE):** Intuition, i.e. his sense of fairness and reasonableness.	○ Judicial absolutism **(JA**) i.e., Law applied per the Personal prejudices and sense of justice of judges; ○ Contractual Justice (**CONJUS**), through Judicial Interventionism; ○ Conceptual Flexibility (**CONCEPT FLEXTY):** Including Legal Indeterminacy; ○ Conception of Law as Predictions **(LPREDICTIONS**); ○ Social Support as a as Criteria for contractual Obligation and Enforceability (**SOCIAL SUPPORT**).
28.	Kintu v Kyotera	[1976] HCB	HC-Allen J.	The Plaintiff, an African Ugandan sued for wrongful dismissal, having	○ Making New Law (**LMAKING**) i.e. that	○ Judicial Absolutism (**JA).** ○ Legal Pluralism (**LP**);

	Coffee Growers Limited	362		been appointed to a position and without notice an Indian also appointed to take up the same post. The defendant's defences were that the seal on the appointment letter of the plaintiff was forged, proving that since 1958, she had used a different seal; and that the directors whose signed the letter were still in dispute at the time. Court held that: ○ The fact that the directors who signed the latter were still in dispute and may have lacked capacity did not affect the validity of the agreement; ○ No special regulations applied to a seal, so any could work, even if it belonged to another company, as long as it was used; ○ A company secretary signing an agreement, witnessed by an advocate was enough to validate the agreement; ○ A contract by a commercial company can be oral or written and even section 34 of the Companies Act cannot change this settled law; ○ Damages are meant to restore a position as good as if no breach had taken place; ○ The plaintiff was an experienced and qualified manager, so could get another job in mitigation of his loss, so damages reduced.	illegality and fraud could be validated; Contract Law understood as including Practices (**PRACTICES**); ○ Recognising inequality amongst contracting parties: Using economic, class as criteria to access justice (**NO-EQUALITY**): determining the Perception Justice; ○ Viewing at remedies as restoration (**RESTORATION).**	○ Perception of law as Predictions (**LPREDICTIONS**): The Role of Judges: To Fill Gaps in the Law; ○ Economic Efficiency (**EFFICIENCY):** Commercialism and Wealth Maximisation; ○ Inequality before the law (**INEQUALITRY**); ○ Conception of Law as Experience **(LEXP)** ○ The Restitution Measure of Damages (**RESTITUTION**); ○ Inequality before the law (**INEQUALITY):** The Conception of Justice as dependent on Class.

				NB: Although damages were looked as restoring a party to the pre-breach status, restitution was clearly seen as the end goal rather than formalistic accuracy in adjudication.		
29.	Amosh.S. Ghata v Tarbhain Haji Jamal & Co. Limited (***N.B. Both Formalism and Flexibility were applied in this decision***)	HCCS 354/68, LDC 82/70	HC-Dickson, J.	The defendant consumed the services of the plaintiff as a structural engineer, having been appointed by an architect appointed by the defendant. Court held that: ○ The architect had no implied authority to appoint the engineer; ○ There was no contract between the parties, not even a void one; ○ Therefore, quantum *meruit* would be unjust liability. **Note** **"*…there was no contract, not even a void one…*"** means that void contracts can be contracts recognized by courts. Such recognition could only be based on a source of normativity different from the legal order. Therefore, this formalistic judge recognized legal pluralism.	○ Contract Law understood as including Practices (**PRACTICES**): Normativity recognized as possible beyond legal validity. ○ Pacta Sunt Servanda Applied (**PACTA**): Treating written terms as sacrosanct, i.e. Attempts to remedy illegal contract using equity rejected;	○ Freedom and Autonomy of Contract **(FOC):** Judicial non-interventionism**;** ○ Conception of Contract as Discrete (**DISCRETE);** ○ Sanctity of Contract (**SANCTITY**); ○ Legal Pluralism (**LP);** ○ Conceptual Flexibility **(CONCEPT-FLEXTY);** ○ Conception of Law as Experience (**LEXP**).
30.	Multiholdings Limited & Multi	HCCS 459/70, LDC	HC-Russel Ag. J,	The plaintiff companies were indebted to the defendant bank, and a third party issued a promissory	○ Contextual Interpretation of Contracts and Application of Rules (**CONTEXTUAL)**:	○ Economic Efficiency (**EFFICIENCY):** Commercialism and Wealth Maximisation;

	Constructors Limited v Uganda Commercial Bank	Case 160/70		note on their behalf in favour of the bank, to cover the debt. The bank foreclosed on the plaintiffs, who claimed that accepting the promissory notes suspended the defendant's rights to foreclose. Court held that: ○ Whether the rights had been suspended depended on all circumstances of the case, since there was no specific agreement; ○ The remedy in a debt is not suspended where the plaintiff would loose a better remedy (*Relied on Allen v. Royal Bank of Canada (1924-5) T.L.R 625).* **Note:** ○ Evidence of Conspiratory Formalism precipitated by capitalist interests i.e. protecting banks and ensuring recovery of their debts.	Invoking Business Reality and Commercial Sense.	○ Conception of Law as Experience **(LEXP**).
31.	Lewis Ralph Dodd v Chanirakant M. Nandha	HCCS 8/70, LDC 180/70	HC-Phadke, J	In a subrogation claim, where a car kept with a garage owner, the defendant had been stolen, court held that: ○ A bailee is not an insurer, and only liable where there was negligence; ○ It was enough for the bailor to show that the car was not returned, a *prima facie* case made	○ Contextual Interpretation of Contracts and Application of Rules (**CONTEXTUAL**); ○ Legal Classificatory Categories ignored (**NO CATEGORIES)**: Treating Economic Negligence as Contractual and used to justify liability;	○ Judicial *ABSOLUTISM* (**JA**); ○ Legal Pluralism (**LP);** ○ Freedom of Contract and Autonomy of contract (**FOC);** ○ Judicial Self-Preservation (J**SELF-PRESERV):** Determination from British Law; ○ Conception of Contract as

	(***N.B. Both Formalism and Flexibility were applied in this decision***)			out for the bailee to show there was no negligence or misconduct; ○ Because of car thefts in Entebbe-Uganda, it was unsafe to leave the car unlocked; ○ Convenience, which is the reason the defendant did not take adequate steps to secure the car was not compelling reason to escape liability; ○ Exemption of liability by bailee had to be by clear and unambiguous terms, brought to notice of bailor; ○ Subrogation was contractual and could not be defeated by a contract between the bailor and bailee; ○ There was no statutory law on bailment in Uganda, per the Judicature Act; ○ The Common Law being applied as far as the circumstances of Uganda permit means that to be applicable, English authorities had to be relevant, reasonable and applicable to the circumstances of Uganda. **Note:** Both Flexibility and Formalism were applied in the same decision, without absurdity.	○ Contract viewed as a network of or other relations (**RELATIONS):** Long Term Relationship of Parties Recognised; ○ Judicial Interventionism in Contract (**JINTERV**) Considerations of ***fairness*** invoked to interfere with contract terms.	Relational (**RELATIONAL**): Including contractual obligations being based on ***Reliance***; ○ Conception of Law as a means to an end **(LMEANS**); Legal Validity and Contractual Obligation judged by ***Practical Utility*** ○ Systematic Flexibility (**SYSTEM-FLEXTY**); Contractual Justice **(CONJUS**), through Judicial Interventionism.
32.	Aniello Ciella v	HCCS 596/1972,	HC-Seldanha	The appellant sought to challenge a restraint of trade clause that	○ Abductive Reasoning to resolve competing interests or in	○ Judicial absolutism **(JA);** ○ Public Interest as a Rule of Recognition, the basis of

	Cassman Brown & Co. Limited	LDC M.B, July 1972 [1973] E.A. 358	.J,	restricted him working in the capital city Kampala and the industrial capital Jinja, having been a manager of roofing and flooring company. Court found for the employers, reasoning that: ○ Whether restraint of trade is good or bad depends on whether it is injurious to public interest; and ○ Whether it goes beyond what is reasonably necessary; ○ That the term was neither contrary to public policy nor unreasonable.	interpretation of statute or precedents (**ABDUCTIVE**): Intuition; i.e. Enforceability of contracts subjected to a judge's sense of reasonableness; ○ Using indeterminate doctrines (**INDETERM-DOCTRINE**): reasonableness and Public Interest; ○ Contextual Interpretation of Contracts and Application of Rules (**CONTEXTUAL**): Public policy invoked.	obligation and enforceability of in Private Contracts (**PUBLIC INTEREST**): But State Policy as representing Public Interest; Conception of Law as Predictions (**LPREDICTIONS)**; ○ Public Opinion as Criteria for contractual Obligation and Enforceability (**PUBLIC OPINION**); ○ Social Support as a Rule of Validity and Recognition of Law (**SOCIAL SUPPORT**); ○ Conceptual Flexibility (**CONCEPT-FLEXTY**).
33.	Mohmood Sebagala v Musayi t/a Musayi's Garage Co. ***(N.B. Both formalism and flexibility applied in this decision).***	[1979] HCB 180	HC	The plaintiff's car was stolen from the defendant's garage while under repair. The plaintiff sued for breach of contract and negligence. Court held that in absence of negligence, there was no liability, reasoning that, unless a special contract to the contrary exists, a bailee was not an insurer. **Note**: The court further held that it was the defendant's watchman's duty to prevent thefts, and found the defendant vicarious liability. The judge stretched the rules on negligence, to defeat formalistic common rules law for what he	○ Legal Classificatory Categories ignored (**NO CATEGORIES**): Treating Economic Negligence as Contractual and used to justify liability; ○ Objectively applying general principles of contract (**GENERAL PRINCIPLES),** i.e. to insurance and bailment.	○ Conceptual Flexibility (**CONCEPT FLEXTY):** Including Legal Indeterminacy; Systematic Flexibility (**SYSTEM-FLEXTY**); ○ Conceptual Formalism (**CONCEPT-FORMAL**): The Conception of Law as Conceptually Ordered**,** i.e., based on Precise, Objective, Neural, Universally Applicable and Fundamental Principles; ○ Conception of Contract as Relational (**RELATIONAL**): Including contractual obligations being based on ***Reliance***; ○ Positivist Conception of Law (**POSITIVISM**): Law as

				perceived as fair and just.		Objective and Neutral; ○ Conception of law as a Means to An End (**LMEANS)**
34.	Kabona Brothers Agencies v Ugandan Metal Producers & Engineering Co. Limited	[1981-82] HCB 74	HC	This was an application to reinstate a claim for loss of expected profits the registrar of the High Court had eliminated from an *exparte* judgment for the applicant. Court dismissed the application, reasoning that loss of anticipated profits will however be allowed if the profits were in reasonable contemplation of the parties to the contract.	○ Using indeterminate doctrines (**INDETERM-DOCTRINE):** reasonableness and Reasonable man; ○ Contract Law understood as including Practices (**PRACTICES)**: commercial practice as superior to positive law	○ Judicial Interventionism (**JA**); ○ Economic Efficiency (**EFFICIENCY):** Commercialism and Wealth Maximisation; ○ Conceptual Flexibility (**CONCEPT-FLEXTY**); ○ Conception of Contract as Relational (**RELATIONAL);** ○ Conception of Law as Experience (**LEXP).**
35.	Grindlays Bank (U) Limited v Kasozi	[1982] HCB 54	HC	A regular surveyor for the appellant bank did extra work for her, than what had been contracted, without agreement on a scale of fees for the extra works. Court held that the contractor was entitled to be paid a *quantum meruit* for the extra works.	○ Judicial Interventionism in Contract (**JINTERV**) ***Equity*** invoked to interfere with Contract.	○ Substantive Justice **(SJ**) ○ Contractual Justice (**CONJUS),** through Judicial Interventionism.
36.	Mobil (U) Limited v Uganda Commercial Bank	[1982] HCB 64	HC-Kato, Ag. J.	The plaintiff issued a cheque for UGX 10,301, but before banking, the amount was fraudulently changed to UGX 40,301. The plaintiff sued her for breach of banking contract, claiming UGX 40,301.	○ Legal Classificatory Categories ignored **(NO CATEGORIES):** Treating Economic Negligence as Contractual and used to justify liability; ○ The judge making law (**LAW MAKING**): Sidestepping the Rules of Law **,** and choosing to	○ Conceptual Flexibility (**CONCEPT FLEXTY):** Including Legal Indeterminacy; ○ Conception of law as a means to an end (**LMEANS);** ○ Conception of Contract as Relational (**RELATIONAL**): Including contractual

				Court held that: ○ The plaintiff was only entitled to the UGX 10,301 originally on the cheque; ○ The customer being in a contractual relationship with the bank, had a duty when drawing a cheque to avoid forgeries; ○ If the customer negligently draws a cheque, in accordance with Donoghue & Stevenson [1932] AC 562, forgery will be treated as a natural consequence; ○ In this case, the defendant was apparent but the alteration not so apparent, therefore section 64 of the Bills of Exchange Act that protected banks was not applicable. **N.B:** This case contradicts the decision by Karokora J, in Consultant Surveyors & Planners v. Standard Bank (U) Limited (1984) HCB, that customers of banks have no duty to avoid forgeries while drawing cheques.	follow general principles.	obligations being based on ***Reliance***; ○ Judicial Absolutism **(JA**); ○ Systematic Flexibility (**SYSTEM-FLEXTY**);
37.	S. Kiggundu v. Barclays Bank of Uganda Limited	(1972) U.L.R 169	H.C Opu, J.	Under a contract of employment, the employee was liable for dismissal if found 'guilty' of unsatisfactory conduct. The plaintiff was accused of selling travellers cheques contrary to the Exchange Control Regulations, and the police investigated but were not able to place charges on him, however the	○ Recognising inequality amongst contracting parties: Using economic, class as criteria to access justice (**NO-EQUALITY**), i.e. the perception of master and servant with one having to serve the other;	○ Inequality before the law (**INEQULAITY);** ○ Conception of Law as Experience **(LEXP);** ○ Conception of Law as A Means to An End (**LMEANS).**

				defendant dismissed him. **The court held and reasoned that:** ○ The right to dismiss an employee accrued to the defendant by virtue of the employee having '***entered into the position of servant'*** doing anything incompatible with the due and faithful discharge of his duty to the ***master*****;** ○ The word guilty did not mean convicted in a court of law, and it was enough that his conduct had made him unreliable.	○ Contextual Interpretation of Contracts and Application of Rules (**CONTEXTUA**L).	
38.	Ian Peters Limited v. House of Novelties Limited	(1968) E.A 19	HC-Saldanha, J.	Under a written contract (indent) for sale of goods where the buyer offered to pay the seller directly but the latter insisted and it was agreed that the seller be paid through a confirming agent as a home agent, the buyer paid but the agent did not pay the seller. Upon instruction to cancel the promissory note used and pay the seller directly, the buyer refused, thus the suit. **The court held and reasoned that:** ○ Whether it was still the law or not that a home agent is presumed liable for the price was irrelevant, because the principal would still be liable; ○ According to the surrounding circumstances, the conclusion was that the defendant was reasonably led to believe that the plaintiff was not interested in the	○ Contextual Interpretation of Contracts and Application of Rules (**CONTEXTUA**L); ○ Using indeterminate doctrines (**INDETERM-DOCTRINE):** reasonableness; ○ The judge making law (**LAW MAKING**): Sidestepping the Rules of Law, and choosing to follow general principles.	○ Judicial Absolutism **(JA);** ○ Conception of Law as Experience (**LEXP**); ○ Conceptual Flexibility (**CONCEPT FLEXTY):** Including Legal Indeterminacy.

				defendant and looked to the agent for payment, thus the defendant was released from liability.		
39.	Patel and 2 Others v. Budaka Ginners Limited	(1968) E.A. 104	HC-Sheridan, C.J.	Under a contract for sale of goods (lint), the buyer delaying sending the promissory note at the agreed time, and altered the date agreed on the ones sent. The defendant refused to deliver the goods. **The court held and reasoned that**: According to the circumstances, the plaintiff was insolvent and unable to honour the 45 day bill, therefore the defendant was entitled to withhold delivery and treat the contract as repudiated;	○ Contextual Interpretation of Contracts and Application of Rules (**CONTEXTUA**L).	○ Conception of Law as Experience **(LEXP);** ○ Economic Efficiency (**EFFICIENCY**).
41.	Lugalambi v. Board of Governors Namilyango	[1975] HCB 321	HC-Allen, J.	The headmaster of a school contracted the plaintiff to effect some repairs at the school. The defendant to which the headmaster was secretary disclaimed authority of the headmaster. The issue was whether the required formalities were complied in before the contract being made. **The court held that,** the headmaster was an agent of the board, the Ministry of Education, and had ostensible and apparent authority to contract.	○ Contractual Obligations and rights determined Purposively (**PURPOSIVE**): Practicality and Functionality used guide the applicability and meaning of parties' actions.	○ Conception of Law as a means to an end **(LMEANS**); Legal Validity and Contractual Obligation judged by ***Practical Utility*** **;** ○ Economic Efficiency (**EFFICIENCY).**
41.	Kafuma v. Masaka	[1975] H.C.B.	HC-Lubogo,	A contract of employment was, silent on how much notice of	○ Judicial Interventionism in Contract (**JINTERV**): Filling gaps in contracts	○ Contractual Justice (**CONJUS**), through Judicial Interventionism;

	District Cooperative Union Limited	285	J.	termination the employee was entitled to. He was dismissed without notice. The court held that, it was implied that the employee was entitled to three months notice of termination.	with implied terms, i.e. Honouring standard terms.	○ Judicial Absolutism (**JA)**.
42.	A.M. Jabi v. Mbale municipal Council	[1975] H.C.B 190	Ssekandi, Ag.J	An employee misconducted himself outside office hours and he was arrested and detained. The employer dismissed him without notice, citing damage to the good name of the employer. **The court held and reasoned that:** ○ A dismissal was wrongful if done without justification or reasonable cause, and although the employer was embarrassed, this was not a fundamental breach of contract to warrant dismissal as it never affected his work, moreover his work was appreciated by the employer; ○ Sufficient notice is to be determined by the terms of the contract, legislation, or common law required that it be reasonable notice; ○ Natural justice should have been observed by giving the employee a hearing; and the notice should have been sufficient to allow the employee find alternative employment on the same terms; ○ The appropriate reparation for wrongful dismissal was damages	○ Judicial Interventionism in Contract (**JINTERV**): Filling gaps in contracts with implied terms, i.e. Honouring standard terms; ○ Contractual Obligations and rights determined Purposively (**PURPOSIVE**): Practicality and Functionality used guide the applicability and meaning of parties' actions; Using indeterminate doctrines (**INDETERM-DOCTRINE):** reasonableness; ○ Contract Law understood as including Practices (**PRACTICES)**: commercial practice	○ Conception of Law as a means to an end **(LMEANS**); Legal Validity and Contractual Obligation judged by ***Practical Utility*** **;** ○ Economic Efficiency (**EFFICIENCY);** ○ Contractual Justice (**CONJUS**), through Judicial Interventionism; ○ Conception of Law as Experience (**LEXP**); ○ Conceptual Flexibility (**CONCEPT FLEXTY):** Including Legal Indeterminacy;

				of a pecuniary nature and not reinstatement as the employer had an unfettered right to dispense with the services of his employee.		
43.	Kitaka v. Uganda Transport Corporation	[1977] H.C.B. 158	Butagira, J.	Under a contract for audit services, a price was agreed, 'subject to the books being in order'. The plaintiff found that the defendant's books were not all in order and did more work than agreed, but the defendant refused to pay more. **The court held that** the proviso meant that any extra work would have to be paid for separately.	○ Contextual Interpretation of Contracts and Application of Rules (**CONTEXTUAL**); ○ Contractual Obligations and rights determined Purposively (**PURPOSIVE**): Practicality and Functionality used guide the applicability and meaning of parties' actions.	○ Conception of Law as a means to an end **(LMEANS**); Legal Validity and Contractual Obligation judged by ***Practical Utility*** **;** ○ Substantive Justice (SJ): Ubuntu concept of justice ○ Economic Efficiency (**EFFICIENCY).**
44.	The Official Receiver v. United Stores Limited & Another	[1962] E.A. 180	EACA-Sir Forbes, V.P., Crawshaw & Newbold, JJ.A)	A builder subcontracted the objector, to do work for the third respondent. At some stage of the works, the builder accepted and authorised that the third respondent pays the objector directly. The objector continued to complete the rest of the work. The builder later became bankrupt and revoked the authority. The bankrupt sued the third respondent for payment and sought to attach the monies owing, thus the objector proceedings by the sub-contractor/second. **The court held and reasoned that**: ○ With the authority to pay, the bankrupt released the third	○ Contextual Interpretation of Contracts and Application of Rules (**CONTEXTUAL**); ○ Practicality and Functionality used guide the applicability and meaning of parties' actions (**PRACTICAL**); ○ Contract viewed as a network of or other relations (**RELATIONS):** Intention to Create a Long Term Relationship of Parties Recognised.	○ Legal validity and Contractual Obligation to be judged by Practical Utility (**PRACT-UTILITY);** ○ Substantive Justice (SJ): *Ubuntu concept of justice*; ○ Economic Efficiency (**EFFICIENCY).** ○ The conception of law as a means to an end (**LMEANS**); ○ Conception of contractual obligations based on Reliance (**RELIANCE);** ○ Conception of contracts as Relational (**RELATIONAL**).

				respondent from paying him in consideration of paying the objector directly; ○ It is not disputed that the bankrupt did not carry out all the work as some was done by the sub-contractor/objector; ○ The authority to pay should receive wide construction and be seen as allowing future payments, not only those due on the date; ○ The subsequent purported revocation of authority was of no legal consequence.		

APPENDIX 4: Formalistic Adjudication In Commercial Hard Cases (NRM Era -1986-2018)

NO	CASE TITLE	CITATION	COURT & JUDGE	CASE SUMMARY	INTERNAL VALUE (S)	EXTERNAL VALUE (S)
1.	Lubega v. Barclays Bank (U) Limited	[1990-94] 1 EA 294	SC Manyindo, DCJ.	The bank had a debenture over the insolvent company that barred sale of its properties without the bank's consent. The appellant bought the company's property behind the bank's back and the bank challenged the sale on grounds of fraud. Fraud was not pleaded but proved in evidence. **The trial court held that** not giving particulars of fraud in the plaint caused no prejudice and therefore immaterial. On appeal however, the Supreme court held that the omission was not a mere irregularity but made the suit bad in law.	○ Giving Procedural Justice Sway (**PROCED-SWAY**): Restricting litigant's case to Pleadings; ○ Literal and Logical deductive interpretation, or mechanical application of rules (**LOGICAL-MECHANIC**).	○ Certainty of Law (**COL**); ○ Positivist Conception of Law (**POSITIVISM**); ○ Conceptual Formalism (**CONCEPT-FORMAL**); ○ Role of Courts as implementers not makers of the law (**ROC-NONMAKERS**);
2.	Nakana Trading Co. Limited v. Coffee Marketing Board (*N.B. Both Formalism and Flexibility were applied in this decision*).	[1990-94] 1 EA 448	HC-Byamugisha J.	In a sale of goods claim that the goods were not fit for purpose, court held that the plaintiff was liable because the defendant delivered the motor vehicles in his names, although not verified or used. Pleas that the defendant knew the purposes for which the vehicles had been bought were irrelevant. Court reasoned that: ○ When a contract is in writing and its language clear and unambiguous,	○ Pacta Sunt Servanda Applied (**PACTA**): Treating written terms as sacrosanct; ○ Literalism in contract interpretation (**LITERALISM**): Disregard of the Contract's purposes; ○ Abductive Reasoning in interpretation of statute or precedents (**ABDUCTIVE**): Intuition used resolve competing answers; ○ Exercising Unrestrained	○ Writing as the best evidence of parties' intentions (**PAROL EVIDENCE);** ○ Conception of Contract as Discrete (**DISCRETE);** ○ Freedom and Autonomy of Contract (**FOC)**: Judicial non-interventionism; ○ Sanctity of Contract (**SANCTITY)**; ○ Judicial Absolutism (**JA);** ○ Inaccuracy in adjudication (**INACCURACY**).

				court's duty is to look at it and determine whether it applies to the facts; ○ No evidence can be adduced to vary the terms of a written contract; ○ In assessing damages, there is no exact science or mathematical formulae court can use to determine them.	Judicial Authority (**UNRESTRAINED AUTHORITY**): Exercise of Unfettered Discretion i.e., award of general damages-exactness, science and mathematics as tools for assessing damages rejected.	
3.	Egypt Air Corporation v. Suffish International Food processors (U) Ltd & Pan World Insurance Co. Ltd. (*N.B. Both Formalism and Flexibility were applied in this decision*).	[1999] 1 EA 69	CA-Barko, JA	The insurer in a marine insurance contract brought a subrogation suit against the tortfeasors, having fully indemnified the insured. Court held that: ○ Although the Insurance Certificate and evidence of payment by the insurer had been tendered, the contract of insurance had not been proved to have existed without the policy itself being tendered; ○ Subrogation springs from a valid and operative contract of insurance which was not proved without the policy.	○ The judge making law (**LAW MAKING**): Sidestepping the Rules of Law, i.e. Rules validating informal insurance contracts sidestepped; ○ Pacta Sunt Servanda Applied (**PACTA**): Treating written terms as sacrosanct.	○ Writing as the best evidence of parties' intentions (**PAROL EVIDENCE);** ○ Sanctity of Contract (**SANCTITY)**; ○ Conception of Contract as Discrete (**DISCRETE);** ○ Freedom and Autonomy of Contract (**FOC**); ○ Positivist Conception of Law (**POSITIVISM**); **i**.e. Proof of written terms the only way to prove valid and operative contract.
4.	Suffish International Food processors (U) Ltd & Pan World Insurance Co. Ltd. v. Egypt	[2002] SCCA 6 (19/6/2002	SC-Oder & Tsekooko, JSC	The supreme court agreed with the court of appeal that without the insurance policy being tendered, there was no proof of a valid and operative contract of insurance to trigger subrogation. Justice Oder rejected *King v. Victoria (1896) AC 250 PC,* which at common law is authority for the proposition that it	○ Positive Law Superior to non-legal orders (**NON-LEGAL INFERIOR**): Practice rejected; ○ Pacta Sunt Servanda Applied (**PACTA):** Disregard of Fairness of Terms and Equity rejected as source of	○ Positivist Conception of Law (**POSITIVISM**); ○ Freedom and Autonomy of contract (**FOC)**; ○ Conception of Contract as Discrete (**DISCRETE);** ○ Procedural justice superior to Substantive Justice **(PJ);**

	Air Corporation			is not open for the third party to question the contractual propriety of the insurer having indemnified the insured, as long there was a contract of insurance and evidence of indemnity. Tsekooko JSC, added that it would be vital to prove a valid and operative policy, to know under what circumstances the usurer may not be liable to pay under the policy, and whether the third party had a defence under the policy. Arguments that: it would be unfair and unjust to allow the respondent who delivered spoilt fish to get away with it; and the practice in marine is to prove contracts of insurance by many means other than the policy, were rejected.	remedy i.e. Common law rule upholding equitable subrogation as above technical defences and holding parties to their insurance contracts rejected/modified.	○ Writing as the best evidence of parties' intentions (**PAROL EVIDENCE).**
5.	Interfreight Forwarders (U) Ltd v. East African Development Bank (*N.B. Both Formalism and Flexibility were applied in this decision*).	[1990-94] 1 EA 117	SC-Oder, JSC.	While the appellant was transporting the respondent's goods, an accident occurred and they were damaged. The respondent sued for negligence, which was not proved, but the principal judge found liability against the appellant as a common carrier. Court held that: ○ Owing to the nature of the business, a common carrier has an implied warranty to ensure safe delivery of the goods; ○ Since a common carrier was not pleaded, the respondent could not rely	○ Giving Procedural Justice Sway (**PROCED-SWAY):** Restricting litigant's case to Pleadings; ○ Contextual Interpretation of Contracts and Application of Rules (**CONTEXTUAL)**: Invoking Business Reality; ○ Contractual Obligations and rights determined Purposively (**PURPOSIVE**): Practicality and Functionality used guide the applicability and	○ Certainty of Law (**COL**); ○ Economic Efficiency (**EFFICIENCY**); ○ Conception of Law as Experience (**LEXP**); ○ Conception of Law as a means to an end **(LMEANS**); Legal Validity and Contractual Obligation judged by ***Practical Utility*** **;** ○ Conception of Law as determinate (**DETRMINATE**): Negligence not to resolve Contract disputes; ○ The Restitution Measure

				on the obligations of such carrier; ○ With regard to damages, restitution principles should be followed, where the market value and currency at the time and place of destruction should be used.	meaning of parties' actions, i.e., Invoking Business Practicality; ○ Recognising Law's Classficatory Categories (**LCATEGOTIN**): Negligence as basis of contractual liability rejected.	of Damages (**RESTITUTION);** ○ Conceptual Formalism (**CONCEPT-FORMAL**): The Conception of Law as Conceptually Ordered**,** i.e., based on Precise, Objective, Neural, Universally Applicable and Fundamental Principles.
6.	Esso Standard (U) Ltd v. Opio	(1992-93) HCB 107	CA	Court held that in breach of contract cases: ○ The measure of damages is only what a party would have benefited from performance of the contract. ○ Exemplary damages cannot be awarded unless the breach gives rise to a tort.	○ Assessing damages based on actual financial loss from non-performance (**ACTURAL LOSS**);	○ Accuracy in Contracting and Adjudication (**ACCURACY**); ○ Contract viewed as Discrete (**DISCRETE**).
7.	Larco Concrete Products Ltd v. Transair Ltd (*N.B. Both Formalism and Flexibility were applied in this decision*).	[1987] HCB 39	CA	The contract between parties incorporated in the United Kingdom provided that the High Court of England shall have non-exclusive jurisdiction. The Court of Appeal held that the High Court had jurisdiction, reasoning that: ○ The use of the word "non" was not a slip; ○ Since business was being carried on in Uganda for gain; ○ Even if the parties had conferred jurisdiction to a foreign court, the	○ Pacta Sunt Servanda Applied (**PACTA**): Treating written terms as sacrosanct; ○ Literalism in contract interpretation (**LITERALISM**); ○ Contractual Obligations and rights determined Purposively (**PURPOSIVE**): Practicality and Functionality used guide the applicability and	○ Freedom and Autonomy of Contract (**FOC**); ○ Sanctity of Contract (**SANCTITY**); ○ Conception of Law as a means to an end **(LMEANS**); Legal Validity and Contractual Obligation judged by ***Practical Utility*** **;** ○ Contractual Justice through Judicial Interventionism (**CONJUS**);

				Uganda High Court would have the discretion to decide whether or not to entertain the dispute; ○ The High Court should jealously guard its jurisdiction and any instrument purporting to oust it should do so in very clear and certain terms; ○ Terms of a contract are not decisive on jurisdiction. The issue is whether the parties submitted to jurisdiction unequivocally.	meaning of parties' actions, i.e., Invoking Business Practicality; ○ Exercising Unrestrained Judicial Authority (**UNRESTRAINEDAUTHORITY**): Exercise of Unfettered Discretion i.e., to modify terms of contract on jurisdiction, and Jealously Guarding Jurisdiction of Court.	○ Judicial Self Preservation (**JUD- SELF PRESERV**); ○ Economic Efficiency (**EFFICIENCY)**.
8.	Interfreight Forwarders (U) Ltd v. East African Development Bank	(1994-95) HCB 54	CA	Court gave the reasoning behind strict adherence to pleadings, that the purpose of pleadings in litigation is to define and deliver with clarity and precision the real matters in controversy, upon which parties can prepare and present their cases, and upon which, court can adjudicate.	○ Giving Procedural Justice Sway (**PROCED-**SWAY): Restricting litigant's case to Pleadings.	○ Certainty of Law (**COL)**; ○ Role of Courts as implementers not makers of the law (**ROC-NONMAKERS**)
9.	Osman v. Mulangwa	[1995-98] 2 EA 275	SC-Tsekooko, JSC.	This was an action for breach of a sale of land contract, however the judge revealed the values and perception of courts in adjudication, when he observed that: "Courts will not make a contract for the parties but will give effect to their clear intentions", and referred with approval to *Jiwaji v. Jiwaji [1968] EA 547*.	○ Pacta Sunt Servanda Applied (**PACTA**): Disregard of Fairness of Terms.	○ Freedom and Autonomy of Contract (**FOC**); ○ Sanctity of Contract (**SANCTITY).**
10.	Osapil v. Kaddu (*N.B. Both Formalism and Flexibility*	[2000] 1 EA 193	CA	The law in Matayo Musoke v. Alibhai Garage [1960] EA 31, which relied on Newbury Car Auctioneers Ltd v. United Finance Ltd & Another, [1956] 3 ALLER	○ Literal and Logical deductive interpretation, or mechanical application of rules (**LOGICAL-MECHANIC**): i.e. A mere	○ Positivist Conception of Law (**POSITIVISM**); ○ Role of Judge as Mechanical deduction, implementers not makers

	were applied in this decision).			905, that in sale of goods, a car logbook is not a document of title was changed. Court held that in Uganda, a buyer who has been given a logbook as well as possession can resale it and pass good title, because a logbook is presumed to be a document of title. Authority for the new proposition was cited as section 31 of the Traffic and Road Safety Act, 1998, and Fred Kamanda v. Ugandan Commercial Bank (CA 17/1995), which held that because the statute created the presumption, a logbook is evidence of ownership. That this was no longer good law. Court further held that in this case the presumption was rebutted because although the seller remained with the logbook and consideration had not been paid in full as was the case in Matayo Musoke's case, under section 20 (1) of the Sale of Goods Act the time for payment or delivery being postponed is immaterial and property passes in the case of an unconditional sale of specific goods in a deliverable state. Further, that having given up possession, the unpaid seller's lien under section 43 was lost, and that according to sections 39(1) and 40 (1), the unpaid seller's lien did not prevent the passing of property.	presumption created by statute taken as evidence of ownership; ○ Pacta Sunt Servanda Applied (**PACTA**): Disregard of Fairness of Terms: Contextual Fairness Ignored, i.e., Disregard of Fairness of Terms (The fact that the seller had not been paid ignored); ○ Applying Formalism with flexible ends in mind (**OPPORTUNISTIC FORMALISM**): ○ A rule in an earlier statute (Sale of Goods Act, received form England in 1902) used to rebut a presumption created in a later statute, the Traffic and Road Safety Act, 1998, to justify formalistic decision.	of the law (**ROC-NONMAKERS**);of rules; ○ Conceptual Formalism (**CONCEPT-FORMAL**); ○ Freedom and Autonomy of Contract (**FOC**); ○ Conception of Contract as Discrete (**DISCRETE);** ○ Tension Management Mechanism (**MGT**): Restraint to Judicial Authority, i.e., by legislative language, intention and norms; ○ Conception of Law as Experience (**LEXP**): Contextual Interpretation of Contracts and Application of Rules, i.e. Old fashioned law not good law-Goodness of law;

11.	Ruhemba v. Skanka Jensen (U) Ltd	[2002] 1 EA 25	CA-Okello, JA.	Section 6 of the Sale of Goods Act provided that a sale of goods contract could be oral, in writing or by conduct. Further, that for a contract above UGX 200 to be enforced, it should be in writing. The judge however held that Since section 6 of the Sale of Goods Act required that all contracts above UGX 200 had to be in writing, oral evidence would not be admissible to vary a written contract of sale of goods.	○ Literal and Logical deductive interpretation, or mechanical application of rules (**LOGICAL-MECHANIC**): i.e. given a ***narrow meaning*** to shut out informality, and Applying ***Conceptual Formalism*** in the Statute; ○ Pacta Sunt Servanda Applied (**PACTA**): Treating written terms as sacrosanct; ○ Presumption of Equality of Contracting Parties (**EQUALITY PRESUMPTION**).	○ Writing as the best evidence of parties' intentions (**PAROL EVIDENCE);** ○ Freedom and Autonomy of Contract (**FOC);** ○ Conceptual Formalism (**CONCEPT-FORMAL**); ○ Conception of Contract as Discrete (**DISCRETE);** ○ Sanctity of Contract (**SANCTITY**); ○ Equality before the law (**EQUALITY**).
12.	Kibalama v. Alfasan Belgie CVBA (*N.B. Both Formalism and Flexibility were applied in this decision*).	[2004] 2 EA 146	CA-Byamugisha JA.	The appellant orally contracted to buy drugs from the respondent, and argued at the hearing that oral agreements were the trade custom in the industry, and allowed by section 4 (1) of the Sale of Goods Act. The court held and reasoned that: a) Since the plaint contravened Order 7 Rule 1 (e) of the Civil Procedure Rules to disclose the full particulars of the type of contract, its terms, subject matter, etc., the suit had to be dismissed; b) For usage to be relied on: ○ The parties must have a business relationship; and	○ Giving Procedural Justice Sway (**PROCED-SWAY**): Restricting litigant's case to Pleadings; ○ The judge making law (**LAW MAKING**): Sidestepping the Rules of Law, i.e. Section 55 of the sale of goods Act that subjected all rights and duties in the Act to usage and the course of dealings sidestepped and indirectly outlawed by judge; ○ Positive Law Superior to non-legal orders (**NON-LEGAL INFERIOR**) ○ Subjecting Acceptability of Non-Legal Orders to, Business Community	○ Certainty of Law (**COL**) on litigation and adjudication; ○ Social Support as a Rule of Validity and Recognition of Law (**SOCIAL SUPPORT**): Business Community support for extra-legal norms; ○ Positivist Conception of Law (**POSITIVISM);** ○ Conception of Law as determinate (**DETRMINATE**); ○ Tension Management Mechanism (**MGT):** i.e. Hierarchical Normativity i.e., Validity of non-legal norms Subject to Conformity with Positive

				○ The usage must be known to all who normally do such business, so that it is presumed to have been incorporated into the contract unless expressly or by implication excluded; c) Newbold P in Harilal v. Standard Bank [1967] EA 512 and the authority of Bhogal v. International Computers (EA) Ltd [1972] EA 55 cited with approval, that for course of dealings to become usage: ○ It must be well known by parties affected by it; must be certain i.e. that the position of each party affected by it is capable of ascertainment and doesn't depend on the whims of the other party; ○ It must be reasonable i.e. the course of dealings is as reasonable men would adopt in the circumstances of the case; ○ It must not be contrary to legislation or a fundamental principle of law; ○ It may be proved by calling witnesses with clear, convincing and consistent evidence that the usage existed as a fact, is well known and practiced by those affected by it. a) Further, that to be a good contract, there must be concluded a bargain that settles everything necessary and leaves nothing to be settled by agreement. b) In this case, the agreement pleaded did not settle everything to create a binding relationship, for instance, did	Knowledge; ○ Using indeterminate doctrines (**INDETERM-DOCTRINE):** reasonable-man; ○ Certainty of terms as a requirement for a valid contract (**CERTAINTY REQUIREMENT**): incomplete contracts declared void and unenforceable; ○ Pacta Sunt Servanda Applied (**PACTA**): No Filling gaps in Contract terms, i.e. unless business community implied them.	Law, Business context/community knowledge and subject to support of reasonable men-not whole public; ○ Sanctity of Contract (**SANCTITY):** Judicial Non-Interventionism.

				not indicate by what means the drugs were to be delivered.		
13.	Uganda Telecom Ltd v. Tanzanite Corporation	[2005] 2 EA 331	SC-Oder JSC.	The appellant issued a proforma invoice indicating willingness to buy 30,000 phone sets from the respondent, through local Purchase Orders, and wrote to the respondent's bank confirming its commitment to do so. The respondent borrowed money using the said letter, manufactured the phones but the appellant only bought 3000 sets and reneged on the contract. Court held and reasoned that: ○ In the case of obligations, the sale of goods contract was governed by the same principles as other contracts, only it was a special type; ○ The terms were uncertain and therefore there was no contract but a mere invitation to treat, and the letter a mere support for a debt application; ○ Special damages even in sale of goods contracts must be specifically pleaded, which was not done; ○ The damages in sale of goods must be the difference of the price from the market price as per sections 49, 50 (3) and 52 of the Sale of Goods Act, because a party can resale the goods on the market.	○ Giving Procedural Justice Sway (**PROCED-SWAY**): Restricting litigant's case to Pleadings ; ○ Presumption of Equality of Contracting Parties (**EQUALITY PRESUMPTION**) i.e. Presumption of literacy of contracting parties ○ Recognition of general principles applicable to all manner of contracts (**GENERAL PRINCIPLES):** i.e. ignoring specific rules (the formalities of sale of goods contracts under section 4 of the Act that allowed contracts entered informally and formally or a combination of the two); ○ Certainty of terms as a requirement for a valid contract (**CERTAINTY REQUIREMENT**); ○ Assessing damages based on actual financial loss from non-performance (**ACTURAL LOSS**).	○ Role of Courts as implementers not makers of the law (**ROC-NONMAKERS**) ○ Equality before the law (**EQUALITY**); ○ Conceptual Formalism (**CONCEPT-FORMAL**): The Conception of Law as Conceptually Ordered**,** i.e., based on Precise, Objective, Neural, Universally Applicable and Fundamental Principles; ○ Accuracy in adjudication (**ACCURACY)**; ○ Certainty of Law (**COL**): Certainty of Contracts.
14.	Ethiopian Airlines v. Motunrola (*N.B. Both Formalism*	[2005]2 EA 57	CA-Mukasa-Kikonyogo DCJ.	The respondent who was frequent flyer with the appellant lost his luggage and sues for its value of $ 3,476.	○ Giving Procedural Justice Sway (**PROCED-SWAY**): Strict adherence to statutory regulation of contract terms;	○ Positivist Conception of Law (**POSITIVISM**): formal legality as ultimate rule of recognition; ○ Freedom and Autonomy

	and Flexibility were applied in this decision).			Court held and reasoned that: ○ The contract between the parties was governed by the Warsaw Convention that limited liability; ○ Ignorance of the law (the convention) by the respondent was no defence; ○ Extrinsic evidence cannot be admitted to alter the contents of a written contract (the terms on the ticket) ○ Although not pleaded, accepting payment for excess luggage by the applicant was illegal; ○ Illegality once brought to the attention of court overrides all questions of pleadings including admissions.	○ Pacta Sunt Servanda Applied (**PACTA**): Treating written terms as sacrosanct); ○ Literal and Logical deductive interpretation, or mechanical application of rules (**LOGICAL-MECHANIC**): Illegality overrides all proof and procedural matters/justice.	of Contract (**FOC)**; ○ Sanctity of Contract (**SACTITY)**: Standard terms superior to substantive justice; ○ Conception of Contract as Discrete (**DISCRETE);** ○ Statutory interventionism (**SINTERV**) i.e. International Treaties regulating contracts have force of law.
15.	Nile Bank Ltd v. Translink (*N.B. Both Formalism and Flexibility were applied in this decision*).	[2005] 2 EA 237	SC	A bank customer claimed to have banked 30 million on the account but found 10m on it. The parties made a contract where the bank indemnified the customer and credited the account with the balance. The customer however indemnified the bank in the event that that the police adduced conclusive proof that the money had never been banked. The police made what it termed a progress report that the money had not been banked. Court held that: ○ The lower courts wrongly focused on the meaning of the word 'conclusive' to find against the bank and ignored the substantive issue of whether the money had been banked;	○ Literal and Logical deductive interpretation, or mechanical application of rules (**LOGICAL-MECHANIC**); ○ Pacta Sunt Servanda Applied (**PACTA):** Treating written terms as sacrosanct; ○ Undue regard to technical or procedural defects to do substantive justice (**PROC-DISREGARD).**	○ Substantive Justice (**SJ)**: Substantiality in disputes and Justice over legal technicalities; ○ Freedom and Autonomy of Contract (**FOC)**; ○ Conception of Contract as Discrete (**DISCRETE);** ○ Sanctity of Contract (**SANCTITY)**.

				○ In ascertaining intention of the parties, the word used should guide court, in this case the words were conclusive proof not a conclusive report.		
16.	Stanbic Bank Uganda Limited v. Atabya Agencies Ltd	[2006] 1 EA 386	SC-Tsekooko	The appellant, a judgment creditor signed a guarantee in lieu of execution, on condition that it was realisable if the appeal was determined in the respondent's favour. The notice of appeal was struck out on a technicality. Court held and reasoned that the guarantee was realisable as the respondent could not wait forever, the appellant having not taken steps to rectify their procedural error.	○ Giving Procedural Justice Sway (**PROCED-SWAY**): fairness of the case ignored for want of procedural propriety; ○ Literal and Logical deductive interpretation, or mechanical application of rules (**LOGICAL-MECHANIC**): Contextual Fairness Ignored; ○ Pacta Sunt Servanda Applied (**PACTA**): Disregard of Fairness of Terms.	○ Procedural Justice as Superior to Substantive Justice (**PJ)**; ○ Economic Efficiency (**EFFICIENCY**): Business Efficacy; ○ Positivist Conception of Law (**POSITIVISM**); ○ Sanctity of Contract (**SANCTITY**); ○ Courts need to end disputes/litigation expeditiously (**EXPEDIENCY**).
17.	Begumisa Financial Services Ltd v. General Mouldings Ltd & Another (*N.B. Both Formalism and Flexibility were applied in this decision*).	[2007] 1 EA 28	CA-Engwau, JA.	The appellant helped the respondent get loans for agreed consideration, but the consideration was not paid. The trial court found for him and awarded interest from the date of judgment. **The court of appeal held that:** ○ The discretion had not been awarded judiciously, and awarded interest from the date of filing the suit; and ○ That interest should be adequate to compensate a party.	○ Interest awarded Purposively (**PURPOSIVE**): need to compensate; ○ Looking at remedies as restoration (**RESTORATION**); ○ Internal Judicial Guidelines (**JUDGING GUIDE**): Caveat on discretion to be exercised judiciously.	○ Conception of Law as Means to an End. (**LMEANS**); ○ Tension Management Mechanism (**MGT):** Restraint to Judicial Authority; ○ Conception of Justice restitutional (**RESTITUTION)**
18.	Kenya Airways Ltd v. Ronald	[2006] HCB 106	CA	The respondent who lost luggage while on a flight with the applicant pleaded	○ Pacta Sunt Servanda Applied (**PACTA):**	○ Freedom and Autonomy of Contract (**FOC**);

	Katumba			ignorance of the terms limiting liability under the Warsaw Convention. Court held that: ○ Whether a party has or has not read or signed a document containing terms, once he assents to it he is bound; ○ The fact that the respondent could not read and write would not exonerate him from the obligations under contract.	Treating written terms as sacrosanct i.e. Standard terms upheld whether read, signed or not; ○ Presumption of Equality of Contracting Parties (**EQUALITY PRESUMPTION**) i.e. Presumption of literacy of contracting parties	○ Sanctity of Contract (**SANCTITY**): Standard terms superior to substantive justice; ○ Equality before the law (**EQUALITY**).
19.	Tajdin Hussein & 2 Others v. HwanSung Industries Ltd	[2006] HCB 101	CA	Goods were sold by sample and on delivery although they corresponded with the description, they were not fit for purpose. Court held that in a sale by sample, once the sample corresponds, fitness for purpose is not an issue.	○ Pacta Sunt Servanda Applied **(PACTA):** Treating written terms as sacrosanct, notwithstanding unfairness; ○ Literal and Logical deductive interpretation, or mechanical application of rules (**LOGICAL-MECHANIC**): Contextual Fairness Ignored.	○ Freedom and Autonomy of Contract **(FOC**); ○ Sanctity of Contract (**SANCTITY);** ○ Conception of Contract as Discrete (**DISCRETE).**
20.	Honday Ellab v. Attorney General	[2011] 1 HCB 38	SC	Under a contract for hirer of a car for an unspecified period, the car got an accident and was severely damaged. The issue was whether the contract had been frustrated and hirer (respondent) discharged from returning it hired car. Court held and reasoned that: ○ An accident did not mean total	○ Giving Procedural Justice Sway (**PROCED-SWAY**): Restricting litigant's case to Pleadings; ○ Recognition of general principles applicable to all manner of contracts (**GENERAL PRINCIPLES**): without regard to justice of the	○ Certainty of Law **(COL);** ○ Conceptual Formalism (**CONCEPT-FORMAL**): The Conception of Law as Conceptually Ordered**,** i.e., based on Precise, Objective, Neural, Universally Applicable and Fundamental Principles; ○ Sanctity of Contract

				destruction, therefore the contract was not frustrated but its performance made impossible; ○ Although frustration would have discharged the contract, since it was not pleaded, it could not be relied on. ○ The hirer still had a duty to return the car, since there was no evidence of total destruction.	particular case.	**(SANCTITY**): non-interventionism
21.	Nile Bank Ltd & Another v. Thomas Kato & Others	HCMA 1190/1999, from HCCS 685/99, Ruling of 30/8/2000	HC-Arach-Amoko	The defence was struck out and judgment entered for the plaintiff. The court reasoned that, the court held that illegality of a contract could not affect the plaintiff's rights since it was not particularly pleaded by showing the sections of the Companies Act contravened.	○ Giving Procedural Justice Sway (**PROCED-SWAY**): Restricting litigant's case to Pleadings; ○ Pacta Sunt Servanda (**PACTA):** Plea of illegality ignored to enforce Contract.	○ Certainty of Law (**CO**L); ○ Freedom and Autonomy of Contract (**FOC**); ○ Procedural Justice as Superior to Substantive Justice (**PJ);** ○ Sanctity of contract (**SANCTITY**): even over Legality; ○ Role of Courts as implementers not makers of the law (**ROC-NONMAKERS**)
22.	Sengooba & 4 Others (Minors) v. Stanbic Bank Ltd	HCCS 184/2001	HC-Kiryabwire, J.	Evidence was led to prove that a father signed an agreement to purchase property for his children. The issue of capacity to contract arose. Court held that: ○ The law on capacity is meant for the benefit of the children, however the authorities relate to cases where minors signed the agreement. ○ That in this case since the minors are not the ones who signed but the father, who had no capacity to	○ Giving Procedural Justice Sway (**PROCED-SWAY**) i.e. Form used to allocate obligations and substantive issue overlooked.	○ Procedural justice as superior to substantive justice (**PJ**); ○ Conceptual Formalism (**CONCEPT-FORMAL**).

				contract.		
23.	Access Financial Services Plc Ltd v. Khayongo Rutiba (*N.B. Both Formalism and Flexibility were applied in this decision*).	HCCS 61/2007	HC-Kiryabwire, J.	The court approved the proposition by *Denning in Solle v. Butcher (1950) 1 KB 671,* that once parties with sound mind have to all outward appearance agreed and entered a contract with sufficient certainty to its terms, unless it is set aside, a party can not rely on his mistake to say that it was a nullity.	○ Certainty of terms as a requirement for a valid contract (**CERTAINTY REQUIREMENT**); ○ The judge making law (**LAW MAKING**): Sidestepping the Rules of Law, i.e. Rule on mistake sidestepped; ○ Pacta Sunt Servanda applied (**PACTA**): Pleas of illegality and mistake ignored.	○ Certainty of Law (**COL**): Certainty of Contracts; ○ Sanctity of contract (**SANCTITY**): even over Legality; ○ Freedom and Autonomy of Contract **(FOC**); ○ Conception of Contract as Discrete (**DISCRETE).**
24.	Saroj Gandesha v. Transroad Ltd. (*N.B. Both Formalism and Flexibility were applied in this decision*).	SCCA 13/2009	SC-Katureebe, CJ.	After judgment in the respondent's favour against the Attorney General, the parties entered an agreement they called the Consent Variation Order (CVO). Under the CVO, the debt was discounted and made payable to different parties including the respondent's lawyer, who later died. The respondent then sued the appellant as legal representative seeking for an account of the money received by the lawyer, citing a letter written prior to the CVO indicating that the money was transferred to the lawyer's clients' account. The appellant maintained that the late lawyer had no duty to account as the money was his income. The Supreme Court held and reasoned that: ○ The court erred in having relied on *Celtel (Uganda) Ltd v. Kituuma Magala*	○ Pacta Sunt Servanda applied (**PACTA**): Plea of illegality ignored i.e. (a) Registration of an agreement in court taken as having cleaned it of illegality; **(b)** Court enforced agreement to pay court awards through third party accounts without genuine transactions or consideration i.e. condoned one of the instruments used to corrupt public officials; ○ A Consent agreement treated as a judgment of court. ○ Literalism in contract interpretation (**LITERALISM**): Disregard of the	○ Conception of law as experience (**LEXP):** Indifference to Corruption; ○ Opportunism (**OPPORTUNISM**); ○ Freedom and Autonomy of Contract **(FOC**); ○ Sanctity of Contract (**SANCTITY**): ○ Judicial Non-Interventionism (**JNON-INTERV).**

				& Co. Advocates, CA 39/2003and hold that the CVO was an agreement for remuneration of counsel that offended section 51(1) of the Advocates Act as it was not notarised and filed with the Law Council, as the CVO became a court judgment on being registered in court. o The CVO having been post judgment was not a remuneration agreement contemplated by the section; o It the respondent felt the payment was based on an illegal agreement, she should have applied to court to set it aside; o Could not be concerned with the intention of the parties in allocating different payments, but assumed both parties had know why the third parties were being paid and chose to protect the payments by an order of court. o Words of the CVO have to be read and enforced as is, without further attachments; o *Celtel (Uganda) Ltd v. Kituuma Magala & Co. Advocates CA 39/2003,* was not applicable because in this case, the agreement was not set aside and its legality not in issue. **Note:** In practice, the transaction reflects a trend of lawyers in public offices being paid kick-backs through proxy entities and protecting their interests by clothing the understandings with orders of court,	Contract's purposes.	

				by virtue of registration in court. The judge as a former private lawyer and public lawyer speak of parties knowing why and protecting that why.		
25.	Rwakatooke Muchope v. Caltex Oil (U) Ltd. (*N.B. Both Formalism and Flexibility were applied in this decision*).	HCCS 809/1999(Judgment of 21/10/2004)	HC-Arach-Amoko	The Plaintiff sought to declare ineffective and non-enforceable a dealership he signed on every page, and stop foreclosure under a mortgage that resulted from it. His grounds were that he had never seen or read the agreement, and it was never referred to during the long time the parties had dealings. The court held that without vitiating factors being proved, the contract was binding**.** The judge reasoned that: ○ A man of the plaintiff's status as a businessman and a marketing manager of a company should have asked for a copy of the agreement before signing. ○ The mortgage deed was a separate agreement, such that problems with the underlying contract would not hinder the defendant from exercising rights under the mortgage.	○ Recorgnising inequality amongst contracting parties: Using economic, social or political class as criteria to access justice (**NO-EQUALITY**): Using economic class as criteria to access justice, i.e, used to measure culpability under contracts; ○ Pacta Sunt Servanda Applied (**PACTA**): Collateral Contracts ignored and Signature on a contract treated as conclusive evidence of consensus;	○ Freedom and Autonomy of contract **(FOC**); ○ Sanctity of Contract (**SANCTITY);** ○ Inequality before the law (**INEQUALITY**): The Conception of Justice as dependent on Class; ○ Conception of Contract as Discrete (**DISCRETE**); ○ Procedural justice as superior to substantive justice **(PJ).**
26.	Triad Holdings Ltd v. Networks Exports PVT Ltd & Others.	HCCS 358/2000(Judgment of 19/8/2005.	HC-Bamwine, J.	The 2nd and 3rd defendants had the duty to pre-inspect rice before it was exported to Uganda. They issued a Clean Report but on reaching Uganda, the rice was found unfit for human consumption. Court held that the plaintiff's remedy	○ Giving Procedural Justice Sway (**PROCED-SWAY**): Restricting litigant's case to Pleadings - refusing to invoke negligence for lack of pleadings.	○ Certainty of Law (**COL);** ○ Pure Conception of Law (**POSITIVISM);** ○ Procedural justice as superior to substantive justice (**PJ);** ○ Conceptual Formalism

				against them lay in negligence, but it had not been pleaded. The suit was therefore dismissed on ground that the plaintiff did not disclose a contractual relationship with them, and had no cause of action by virtue of the principle of privity of contract.		(**CONCEPT-FORMAL**).
27.	Mirembe Wire Products Ltd v. Goldstar Insurance Co. Ltd.	HCCS 54/2002 (Judgment of 18/7/2007	HC-Lugayizi, J.	Insurance was issued through a cover note, and the policy issued later having wider terms than on the cover note. Insured goods were damaged while in transit following the cover note being issued. **Court held that:** ○ It could not read into the cover note terms other than those expressly stated in it. ○ Although the policy later referred to the cover note, the two were different insurance contracts and the terms in the policy cannot be held as having been incorporated in the cover note.	○ Literalism in contract interpretation **(LITERALISM**): restricted itself to the four corners of the contract & rejected implied or incorporated terms; ○ Pacta sunt servanda Applied (**PANCTA**).	○ Freedom and Autonomy of Contract (**FOC);** Judicial non-interventionism**;** ○ Sanctity of Contracts (**SANCTITY**); ○ Conception of Contract as Discrete (**DISCRETE)**.
28.	Aqua Plumbing (U) Ltd v. United Assurance Co. Ltd	HCCS 431/2002 (Judgment of 15/3/2004)	HC-Lugayizi, J.	A comprehensive insurance contract expired and an accident happened before its renewal. However, at the time, a third party insurance cover was running with a sticker issued by the insurer reading "Comp", which the plaintiff took to mean "Comprehensive". Court held refused to take "Comp" to mean "Comprehensive", and reasoned that it would go against the cardinal principle that insurance covers future	○ Literalism in contract interpretation (**LITERALISM**): refusing to infer meaning into an abbreviation. ○ Recognition of general principles applicable to all manner of contracts (**GENERAL PRINCIPLES):** A general insurance	○ Freedom and Autonomy of Contract (**FOC**); ○ Conceptual Formalism (**CONCEPT-FORMAL**): The Conception of Law as Conceptually Ordered**,** i.e., based on Precise, Objective, Neural, Universally Applicable and Fundamental Principles. ○ Freedom and Autonomy

				events not those in the past.	principle of fortuity of risk invoked to refuse imputation of a contract and liability of insurers.	of Contract **(FOC**).
29.	Kenkom Limited v. Saracen Uganda Ltd.	HCCS 134/2003 (Judgment of 18/7/2007)	HC-Egonda Ntende, J.	This was a subrogation suit; in cash in transit insurance contract was proved not to have been signed by the insured. **Court held** that there was no law declaring such a contract invalid, therefore it was valid and enforceable.	○ Positive Law Superior to non-legal orders (**NON-LEGAL INFERIOR):** Anything not invalidated expressly by law seen as valid;	○ Conception of Law as Determinate (**DETERMINANCY);** ○ Positivist Conception of Law (**POSITIVISM**); ○ Role of Courts as implementers not makers of the law (**ROC-NONMAKERS**).
30.	Greenboat Entertainment Ltd v. City Council of Kampala. (*N.B. Both Formalism and Flexibility were applied in this decision*).	[2007] UGCOMMC 20.	HC-Bamwine, J.	The contract for the plaintiff to manage street parking in the city expired, but the Plaintiff allowed by the defendant to continue offering the services. Tenders were later invited and the contract awarded to a third party. The plaintiff argued that the contract was renewed and the court held that: ○ There is a difference between a contract and an agreement, as an agreement only becomes a contract when an intention is formed to have a legally binding relationship. ○ Call it an administrative arrangement or agreement in this case, but there no contract between the parties. ○ Written contracts cannot be renewed orally and if so done, the contract becomes invalid for want of certainty of terms. ○ Courts should be cautious of implying additional terms in contracts, for that	○ Giving Procedural Justice Sway (**PROCED-SWAY**): oral contracts rejected. ○ The judge making law (**LAW MAKING)**: Government can enter pacts without intending to be bound/"administrative arrangements; ○ Applying Formalism with flexible ends in mind (**OPPORTUNISTIC FORMALISM**); ○ Pacta Sunt Servanda Applied (**PACTA**): No Filling gaps in Contract terms, i.e., Refusal to imply terms in contract.	○ Sanctity of Contract (**SANCTITY**); ○ Freedom and autonomy of contract (**FOC**): Judicial non-interventionism; ○ Opportunism (**OPPORTUNISM**) i.e. arrangements invented as a middle stage between contract and mere invitations or pre-contractual non-binding statements; ○ Conception of Law as Means to an End (**LMEANS**): Court stretching contractual doctrine to save the state from liability.

				will be rewriting the contract for the parties.		
31.	Kirasha v. United Assurance Co. Ltd. (*N.B. Both Formalism and Flexibility were applied in this decision*).	HCCS 861/2004 (10/5/2006)	HC-Bamwine, J.	In a claim by an insured for indemnity, the defendant alleged that the plaintiff burnt his own vehicle and there was no accident, proving that similar claims had been made on a number of occasions from other insurers. Court held that: ○ Evidence of similar facts had not been pleaded and could not be relied on; ○ It was possible that the plaintiff as a transporter had many similar cases; ○ The defendant was negligent in not following a novel idea of sending ashes to Kenya or South Africa for further testing; ○ General damages are not pleaded but awarded by court on estimating the pain and suffering one has gone through. **Note:** Both Formalism and Flexibility used in the same decision.	○ Giving Procedural Justice Sway (**PROCED-SWAY**): Restricting litigant's case to Pleadings i.e. in the face of possible unjust enrichment and fraud; ○ Recognising inequality amongst contracting parties: Using economic, social or political class as criteria to access justice (**NO-EQUALITY**); i.e. Presumption of truthfulness made based on a party's occupation; & Expensive process of testing samples from other countries seen as novel and the normal; ○ Exercising Unrestrained Judicial Authority (**UNRESTRAINED AUTHORITY**): Exercise of Unfettered Discretion i.e., award of general damages.	○ Certainty of Law (**COL)**: Certainty in litigation and adjudication; ○ Inequality before the law **(INEQUALITY)**: Class oriented Conception of Justice; ○ Judicial Absolutism (**JA);** ○ Law as Predictions of What Judges Will Do (**LPREDICTIONS**), i.e. Personal intuitions, prejudices and preferences with regard to general damages.
32.	Akkermans Industrial Engeineering Ltd v. Attorney General (*N.B. Both Formalism*	HCCS 333/2004(19/01/2009)	HC-Kiryabwire, J.	In a case where there was a lapse in the contract but the plaintiff provided services that the defendant consumed, *quantum meruit* was claimed and awarded by court.	○ Pacta Sunt Servanda Applied (**PACTA**): No Filling gaps in Contract terms **i.e.,** Equity limited by need to be accurate in awarding remedies ○ Using indeterminate	○ Accuracy in adjudication (**ACCURACY**); ○ Judicial Absolutism **(JA);** ○ Conceptual Formalism (**CONCEPT-FORMAL**).

	and Flexibility were applied in this decision).			Court however reasoned that: ○ *Quantum meruit* being an equitable remedy, it must cover only actual services rendered; ○ It was unreasonable for the plaintiff to be paid days they did not work waiting for spare parts.	doctrines (**INDETERM-DOCTRINE)**: reasonableness used to limit equity; ○ Exercising Unrestrained Judicial Authority (**UNRESTRAINED AUTHORITY**): Exercise of Unfettered Discretion i.e., award of general damages.	
33.	Jamba Soita Ali v. David Salaam (*N.B. Both Formalism and Flexibility were applied in this decision*).	HCCS 400/2005 (3/7/2006)	HC-Bamwine, J.	The Plaintiff sought to recover money lent to the defendant, who was introduced to him by a person they both knew, saying he could lend money. Court held that: ○ The plaintiff was engaged in money lending illegally without a licence; ○ Amending the plaint to remove the claim for interest did not purify the transaction, as there was nothing friendly about the loan but only an illegal loan.	○ Literal and Logical deductive interpretation, or mechanical application of rules (**LOGICAL-MECHANIC**): i.e. ignoring the unfairness of the principal amount lent not being returned; and Illegality overrides all proof and procedural matters/justice i.e that pleadings no cure to illegality; ○ Pacta Sunt Servanda Applied (**PACTA**): Disregard of Fairness of Terms; ○ Contract Law understood as including Practices (**PRACTICES**): Friendliness would cure potential illegality of loan.	○ Conception of law as determinate (**DETERMINACY**); ○ Role of Courts as implementers not makers of the law (**ROC-NONMAKERS**); ○ Positivist Conception of Law (**POSITIVISM**): Supremacy of Law**, i.e.,** Value of Legality of Contracts as precondition to Enforcement; ○ Substantive Justice (**SJ**): ***Ubuntu concept of justice***: ○ Friendliness as a Norm superior to the legal order/norms.

34.	Amis Olaboro t/a Lopai Hardware v. Kumi District Local Government Council (*N.B. Both Formalism and Flexibility were applied in this decision*).	HCMA 479/2005	HC-Lameck Mukasa, J.	The defendant raised the defence of time limitation as being 3 years for contract cases against local governments, and the plaint not disclosing why there was delay. The plaintiff sought to have that declared a mere technicality, curable by Article 126 of the constitution. Court held that time bars are matters of substance not mere technicalities.	○ Giving Procedural Justice Sway (**PROCED-SWAY**): i.e. Commands on technical and procedural justice treated as matters of substance; ○ Contextual Interpretation of Contracts and Application of Rules (**CONTEXTUAL**): Political and State Interests Protected over Contract.	○ Procedural Justice Superior to Substantive Justice **(PJ**); ○ Opportunism (**OPPORTUNISM**) i.e. Substantiality of commands instrumentally and selectively made; ○ State Protectionism (**STATE POLICY).**
35.	Multiple Industries Ltd v. Alam Construction EA Ltd.	HCCS 300/2006	HC-Kiryabwire, J.	In a suit for the price of goods supplied by the plaintiff, the defendant argued that the debt was caused by the fraud of one of its employees, who was acting outside the scope of his duties. Court held that such employee fraud had to be pleaded and strictly proven otherwise the employer was liable.	○ Giving Procedural Justice Sway (**PROCED-SWAY**): Restricting litigant's case to Pleadings: for allocation of rights and obligations.	○ Certainty of Law (**COL);** ○ Role of Courts as implementers not makers of the law (**ROC-NONMAKERS).**
36.	Greenland Bank ltd (In Liquidation) v. Express Sports Club Ltd.	HCCS 232/2006 (1/6/2007)	HC-Lameck Mukasa	A football existed before the defendant was incorporated, and borrowed from the plaintiff. Court held that the plaintiff has no cause of action against the defendant, reasoning that: ○ There was no ratification of the pre-incorporation contracts; ○ Although the memorandum and Articles of association clearly recognised the existence of the club pre-incorporation, it was not a contract between the plaintiff and the	○ Recognition of general principles applicable to all manner of contracts (**GENERAL PRINCIPLES**): Privity of Contracts and Non-Enforceability of pre-incorporation contracts; ○ Pacta Sunt Servanda Applied (**PACTA**): Disregard of Fairness of Terms.	○ Conceptual Formalism (**CONCEPT-FORMAL**): The Conception of Law as Conceptually Ordered**,** i.e., based on Precise, Objective, Neural, Universally Applicable and Fundamental Principles; ○ Positivist Conception of Law (**POSITIVISM);** ○ Conception of Contract as Discrete

				defendant, therefore could not be relied on.		(**DISCRETE**);
37.	Hajji Asadu Lutale v. Michael Ssegawa. (*N.B. Both Formalism and Flexibility were applied in this decision*).	HCCS 292/2006 (15/2/2008	HC-Bamwine. J.	This was a suit for refund of the price plus special and general damages for selling a machine that was not fit for purpose and breach of the condition of merchantable quality (section 15 (a) & (b) of the Sale of Goods Act. Court found in favour of the plaintiff, and ordered refund of the price and general damages, but declined to award expenses incurred as a result of the breach such as rent and other services. Court reasoned that business sense required that the machine to have been returned to the seller at the earliest.	○ Pacta Sunt Servanda Applied (**PACTA**); ○ Exercising Unrestrained Judicial Authority (**UNRESTRAINED AUTHORITY**): Exercise of Unfettered Discretion i.e., award of general damages; ○ Abductive Reasoning in interpretation of statute or precedents (**ABDUCTIVE**)**:** Intuition used to resolve competing answers, i.e. his business sense invoked to deny party special damages he had proved as incurred.	○ Economic Efficiency (**EFFICIENCY)**; ○ Judicial Absolutism **(JA);** ○ Conception of Law as Predictions **(LPREDICTIONS);** ○ Freedom and autonomy of contract (**FOC**).
38.	Hansa & Lloyds Ltd & Emmanuel Onyango v. Aya Investments Ltd &Mohammad Hamid.	HCCS 857/2007 (26/8/2010)	HC-Kiryabwire, J.	The parties agreed to nothing and the judge expressed his inability to get the true facts of the case as a result. The judge indicated that it was a hard case, the evidence enigmatic and the relationship between the parties very informal. The court admitted to having applied mere logic to interpret the documents before him and arrive at conclusions.	○ Literal and Logical deductive interpretation, or mechanical application of rules (**LOGICAL-MECHANIC**).	○ Positivist Conception of Law (**POSITIVISM**).
39.	Kibyami v. Mission and Relief Transport.	HCCS 263/2006 (30/11/2005).	HC-Lameck Mukasa	There was an agreement for hire of a motor vehicle to transport goods. The agreement was drawn on the letterhead of the defendant, although the defendant	○ Giving Procedural Justice Sway (**PROCED-SWAY**): Technical rules of proof	○ Freedom and Autonomy of contract (**FOC);** ○ Procedural justice as superior to substantive

	(*N.B. Both Formalism and Flexibility were applied in this decision*).			denied the telephone numbers; fax number and other particulars on the letters. Also that in her organisation, there was no operations director, who allegedly signed the contract. Therefore one of the issues was whether the contract was concluded, and enforceable. The court held that there was a valid and enforceable contract between the parties, reasoning that: ○ Questions before court had to be answered by looking at both the documents between them and their conduct. ○ Although the defendant had pleaded the defences above, evidence was adduced to show the defendant's management structure or disprove the particulars on the letterhead; ○ The plaintiff was an outside who should not have been expected to know the weakness in the contract pleaded by the defendant, such as the internal arrangement of the defendant.	used to find a valid and enforceable contract; ○ Literalism in contract interpretation (**LITERALISM**); ○ Contract viewed as a network of relations (**RELATIONS**): i.e. The outsider protected against corporations.	justice **(PJ**); ○ Dehumanisation of law **(DEHUMAN**)- Corporations seen as fully integrated entities not reducible to invoking human beings behind them; ○ Conception of Contract as Relational **(RELATIONAL**).
40.	DFCU Bank (U) Ltd v. Ndibazza & Others (*N.B. Both Formalism and Flexibility were applied in this decision*).	[2016] UGCOMMC 2 (11/1/2016)	HC-Madrama, J.	The second defendant was a collateral manager appointed to secure and supervise goods taken as collateral by the plaintiff for money lent to the 1ST defendant. Under the contract, the 2ND defendant had a duty to act with skill and care. The plaintiff also claimed that the 2ND defendant was a bailee under which contract she had a duty to keep	○ Giving Procedural Justice Sway (**PROCED-SWAY**): Technical rules of proof used to find a valid and enforceable contract i.e. Court relied on requirements for proof to reject a negligence and bailment claim;	○ Judicial Self Preservation (**JUD-SELF PRESERV**), i.e. Autonomy of judges from common law and precedents; ○ Conception of law as Indeterminate (**INDETERMINACY);** ○ Conceptual Formalism

				secure the goods. The plaintiff who had dual control with the 2ND defendant stole the goods and diverted them, thus the suit, the claim being that the 2ND defendant was negligent and liable for the debt. Court held that: ○ Negligence had not been proved as all parties agreed that the 1ST defendant stole the goods. That theft dispelled the claim that there was negligence. ○ The judge noted the common law duty of bailee, with or without contract being proved to keep secure custody of the goods and avoid thefts. ○ Without assigning reasons for departure the judge reiterated that since negligence had not been proved, the 2ND defendant could not be held liable.	○ The judge making law (**LAW MAKING**): Sidestepping the Rules of Law, i.e. Rule in precedents sidelined and instead a new rule set by requiring proof of negligence in a bailment claim; ○ Legal Classificatory Categories ignored (**NO CATEGORIES**): Negligence Invoked to Find Liability in Contract.	(**CONCEPT-FORMAL**); ○ Role of Court as Law Makers and Reformers (**LMAKERS**).
41.	Jade Petroleum Ltd v. Salim Ramzanli & Another	[2017] UGCOMMC 114(18/8/2017)	HC-Madrama, J.	The Plaintiff sued for conversion of his goods and the defendant claimed to have bought them from the third party, who in turn filed a defence that he had also bought form another person but adduced no evidence. Court held that: ○ Under section 22 of the Sale of Goods Act, a sale by a non-owner passes no better title than he has unless the exceptions to that nemo dat quod non habe rule exist. Section 23 also deals with sale under	○ Literal and Logical deductive interpretation, or mechanical application of rules (**LOGICAL-MECHANIC**): rule on passing of title applied without regard to the fairness of the case, i.e. the relevancy of the second seller ignored; ○ Pacta Sunt Servanda Applied (**PACTA**): Disregard of Fairness of Terms;	○ Positivist Conception of Law (**POSITIVISM**); ○ Role of Courts as implementers not makers of the law (**ROC-NONMAKERS**); ○ Conception of Contract as Discrete (**DISCRETE);** ○ Conceptual Formalism (**CONCEPT-FORMAL**).

				voidable title, and none of the two gave the defendant any rights in the goods. ○ The argument by the defendant, that the plaintiff ignored pursuing the third party was immaterial, as the law on passing of title was clear.		
42.	Mogas (U) Ltd v. Benzina (U) Ltd)	HCCS 88/2013 [2017] UGCOMMC 92 (5/9 2017)	HC-Madrama, J.	In the contract for supply of goods, the time for delivery was mentioned as "immediately". The plaintiff had a duty to provide a Payment Guarantee, and the defendant pleaded frustration of the contract. The court held that the doctrine of frustration and its effect of loss staying where it falls has been solidified into a statutory rule by section 66(1) &(2) of The Contract act, 2010. However, the frustrating event pleaded was not the subject of the contract i.e. Iran as a source of Bitumen causing the blockage of funds was not a term of the contract but a matter of choice. The word 'immediately' meant that the goods had to be supplied within the time of the guarantee.	○ Pacta Sund Servanda Applied (**PACTA**): Meaning of terms of contract restricted to the sense in other terms of the contract and frustrating event rejected because it wasn't specifically part of the contract.	○ Freedom of contract and Autonomy of contract **(FOC);** ○ Sanctity of Contract (**SANCTITY)**; ○ Conceptual Formalism (**CONCEPT-FORMAL**); ○ Conception of Contract as Discrete (**DISCRETE)**.
43.	Asante Aviation Ltd v. Star of Africa Air Charters Ltd & 3 Others	[2017] UGCOMMC 125(2/11/2017)	HC-Wangutusi, J.	In a contract for sale of an aircraft where the buyer defaulted to pay the full price, duress was claimed as having made the plaintiff sign the contract. Rejecting the defence of duress, the judge held that it had not been proved,	○ Pacta Sunt Servanda Applied (**PACTA**): Disregard of Fairness of Terms;	○ Judicial Non-Interventionism (**JNOIN-INTERV);** ○ Freedom of and Autonomy of Contract (**FOC)**; ○ Positivist Conception of Law (**POSITIVISM**);

				and relied with approval the proposition in *Stockloser v. Johnson (1954)1 ALL ER 630,* that; **"People who freely negotiate and conclude a contract should be held to their bargain and judges should not intervene by substituting, according to their individual sense of fairness, terms which are contrary to those which the parties have agreed upon themselves."**		○ Conceptual Formalism (**CONCEPT-FORMAL**); ○ Sanctity of Contract (**SANCTITY**).
44.	AbdulRahman Elamin v. Dhabi Group, Warid Telecom Ltd & Others. (*N.B. Both Formalism and Flexibility were applied in this decision*).	[2017] CACA 60(16/11/2017)	CA-Rhemmy Kasule, JA.	The appellant brought a suit to recover damages from breach of contract with the 1ST respondent, which was a United Arab Emirates holding group, owning a company that owned and controlled the 2ND respondent. By the contract, the appellant was entitled to 3% shareholding in the 2ND respondent as commission. The court dismissed the appeal and held that the trial judge was right in striking out the plaint and dismissing the suit, for: ○ The 2nd and 3rd respondents although were to be affected by the share transfer if it had taken place, were not party to the agreement and therefore there was no cause of action. ○ Pleas by the appellant that the connection will be proved at the trial were rejected and court relied on the plaint as not disclosing enough to hold them liable;	○ Giving Procedural Justice Sway (**PROCED-SWAY**): Restricting litigant's case to Pleadings: for allocation of rights and obligations i.e. Suit dismissed based on pleadings not disclosing enough; ○ New Law Made (**MAKING LAW**): a new rule laid out, that a company not incorporated or registered in Uganda could not be sued; ○ Recognition of general principles applicable to all manner of contracts (**GENERAL PRINCIPLES**): Applying the Privity of Contract Doctrine: ignoring the substantive justice doctrine.	○ Certainty of Law (**COL**); ○ Procedural Justice as superior to substantive justice **(PJ);** ○ Role of Court as Law Makers and Reformers (**LMAKERS**); ○ Conceptual Formalism (**CONCEPT-FORMAL**): The Conception of Law as Conceptually Ordered**,** i.e., based on Precise, Objective, Neural, Universally Applicable and Fundamental Principles; ○ Conception of Contract as Discrete (**DISCRETE);**

				○ The Plaint did not show that the 1ST respondent been registered in Uganda, and the law is that if a company is not incorporated in Uganda, then it does not exist in Uganda as a body corporate; ○ The 1ST respondent does not exist within the court's jurisdiction and could not be sued. ○ The plaint couldn't be cured by amendment or substitution of parties but a fresh suit could be filed.		
45.	Arim v. Stanbic Bank (*N.B. Both Formalism and Flexibility were applied in this decision*).	[2015] CACA 113(17/4/2015	CA-Kakuru, JA.	A court order to transfer money from the appellant's account was issued containing the wrong account numbers. The appellant issued countermand instructions, which the respondent did not carry out, and instead complied with the court order. The issues were whether the respondent bank was in breach of her duty as a banker and should have disobeyed the erroneous court order. The judge held that: ○ The respondent had a duty and obligation to obey a court order. It was not open to him to disregard it whether or not it contained errors minor or major. ○ A party who knows a court order, whether null and void, regular or irregular cannot be permitted to disobey it was recently re-affirmed by this court**.**	○ Exercising Unrestrained Judicial Authority (**UNRESTRAINED AUTHORITY**): Jealously Guarding Jurisdiction: Upholding the Sanctity of Court Orders, i.e., Court orders held as sacred and must be obeyed even if irregular, null or void.	○ Judicial Self Preservation (**JUD-SELF PRESERV**); ○ Judicial Absolutism (**JA);** ○ Positivist Conception of Law (**POSITIVISM):** Supremacy of Law.

46.	Arim v. Stanbic Bank (*N.B. Both Formalism and Flexibility were applied in this decision*).	[2016] SCCA 6 (22/12/2016)	SC-Ekirikubinza, JSC.	The supreme court upheld the decision of the court of appeal that even if the court order was erroneous the respondent had a duty to obey it and was not in breach of her duties as a banker to the appellant.	○ Exercising Unrestrained Judicial Authority (**UNRESTRAINED AUTHORITY**): Jealously Guarding Jurisdiction, i.e., Upholding the ***Sanctity of Court Order***s: Court orders held as sacred and must be obeyed even if irregular, null or void.	○ Judicial Self Preservation (**JUD-SELF PRESERV**); ○ Judicial Absolutism (**JA**); ○ Positivist Conception of Law (POSITIVISM): Supremacy of Law.
47.	Halai Construction Ltd v. Coil Ltd (*N.B. Both Formalism and Flexibility were applied in this decision*).	HCCS 785/2014	HC-Wangutusi, J.	Termination of a sub-contract was in issue and neither party adduced evidence to prove that termination actually took place. Court held that: ○ It is trite that terms of a contract are best ascertained by reviewing the contract itself. ○ No terms are implied in a contract unless this is what was intended and necessary to give business efficacy to the contract.	○ Contextual Interpretation of Contracts and Application of Rules (**CONTEXTUAL**): Invoking Business Reality i.e. that implied terms had to have the effect of giving the contract business efficacy ○ Pacta Sunt Servanda Applied (**PACTA**): Implying terms in a contract conditioned to intention of the parties;	○ Freedom and Autonomy of Contract (**FOC**): Judicial non-interventionism; ○ Sanctity of Contract **(SANCTITY**); ○ Economic Efficiency (**EFFICIENCY**): i.e. Judicial Interventionism conditioned to satisfying intention of the parties and business efficacy; ○ Opportunism (**OPPORTUNISM**).
48.	Omega Construction Co. Ltd v. Kampala Capital City Authority (*N.B. Both Formalism and Flexibility were applied in*	HCCS 780/2015(28/4/2017)	HC-Madrama,J.	A building contract between the parties was terminated and a final certificate of payment issued by the defendant's project manager, but the defendant sought to amend it citing errors by the manager. The plaintiff sued to recover the amount on the certificate. The defendant is public body and the laws on procurement regulated its contracts. **The court held that** the plaintiff should	○ Pacta Sunta Servanda Applied (**PACTA**): i.e. Contract terms strictly enforced to exclusion of case law; ○ Literal and Logical deductive interpretation, or mechanical application of rules (**LOGICAL-**	○ Freedom and Autonomy of Contract (**FOC**); ○ Sanctity of contract (**SANCTITY**); ○ Positivist Concept of Law (**POSITIVISM):** Logical deduction of law**;** ○ Conception of Law as determinate

	this decision).			be paid the amount on the first certificate, and the defendant acted in contravention of the Procurement Law that required such payments to be done within 30 days. The court reasoned that: ○ If a contract is clear, it has to be interpreted as it is. Expositions from case law, common law or equity cannot be applied. ○ If a statute is clear, case law cannot be invoked to contradict it, as section 14 of the Judicature Act subjects case law to written law and then other sources like common law follow. ○ A contractual clause is enforceable irrespective of adequacy of amounts stipulated in it, therefore the plaintiffs could not claim for more than was agreed. ○ The defendant was bound by estoppel under section 114 of the Evidence Act to honour the certificate issued by its Project Manager. ○ The plaintiff was entitled to commercial interest on the debt, which courts awarded between 18%-24%, therefore 18% was fair interest.	**MECHANIC**); ○ Giving Procedural Justice Sway (**PROCED-SWAY**): i.e. Mechanical application of Procedural Rules; ○ Judicial Interventionism in Contract (**JINTERV**) Equity invoked to interfere with Contract: Equitable and statutory estoppel used to allocate obligation to pay;	(**DETERMINACY);** ○ Conceptual Formalism (**CONCEPT-FORMAL**); ○ Substantive Justice (**SJ):** Estoppel used.
49.	Thunderbolt Technical Services Ltd v Apedu Joseph & K.K Security (U) Ltd	HCCS No. 340 of 2009.	HC-Kiryabwire, J.	The contract provided for limitations of liability against a security company in the event of theft. The guarding company's employee who was meant to guard the premises carried out the theft. **The Judge** acknowledged that the theft by the employee was a fundamental breach of the security contract, but	○ Pacta Sunt Servanda Applied (**PACTA**); ○ Literalism in contract interpretation (**LITERALISM**); ○ Presumption of Equality of Contracting Parties (**EQUALITY PRESUMPTION**): i.e.	○ Freedom and Autonomy of Contract (**FOC**); ○ Sanctity of Contract (**SANCTITY**); ○ Equality before the law (**EQUALITY**); ○ Conception of Contract as Discrete

				freedom of contract was invoked to award only up to the maximum limit of special damages fixed by the contract terms. **The Judge further reasoned and noted** with approval the English authorities of *Suisse Atlanti que Societe D'armement Maritime SAV v Rotterdam Sche Kolen Centrale*, *(1966) 2 ALLER 61* and *Photo Production Ltd v Securicor Transport Ltd, (1980) 1 ALL ER 556* for the proposition that such freedom of contract would be interfered with by the court in cases where the parties were of unequal bargaining power or where one of the parties did not sign the contract and that the court had to look at the contract as a whole before making its decision.	Parties being of equal bargaining power taken as a pre-condition for non-interference with freedom of contract.	(**DISCRETE**).
50.	Brazafric Enterprises Ltd	HCCA No. 16 of 2014 (UG COMMC 135/2015).	Hellen Obura, J.	The contract provided for limitations of liability against a security company in the event of theft. The guarding company's employee who was meant to guard the premises carried out the theft. **The Judge** acknowledged that the theft by the employee was a fundamental breach of the security contract, but freedom of contract was invoked to award only up to the maximum limit of special damages fixed by the contract terms. **The Judge further reasoned and noted** with approval, *Thunderbolt Technical Services Ltd v Apedu Joseph*	○ Pacta Sunt Servanda Applied (**PACTA**); ○ Literalism in contract interpretation (**LITERALISM**) ; ○ Presumption of Equality of Contracting Parties (**EQUALITY PRESUMPTION**): i.e. Parties being of equal bargaining power taken as a pre-condition for non-interference with freedom of contract	○ Freedom and Autonomy of Contract (**FOC);** ○ Sanctity of Contract (**SANCTITY);** ○ Equality before the law (**EQUALITY);** ○ Conception of Contract as Discrete (**DISCRETE**)**.**

				& K.K Security (U) Ltd, *HCCS No. 340 of 2009* and the English authorities of *Suisse Atlanti que Societe D'armement Maritime SAV v Rotterdam Sche Kolen Centrale*, (1966) 2 ALLER 61 and *Photo Production Ltd v Securicor Transport Ltd, (1980) 1 ALL ER 556* for the proposition that such freedom of contract would be interfered with by the court in cases where the parties were of unequal bargaining power or where one of the parties did not sign the contract and that the court had to look at the contract as a whole before making its decision.		
51	Ngege (U) Limited v. SDV Transami (U) Limited	HCCS 579/2003	Egonda Ntende, J.	The plaintiff sued the defendant for breach of a carriage and bailment contract, and recovery of the value of fish, which upon reaching Egypt had been declared unfit for human consumption. The defendant, which had issued an invoice for the services, denied existence of a contractual relationship between the parties and in the alternative claimed protection of her standard terms. After a 4 year delay in the courts, the court: ○ Entered judgment for the defendant on ground of failure by the plaintiff to prove her case, as evidence was insufficient; ○ Held that the 4-year delay was unacceptable and the case had to be dismissed.	○ Giving Procedural Justice Sway (**PROCED-SWAY**): evidential rules strictly applied to make a finding;	○ Courts need to end disputes/litigation expeditiously (**EXPEDIENCY**); ○ Procedural Justice as Superior to Substantive Justice (**PJ).**

52.	Congolese Rally for Democracy v. Palm Beach Hotel	HCMA 279/2000	Arach Amoko, J.	This was a claim for payment of carriage fees, arising from the plaintiff having severally incurred very high risk, by transporting military hardware to the defendant, in battlefields. The defendant was a rebel organisation that was fighting in the Democratic Republic of Congo, but with an office in Uganda. The researcher being counsel for the defendant rebel group brought and argued an application challenging the jurisdiction of court, on ground of the contract having been concluded and performed outside Uganda; the contract having been unenforceable for being contrary to public policy, and the defendant rebel group not being a legal entity, capable of being sued. The plaintiff counter argued that it would be defeating the interests of fairness and justice if the plaintiff that incurred such risk, was denied a right to sue the defendant, which actually received and used the goods in issue. The court found for the defendant and dismissed the suit, reasoning that: ○ The suit had to be filed where the defendant resided or the cause of action wholly or partly arose, none of which applied to the case, as the defendant, a rebel group could not be said to reside in Uganda; ○ The rebel group was not a legal entity capable of being sued, and the plaintiff had assumed the risk of dealing with	○ Literal and Logical deductive interpretation, or mechanical application of rules (**LOGICAL-MECHANIC**): rule on passing of title applied without regard to the fairness of the case, i.e. the relevancy of the second seller ignored; ○ Giving Procedural Justice Sway (**PROCED-SWAY**): evidential rules strictly applied to make a finding.	○ Positivist Conception of Law (**POSITIVISM):** Supremacy of Law: Conception of Law as logical deductions; ○ Role of Courts as implementers not makers of the law (**ROC-NONMAKERS**); ○ Procedural Justice as Superior to Substantive Justice (**PJ).**

				it.		
53.	Batanda v. Bollore Africa Logistics Limited	HCCS 182/2009 (Unreported- **Judgment dated 23/1/2017**)	HC-Mugenyi, J.	The Plaintiff was employed by the defendant to serve in the defendant's Ugandan subsidiary, but latter offered to be transferred to the Tanzanian subsidiary, with an offer to be returned to the Ugandan subsidiary at expiry of the term agreed. The plaintiff refused to sign the offer, but later brought action for damages for unlawful termination, arguing that the defendant was bound to return him to the Ugandan subsidiary after Tanzania. **The Court held and reasoned that**: ○ Under Ss. 3(1), 3(2), & 10 of the Contract Act, No. 7 of 2010, offer and acceptance exists where communicated in a manner capable of having effect, and the non-signing of the offer meant that the plaintiff did not accept the offer, thus no contract existed beyond employment in Tanzania; ○ Where a contract is in writing, no extrinsic evidence can be called to add or deduct from its terms, *per Ramanbai Patel v. M/s Madhvani International Limited [1992-93] HCB 189*.	○ Literal and Logical deductive interpretation, or mechanical application of rules (**LOGICAL-MECHANIC**); ○ Pacta Sunt Servanda Applied (**PACTA**): Treating written terms as sacrosanct.	○ Positivist Conception of Law (**POSITIVISM**); ○ Writing as the best evidence of parties' intentions (**PAROL EVIDENCE);** ○ Freedom and Autonomy of Contract **(FOC);** ○ Sanctity of contract **(SANCTITY);** ○ Conceptual Formalism (CONCEPT-FORMAL); ○ Conception of Contract as Discrete (DISCRETE).
54.	Monday Eliab v. Attorney General	S.C.C.A 16/2010 (Judgment of 14/11/2011).	Tumwesigye, J.S.C.	Following the Appellant hiring a motor vehicle to the State House (President's official Home), the vehicle was involved in an accident and for a while kept by the police and latter handed over to a	○ Giving Procedural Justice Sway (**PROCED-SWAY**): Restricting litigant's case to Pleadings;	○ Procedural justice superior to Substantive Justice **(PJ);** ○ Conception of Contract as Discrete

				third party who had sold it to the Appellant but whom he had not fully paid (unpaid seller). The Appellant sued for the value of the vehicle and lost income, and interest. The High Court awarded all the claims but the Court of Appeal reversed them on ground that the contract had been frustrated by the accident and the Appellant had not taken steps to mitigate his loss. **The Judge held and reasoned that:** ○ Frustration was not pleaded as a defence, ground of appeal or leave sought to add it as required by law and therefore couldn't be available as a defence; ○ The burden of proof for frustration was on the respondent that alleged it, which wasn't discharged; ○ The plea of mitigation was rejected as the judge saw nothing more the Appellant could have done.	○ Literal and Logical deductive interpretation, or mechanical application of rules (**LOGICAL-MECHANIC**).	(**DISCRETE);** ○ Certainty of Law (**CO**L); ○ Positivist Conception of Law (**POSITIVISM**).

APPENDIX 5: Flexible Adjudication In Selected Hard Commercial Cases (NRM Era 1986-2018)

NO.	CASE TITLE	CITATION	COURT & JUDGE	CASE SUMMARY	INTERNAL VALUE (S)	EXTERNAL VALUE (S)
1.	Construction Engineers and Builders Limited v Attorney General	SCCA 24/94, (2/9/95)	SC-Manyindo, JSC.	Amidst performance of a road construction contract, the 1979 war broke out and the contractor could not continue construction normally. The officer entitled to suspend work was not available and a junior officer allowed the contractor to suspend works. After the war, a dispute arose as to whether the contractor was entitled to payment of completed works. The defendant claimed that the contractor had abandoned work. Court held in favour of the contractor, reasoning that: ○ The High Court had done its best and devised an anodyne formula that the letter by the junior officer was not a suspension but a permission to leave site; ○ It was very reasonable to save the contractor as no contractor could have carried on works amidst war, when supplies were in	○ Contextual Interpretation of Contracts and Application of Rules (**CONTEXTUAL**); ○ Contractual Obligations and rights determined Purposively (**PURPOSIVE**): Practicality and Functionality used guide the applicability and meaning of parties' actions; ○ Using indeterminate doctrines (**INDETERM-DOCTRINE)**: reasonableness.	○ Conception of Law as a means to an end **(LMEANS**); Legal Validity and Contractual Obligation judged by ***Practical Utility;*** ○ Substantive Justice (**SJ**): ***Ubuntu concept of justice***; ○ Conceptual Flexibility (**CONCEPT FLEXTY):** Including Legal Indeterminacy; ○ Social Support as a as Criteria for contractual Obligation and Enforceability (SOCIAL SUPPORT); Sensibleness; ○ Conception of Law as Experience (LEXP);

				shortage and foreign staff had left the country; ○ The two parties had acted very sensibly in response to the war.		○ Economic Efficiency (EFFICIENCY).
2.	Oyester International Limited v Air Guide Services Limited	HCCS 424/1994, Judgment of 12/06/95	HC-Ntabooba, PJ.	A director made a contract in the names of the company but for his own benefit. The court held that the company had a right to be indemnified by such director. Court reasoned that: ○ The memorandum and articles of association of the company is a contract that regulates affairs within the company, including between the company and the directors; ○ Although under such a contract there is only a duty for the director to be indemnified and not vice versa, the equitable fiduciary duty to account for benefits received should by analogy be looked at as implying a duty for the directors to indemnify the company at law and equity; ○ It is only fair that the company be indemnified.	○ The judge making law (**LAW MAKING**): Sidestepped the Statutory Rule**,** to find equity and fairness and ***Stretching the meaning*** and Applicability of a rule, i.e. equitable rule premises stretched to justify decision; ○ Judicial Interventionism in Contract (**JINTERV**) Considerations of ***fairness and equity*** invoked to interfere with contract terms.	○ Judicial Absolutism **(JA);** ○ Contractual Justice through Judicial Interventionism (**CONJUS)**; ○ Substantive Justice (**SJ**): ***Ubuntu concept of justice***; ○ Conception of Contract as Relational (**RELATIONAL**): Obligation as based on ***Benefit***.
3.	Manasseh Kamugisha v Uganda	HCCS 115/1994, Judge-ment of	HC-Kello, J.	Oral evidence was adduced to modify a written contract.	○ The judge making law (**LAW MAKING**):	○ Contractual Justice through Judicial

	Prefabrication Building	5/12/95		Court used equitable estoppel to overrule the best evidence rule and held the contract as having been modified.	Sidestepped the Statutory Rule, to find equity and fairness; ○ Judicial Interventionism in Contract (**JINTERV**): ***Equity*** invoked to interfere with Contract.	Interventionism (**CONJUS**); ○ Systematic Flexibility (**SYSTEM-FLEXTY**): including Informal representations being as valuable as written terms;
4.	Oriental Insurance Brokers Limited v Transocean (U) Limited	[1999] 2 EA 260	SC-Oder, JSC.	The issue was whether an insurance broker had locus standi to sue the insured for the premium. Court held that because section 43(3) &(4) of the Insurance Act obliged the broker to remit premium collected to the insurer, by implication the broker had a right to sue for premiums and enforce payment. Court further held that the principles of the contract of agency applied between the broker and the insured and the broker and the insurer on the other hand. Note: By holding that the broker	○ The judge making law (**LAW MAKING**): ***Stretching the meaning*** and Applicability of a rule and ***Modifying a rule*** in a statute.	○ Perception of law as Predictions (**LPREDICTIONS**); ○ Judicial Absolutism (**JA).**

				was an agent of both the insurer and the insured, the Supreme Court legalised the broker acting in a dual capacity, which is otherwise illegal under the Ugandan Insurance Act.		
5.	Shiv Construction Co. Limited v Endesha Enterprises Limited.	[1999] 1 EA 329	SC-Tsekooko, JSC.	A joint venture was entered to facilitate and result in formation of a company. The company was set up, but without the joint venture being mentioned in its documents. The plaintiff continued to perform obligations under the joint venture. The issues were whether the plaintiff had consideration, whether the company was liable under the joint venture and whether the plaintiff could sue. Court held that the joint venture had sufficient consideration because the promises under it had financial implications in the form of shares; The joint venture was still in force even after the company incorporation because the parties could not perform all obligations under it in the one day that was taken to so	○ Contractual Obligations and rights determined Purposively (**PURPOSIVE**): Practicality and Functionality used guide the applicability and meaning of parties' actions, i.e., Consideration seen as any financial value.	○ Conception of Law as a means to an end **(LMEANS**); Legal Validity and Contractual Obligation judged by ***Practical Utility;*** ○ Conception of Contract as Relational (**RELATIONAL**); ○ Economic Efficiency (**EFFICIENCY):** Commercialism and Wealth Maximisation;

				incorporate; Consideration includes benefits, rights, profits, interest, forbearance, loss, or responsibility to be suffered.		
6.	Bank of Uganda v Masaba	[1999] 1 EA 2	SC	The appellant offered its employees an option to retire early in exchange for writing off their housing loans. After retirement, the appellant reneged on its undertaking. The appellant argued that the plaint had not disclosed the specific particulars of negligent misrepresentation, there was no binding contract, and estoppel was wrongly used. The court	○ Undue regard to technical or procedural defects to do substantive justice (**PROC-DISREGARD)**: No strict adherence to rules on pleadings; ○ Legal Classificatory Categories ignored (**NO CATEGORIES**):	○ Substantive Justice superior to Procedural Justice (**SJ)**; ○ Systematic Flexibility (**SYSTEM-FLEXTY**); ○ Conceptual Flexibility (**CONCEPT FLEXTY**): Including Legal ***Indeterminacy***

				found for the respondent, reasoning was that: ○ The plaint read as a whole, the particulars given in the different paragraphs were sufficient disclosure. ○ *Hadley Byne's Co. Ltd v. Heller & Partners Ltd [1961] ALLER 465; Edwards v. Skyways Limited [1964] WLR 1078; & Esso Petroleum Co. Ltd v. Mardon [1976] 2 ALLER* 5, provided the correct legal positions. Lord Denning MR's proposition in Esso Petroleum was especially correct, that if a man professes special knowledge or skill, and makes a representation by virtue thereof to another, whether as advise, opinion or information, with intention of inducing him to enter a contract, he is under duty to use reasonable care to see that the representation is correct, and the advice, opinion or information reliable. If he negligently does otherwise, and induces the other to enter into a contract, he is liable.	Treating Economic Negligence as Contractual and used to justify liability; ○ Judicial Interventionism in Contract (**JINTERV**) ***Equity*** invoked to interfere with Contract and Filling gaps in contracts, i.e., ***Lack of bargain and consideration*** noted ***but obligations/liability found*** in contract; ○ The judge making law (**LAW MAKING)**: Modifying a rule in a statute, i.e. Equity and local legal regime uniqueness cited for modifying rule that estoppel is always a shield; ○ Contextual Interpretation of Contracts and Application of Rules	and ***Plasticity of Consideration***; ○ Perception of law as Predictions (**LPREDICTIONS**): The Role of Judges: To Fill Gaps in the Law; ○ Conception of Contract as Relational (**RELATIONAL**): Including contractual obligations being based on ***Reliance***; ○

				○ Estoppel having been used as a sword and not a shield, and the fact that the agreement to write off housing loans having lacked consideration in the strict sense were immaterial. This was based on estoppel having become incorporated into Ugandan statutory law under section 113 of the Evidence Act, and Denning J, holding in Central London Property Trust Limited v. High Trees Limited [1947] KB 130, relying on Hughes v. Metropolitan Railways [1877] 2 AC 439, that; if there is estoppel, even if there is no consideration in such strict sense, the promisor is liable. ○ It was not equitable that the appellant be allowed not to be bound by the undertaking the two parties agreed to, so estoppel rightly used as a sword. ○ Issues of remoteness of damages don't arise, for as per *Esso Petroleum's* case, the respondent was to be paid damages not for loss of bargain, for there was no bargain given, but for being induced to enter into a	(**CONTEXTUAL**). ○	

				contract that turned disastrous, whether it be treated as a breach of warranty or negligent misrepresentation.		
7.	Kanyomozi v Motor Hart (U) Ltd	[1999] 2 EA 114	SC-Mulenga JSC	After failing to repair the appellant's motor vehicle, the respondent offered to redo the job at its cost. No time was agreed, but after three years, the job was not done. The issues were whether the suit was premature and whether the appellant waived his right to sue. Court held that: ○ Where there is no stipulation as to time, court will impute a term that the work would be done within a reasonable time; ○ 1987-90 was unreasonable in the circumstances; pleas of lack of spares were rejected. ○ The trial judge was wrong to hold that to make time of essence, the appellant had to give notice it, and that he regretted the decision but had no choice. Such notice was not mandatory. Without it there can be breach of an	Judicial Interventionism in Contract (**JINTERV**): Filling gaps in contracts with implied terms.	○ Contractual Justice (**CONJUS)**, through Judicial Interventionism;

				implied term. **Note**: Formalism in the High Court was openly substituted by flexibility at the supreme court.		
8.	Banax Ltd v Gold Trust Bank Ltd (N.B. Both Formalism and Flexibility were applied in this decision)	[1997) HCB 37	SC	Where a bank froze the appellant's business unjustifiably, court held that it breached the banking contract. However, for damages, court held that: ○ Damages for breach of banking contract have to be proved, as opposed to a trade contract where an assumption will be made that one lost business; ○ Damages for loss of business require evidence of a pattern of trading; ○ Inconvenience only attracts nominal damages.	○ Recognising inequality amongst contracting parties: Using economic, social or political class as criteria to access justice (**NO-EQUALITY**): Banks protected against assumed loss by the customer as opposed to traders; ○ Assessing damages based on actual financial loss (**ACTUAL LOSS**).	○ Inequality before the law (**INEQUALITY**); ○ Conception of contractual Obligation as based on Promise (**PROMISE**); ○ Inequality before the law (**INEQUALITY**): The Conception of Justice as dependent on Class.
9.	Alphonse Odido v Lebel (EA) Ltd & 2 Others	[1987] HCB 58	HC-Oder J.	On the principles to govern grant of temporary injections, court hailed the flexibility created by *Lord Diplock in American Cynamid Co. Ltd v. Ethican Ltd [1975] AC 396,* where the requirement for the applicant to prove a	○ The judge making law (**LAW MAKING**): Sidestepped the Rule**,** to find equity and fairness: Principles in precedents	○ Conceptual Flexibility (**CONCEPT-FLEXTY);** ○ Perception of law as Predictions (**LPREDICTIONS**): The Role of

				primafacie case was replaced by a requirement to simply show that he or she had a case to be tried with at least 50% chances of success, after which the issue should be the balance of convenience. Court reasoned that this flexibility approach is what is appropriate for Uganda, as opposed to the principles found in older cases. He recommended that the court of appeal (then the highest court) ought to adopt the U.K approach and set new rules on injunctions.	sidestepped in preference for softer and flexible rules; ○ Flexibility recognised as a judging paradigm (**FLEXIBILITY**): The flexibility of the U.K courts adopted and applauded.	Judges: To Fill Gaps in the Law;
10.	Huq v Islamic University In Uganda (N.B. Both Formalism and Flexibility were applied in this decision)	[1995-98] 2 EA 117	SC-Wambuzi, CJ.	The appellant was employed as Rector of the respondent university that was set up by statute of Parliament and Sovereign agreements between the government of Uganda and the Organisation of Islamic Countries. Court found appellant's contract of employment unenforceable on grounds that: ○ It had not been attested as required of contracts employing foreigner; ○ The advocate who drew it did not possess a valid	○ The judge making law (**LAW MAKING**): Modifying a rule in a statute; ○ Contract Law understood as including Practices (**PRACTICES**): Business practice of the employer. ○ Literal and Logical deductive interpretation, or mechanical application of rules (**LOGICAL-**	○ Judicial Absolutism **(JA**); ○ Perception of law as Predictions (**LPREDICTIONS**): The Role of Judges: To Fill Gaps in the Law; ○ Economic Efficiency (**EFFICIENCY)**: Business Efficacy; ○ Opportunism (**OPPORTUNISM**); ○ Conception of Law as a means

				practicing certificate. ○ Court reasoned that the exemption to attestation given to employees of government undertakings by section 13 of the Employment Act, did not apply, because although the word 'undertaking' meant enterprise, or something undertaken, in this case the university was not a permanent undertaking and its employees not those of the state. Note: ○ Tsekooko JSC, dissented on the issue of the advocate's lack of a licence being used to prejudice a party that goes to him innocently. Therefore, putting substantive justice above procedural justice; ○ Formalism used but flexibility applied opportunistically to justify denial of exemption in the law; ○ Tendency to shield government from obligations that would come from the respondent being its undertaking	**MECHANIC**); ○ Giving Procedural Justice Sway (**PROCED-SWAY**); ○ Applying Formalism with flexible ends in mind (**OPPORTUNISTIC FORMALISM)**; Literal and Logical deductive interpretation, or mechanical application of rules (**LOGICAL-MECHANIC**): Faced with a liberal and wide definition, court chose a narrow definition of undertaking.	to an end **(LMEANS**); Legal Validity and Contractual Obligation judged by ***Practical Utility;*** ○ Conceptual Formalism (**CONCEPT-FORMAL**); ○ Procedural Justice as Superior to Substantive Justice (**PJ)**; ○ Purist Conception of Law **(POSITIVISM**).

				visible.		
11.	Jane Bwiriza v. Osapil	[2001-2005] HCB 52	SC	The second buyer from whom the motor vehicle had been impounded by Kaddu, who lost to Osapil (Respondent) in *Kaddu v. Osapil [2000] EA 193 (Case No. 20* above), now brought an action for the loss of earnings and profits during the period of disentitlement. Court held and reasoned that: ○ The appellant's loss was too remote as the seller (first buyer) did not contemplate that the motor vehicle would be used for commercial purposes; ○ The general rule to passing of property in the goods under sections 19 and 20 of the Sale of Goods Act is modified by the intention or conduct of the parties; and ○ The retention of the logbook, the insurance certificate and the road	○ Contextual Interpretation of Contracts and Application of Rules (**CONTEXTUAL)**; ○ Contractual Obligations and rights determined Purposively (**PURPOSIVE**): Practicality and Functionality used guide the applicability and meaning of parties' actions; ○ Contractual Obligations and rights determined Purposively (**PURPOSIVE**); ○ Contextual Interpretation of Contracts and Application of Rules (**CONTEXTUAL):** Intention searched from parties	○ Economic efficiency (**EFFICIENCY**): Business Efficacy; ○ Conception of Law as a means to an end **(LMEANS**); Legal Validity and Contractual Obligation judged by ***Practical Utility;*** ○ Systematic Flexibility (**SYSTEM-FLEXTY**); ○ Conception of Contract as Relational (**RELATIONAL**): Including contractual obligations being based on ***Reliance***; ○ Conceptual Flexibility (**CONCEPT**

				licence show that property in the goods had not passed, as the intention was not that it passes.	conduct and circumstances of contract; ○ Legal Classificatory Categories ignored (**NO CATEGORIES**): Treating Economic Negligence as Contractual and used to justify liability;	**FLEXTY):** Including Legal Indeterminacy; ○ Conception of Law as A Means to An End **(LMEANS**).
12.	TransAfrica Assurance Co. Ltd v. Cimria (EA) Ltd	[2002] 2 EA 64	CA-Okello, JA.	Referred to *Mbogo v. Shah [1968] EA 93*, with approval that an appellate court will not interfere with the discretion of a court unless it was used in a way that causes injustice.	Exercising Unrestrained Judicial Authority (**UNRESTRAINED AUTHORITY**): Jealously Guarding Jurisdiction, i.e., Inherent Jurisdiction invoked.	○ Judicial Absolutism (**JA)**; ○ Substantive Justice as superior to even rules on judicial authority **(SJ);** ○ Judicial self Preservation (**JSELF-PRESERV).**
13.	DFCU Bank v. Kasozi (N.B. Both Formalism and Flexibility were applied in this decision)	[2003] 2 EA 414	CA-Okello, JA.	An advocate (respondent) had drawn a sale agreement between him and the appellant, without indicating his name as drawer, as required by section 66 of the Advocates Act, 1970. The respondent, who also worked with the Central Bank, had had his purchase	○ The judge making law (**LAW MAKING**): Sidestepped the Statutory Rule**,** to find Substantive Justice; ○ Undue regard to technical or procedural defects to do substantive	○ Substantive Justice Superior to Procedural Justice **(SJ);** ○ Constitutionalism (**CONSTLISM):** that Formalism Unconstitutional under Article 126 (2)(e); ○ Conception of

				of the property sold by the appellant in foreclosure declared illegal in *Nagongera Millers &Farmers Ltd & Another v. Gold Trust Bank Ltd [HCCS 1329/1999],*for offending public policy, since the central bank had drawn the repayment schedule. The buyer therefore brought this suit against the bank for damages. The Court of Appeal held that: ○ Although the contract offended section 66 of the Advocates Act, putting the name and address of the drawer was a matter of mere form and a technicality, not substance; ○ Substantive justice commanded by Article 126 (2)(e) of the Constitution required that it be ignored. ○ *Caltex Oil Uganda Ltd v. Serunkuma Bus Services Ltd [2000] LLR 4 (CA)* in which hitherto declared such omissions fatal to the contract, rejected as not binding on the judge	justice **(PROC-DISREGARD);** ○ Law Understood and Applied Purposively (**PURPOSIVE);** ○ Illegal contract for breach of public policy and statutory rule used as basis of legal obligations; ○ Pacta Sunt Servanda (**PACTA**): Plea of illegality ignored to enforce Contract; ○ Contextual Interpretation of Contracts and Application of Rules (**CONTEXTUAL**): Public policy invoked to determine Contractual Obligations and Enforceability**.**	law as A Means to An End (**LMEANS)**; ○ Sanctity of contract (**SANCTITY):** even over Legality; ○ Public Interest as a Rule of Recognition, the basis of obligation and enforceability of in Private Contracts (**PUBLIC INTEREST**): But State Policy as representing Public Interest; ○ Opportunism (**OPPORTUNISM):** Public Policy used selectively and opportunistically i.e. it was used in Nagongera's case, and in this resultant suit, defeated by burden of proof, to justify a remedy;

14.	Sugar Corporation Uganda Ltd v Lawsam Chemicals (U) Ltd (N.B. Both Formalism and Flexibility were applied in this decision)	[2003] 2 EA 679	SC-Tsekooko, JSC.	Section 16 (a) of the Sale of Goods Act required that there is an implied condition that the goods shall be fit for purpose where the buyer relied on the seller's skill and judgment. The appellant bought cleaning chemicals for its boilers from the respondent who had to send experts to use them in cleaning. The appellant did not want to lose time waiting and did the cleaning itself but the chemicals did not work, thus the suit for refund of the deposit on the price. Court held and reasoned that: ○ The appellant had the burden of proof to prove unfitness for purpose, and an independent expert was required; ○ The chemical was presumed fit for purpose as ordered and supplied as the appellant didn't rely on the respondent's judgment and skill, having done the cleaning herself. ○ The appellant took the risk like all managers in a crisis, at their peril.	○ Giving Procedural Justice Sway (**PROCED-SWAY**); ○ Evidential Rules used to shut court's eyes to failure of goods to perform purpose; ○ Contractual Obligations and rights determined Purposively (**PURPOSIVE**): Practicality and Functionality used guide the applicability and meaning of parties' actions; ○ Contract Law understood as including Practices (**PRACTICES);** ○ Contract viewed as a network of or other relations (**RELATIONS):** Using Reliance to find contractual obligation.	○ Economic Efficiency **(EFFICIENCY**; ○ Conception of Contract as Relational (**RELATIONAL**): Including contractual obligations being based on ***Reliance***; ○ Conception of Law as a means to an end **(LMEANS**); Legal Validity and Contractual Obligation judged by ***Practical Utility***: Technical Rules of evidence used to give way for flexibility findings.

15.	Magezi & Another v. Ruparelia	[2005] 2 EA 156	SC-Karokora, JSC.	The appellant sold their contract to supply roadside parking meters to the Kampala city authority. A deposit of the price was paid and the balance payable "upon commencement of the business", which became contentious. Court held that the intention had to be got from the words of the contract, and until the street meters were installed, business could not be said to have commenced. The reasoning was that, in resolving ambiguity, Lord Wilberforce was right in *Reardon Smith Line Ltd v. Hansen Tangen [1976] WLR 995*, that: ○ Contracts are not made in a vacuum as there is always a setting in which they will be placed; ○ The nature of what is legitimate to have regard to is always described as surrounding circumstances; ○ Surrounding circumstances is an imprecise phrase which can be illustrated but	○ Using indeterminate doctrines (**INDETERM-DOCTRINE):** reasonableness; Contractual Obligations and rights determined Purposively (**PURPOSIVE)**; ○ Contextual Interpretation of Contracts and Application of Rules (**CONTEXTUAL**): the background of the transaction, and the conditions of the market place.	○ Economic Efficiency (**EFFICIENCY):** Commercialism and Wealth Maximisation**:** The Market and business sense to determine allocation of obligations and rights; ○ Conceptual Flexibility (**CONCEPT-FLEXTY)** ○ Reasonableness and reasonable man; ○ Law as a Means to An End (b; ○ Substantive justice as superior to procedural justice **(SJ);** ○ Legal Pluralism (**LP)**.

				hardly defined; ○ In commercial contracts, it is certainly right that courts should know the purpose of the contract, which presupposes knowledge of the genesis of the transaction, the background, the contract and the market in which the parties are operating; ○ Intention is what reasonable people would have had in place in the situation of the parties.		
16.	Shenoi & Another v. Maximov	[2005] 2 EA 280	SC-Oder, JSC.	The respondent sent money for investment to the appellant on the appellant representing that they were entering a joint venture. No business took place and the respondent sued for money had and received with interest. Court held and reasoned that: ○ Argument that the money was a mere investment in business therefore not refundable were not tenable; ○ In cases like this, the law implied a duty that the recipient of money did so for the use of the other and liable to pay it back; ○ Since money had been	○ Contractual Obligations and rights determined Purposively (**PURPOSIVE);** ○ Contextual Interpretation of Contracts and Application of Rules (**CONTEXTUAL**): Implied duty to pay back in view of business nature of contract and, Business conditions and reality used to guide use of judicial discretion on rate of interest to award.	○ Economic Efficiency **(EFFICIENCY**): Business efficacy; ○ Conception of Law as means to an end (**LMEANS);** ○ Substantive justice as superior to procedural justice (**SJ)**.

				sent for investment, discretion wrongly used to award interest of 6% was too little, so increased to 20%. ○ Corporate personality was ignored and the appellant (a director), held liable jointly with the company.		
17.	Goustar Enterprises Ltd v. Oumo	[2006] 1 EA 77	SC-Karokora, JSC.	Defective tractors sold and defects discovered only during testing after delivery. The contention was that the buyer damaged tractors during use and there was no rejection in the legal sense, instead acceptance existed by virtue of the tractors being used (section 35 of the Sale of Goods Act). Court held and reasoned that: ○ Returning tractors for repair was not rejection in the legal sense. ○ Communication of the purpose of the tractors alone was enough evidence that the buyer relied on the seller's skill and judgment, to create a condition under section 15 (1)(a) of the Sale of Goods Act, otherwise there would be no reason to do so. ○ Seller was liable under 15 (1)(a) of the Sale of	○ Contractual Obligations and rights determined Purposively (**PURPOSIVE):** Purposive Judging-the purpose of communication extended to mean reliance on skill and judgment; ○ Contract viewed as a network of or other relations (**RELATIONS):** Using Reliance to find contractual obligation.	○ Economic Efficiency (**EFFICIENCY**): Business Efficacy; ○ Substantive Justice as superior to procedural justice **(SJ);** ○ Conception of Contract as Relational (**RELATIONAL**): Including contractual obligations being based on ***Reliance***; ○ Conception of Law as means to an end (**LMEANS).**

				Goods Act, and per the authority of Sugar Corporation of Uganda v. Lasam Chemical (Uganda) Ltd [2001] LLR 160 SCU.		
18.	Magezi v. Multichoice Uganda Ltd	[2007] 1 EA 164	HC	An employee claimed unlawful dismissal claiming that under common law he was entitled to reasonable notice of 3 years; yet give n only 30 days. Court held and reasoned that: ○ In Uganda, under section 14(2) of the Judicature Act, the common law is subject to written law, which under section 25 of the Employment Act required a minimum of 15 days. So 30 days adequate. ○ The purpose of the notice was to allow the employee to sort his or her affairs and seek alternative employment, so even under common law, 3 years was unreasonable.	○ Contractual Obligations and rights determined Purposively (**PURPOSIVE**): Practicality and Functionality used guide the applicability and meaning of parties' actions.	○ Economic Efficiency (**EFFICIENCY**); ○ Conception of Law as a means to an end **(LMEANS**); Legal Validity and Contractual Obligation judged by ***Practical Utility.***
19.	Gitway Investments Ltd v. Tajmal Ltd & Others	[2006] 2 EA 76	HC	On the role of courts in making or modifying law, court quoted with approval Lord *Lloyd of Berwick, in Hunter and Others v. Canary Wharf Ltd, UKHL Decision of*	○ The judge making law (**LAW MAKING**): Modifying a rule in a statute: Court assumed the role of modernising the	○ Perception of law as Predictions (**LPREDICTIONS**): The Role of Judges: To Fill Gaps in the Law; ○ Tension

				24/4/1997, that: "Like I imagine all Your Lordships, I would be in favour of modernising the law whenever this can be done. But it is one thing to modernise that law, by ridding it of unnecessary technicalities; it is another thing to bring about fundamental change in the nature and scope of a cause of action"	law, by getting rid of technicalities; ○ Internal Judicial Guidelines (**JUDGING GUIDE**): Limits to law Making by Court restrained itself from making fundamental changes to legal doctrine.	Management Mechanism (**MGT**): Limited Judicial Absolutism
20.	Eldam Enterprises Ltd v. SGS (U) Ltd & 2 Others (N.B. Both Formalism and Flexibility were applied in this decision)	[2007] HCB 37.	HC	A contract for sale of good that contravened a statute that required all imported good to be pre-inspected by the first defendant (SGS) was held as enforceable under the Sale of Goods Act. Court reasoned that the obligations and rights under the Sale of Goods Act were not affected by the law on inspection.	○ Recognising Law's Classificatory Categories (**LCATEGOTIN**): Special branches of contract law taken as exclusive source of rights and obligations notwithstanding other relevant laws; ○ Applying Formalism with flexible ends in mind (**OPPORTUNISTIC FORMALISM**): Legality opportunistically and instrumentally valued.	○ Conceptual Formalism (**CONCEPT-FORMAL**): The Conception of Law as Conceptually Ordered**,** i.e., based on Precise, Objective, Neural, Universally Applicable and Fundamental Principles; ○ Opportunism (**OPPORTUNISM**).

21.	SDV Transami (U) Ltd v. Nsibambi Enterprises Ltd (N.B. Both Formalism and Flexibility were applied in this decision)	[2008] HCB 93	CA	The appellant transported the respondent's goods and lost all of them, but pleaded exemption from liability clauses in the contract. Court held that: ○ For exemption clauses to be enforceable, they must be clear, unambiguous and accepted by the parties; ○ If the incident amounts to a fundamental breach or of negligence is involved, exemption clauses will not be enforceable. ○ Allowing exemption clauses would defeat the purpose of the contract and cause injustice as no iota of goods was delivered.	○ Contractual Obligations and rights determined Purposively (**PURPOSIVE**): The purpose of the contract used to declare clear terms unenforceable; ○ Legal Classificatory Categories **ignored (NO CATEGORIES**): Treating Economic Negligence as Contractual and used to justify liability; ○ Certainty of Contracting used as pre-condition for enforceability (**CONTRACT-CERTAINTY);** ○ Abductive Reasoning in interpretation of statute or precedents (**ABDUCTIVE**)**:** Judge's sense of justice used to override terms enforceability.	○ Substantive Justice (**SJ**): ***Ubuntu concept of justice***; ○ Conception of Law as Predictions (**LPREDICTIONS)**: Intuition and Prejudices of Judge; ○ Systematic Flexibility (**SYSTEM-FLEXTY**); ○ Conception of Contract as Relational (**RELATIONAL**): Including contractual obligations being based on ***Reliance***; ○ Conception of Law as means to an end (**LMEANS);** ○ Certainty of Law **(COL**): Certainty of contracts as a condition for enforceability.

22.	Dr. Vincent Karuhanga t/a Friends Ployclinic v. National Insurance Corporation and Uganda Revenue Authority.	[2008] HCB 151	HC-Bamwine, J.	The insured (URA) had an employee scheme insured with the first defendant, under which the plaintiff treated them. The scheme was internally terminated by the URA and not communicated to the plaintiff, or the first defendant. Court held that the insurance contract continued to be effective and therefore the insurer liable but the insured was not liable to the third party/plaintiff. From my experience, having been counsel for the insurer, the judge conveniently and instrumentally edited the facts and legal principles applicable in this case. He ignored the fact that the insured at all material times knew that the plaintiff continued to treat her employees and their families. The only way the insurer would be liable was if there was a valid and subsisting contract between the third party and the insured in the first place. Otherwise there would be no	○ The judge making law (**LAW MAKING**): The judge sidestepping rules, i.e., governing liability under insurance law to find a remedy for the plaintiff. ○ Abductive Reasoning to resolve competing interests or in interpretation of statute or precedents (**ABDUCTIVE):** Intuition, by finding a contract where there was none and failing to see one where it existed.	○ Judicial Absolutism (**JA);** ○ Law as a means to an end (**LMEANS);** ○ Conception of Law as Predictions (**LPREDICTIONS)-**

				consideration on the plaintiff's part to give the insurer. The judge chose to ignore these principles of law and chose to reflect the insurer as having continued to contract to treat employees of a stranger (since the URA was not concerned as per the judge's words).		
23.	Mbale Exporters & Importers v. IBERO (U) Ltd	[2007] 1 HCB 95.	CA	The parties had a contract for the supply of coffee, and the plaintiff took two trucks of coffee to the buyer's warehouses two days late, on a Sunday (non-working day). The plaintiff then asked buyer's security guard that the coffee be kept in the yard until the next morning when the buyer would be open for work. The next day the coffee was reported as having been stolen from the trucks overnight. Court held and reasoned that: ○ To ascertain if time is of essence under the Sale of Goods Act, one has to look at not only the terms, but also the conduct of the parties, and all circumstances of the case. ○ In this case, since the	○ Contextual Interpretation of Contracts and Application of Rules (**CONTEXTUAL**): Surrounding circumstances used to arrive at intention of parties; ○ Legal Classificatory Categories ignored (**NO CATEGORIES)**: Treating Economic Negligence as Contractual and used to justify liability; ○ In bailment, formalities of contract formation immaterial i.e. Consideration,	○ Contractual Justice through Judicial Interventionism (**CONJUS);** ○ Conception of Law as Experience (**LEXP**); ○ Judicial Absolutism (**JA**); ○ Law a Means to an End (**LMEANS**); ○ Systematic Flexibility (**SYSTEM-FLEXTY**): including Informal representations being as valuable as written terms; ○ Conception of Contract as Relational (**RELATIONAL**): Including

				coffee was delivered two days late and the buyer never repudiated the contract, time was not of essence. ○ A contract of bailment can take place without consideration, and in this case the security guard having accepted the coffee, whether he acted within the course of his employment or not, did it for his benefit or acted negligently, a contract of bailment was made between the buyer and the seller. ○ The buyer owed the seller and breached a duty of care under the contract of bailment, responsible for whatever would happen to the coffee until it was weighed and tested and acted on under the contract of sale of goods.	*consensus ad idem* and authority of agent to contract.	contractual obligations being based on ***Reliance***; ○
24.	Nantumbwe Shamira v. Kampala City Council & Others.	HCCS 33/2007(30/3/2009)	HC-Singh Choudry	In a suit by a next friend on behalf of a minor who later became of age, the court held that: ○ All procedural technicalities such as the plaintiff that was a minor applying to become the direct plaintiff were	○ Undue regard to procedural defects to do substantive justice (**PROC-DISREGARD):** All procedural defects seen as curable by Article 126 of the Constitution; ○ Contextual Interpretation of	○ Substantive Justice as superior to procedural justice (**SJ**); ○ Systematic Flexibility (**SYSTEM-FLEXTY**); ○ Law as a means to an end

				curable by Article 126 (2) of the Constitution; ○ Article 12 of the Convention on the rights of the Child (1989) cited to hold that a contract with a minor was void, reasoning further that a commercial transaction on behalf of minor may be to his or her detriment.	Contracts and Application of Rules (**CONTEXTUAL);** ○ Legal Classificatory Categories ignored **(NO CATEGORIES)**: relying on international law in a municipal dispute, to find invalidity of contract	(**LMEANS).**
25.	Concorp International Ltd v. East & Southern African Trade & Development Bank	[2010] 1 HCB 12	CA	The appellant sued for breach of loan agreements, but the respondent, a bank established by Charter between different states pleaded immunity from "every form of legal process", as stipulated in Article 43 (3) of the charter. The court held and reasoned that: ○ The interpretation must depend on the intentions of the legislature; ○ 'The object of the charter having been to regulate relations between them, as per the preamble, the immunity must be restricted to transactions between the	○ Contextual Interpretation of Contracts and Application of Rules (**CONTEXTUAL**): Public policy invoked to determine Contractual Obligations and Enforceability**;** ○ Contractual Obligations and rights determined Purposively (**PURPOSIVE**): Practicality and Functionality used guide the applicability and meaning of parties' actions.	○ Conception of Law as a means to an end **(LMEANS**); Legal Validity and Contractual Obligation judged by ***Practical Utility;*** ○ Public Interest as a Rule of Recognition, the basis of obligation and enforceability of in Private Contracts (**PUBLIC INTEREST**): But State Policy as representing Public Interest.

				respondent and member states. ○ To confer absolute immunity would be contrary to public policy, for even sovereign immunity is restricted to sovereign acts. ○ Immunity of international organisations like the respondent should be based on the functionality principle, which means that it should encompass all and only acts needed for the proper functioning of the organisation's functions under the charter.		
26.	Uganda Wildlife Authority v. Hon. Francis Mukama	CA 78/2002; (2/2/2010)	CA-Twinomujuni	A principle had been laid down in *Southern highlands Ltd v. David Queen (1960) EA 490, 492*, that in employment cases, employees wrongfully dismissed are entitled to full compensation for financial, with exception that they should take steps to get alternative employment, and if they get it before the suit, their new income should be taken into account in assessing damages. In this case, the plaintiff had become a Member of Parliament (MP) and was	○ Abductive Reasoning in interpretation of statute or precedents (**ABDUCTIVE)**: Judge's personal knowledge, intuition and prejudice; ○ Contextual Interpretation of Contracts and Application of Rules (**CONTEXTUAL);** Relevancy to Uganda's political reality.	○ Conception of Law as Predictions (**LPREDICTIONS);** ○ Conception of Law as Experience (**LEXP**); ○ Judicial Absolutism (**JA);** ○ Substantive Justice (**SJ**): ***Ubuntu concept of justice***.

				being remunerated as such. The court held that becoming a Member of Parliament was not such alternative employment as covered by the *David Queen case.* Court reasoned that: ○ In Uganda, becoming a Member of Parliament is tricky business, such that one has to spend a lot in the process and there is no guarantee that he will recover it in his term; ○ The demands of the job are such that the MP has to spend the facilitation on expenses such as transport, entertainment, fundraisings and donations to his constituents. ○ It is a well-known fact that many MPs end up with huge debts and fail to improve themselves; ○ This is not the type of employment their Lordships had in mind in the David Queen case.		
27.	East African Development Bank v. Ziwa Horticultural Exporters Ltd	HCMA 1048/2000	HC-Okumu Wengi	The agreement had an arbitration clause, and the plaintiff instead filed a suit. Section 6 of the Arbitration and Conciliation Act made it	○ The judge making law (**LAW MAKING**): The judge sidestepping rules, i.e., Court	○ Perception of law as Predictions (**LPREDICTIONS**): The Role of Judges: To Fill Gaps in the Law;

				mandatory for court to refer the matter to arbitration upon application of any party. The judge declined to refer the matter and reasoned that: ○ Empowering people to adjudicate their own disputes did not oust the core mandate and function of courts in the context of governance. ○ The Arbitration Act's ousting of the jurisdiction of court has to be looked at alongside the constitution and the Judicature Act that give the High Court inherent powers; ○ Court may not desire to intervene but circumstances may arise when intervention is essential such as the need to stop hardship and delays of arbitration, and the list is endless.	insisting on having jurisdiction in face of an ousting statutory rule; ○ Contextual Interpretation of Contracts and Application of Rules **(CONTEXTUAL**): Court seeing its function and mandate as a governance matter; ○ Exercising Unrestrained Judicial Authority (**UNRESTRAINED AUTHORITY**): Jealously Guarding Jurisdiction, i.e., Inherent Jurisdiction; ○ Judicial Interventionism in Contract (**JINTERV**): ***Fairness*** invoked to Interfere with contract terms	○ Contractual Justice through Judicial Interventionism (**CONJUS);** ○ Judicial Self Preservation (**JSELF-PRESERV);** ○ Judicial Absolutism (**JA).**
28.	DFCU Ltd & DFCU Leasing Co. Ltd v. Sam Mutongole (N.B. Both Formalism and Flexibility were applied in this	CA 56/2007	CA-Nshimye, JA.	The appellant's defence had been struck out for indicating irrelevant particulars i.e. a car number different from the one in issue. The court of appeal	○ Undue regard to technical or procedural defects to do substantive justice (**PROC-DISREGARD**); ○ Using	○ Substantive justice as superior to procedural justice **(SJ);** ○ Conceptual Flexibility

	decision)			held and reasoned that: ○ Having given the wrong number plate was a professional error of counsel that shouldn't be visited on his client. ○ Sticking out the entire defence would be a fundamental error that would deny the appellant substantive justice under Article 126 (2)(e).	indeterminate doctrines (**INDETERM-DOCTRINE):** Substantiality in Article 126 (2)(e) invoked to cure defects.	**(CONCEPT FLEXTY);** ○ Constitutionalism (**CONSTLISM);** ○ Systematic Flexibility **(SYSTEM-FLEXTY):** Uncertainty in litigation and adjudication acceptable.
29.	Pan African Insurance Co. (U) Ltd v. International Air Transport Association.	HCCS 667/2003 (25/01/2008)	HC-Lameck Mukasa	The plaintiff issued an insurance guarantee under which, payment was due if the defendant issued a notice of default that specified the particulars of the creditor airline, amounts due and other details. A notice of default was served without a demand, and later a demand sent for the whole guarantee amount without particulars. The plaintiff paid some little money out of pressure of legal action, and then sued for a refund and declarations that it was not liable. Court held and reasoned that: ○Guarantees are to be constructed like any other contracts, in that the real intention as can be reasonably inferred from the	○ Contextual Interpretation of Contracts and Application of Rules (**CONTEXTUAL)**: Circumstances and context used to infer the *real* intention; ○ Judicial Interventionism in Contract (**JINTERV**) ***Equity*** invoked to interfere with Contract.	○ Substantive Justice (**SJ)** ○ Contractual Justice (**CONJUS**), through Judicial Interventionism ○ Judicial Absolutism **(JA).**

				circumstances had to be sought as opposed to the technical rules of interpretation. ○ The plaintiff was bound by estoppel to honour the guarantee; ○ Although preconditions to any contract had to be taken into account, in this case the plaintiff was bound to pay.		
30.	Muwema & Mugerwa Advocates v. Shell (U) Ltd (N.B. Both Formalism and Flexibility were applied in this decision)	CA 18/2011	CA-Mpagi Bahigeine, DCJ.	Following a representative action, the plaintiffs having succeeded and been awarded costs, counsel sought to recover fees agreed to their representatives under a remuneration agreement. He got a charging order to have his fees deducted by the defendant before paying the plaintiffs. Some of the plaintiffs then brought an action in the High Court claiming that they were not bound by the remuneration agreement, but before hearing, counsel (the respondent) obtained an order from the registrar of the Court of Appeal staying all proceedings in the High Court.	○ Abductive Reasoning in interpretation of statute or precedents (**ABDUCTIVE)**: Judge's personal emotions and prejudices and preferences; ○ Exercising Unrestrained Judicial Authority (**UNRESTRAINED AUTHORITY**): Jealously Guarding Jurisdiction, i.e., Judge ignored court order to fight for her jurisdiction; ○ The judge making law **(LAW MAKING):** Modifying a rule in a statute, to find	○ Conception of Law as Predictions (**LPREDICTIONS);** ○ Judicial Absolutism (**JA**); ○ Conception of Law as a means to an end **(LMEANS**); Legal Validity and Contractual Obligation judged by ***Practical Utility;*** ○ **On Appeal:** ○ Tension Management Mechanism (**MGT**): using Judging Guidelines, i.e. Royalty to the Judicial Code: Civility, Good

				Justice Mulyagonja of the High Court: ignored the order of stay and heard the application; declared the remuneration agreement a nullity; banned the lawyer from practicing in the High Court pending disciplinary proceedings of fraud that she said the Law Council should commence; and set aside both the order of the charging registrar and that of a fellow judge that awarded in the main suit. The High Court judge reasoned that: ○ She was embarrassed and her jurisdiction attacked by the Court of Appeal order of stay, and had to fight for her jurisdiction; ○ Her skills as a judge have been tested to their utmost limits, and she had suffered anxiety, and stress while hearing the case, like never before; ○ She had persevered to plant the judgment on what appeared the most virgin terrain in Ugandan jurisprudence, to ease the work of her brothers and sisters.	fairness and equity, i.e., Judge sought to provide ease for future judges. On Appeal: ○ Using indeterminate doctrines like reasonableness (**INDETERM-DOCTRINE**): Judges to avoid actions and attitudes that seem to the reasonable man biased; ○ Exercising Unrestrained Judicial Authority (**UNRESTRAINED AUTHORITY**): Jealously Guarding Jurisdiction: Upholding the Sanctity of Court Orders, i.e., Court orders held as sacred and must be obeyed even if irregular, null or void; and ***Interim orders to be issued whenever***	Mannerism, Professionalism and decorum; ○ Conceptual Formalism (**CONCEPT-FORMAL**): The Conception of Law as Conceptually Ordered**,** i.e., based on Precise, Objective, Neural, Universally Applicable and Fundamental Principles; ○ Social Support as a Rule of Validity and Recognition of Law (**SOCIAL SUPPORT**); ○ Purist Conception of Law (**POSITIVISM**)- ***No extraneous considerations***, and Conception of Legal System as ***Comprehensive,*** i.e. that Judicial System like a Machine with lubricants and engine, etc;

				On Appeal, Court held and reasoned that: ○ It was not a safe attitude for the trial judge to say that she would not be deterred by an order of the Registrar of the Court of Appeal, as this could be seen as bias; ○ Interim orders are issued if it appears just and convenient and to protect the court when over whelmed with cases; ○ Orders of court must be obeyed, whether null or valid, regular or irregular, otherwise consequent proceedings a nullity; ○ Registrars are a vital log of the legal machinery and there is nothing embarrassing for a judge to be served by their orders; ○ Ignoring court order with such impunity destroys their authority, yet judicial orders are the reason the judicial machinery exists. ○ The judge was wrong to prejudge the competence of a matter before a superior court and wrong on the procedure to discipline a lawyer for	***just and convenient***; ○ Literal and Logical deductive interpretation, or mechanical application of rules (**LOGICAL-MECHANIC**); ○ Internal Judicial Guidelines (**JUDGING GUIDE**): Limits to law Making, i.e. New matter be handled with Civility and Order; ○ **and** that Judges should always comply with ***basic standards of good manners, professional decorum and Civility*** seen as a lubricant of the adversarial system and indispensable.	○ Procedural Justice vital part of Justice (**PJ**); ○ Tension Management Mechanism (**MGT**): Judicial Code of Conduct as Judging Guideline; ○ Judicial Self Preservation (**JSELF-PRESERV):** Orders of Court as Key engine of the Judicial Machinery; ○ Conceptual Flexibility (**CONCEPT FLEXTY**): Reasonable-man used and that Judges as impersonal i.e. not to be influenced by human attributes.

				matters that were before another court; ○ Justice should not only be done but be seen to be done, in that the right-minded people should not go away thinking, "the judge was biased". ○ The proposition by *Devlin J, in Licensing Justices Ex parte Barsley [1960] 2 AER 703; and Lord Hewart in RV Sussex Justices Ex parte McCarthy (1924) 1 KB 256,* are correct, therefore all circumstances should be looked at in the eyes of a reasonable man. ○ Verbal exchanges in court between the judge and counsel, plus the recounts of stress showed bias on the judge's part. ○ New matters coming before courts are increasing, and require civility and the highest order of both the bench and the bar. Advocates should not work hard to annoy the judges and judges should not succumb to temptation to react in kind. ○ The judge acted on extraneous considerations which ought not to influence her, making it		

				apparent that she had ignored her duty to act fairly in the midst of taunts and unbearable stress. ○ The judge let the stress get the better of her and color her judgment."…**all of us should comply with basic standards of good manners and professional decorum. We should not forget the necessity of civility as an indispensable lubricant that keeps our adversarial system functioning**".		
31.	Kituuma Magala & Co. Advocates v. Celtel (Uganda) Ltd CA 39/2003 (***N.B. Both Formalism and Flexibility were applied in this decision***)	SCCA 9/2010	SC-Katureebe, CJ.	A lawyer was retained by the respondent to collect debts with an option to sue difficult debtors. Some suits were accordingly filed but before their conclusion, the contracted was terminated by the respondent. The lawyer brought action to recover his fees under the Advocates Remuneration rules that had standard schedules of assessing fees. The respondent claimed that the contract with counsel was illegal and unenforceable. The judge chose not to recognise counsel's right to	○ Recognising inequality amongst contracting parties: Using economic, social or political class as criteria to access justice (**NO-EQUALITY**); ○ Literalism (**LITERALISM**); ○ Contextual Interpretation of Contracts and Application of Rules (**CONTEXTUAL):** Public policy invoked to determine Contractual	○ Opportunism (**OPPORTUNISM**); ○ Inequality before the law (**INEQUALITY**): The Conception of Justice as dependent on Class; ○ Social Support as a as Criteria for contractual Obligation and Enforceability (**SOCIAL SUPPORT)**; i.e. Public policy as Social utility as a rule of recognition;

				recover costs with or without the agreement and held that he chose to be paid under an agreement, thus its legality the issue. He then held that the lawyers' remuneration agreement was illegal because it had not been registered with the Law Council and notarised. Court reasoned that: ○ Basing on *Pandit v. Sekatawa [1964] EA 491,* in which Udo Udoma CJ, gave the rationale of the requirement in section 51(1) if the Advocates Act, as public policy, in the sense that clients had to be protected from advocates, and bring the latter within the control of courts. Further, that the rule helped to ensure that lawyers did not appear for clients unless duly instructed. ○ Lawyers were a special group of professionals and so their agreements special and not governed by the general rule that unlawful parts of an agreement should always be severed and the rest enforced.	Obligations and Enforceability; ○ Contractual Obligations and rights determined Purposively (**PURPOSIVE**): Practicality and Functionality used guide the applicability and meaning of parties' actions; ○ Applying Formalism with flexible ends in mind (**OPPORTUNISTIC FORMALISM**).	○ Conceptual Formalism (**CONCEPT-FORMAL**).
32.	National Social Security Fund &	SCCA 15/2009	SC-Odoki, CJ.	The respondent and its sister company Alcon Kenya bided	○ Undue regard to technical or procedural defects	○ Substantive justice as superior to

	Sentoogo v. Alcon International Ltd, decision of 8/2/2013			to construct a workers' house on behalf of the appellant, the retirement benefits manager in the country. Alcon Uganda was found unsuitable and the contract awarded to Alcon Kenya, however internally it was agreed and the contract was assigned to Alcon Uganda, which signed the contract and constructed the NSSF house. A dispute arose regarding the final amount payable and after arbitration, the application to set aside the award was rejected in the High Court, but the Court of Appeal set it aside, thus the appeal to the Supreme Court. Court held that: ○ The arbitration award was contrary to public policy, for the respondent had fraudulently signed and ran the contract; ○ It is not enough that there was deceit, but court must be satisfied that there was some form of reprehensible or unconscionable conduct that substantially contributed to the award being given. It this case substituting names was fraud, illegal and therefore	to do substantive justice (**PROC-DISREGARD): P**ublic interest-workers' money protected by overriding statutory procedural rules; ○ Contextual Interpretation of Contracts and Application of Rules (**CONTEXTUAL**): ***Public policy*** invoked and Contrary to ***Public Policy Determinants*** as: Substantiality, legality, and unconscionability.	procedural justice **(SJ);** ○ Public Interest as a Rule of Recognition, the basis of obligation and enforceability of in Private Contracts (**PUBLIC INTEREST**).**:** Public Interest understood as Public Policy, and understanding Public Policy as National Interests, Justice, Morality. Constitutionality. Substantiality of effects of wrongs, and legality of actions in issue;

				contrary to public policy, which under section 34(2)(b)(ii) of the Arbitration and Conciliation Act is a ground to set aside an award. ○ Although fraud has to be specifically pleaded and proved, it is enough that it was first observed by the court of appeal during the making of its decision, for the respondents all along knew about it, and that is why they concealed it. ○ Being contrary to Public policy means anything against the constitution, national interests, justice and morality.		
33.	Attorney General v. Afric Cooperative Society Ltd.	SCM.A 6/2012	SC-Katureebe, JSC	The applicant applied to adduce further evidence in the supreme court, to tender a report by the government ombudusman, that the consent judgment respond had relied on to be paid and still sought up to UGX 120 billion was forged. The court held that although Rule 30 of the Judicature (Supreme Court) Rules gave not jurisdiction to court to allow further evidence, the application was allowed,	○ Exercising Unrestrained Judicial Authority (**UNRESTRAINED AUTHORITY**): ***Jealously Guarding Jurisdiction***, i.e., Inherent powers of court in statutes and Article 126 invoked; ○ The judge making law (**LAW MAKING**): Sidestepped the Statutory Rule,	○ Substantive Justice as superior to procedural justice (**SJ);** ○ Public Interest as a Rule of Recognition, the basis of obligation and enforceability of in Private Contracts (**PUBLIC INTEREST**): Public Good as the end of law

				reasoning that: ○ The object of the rule barring further evidence was merely to bring an end to litigation; ○ The restriction should always be read within the context of provisions that give the court inherent powers to achieve the ends of justice or prevent abuse of court process (Rule 2(2) of the Judicature (Supreme Court) Rules; and 98 of the civil Procedure Act); and Articles 126 (1) & (2) (e) of the Constitution, that obliges courts to do justice without due regard to technicalities, and in accordance with the values, norms and aspirations of the people, thus court had to exercise due care; ○ In cases that are hard like this one, the supreme had to always be guided by the above provisions, and take into account exceptional matters, like the colossal amount of public money involved and the length of time the issue had spent hanging around the ministries of justice, finance and the courts; ○ If colossal amounts of	i.e., to find equity and fairness; ○ Using indeterminate doctrines (**INDETERM-DOCTRINE**): Public interest and Substantiality in Article 126 (2)(e) invoked to cure defects; ○ Undue regard to technical or procedural defects to do substantive justice **(PROC-DISREGARD**).	and justice; ○ Judicial Absolutism (**JA);** ○ Contractual Justice through Judicial Interventionism (**CONJUS);** ○ Conceptual Flexibility (**CONCEPT FLEXTY**) Inherent powers and Article 126. ○

				public money were to be paid against a forged consent judgment, that would be abuse of process negated by Article 126 of the Constitution. ○ The respondent would not be prejudiced by the additional evidence sought to be tendered.		
34.	British American Tobacco Ltd v. Sedrach Mwijakubi & 4 Others	[2013] HCB 35	CA	A consent judgment was filed but not signed by the Registrar of the court. The court ignored it and replaced it with its own and contradictory judgment. The court upheld the decision of the lower court and observed that it was prudent to always give reasons for a judge's decision but giving such reasons was simply a matter of style, and failure not fatal.	Exercising Unrestrained Judicial Authority (**UNRESTRAINED AUTHORITY**): Exercise of ***Unfettered Discretion***, i.e., Court taking the giving of reasons for a decision as discretionary and simply a matter of style.	○ Conception of Law as Predictions (**LPREDICTIONS**); ○ Judicial Absolutism (**JA).**
35.	Nipunnoratiam Bhatia v. Crane Bank Ltd	[2013] HCB 76	CA	A sale of goods contract was entered when the goods were in the hand of a third party. The court held that since the intention of the parties was that the property in the goods would be transferred without any encumbrances, and although a buyer would be a bonafide purchaser without	○ The judge making law (**LAW MAKING)**: Modifying a rule in a statute, to find equity and fairness, i.e. Court declared as illegal and unenforceable contracts where goods have third	○ Judicial Absolutism (**JA);** ○ Contractual Justice through Judicial Interventionism **(CONJUS**); ○ Perception of law as Predictions (**LPREDICTIONS**).

				notice and thus protected, such an agreement was not enforceable, being contrary to the law. That the court could not condone what is illegal.	party encumbrances, contrary to lighter remedies under the Sale of Goods Act.	
36.	Uganda Revenue Authority v. Wanume (N.B. Both Formalism and Flexibility were applied in this decision)	[2012] 1 HCB 43	CA	The respondent was dismissed from duty yet the contract was a fixed one without provision for termination. The issue was; what damages are awardable by court in such cases. Court held that: ○ Damages are by nature compensatory in money terms for loss or injury suffered. ○ No damages are due for injury to feelings or reputation, because the law needs to be kept at pace with economic and social development of modern society. ○ Punitive Damages are only awarded when there is high handed, malicious and such conduct or improper interference of public officers with the rights of ordinary subjects or against unjust enrichment. They are meant to appease the victim and	○ Assessing damages based on actual financial loss (**ACTUAL LOSS**): no sentimental matters, save if wrong had public implications; ○ Contract viewed as a network of or other relations (**RELATIONS):** Contract used as an Instrument of Social Relations. ○	○ Conception of contractual Obligation as based on Promise (**PROMISE)**; ○ Accuracy in Contracting and Adjudication (**ACCURACY)**; ○ Conception of Law as Experience **(LEXP**): Modern sense of loss to guide courts- Modern life seen as not valuing sentiments, no value for Ubuntu; ○ Conception of Contract as Relational **(RELATIONAL**); ○ Economic Efficiency (**EFFICIENCY):** Commercialism and Wealth Maximisation.

				warn society against similar conduct as the same will be an affront to society and its sense of decency.		
37.	Cooper Mptors Corporation (U) Ltd v. Genesis Transporters Ltd & Others.	HCCS 93/2008 (28/11/2008)	HC-Singh Choudry, J.	The plaintiff was a supplier of buses that the defendants bought under an agreement between the defendants and a Kenyan Company (a non-party to the suit). The court identified jurisdiction as the issue and asked parties to file skeleton submissions for a ruling. The court: ○Allowed evidence from one of the parties and based on it; plus; ○The judge's own inferences and deductions to make findings on the merits of the claim as well, without a proper trial. ○Upon the losing party seeking for leave to appeal, the judge allowed leave but sought to bind and pre-empt the Court of Appeal in saying that he allowed as long as the higher court will base on a proper understanding of the law of Consumer Credit Agreements.	○ Undue regard to technical or procedural defects to do substantive justice (**PROC-DISREGARD)**, i.e. Court turning an adversarial trial into an inquisitional one; and trying to bias the Court of Appeal (higher court).	○ Judicial Absolutism (**JA**); ○ Systematic Flexibility **(SYSTEM-FLEXTY):** Uncertainty in litigation and adjudication acceptable; ○ Conception of law as Predictions (**LPREDICTIONS)**.
38.	British American Tobacco (U) Ltd v. Francis Mulindwa &	HCCS 767/2004 (24/4/2013)	HC-Kiryabwire, J.	The defendants were dismissed by the plaintiff after discovering that they were involved in acts that caused	○ Contextual Interpretation of Contracts and Application of	○ Economic Efficiency (**EFFICIENCY):** Practice, the

	Others			financial loss to her. The judge agreed and held that the offences were grave enough to justify summary dismissal, reasoning that: ○Whether the misconduct was sufficiently grave to amount to a repudiation of the employment contract depended on the circumstances of each case, the nature of employment and possibly the terms of the contract; ○Previous case law is of limited precedent value, particularly as attitudes to certain forms of misconduct may change over time.	Rules (**CONTEXTUAL**): The gravity of misconduct of employees measured by the context, and the changing attitudes in society; ○ Contract viewed as a network of or other relations (**RELATIONS):** Contract used as an Instrument of Social Relations; ○ Contract Law understood as including Practices (**PRACTICES)**.	market and social attitudes as the measure of contractual wrong; ○ Social Support as a Rule of Validity and Recognition of Law **(SOCIAL SUPPORT**); ○ Conceptual Flexibility (**CONCEPT FLEXTY):** Including Legal Indeterminacy; Conception of Contract as Relational (**RELATIONAL**).
39.	Eclipse Edil Soil JVC Co. Ltd v. Kampala City Council (N.B. Both Formalism and Flexibility were applied in this decision)	HCCS 256/2005 (9/2/2007)	HC-Bamwine, J.	The plaintiff, a building contractor sued for non-payment, and the defendant pleaded poor quality work and illegality, citing non-registration with government of the plaintiff's civil engineer used as required by Act regulating the industry. The court held that: ○ The defendant should not have expected quality	○ Applying Formalism with flexible ends in mind (**OPPORTUNISTIC FORMALISM**). ○ The judge making law (**LAW MAKING**): Sidestepped the Statutory Rule, to find equity and fairness; ○ Using indeterminate	○ Substantive Justice as superior to Procedural Justice (**SJ**): and ***Ubuntu Conception of Justice***; ○ Conceptual Flexibility (**CONCEPT-FLEXTY**); ○ Constitutionalism (**CONSTLISM**); ○ Conception of

				work without investing, as her payments normally delayed; ○ Substantive Justice demanded that the defendant be held liable, and the non-registration of the engineer was curable under Article 126(2)(e) of the Constitution. ○ Non-registration was not pleaded therefore could not be relied on at the trial.	doctrines (**INDETERM-DOCTRINE**): Substantiality in Article 126 (2)(e) invoked to cure defects;	Law as A Means to An End (**LMEANS**); ○ Opportunism (**OPPORTUNISM**).
40.	Amrit Goyal v. Hari Chand Goyal & Others	HCMA 649/2001 (25/9/2003)	HC-Ogoola, J.	A contract relating to shares being agreed to be transferred was signed in India and meant to be effected in Uganda. It required the consent of the prior Minister under the Exchange Control Act 0f 1951. The court held that the requirement in the statute had been overtaken by the government policy of liberalism in foreign exchange trading, and the liberalism in the Company's Act as amended in 1996, that allowed a free transfer of shares. The court further reasoned that the law had to be updated to match the changing times, since 1951	○ Contextual Interpretation of Contracts and Application of Rules (**CONTEXTUAL):** Government policy of commercial liberalism cited to override a rule in a statute. ○ The judge making law (**LAW MAKING):** Modifying a rule in a statute.	○ Economic Efficiency (**EFFICIENCY):** Commercialism and Wealth Maximisation: Commercial Liberalism; ○ Public Interest as a Rule of Recognition, the basis of obligation and enforceability of in Private Contracts (**PUBLIC INTEREST**): But State Policy as representing Public Interest; ○ Perception of law as Predictions (**LPREDICTIONS**

				was a very long time ago.		); ○ Conception of Law as Experience **(LEXP**): Legal Validity as conditioned on Responsiveness to the market and contemporary circumstances.
41.	Alpha International Investments Ltd v. Kizito	HCCS 131/2001 (22/4/2003).	Arach-Amoko	Under a money-lending contract, interest was 240% per annum. Sections 12 and 13 of the Money Lenders Act, 1952 (Chapter 273, Laws of Uganda) authorised courts to reopen transactions in which they deemed interest to be excessive, and therefore harsh and unconscionable. Excessive was defined as interest above 24% of lower interest that the court would deem so. The court held and reasoned that: ○ The interest rate was excessive, harsh and unconscionable, and in absence of data on market rates of moneylenders, the court reduced to 24% that was near the average commercial bank lending rate.	○ Using indeterminate doctrines (**INDETERM-DOCTRINE**): reasonableness; ○ Contractual Obligations and rights determined Purposively (**PURPOSIVE**): Practicality and Functionality used guide the applicability and meaning of parties' actions; ○ The judge making law (**LAW MAKING**): Sidestepped the Statutory Rule**,** to find equity and fairness; ○ Practice, the market and social attitudes as the	○ Conceptual Flexibility **(CONCEPT FLEXTY**); ○ Economic Efficiency (**EFFICIENCY):** Commercialism and Wealth Maximisation; Conception of Law as Experience (**LEXP)**, i.e. Relevancy of legal norms to changing market conditions; ○ Conception of Law as a means to an end **(LMEANS**); Legal Validity and Contractual Obligation judged by ***Practical Utility.***

				○ At the time the 1952 Act was enacted, legislators were not aware that business circumstances would change, as has since happened. For instance that competition, inflation and increase of business risk had emerged which meant that courts had to be guided not by the set 24% but the commercial practice.	measure of contractual wrong; ○ Contextual Interpretation of Contracts and Application of Rules (**CONTEXTUAL)**	
42.	John Kawanga, Remmy Kasule both t/a Kasule and Kawanga Advocates v. Stanbic Bank Uganda Ltd. (***N.B. Both Formalism and Flexibility were applied in this decision***)	HCCS 410/2002(27/6/2003)	HC-Lugayizi, J.	A cheque drawn by the plaintiff law firm was dishoured without reason by the defendant bank upon presentation. Court held that in such cases the bank customer is entitled to substantial damages, with or without proof of financial loss. By way of reasoning: ○ Precedents like *Coker v. Standard Bank of Nigeria Ltd (1976) ALR Comm. 174*, which supported the proposition that the remedy is available to traders and not professionals like lawyers were found to contravene Article 21(1) of the Uganda Constitution that guaranteed the right against discrimination,	○ Conformity with the Constitution as a Rule of Recognition (**CONS-CONFORM):** Precedents departed from, for being unconstitutional-creating inequality before the law; ○ Presumption of Equality of Contracting Parties (**EQUALITY PRESUMPTION**): Legal Practice treated as an ordinary commercial business akin to trading; ○ Contract viewed	○ Constitutionalism (**CONSTLISM**); ○ Equality before the law (**EQUALITY**); ○ Economic Efficiency (**EFFICIENCY):** Commercialism and Wealth Maximisation: Business Efficacy and Changing character of the legal profession-from voluntariness to commercialism; ○ Conception of Contract as Relational (**RELATIONAL**): Including contractual obligations being

				and equality before the law. ○ Lawyers were said to be engaged in commercial legal business, and therefore entitled to the same treatment as traders.	as a network of or other relations (**RELATIONS)**; ○ Contract viewed as a network of or other relations (**RELATIONS):** Using Reliance to find contractual obligation i.e., Substantial damages in banking contracts without proof of loss.	based on ***Reliance***.
43.	Sara Kagoro t/z Twengoma & Quality Tailoring Groups, Nyamurambi Women Group v. ECLOF (***N.B. Both Formalism and Flexibility were applied in this decision***)	HCCS 104/2002(16/4/2007)	HC-Lameck Mukasa, J.	The defendant wrongfully impounded the plaintiff's machinery. The court held that there were no guidelines in law on how compensation should be arrived at in such cases. The court then decided to: ○ Invoke the rule in Article 126(2)(c) of the Constitution, that enjoins courts to ensure that adequate compensation is awarded to aggrieved parties; ○ Send the file to the court registrar to appoint valuers agreeable the parties, and that the compensation	○ Using indeterminate doctrines **(INDETERM-DOCTRINE):** adequacy of compensation under Article 126 (2) (c); ○ Conformity with the Constitution as a Rule of Recognition (**CONS-CONFORM)**; ○ Making uncertain court orders (**ORDER-UNCERTAIN**): final court award contingent on the Registrar, the parties'	○ Conceptual Flexibility (**CONCEPT FLEXTY):** Including Legal Indeterminacy; Systematic Flexibility **(SYSTEM-FLEXTY):** Uncertainty in litigation and adjudication acceptable; ○ Sanctity of contract (**SANCTITY**): even over Legality, i.e. parties' agreement to court decisions as ground of

				recommended by such valuers then becomes the one ordered by court.	consensus, and an expert's opinion.	Acceptability of Court Decisions.
44.	Tobacco and Commodity Traders International Inc. v. Mastermind Tobacco (U) Ltd	H,C.C. C 18/2002(9/5/2003)	HC-Ogoola, J.	During a scheduling conference, a petition for winding up a company was opposed on grounds that the documents submitted in its support did not conform to legal requirements. The power of attorney was not stamped, in Spanish without the English translation, and not properly signed as the names of signatories were missing; the Affidavit contained hearsay evidence; and there was no company resolution to wind it up. The Judge observed that: ○ The case represented the battle between technicalities and formalism; ○ The scheduling conference as a preliminary stage of the trial was meant to be flexible, without much formality; ○ In considering rules like the one against hearsay in Affidavits, courts had to "**be alive to the**	○ Flexibility recognised as a judging paradigm (**FLEXIBILITY**); ○ The judge making law (**LAW MAKING**): Sidestepped the Statutory Rule**,** to find equity and fairness; ○ Contract Law understood as including Practices **(PRACTICES**): Intricacies of modern commercial intercourse; ○ Using indeterminate doctrines (**INDETERM-DOCTRINE**): Substantiality in Article 126 (2)(e) invoked to cure defects; ○ Contextual Interpretation of Contracts and Application of	○ Systematic Flexibility (**SYSTEM-FLEXTY**); ○ Economic Efficiency (**EFFICIENCY);** ○ Substantive Justice as superior to Procedural Justice (**SJ**); ○ Constitutionalism (**CONSTLISM);** ○ Conception of Law as a means to an end **(LMEANS**); Legal Validity and Contractual Obligation judged by ***Practical Utility;*** ○ Conception of Law as Predictions (**LPREDICTIONS)**: A judge's personal prejudices, intuitions and preferences; ○ Conceptual

				intricacies of modern commercial intercourse". In hearing commercial cases, it was unlikely that any one person in the company knew all the facts. For instance, the directors of the petitioner were spread over many countries. Therefore, the closest to personally knowing all the facts was competent to swear the Affidavit, which "**the court must give due consideration even though they may amount to hearsay".** ○ Although unstamped are not admissible in evidence by virtue of section 38 of the Stamps Act, this could be effectively remedied by payment of the outstanding duty. ○ A company resolution to wind up the company need not exist, as long as authority to do so was given in whichever way. ○ The rest of the objections were mere technicalities and irregularities, which could be remedied in the interest of substantive justice, in accordance with Article 126(2)(e). ○ Technicalities should not	Rules (**CONTEXTUAL**): Comparison between 2013 Uganda and with 19Th Century England used to justify sidestepping of rules; ○ Abductive Reasoning in interpretation of statute or precedents (**ABDUCTIVE**)**:** A judge's personal sentiments; ○ Internal Judicial Guidelines (**JUDGING GUIDE):** Technicalities and formalism justified for purposes of technical knockouts but intolerable where they determined the substantive outcome of litigation.	Flexibility (**CONCEPT FLEXTY**).; ○ Tension Management Mechanism (**MGT**): Judging Guideline, i.e. based on limiting formalistic wins to procedural battles, without being used in substantive decisions.

				defeat the litigant in 2013 Uganda, when in England courts held against this 116 Years ago, *per Pearce, L.J in Pontin v. Wood [1962] 1 QB 594*, who wrote that this was not possible even in 1887 England. ○ His personal sentiments about the veritable battle between procedural technicalities and substantive justice, thus: "**In as much as these technicalities are aimed at a quick technical knock-out in this battle royale, they are understandable. However, in as much as the technicalities are intended to muzzle the course of justice by ousting the substantive merits of the petition from being aired by the Petitioner and heard by the Court, they are simply intolerable."**		
45.	United Assurance Co. Ltd v. Attorney General	[1995] VI KALR 109	SC-Wambuzi, C.J	The issue was whether the appellant had properly contracted counsel to file the suit without a company resolution having been filed. The court held that what mattered was that authority to	○ The judge making law (**LAW MAKING**): Sidestepped the Statutory Rule**,** to find equity and fairness, i.e., Statutory Rule	○ Substantive Justice superior over procedural rules (**SJ);** ○ Judicial Absolutism **(JA**); ○ Conception of Law as Means to

				file the suit had been given, and it was irrelevant how this had been done.	replaced 'the end justifies the means' as guides the court decision; ○ Law understood and applied Purposively (**PURPOSIVE**)	An End **(LMEANS**).
46.	Atom Outdoor Ltd v. Arrow Centre (U) Ltd (N.B. Both Formalism and Flexibility were applied in this decision)	HCCS 448/2003 (17/12/2004)	HC-Arach Amoko, J.	This was a contract where the defendant rented land to the plaintiff to erect and maintain a billboard on which advertisement could be made. The court held that the plaintiff was to earn from the rent not the advertisement, therefore it was not her duty to meet the cost of printing the flexi face for the defendant's billboard. The court reasoned that: ○ To read into the contract that the defendant had such a duty would flout business common sense. ○ Such was a liability that no businessman in his right senses would be willing to incur. ○ Commercial contracts ought to be interpreted as per the guidelines of LS Sealy & RJA Hooley, in 'Text And Materials in Commercial Law', Butterworths, P. 14-15,	○ Contextual Interpretation of Contracts and Application of Rules (**CONTEXTUAL**): Business common sense and standard of a businessman invoked, with Commercial Sense being held as the main principle in construction of commercial contracts; ○ Contractual Obligations and rights determined Purposively (**PURPOSIVE**): Practicality and Functionality used guide the applicability and meaning of parties' actions; ○ Internal Judicial	○ Conception of Law as Experience **(LEXP**): commercial and Business Common Sense; ○ Social Support as a Rule of Validity and Recognition of Law (**SOCIAL SUPPORT)**; ○ Tension Management Mechanism (**MGT**): Judging Guideline as giving the Contract Effect; ○ Economic Efficiency (**EFFICIENCY**): Business Efficacy; ○ Sanctity of Contract **(SANCTITY):** derivable from the contractual words and the

				391, thus: the commercial sense of the provision, derivable from the words used, the remainder of the document, the nature of the transaction, and the legal and factual metrix; and that the duty of the court is simply to give effect to the contract, and not dictate to the parties what the court thinks they ought to have agreed or what a person (reasonable or otherwise) might have agreed.	Guidelines **(JUDGING GUIDE)**: The duty and role of courts restricted to giving the contract effect not dictation of court's views.	legal and factual matrix; ○ Conception of Contract as Relational (**RELATIONAL**): reasonableness as governing an network of connections and relations; ○ Conception of Law as a means to an end **(LMEANS**); Legal Validity and Contractual Obligation judged by ***Practical Utility.***
47.	Edward Makubuya t/a Edward Engineering Works v. Kampala City Council, Kawempe Division	HCCS 59/2003 (1/3/2004)	HC-Ogoola, J.	The procedure in the Public Procurement law was not followed in contracting the plaintiff by the defendant, a local government. The court held that: ○ Not following the procurement law affects the government bodies but cannot be used against an innocent third party such as the plaintiff. ○ The doctrine of estoppel binds the defendant to the contract.	○ The judge making law (**LAW MAKING**): Sidestepped the Statutory Rule, to find equity and fairness; ○ Judicial Interventionism in Contract (**JINTERV**) ***Equity*** invoked to interfere with Contract.	○ Substantive Justice (**SJ**): ***Ubuntu concept of justice***; ○ Contractual Justice **(CONJUS),** through Judicial Interventionism, i.e. Equity to mitigate rigours of formalism; ○ Judicial absolutism (**JA)**; ○ Perception of law as Predictions (**LPREDICTIONS**): The Role of Judges: To Fill

						Gaps in the Law.
48.	Kitayimbwa Salongo v. Peggy Garments Ltd	HCCS 345/2003(22/5/2009)	HC-Lameck Mukasa, J.	In a sale of goods contract by sample, a dispute arose as to conformity of the bulk of the goods supplied with the sample, as provided in section 16 of the Sale of Goods Act. Further, whether section 48 of the Sale of Goods Act that allows a right to sue for the price was available to the seller. The Court held and reasoned that, the eye is the best test to check differences and resolve imperfections of language. That language cannot fully describe the particulars of the goods.	○ Contract viewed as a network of or other relations (**RELATIONS):** Cooperation and Trust Recognised as Expected by parties ; ○ Judicial Interventionism in Contract (**JINTERV**) ***fairness, equity and ubuntu*** invoked to interfere with Contract.	○ Substantive Justice (**SJ**): ***Ubuntu concept of justice***; ○ Conception of Contract as Relational (**RELATIONAL)**.
49.	Obed Tashobya v. DFCU Bank Ltd (N.B. Both Formalism and Flexibility were applied in this decision)	HCCS 742/2004 (9/5/2007)	HC-KiryabwireJ.	The plaintiff banked a foreign cheque on his account with the defendant, and after a few days the defendant credited the plaintiff's account with the money and he was allowed to draw against it. The defendant later recalled the money on ground that the cheque had been dishonoured by the alleged paying bank. The plaintiff claimed breach of contract. Court held that the plaintiff would not be allowed to keep	○ Contextual Interpretation of Contracts and Application of Rules (**CONTEXTUAL**); ○ Contract Law understood as including Practices (**PRACTICES):** Bank custom and practice; ○ Judicial Interventionism in Contract	○ Conception of Law as Experience (**LEXP);** ○ Economic Efficiency (**EFFICIENCY):** Business Practice and Efficacy; ○ Contractual Justice (**CONJUS**), through Judicial Interventionism: Equity to mitigate

				the money, reasoning that: ○ Uganda's context had to be taken into account, especially the Bicupuli (fake cheques) that were floating around the country. ○ It had become a recognised bank custom that pending final clearance, banks would allow customers to draw against the expected credit on the account. But they would recall the money if the cheque got dishonoured. ○ The bank had no license to be imprudent, however being imprudent does not mean being negligent. ○ It was not equitable to allow unjust enrichment by the plaintiff.	(**JINTERV**) ***Equity*** invoked to interfere with Contract; ○ Recognising Law's Classficatory Categories (**LCATEGOTIN)**: Negligence as basis of contractual liability rejected.	rigours of Common Law; ○ Conception of Law as a means to an end **(LMEANS);** ○ Substantive Justice (**SJ**): ***Ubuntu concept of justice***.
50.	Ecumenical Church Loan Fund (U) ECLOFF v. John Bwiza & Others t/a Kamabare Women's Development (***N.B. Both Formalism and Flexibility were applied in this decision***)	HCCS 614/2004(31/10/2007	HC-Bamwine, J.	The loan contract was given out before the borrower was incorporated, and court recognised the principle that pre-incorporation contracts are not binding. The court however further held that, "it would be preposterous for a man who does not deny taking another's money to plead without shame that the other should whistle of his	○ The judge making law (**LAW MAKING**): Sidestepped the Statutory Rule, to find equity and fairness : A rule of law sidestepped on ground of non-conformity with reason; ○ Expectancy loss Considered	○ Conception of Contractual Obligation as Promise (**PROMISE**); ○ Substantive Justice (SJ): *Ubuntu concept of justice*; ○ Conception of Contract as Discrete (**DISCRETE**);

				money merely because of an alleged illegality, which the parties may not have had in contemplation at the time of the contract."	(**EXPECTANCY**).	○ Sanctity of Contract (**SANCTITY**): even superior to law.
51.	Petrocity Enterprises (U) Ltd v. Security Group (U) Ltd	HCCS 869/2004(27/4/2010)	HC-Kiryabwire J.	The defendant was challenging the authority of the signatory to bind it. The court held that because of the nature of the contract, that involved invoices, it was reasonable to assume that the accountant had authority to sign on behalf of the defendant company.	○ Contractual Obligations and rights determined Purposively (**PURPOSIVE**): Practicality and Functionality used guide the applicability and meaning of parties' actions, i.e., Nature of the business used as ground reasonable supposition that signatory had authority.	○ Conception of Law as a means to an end **(LMEANS**); Law to be judged by its ***Practical Utility;*** ○ Economic Efficiency (**EFFICIENCY):** Commercialism and Wealth Maximisation; Social Support as a as Criteria for contractual Obligation and Enforceability (**SOCIAL SUPPORT)**; Business Common Sense.
52.	Shine Pay (U) Ltd v. Kiyonga Francis	HCCS 547/2004(27/3/2006)	HC-Bamwine, J.	The contract provided for a default penalty of 180% per annum. The court held that this was excessive and in its place awarded interest at the rate of 25%, which was seen as the average commercial lending rate.	○ Judicial Interventionism in Contract (**JINTERV**) Considerations of ***fairness*** invoked to interfere with contract terms.	○ Contractual Justice (**CONJUS),** through Judicial Interventionism..

53.	Shell Uganda Ltd v. Captain Naeem Chaudry	HCCS 179/2004(10/2/2008)	HC-Bamwine, J.	A defence of limitation of time was raised but the plaintiff argued that it had not been pleaded, therefore could not be raised by the defendant. The court held that limitation was a matter of law and need not be pleaded to be raised.	○ Undue regard to technical or procedural defects to do substantive justice **(PROC-DISREGARD);**	○ Substantive Justice superior over procedural rules **(SJ);**
54.	Were Fred v. Kaga Ltd (N.B. Both Formalism and Flexibility were applied in this decision)	HCCS 530/2004(23/12/2005)	HC-Bamwine, J.	The plaintiff bought a motor vehicle from one Muyingo, an employee of the defendant, in whose names the vehicle was registered. The plaintiff paid in full and took possession but could not transfer the vehicle into his names as the defendant claimed that Muyingo had no authority to sell and took all the money for his own benefit. The court held that Muyingo had ostensible authority to sale the vehicle, and further reasoned that: ○ A logbook is a document of title; ○ According to section 22 of the Sale of Goods Act, goods sold without the authority of the owner cannot have their title passed; ○ Section 58 of the Sale of Goods Act that gives common law a force of	○ Legal Classificatory Categories ignored (**NO CATEGORIES):** The law of agency deemed incorporated into the Sale of Goods Act by section 58 that reserved common law and the law merchant. ○ Disregard of Fairness of Terms (**NO-FAIRNESS**).	○ Conceptual Flexibility (**CONCEPT FLEXTY):** Including Legal Indeterminacy.

				law incorporates the law of agency, such that a sale by an agent of the owner is a sale by the owner, even if the agent pocketed all the money received.		
55.	Mbale United Transporters Ltd v. Town Clerk, Mbale Municipal Local Government Council & Others (***N.B. Both Formalism and Flexibility were applied in this decision***)	HCCS 267/2004(30/9/2005)	HC-Kiryabwire, J.	The plaintiff's contract to manage a taxi park was terminated by the town clerk, without the matter being considered by the Procurement Committee as required by the Procurement Law. The termination resulted in clashes amongst taxi drivers and operators, and lives were lost. The court held and reasoned that: ○ The value of legal procedures cannot be underestimated especially where they interact with private bodies. ○ The value of procurement procedures is to ensure transparency, public accountability, and best practices, and court has to take judicial notice of these principles. ○ The contract termination had not been done transparently and therefore although the right existed, it had been	○ Contract Law understood as including Practices (**PRACTICES)**: Corporate governance; ○ Contract Law understood as including Practices (**PRACTICES**): corporate governance recognised as ground for legal validity. ○ Contextual Interpretation of Contracts and Application of Rules (**CONTEXTUAL**): Procedures held to be of great value as their flouting had led to loss of lives, and The conception of justice seen as different where a	○ Conception of Law as Experience (**LEXP**); ○ Conception of Law as a Means to An End **(LMEANS)**: ○ Legal Pluralism **(LP**); ○ Public Interest as a Rule of Recognition, the basis of obligation and enforceability of in Private Contracts (**PUBLIC INTEREST**); ○ Conception of Law as a means to an end **(LMEANS**); Legal Validity and Contractual Obligation judged by ***Practical Utility.***

				done irregularly. ○ The decision was reached with lapse in corporate governance, and was procedurally irregular, there illegal interference with the contract.	matter related to private bodies, vis a vis government ones; ○ Applying Formalism with flexible ends in mind (**OPPORTUNISTIC FORMALISM**): that Procedural irregularities amounted to illegality that went to the core of the dispute.	
56.	Setramaco International Ltd v. Board of Directors/Headmaster, Lubiri Secondary Scholl & Others (***N.B. Both Formalism and Flexibility were applied in this decision***)	HCCS 478/2005 (20/01/2009)	HC-Kiryabwire, J.	The legality of a contract with the defendant (a public School) was challenged for not having been entered following the Procurement Law. The court held that there is nowhere in the said law that the contracts are made invalid. Instead, the non-compliance had to be visited against the public body.	○ Applying Formalism with flexible ends in mind (**OPPORTUNISTIC FORMALISM**), i.e. The judge applied the law strictly to defeat its effect of avoiding contracts not entered following its commands; ○ Recognising inequality amongst contracting parties: Using economic, social	○ Opportunism (**OPPORTUNISM**); ○ Substantive Justice (SJ): *Ubuntu concept of justice*; ○ Inequality before the law **(INEQUALITY**): Weaker party protection from the commands of Public Commercial law.

					or political class as criteria to access justice (**NO-EQUALITY**);	
57.	Eastern and Southern African Trade and Development Bank v. Hassan Bassajjabalaba & Aisha Basajja	[2007] UGCommC 30	HC-Bamwine, J.	The contract gave jurisdiction to English courts. The court held that the Ugandan courts still had jurisdiction to hear the dispute, reasoning that: Convenience dictated that Ugandan courts would have jurisdiction, because the contract was made and effected in Uganda.	○ Exercising Unrestrained Judicial Authority (**UNRESTRAINED AUTHORITY**): ***Jealously Guarding Jurisdiction, i.e.,*** Inherent Jurisdiction and judicial intervention in contract.	○ Conception of Law as a means to an end **(LMEANS**); Legal Validity and Contractual Obligation judged by ***Practical Utility***: Convenience used to intervene in the contract and assume jurisdiction; ○ Judicial Absolutism **(JA).**
58.	Mariam Naigaga v. Orient Bank Ltd	HCCS 464/2013 (7/4/2015)	HC-Senoga Anglin, J.	The plaintiff having bought property from a bailiff as agent of the defendant bank in a foreclosure, and could not enjoy her rights. Sued the bank. Court held and reasoned that: ○ The bailiff was an agent of the bank, in view of the ordinary rule of law and the ordinary usage of human kind; ○ The intention of the parties to any contract should always be discerned from its words;	○ Contextual Interpretation of Contracts and Application of Rules **(CONTEXTUAL**): Commercial cases held as attracting higher interest to cope with the market value of money. ○ Contract Law understood as including Practices **(PRACTICES**): Commercial usage imputed	○ Conception of Law as experience (**LEXP**); ○ Substantive Justice (**SJ): *Ubuntu concept of justice***: Responsiveness to Ordinary Human Practices; ○ Economic Efficiency (**EFFICIENCY):** Commercialism and Wealth Maximisation: Contract law to

				○ Interest to be awarded by courts in commercial cases had to be higher to reflect the current commercial value of money.	from ordinary human kind practices	be responsive and relevant to the modern market place and forces.
59.	Tamp Engineering Consultants Ltd v. MacDowell Ltd	HCCS 224/2010(25/01/2016	HC-Senoga Anglin, J.	An issue arose as to what should guide court in awarding damages for breach of contract. The court held that: ○ In accordance with section 61(4) of the Contract Act, circumstances and means that can help in remedying the inconvenience caused by the breach are relevant considerations; ○ The measure of general damages is the opinion of reasonable men.	○ Using indeterminate doctrines (**INDETERM-DOCTRINE**): The reasonable; ○ Contract viewed as a network of or other relations (**RELATIONS):** Using Reliance to find contractual obligation i.e., Inconvenience subject of compensation; ○ Contractual Obligations and rights determined Purposively (**PURPOSIVE**): Practicality and Functionality used guide the applicability and meaning of parties' actions.	○ Conceptual Flexibility (**CONCEPT FLEXTY**); ○ Economic Efficiency (**EFFICIENCY**): Business Efficacy; ○ Conception of Law as a means to an end **(LMEANS**); Legal Validity and Contractual Obligation judged by ***Practical Utility;*** ○ Conception of Contract as Relational (**RELATIONAL**): Including contractual obligations being based on ***Reliance***.
60.	Arnold Brooklyn & Company v. Kampala City Council (N.B. Both Formalism and	C P No. 23/2013(4/4/2014).	CA/C. C	During the trial for breach of contract, a constitutional defence was raised, that the contract was invalid, having	○ Pacta Sunt Servanda (**PACTA**): Plea of illegality ignored to enforce Contract:	○ Conceptual Flexibility (**CONCEPT FLEXTY):** Including Legal

	Flexibility were applied in this decision)			been executed with a government body without the approval of the Attorney General, contrary to Article 119(5) of the Constitution. The court held that: ○ Such a contract was invalid, but this did not resolve the dispute between the parties. ○ The matter had to be sent back to the High court for resolution of the dispute on its merits, as it was anticipated that further questions could arise such as whether the said approval by the Attorney General could be given retrospectively.	Unconstitutionality of the contract held not adequate to resolve.	Indeterminacy;); ○ Legal Pluralism (**LP):** Validity of norms can be sought beyond the four corners of the constitution; ○ Sanctity of contract (**SANCTITY**): even over Legality.
61.	NEC Health World Pharmaceuticals Ltd v. Engineering Construction Co. Ltd.	HCCS 809/2012(24/4/2013)	HC-Musene, J.	A building contract was not fully performed but the contractor claimed the full contract price under the doctrine of substantial performance. Court held that: ○ Where a contract is substantially performed, minor faults will be ignored and he or she is paid the full price under the doctrine of substantial performance. ○ Such performance had to	○ Using indeterminate doctrines (**INDETERM-DOCTRINE**): Substantiality in performance substituted for complete performance.	○ Substantive Justice (**SJ)**; ○ Conceptual Flexibility (**CONCEPT FLEXTY):** Including Legal Indeterminacy.

				be proved by the claimant thereof; otherwise the doctrine was not available.		
62.	Central Purchasing Corporation v. Hon. Major General (RTD) Kahinda Otafiire	HCCS 627/2003(31/08/2007)	HC-Bamwine, J.	The defendant, a minister made a contract for purchase of iron sheets, but never physically dealt with the plaintiff, but only through an agent. The minister denied receiving delivery of the goods. Court held that: ○ A sale through an agent was presumed and the denial of delivery rejected because the minister had to transact through messengers, as he could not pick up the iron sheets himself. ○ Property in the goods passed with risk in accordance with section 19 of the Sale of Goods Act, and the seller entitled to an action for the price under section 48 of the Sale of Goods Act; ○ If the goods were stolen the loss had to fall on the minister. ○ Being a commercial transaction, interest was due, but due to the unique circumstances of the case, it was only awarded from the date of judgment,	○ Recognising inequality amongst contracting parties (**NO-EQUALITY)**: Court's rule of practice modified for a minister and Using economic, social or political class as criteria to access justice; ○ Contract viewed as a network of relations (**RELATIONS**); ○ Applying Formalism with flexible ends in mind (**OPPORTUNISTIC FORMALISM**); ○ Contextual Interpretation of Contracts and Application of Rules (**CONTEXTUAL**).	○ Inequality before the law (**INEQUALITY**); ○ Conception of Law as Experience **(LEXP);** ○ Conception of Contract as Relational (**RELATIOAN**L); ○ Opportunism (**OPPORTUNISM**).

				not before.		
63.	Damas Mulagwe v. Lanex Forex Bureau Ltd & others	HCCS 358/2006(10/01/2011)	HC-Kiryabwire J.	Under a contract with the first defendant, the plaintiff deposited $ 160,000 to be generating interest, but neither the principal amount nor the interest were paid as agreed. The Financial Institutions Act that regulated Forex Bureaus barred them from receiving such deposits. The first defendant had common ownership with the other defendants, thus the suit. Court held that the contract was illegal as Forex Bureaus were not authorised to take deposits, however the money would be taken as money had and received of the account of the plaintiff, therefore had to be repaid by the defendants.	○ Judicial Interventionism in Contract (**JINTERV**) ***Equity*** invoked to interfere with Contract: , invoked to get a remedy for the plaintiff in the face of a statutory rule nullifying the contract.	○ Substantive Justice (**SJ**): ***Ubuntu concept of justice***; ○ Contractual Justice (**CONJUS),** through Judicial Interventionism; ○ Legal Pluralism (**LP)**.
64.	Swaibu Katongole v. Spear Tourism and Cargo (U) Ltd	HCCS 225/2006(7/4/2008)	HC-Kiryabwire J.	The plaintiff contracted with a company in Dubai for his goods to be transported to Uganda. The court however found a Ugandan company liable for non-delivery of the goods on grounds of lifting the veil of incorporation. Court reasoned that: ○ The companies	○ The judge making law (**LAW MAKING**): Sidestepped the Statutory Rule**,** to find equity and fairness: in interest of justice, rule of law on corporate personality	○ Judicial Absolutism (**JA);** ○ Conception of Law as a means to an end **(LMEANS**); Legal Validity and Contractual Obligation judged by ***Practical Utility;***

				constituted one economic unity and therefore it was fraudulent practice to seek protection from the veil; ○ In the interest of justice, a remedy had to be found for the plaintiff, therefore the veil had to be lifted.	sidestepped; ○ Exercising Unrestrained Judicial Authority (**UNRESTRAINED AUTHORITY**): Jealously Guarding Jurisdiction, i.e. Inherent Jurisdiction, for court not to be helpless;	○ Judicial self-preservation (**JSELF-PRESERV);** ○ Substantive Justice (**SJ).**
65.	NIS Protection (U) Ltd v. Nkumba University	HCCS 604/2004(16/5/2006)	HC-Bamwine J.	The plaintiff received a call from the security officer of the defendant ordering security services, and all terms were agreed. After the plaintiff had finished mobilising but before deployment, she was stopped by the defendant on ground that the officer had no authority to contract. Court held and reasoned that: ○ Whether the issue be approached from tort, agency law or contract, there was a valid contract concluded between the parties. ○ The rule that servants bind their employers even	○ Legal Classificatory Categories ignored (**NO CATEGORIES);** ○ Abductive Reasoning in interpretation of statute or precedents (**ABDUCTIVE**)**:** Judge's sense, intuition, preferences and prejudices; ○ Judicial Interventionism in Contract (**JINTERV**) Considerations of	○ Conception of Law as A Means to An End (**LMEANS);** ○ Conceptual Flexibility (**CONCEPT-FLEXTY**); ○ Perception of law as Predictions (**LPREDICTIONS**); ○ Substantive Justice (**SJ**): ***Ubuntu concept of justice***; ○ Contractual Justice (**CONJUS**), through Judicial

				if their actions are criminal or wanton did not only make sense but was just as well therefore would be followed. ○ Directors bind companies due the indoor management rule that exists by virtue of there being constructive notice. ○ So long as strangers act bonafide, they ought to be protected.	***fairness*** invoked to interfere with contract terms, i.e. Weaker/ disadvantaged party protected by court.	Interventionism..
66.	Hope Mukankusi v. Uganda Revenue Authority (N.B. Both Formalism and Flexibility were applied in this decision)	HCCS 438/2005(19/7/2010)	HC-Lameck Mukasa, J.	The plaintiff bought goods from an auction conducted on behalf of the defendant, however the goods were handed over to the original owner after paying the tax due on the goods. The court held that under section 57(1) (c) of the Sale of Goods Act, a contract at an auction is complete at the fall of the hammer, and therefore in this case property had passed to the plaintiff. Regarding damages, the court held and reasoned that: ○ Damages for breach of contract should be for loss that was foreseeable, in line with the decision in *Hadley v. Baxendale*	○ Giving Procedural Justice Sway (**PROCED-SWAY**); ○ Restricting litigant's case to Pleadings.; ○ Using indeterminate doctrines (**INDETERM-DOCTRINE**): Substantiality in Article 126 (2)(e) invoked to cure defects; ○ Contextual Interpretation of Contracts and Application of Rules (**CONTEXTUAL**): Commercial transactions allowed higher	○ Conceptual Flexibility (**CONCEPT-FLEXTY);** ○ Constitutionalism (**CONSTLISM**); ○ Systematic Flexibility **(SYSTEM-FLEXTY):** Uncertainty in litigation and adjudication acceptable; ○ Inaccuracy in damages (**INNACURACY**); ○ The Restitution Measure of Damages (**RESTITUTION);** ○ Economic Efficiency (**EFFICIENCY):** Commercialism

				(1854) 9 Exch. 341 at 354. ○ Special damages cannot be awarded unless they are pleaded and specifically proved; ○ The court has to be guided by Article 126(2)(c) of the Constitution, that victims of wrong have to receive adequate compensation. The goal should be to restore a party to their original position before the breach; ○ The rule in Esso Petroleum Co. Ltd v. Mardon (1976) 2 ALLER, that assessing loss is looking into the future to see what would have happened, is necessarily problematic. It can only be a rough and ready estimate. ○ Commercial transactions should attract a higher rate of interest.	interest rate in adjudication; ○ Contract viewed as a network of relations (**RELATIONS**); ○ Viewing remedies as restoration (**RESTORATION**).	and Wealth Maximisation; ○ Certainty of Law (**COL)**.
67.	Buildtrust Construction (U) Ltd v. Martha Rugasira	HCCS 288/2005(30/01/2008)	HC-Kiryabwire J.	The court awarded a lesser amount to what was proved as the loss, reasoning that during a failed attempted settlement, the parties had come to that figure.	○ Contextual Interpretation of Contracts and Application of Rules (**CONTEXTUAL):** A possible settlement amount treated as the fair and just	○ Conception of Law as Experience (**LEXP);** ○ Conceptual Flexibility (**CONCEPT-FLEXTY**); ○ Substantive Justice (**SJ):**

					compensation.	***Ubuntu concept of justice***: Settlement and Reconciliation as end of law and justice.
68.	Bank of Africa Uganda Ltd v. Clive Mutiso & Others.	HCCS 152/2007(28/7/2009).	HC-Bamwine, J.	A bank customer who operated through several companies banked a forged foreign cheque that the plaintiff sent to the international banking system for clearance. After 21 days the customer's account was credited with the funds, which the customer withdrew. The cheque then dishonoured and the customer claimed that he withdrew money lawfully and the bank was estopped from claiming otherwise. Upon presentation of the cheque at the beginning, the bank had been shown a lease of land involving the customer, and a company that appeared as drawer of the cheque to justify the source of funds. The land was however registered in the names of Sir Henry Morgan & Associates Ltd (the 3RD defendant), owned by the bank customer and his family.	○ Judicial Interventionism in Contract (**JINTERV**) Considerations of ***fairness and equity*** invoked to interfere with contract terms: Interfering with contract terms: Quasi-Contract assumed to cover uncertainty of the nature of relationship; ○ Legal Classification Categorisation Recorgnised **(LCATEGOTIN):** Negligence Rejected; ○ Applying Formalism with flexible ends in mind (**OPPORTUNISTIC FORMALISM**): Remedies	○ Contractual Justice (**CONJUS**), through Judicial Interventionism: Quasi-Contract and Equity as tool against the rigours of common law; ○ Judicial Absolutism (**JA**); ○ Conception of law as Predictions (**LPREDICTIONS**); ○ Opportunism (**OPPORTUNISM**); ○ Conception of Law as a Means to An End (**LMEANS**): Justice as a paper judgment not the ultimate end of law; ○ Substantive Justice (SJ):

				At the trial, for failure to file a defence in time, default judgment was entered against the 3RD defendant. However Henry Morgan later appeared in court, and without going through the due process of applying to have the judgment set aside, the same judge that entered it allowed Morgan to participate in the proceedings and defend the case. Court held that the customer acted fraudulently and the money was repayable by him to the bank as money had and received. Further, that the veil of incorporation be lifted over two of the companies, one of which had been proved to own property bought from the proceeds of the fraud, as the denial of nexus to them by the fraudulent customer was not credible evidence. The court however went on to hold and reason that: ○ There existed a quasi-contract between the parties, under which liability was based on equity, unjust benefit or enrichment.	awarded while disabling the judgment creditor from recovery; ○ Undue regard to technical or procedural defects to do substantive justice **(PROC-DISREGARD**).	*Ubuntu concept of justice*; ○ Contractual Justice (**CONJUS),** through Judicial Interventionism.

				○ The assets owned by the companies over which the veil had been lifted should not be sold until the fraudulent customer pays the decretal amount; ○ The veil of incorporation over Sir Henry Morgan & Associates would not be lifted, since the fraudulent customer had testified that there was no nexus with the fraudulent customer; ○ The lawyer who held out himself as agent of the alleged drawer of the cheque was held not liable, although the possibility was there that he had never existed; ○ The Bank was grossly negligent/reckless but it was immaterial in this case. N.B: The researcher was counsel for the plaintiff bank and will share his experience in the analysis, which include, that: ○ The companies over which the veil was lifted were not held liable or ordered to pay the money, but only have their assets frozen, which in essence was a hollow remedy.		

				○ Substantial evidence that proved the 3RD Defendant as owned and controlled by the fraudulent customer was not commented on or even acknowledged in the judgment; ○ The court was made aware that there no known assets in the names of the customer, and the only way the plaintiff could recover was to have the companies that held assets made liable, but the judge chose to award the bank while denying her the only available way to actually realise the fruits of litigation; ○ 'A notice of appeal was filed but for over five years, the court has refused to release the record, and the recorded proceedings were reported as lost. ○ The trial judge was since promoted and is now the principle judge.		
69.	Kamugisha v. Uganda Revenue Authority	[2012] UGCOMMC 149	HC-Madrama, J.	The plaintiff gave information to the defendant about a tax defaulter, having been agreed as permitted by section 7 of the Finance Act, 1999 that the plaintiff would	○ Recognising inequality amongst contracting parties (**NO-EQUALITY**); ○ Contextual Interpretation of	○ Inequality before the law (**INEQUALITY**): government a superior and favoured party; ○ Economic

				be paid a 10% commission of the tax recovered. The defendant refused to pay the commission and after several reminders, the plaintiff brought this suit for the 10%, interest and damages. One of the issues was the rate of interest payable. The plaintiff sought to rely on section 136 (1) and (2) of the Income Tax Act, which allowed the defendant to receive a 2% monthly interest on delayed tax payments, arguing that the plaintiff be paid interest at the same rate, in accordance with Article 21 of the Constitution that all persons shall be equal before and under the law. In the judgment: ○ The judge was silent about the principle of equality and instead relied on section 7 of the Finance Act, 1999 not granting interest to hold that it was a matter of court's discretion. ○ He then awarded 20% as the commercial lending rate. ○ General damages were awarded for inconvenience and other	Contracts and Application of Rules (**CONTEXTUAL**): Commercial Sense; ○ Contract Law understood as including Practices (**PRACTICES**): Commercial lending rate adopted; ○ Contract viewed as a network of or other relations (**RELATIONS):** i.e., Using Reliance to find contractual obligation , i.e., Inconvenience considered compensable without need for proof.	Efficiency (**EFFICIENCY):** Commercialism and Wealth Maximisation; Judicial absolutism (**JA);** ○ Conception of Law as a means to an end **(LMEANS**); Legal Validity and Contractual Obligation judged by ***Practical Utility;*** ○ Conception of Contract as Relational (**RELATIONAL**): Including contractual obligations being based on ***Reliance***.

				losses rejected as not having been strictly proven.		
70.	Highland & Agriculture Export Ltd & Another v. Alpha Global 21ST Joint Venture & 5 Others.	[2017] UGCOMMC 113(18/8/2017)	HC-Wangutusi, J.	The plaintiff sued the defendant for recovery of money owing from the supply of goods and services, and sought to maintain action on dishonoured cheques as alternative and independent causes of action. At the trial it was proved that much of the debt was a result of interest that had been agreed at 15% per month. The defendant had claimed that the cheques were issued as security without dates and amounts, and one of the plaintiffs was signatory on the cheques. The judge held that the cheques were not enforceable on their face, reasoning that: ○ Although the law is that a cheque dishonoured forms an independent cause of action and is enforceable on its face without further proof, it would be prudent and just and the court is mandated to investigate the underlying contract and ascertain whether the amounts on the cheques was due.	○ Judicial Interventionism in Contract (**JINTERV**) Considerations of fairness invoked to interfere with contract terms, i.e., Transaction underlying cheques opened on grounds of prudence and justice; ○ Using indeterminate doctrines (**INDETERM-DOCTRINE**): harsh and unconscionable, as per section 26 of the Civil Procedure Act; ○ Internal Judicial Guidelines (**JUDGING GUIDE**): Judge's mind and personal attributes, i.e. prudence.	○ Conceptual Flexibility (**CONCEPT FLEXTY**); ○ Contractual Justice (**CONJUS**), through Judicial Interventionism: Equitable doctrines of harsh and unconscionable, Fairness and Conscionability of bargain; ○ Tension Management Mechanism **(MGT):** Judging Guideline, i.e. Judges to be prudent; ○ Substantive Justice **(SJ).**

				○ In Uganda, section 26 of the Civil Procedure Act makes contractual interest that the court deems harsh and unconscionable unenforceable by due process of law. In this case, the agreement on interest was therefore unenforceable.		
71.	Prof. Egbert De SMET v. Juliet Nakassaga (N.B. Both Formalism and Flexibility were applied in this decision)	[2017] UGCOMMC 135(1/8/2017)	HC-Kainamura, J.	The contract between the parties provided that it was only enforceable under the Court of Commerce in Antwarp. The court held that since Article 139(4) of the Constitution gave unlimited jurisdiction to the High court in all matters, a mere term of an enforceable contract could not oust this jurisdiction, per *Huadar Guangdong Chinese Co Ltd Vs Damco Logistics Uganda Limited Civil Suit No 4 And 5 Of 2012*	○ Exercising Unrestrained Judicial Authority (**UNRESTRAINED AUTHORITY**): Jealously Guarding Jurisdiction, i.e., Inherent Jurisdiction; ○ Conformity with the Constitution as a Rule of Recognition (**CONS-CONFORM**): Article 139(4) of the Constitution gave unlimited jurisdiction to the High court in all matters.	○ Constitutionalism (**CONSTLISM)**; ○ Judicial Absolutism (**JA);** ○ Contractual Justice (**CONJUS**), through Judicial Interventionism.
72.	Belex Tours & Travel v. Crane Bank Ltd & Another (N.B. Both Formalism and Flexibility were	[2013] CACA 13 (24/10/2013)	CA-Byamugisha, J.A.	The appellant defaulted on a loan from the 1ST respondent bank, and her furnished hotel was sold under foreclosure to the second respondent. The	○ Undue regard to technical or procedural defects to do substantive justice (**PROC-DISREGARD**):	○ Perception of law as Predictions (**LPREDICTIONS**): The Role of Judges: To Fill Gaps in the Law:

	applied in this decision)			appellant sued for recovery of the balance of the sale price after deducting the amount due and the value of the movable property in the hotel. The court of appeal reappraised the evidence and made its own findings not raised or even pleaded by the parties. The position in *Stephen Lubega v. Barclays Bank Ltd, CA 2/1992*, that fraud has not only to be pleaded but also particularised in the plaint was rejected as old law that was rejected in *NSSF vs. Alcon International, SCA 15/2009***.** The court therefore held that it was a classic case of 'Shylock' as the alleged sale and transfer of both the movable and immovable property was fraudulent, illegal and void because: ○ The 2nd respondent had only paid a small portion of the price and the 1ST respondent bank financed the balance through a mortgage secured by the very property of the Appellant being sold in foreclosure; ○ The transfer into the 2ND	Court rejected the requirement by precedents to plead and particularise fraud, and made independent findings of fraud and illegality not pleaded or argued; ○ Giving Procedural Justice Sway (**PROCED-SWAY**): Formalities on signing documents for land conveyance strictly applied to declare mortgage and transfer void; ○ Guidelines (**JUDGING GUIDE**): That courts in Uganda have consensus not to allow one to benefit from acts of fraud and illegality; ○ Contractual Obligations and rights determined Purposively **(PURPOSIVE**): i.e. that Benefiting from fraud or	Courts as guardians of justice gates; ○ Opportunism (**OPPORTUNISM**); ○ Conception of Law as a means to an end **(LMEANS**): Answer coming before the adjudicatory approach; ○ Tension Management Mechanism (**MGT):** Judging Guideline as Judicial Consensus; ○ Judicial Absolutism (**JA);** Mandate to override all procedural rules; ○ Substantive Justice over Procedural Justice (**SJ**); ○ Systematic Flexibility (**SYSTEM-FLEXTY**); ○ Contractual Justice (**CONJUS**), through Judicial

				respondent's names allegedly took place before the sale agreement, implying that the mortgage had been released by the time of sale, and the transaction was deceitful/fraudulent. ○ There was no public auction as alleged but a private arrangement between the respondents. The court further reasoned that: ○ The mortgage deed from which the sale took place, and the transfer instruments were null and void because the signing did not comply with the formalities of being done in latin characters or indicating names of signatories against the signatures, as commanded in sections 147 & 148 of The Registration of Titles Act; ○ "As the cases of Zaabwe vs. Orient Bank SCA 4/2006, NSSF vs. Alcon International (supra) and a host of other cases in this court and at the Supreme Court have demonstrated, courts of law in this	illegality considered injurious to parties and society; ○ Contract viewed as a network of relations and (**RELATIONS):** Contract used as an Instrument of Social Relations; ○ The judge making law (**LAW MAKING**): that Justice demands Courts to be firm guards of the gates of justice; ○ Internal Judicial Guidelines (**JUDGING GUIDE**): guards of the gates of justice, with fairness and justice.	Interventionism; ○ Conception of Contract as Relational (**RELATIONAL**).

				country will not permit parties to benefit from their illegal and fraudulent transactions to the detriment of others and society. Justice demands that in all such cases courts stand firmly on guard at the gates of justice."		
73.	Zaabwe vs. Orient Bank Ltd & 5 Others	SSCA 4/2006	SC-Kanyeihamba, JSC.	The first respondent had by foreclosure sold the Appellant's property upon default to pay a loan given to a donee of a power of attorney by the Appellant. The mortgage deed and all loan documents had been signed by the donee and the loan given to and used by her. Court reappraised the evidence in the lower court and made findings of fraud not pleaded or argued before, holding that court had such powers. The court rejected the rule in *Stephen Lubega v. Barclays Bank Ltd, CA 2/1992*, that fraud has not only to be pleaded but also particularized in the plaint. The court further reasoned that an agent doesn't have authority to use the powers	○ Undue regard to technical or procedural defects to do substantive justice (**PROC-DISREGARD**): rejected the requirement to plead and particularise fraud.	○ Systematic Flexibility **(SYSTEM-FLEXTY);** ○ Perception of law as Predictions (**LPREDICTIONS**): The Role of Judges: To Fill Gaps in the Law to arrive at what is perceived just and fair; ○ Contractual Justice (**CONJUS**), through Judicial Interventionism..

				given in a power of attorney to his/her own benefit. The bank knew that the money was to be used for the sole benefit of the donee, to the detriment of the Appellant, which made the transactions fraudulent, null and void, and so was the sale by foreclosure.		
74.	Karangwa v. Kulanju	HCCA 3/2016 [2017] UGCOMMC 91(24/8/2017)	HC-Madrama, J.	The respondent duped the supplier of goods to the Appellant, that he had a buyer for goods whose full price the Appellant had failed to pay, and orally undertook that he stood guarantor of the balance payable if the supplier could discount the debt. The issues were whether the oral guarantee was valid and enforceable. The controversy partly arose from ambiguity in the Contract Act, No. 7/2010, for: Section 10 (6) provides that all contracts by way of guarantee or indemnity shall be in writing; section 10(5) provides that all contracts above 25 currency points shall be in writing while those below may be oral of by conduct; and section 68 provides that guarantees and	○ The judge making law (**LAW MAKING**): Court resolved ambiguity in a statute by inferring additional words in sections 10(6) and 68 of the Contract Act; ○ Internal Judicial Guidelines (**JUDGING GUIDE):** Harmonisation of Statutes to resolve contradictions in them; ○ Judicial Interventionism in Contract (**JINTERV**) ***Equity*** invoked to interfere with Contract.: Contract declared unenforceable for	○ Perception of law as Predictions (**LPREDICTIONS**): The Role of Judges: To Fill Gaps in the Law; ○ Contractual Justice (**CONJUS**), through Judicial Interventionism; ○ Tension Management Mechanism **(MGT**): Judging Guideline, i.e. Harmonisation of Statutes.

				indemnities may be made in writing or orally. The court held that: ○ The above sections should read together and although they appear to contradict, the Act had to be harmonised. Accordingly, that the word 'shall' in section 10(6) being mandatory should be treated as implying that guarantees and indemnity contracts above 25 currency points shall be in writing. As such those below may be oral, so that the permissive and discretionary word 'may' used in section 68 is taken as permitting only guarantees and indemnities below 25 currency points. ○ The Respondent did not come to court with clean hands and in equity could not enforce the guarantee. The guarantee arose as a result of deceitful scheme. It was about lying the supplier that there was a buyer, who was fictitious, to make him reduce his price/debt.	offending equity- No clean hands no justice.	

75.	Portland International (PTY) Ltd v Sembule Steel Mills Ltd & 2 Ors	[2017] UGCOMMC 118 (3/10/2017)	HC-Senoga Anglin,J.	The contract provided that the law of south Africa was applicable to it and the South African Courts had exclusive jurisdiction. Court held that: ○ Under Article 139(1) of the Constitution, and section 14(1) of the Judicature Act, the High Court had unlimited jurisdiction. ○ Following LARCO Concrete Products Ltd v. Transair Ltd [1987] HCB 40 [1988-90] HCB 80, a term of the contract cannot oust the unlimited jurisdiction of the High Court, unless it is very clear and unequivocal, and such jurisdiction should be jealously guarded. ○ The court further reasoned that, "…the Defendants are residents of Uganda, carry on their business here, have witness and Advocates here. It is therefore appropriate and cost effective to maintain the suit in Uganda".	Exercising Unrestrained Judicial Authority (**UNRESTRAINED AUTHORITY**): Jealously Guarding Jurisdiction, i.e., Inherent Jurisdiction. ○ Court Interfered with a term of the contract to maintain and guard its jurisdiction; ○ Contract Law understood as including Practices (**PRACTICES);** ○ Contractual Obligations and rights determined Purposively (**PURPOSIVE**): Business expedience/efficacy and cost effectiveness used to override a term of the contract on jurisdiction.	○ Economic Efficiency (**EFFICIENCY)**: Business Efficacy; ○ Conceptioin of Law as a Means to An End (**LMEANS**): Contracts to be enforced in response to cost effectiveness; ○ Judicial Absolutism (**JA);** ○ Contractual Justice (**CONJUS**), through Judicial Interventionism.
76.	Uganda Telecom v. ZTE Corporation	[2016] CACA 59(1/12/2016)	CA-Kakuru, JA.	An appeal challenging the judge's refusal to dismiss a suit for want of a cause of action, and allowing the	○ Undue regard to technical or procedural defects to do substantive	○ Substantive Justice superior to procedural justice (**SJ).**

				matter to be heard on the merits was filed out of time. An application was made to dismiss the appeal. Court held that in the interest of justice, the appeal was allowed to proceed and be heard on the merits so that the matter could be returned to the lower court to be heard on its merits. The court called the time bar a misdemeanor.	justice **(PROC-DISREGARD);**	
77.	National Housing & Construction Corporation v. Lion Assurance Co. Ltd	[2017] UGCOMMC 14(17/2/2017)	HC-Madrama, J.	The defendant issued an advance payment guarantee for the accommodation of the plaintiff's contractor. After the contractor breached the building contract, the plaintiff sued for the guarantee value. The defendant challenged the suit on ground that no payment was made by the plaintiff to the contractor after issuance of the guarantee and yet guarantees are meant to cover future risk not past payments. The court held and reasoned that: ○ The purpose of guarantees is like letters of credit, to work as a tool of commerce. Therefore, their efficacy has to be	○ Pacta Sunt Servanda (**PACTA)**: Plea of illegality ignored to enforce Contract: Guarantees held as autonomous contracts; ○ Contractual Obligations and rights determined Purposively (**PURPOSIVE**): Practicality and Functionality used guide the applicability and meaning of parties' actions: Business efficacy as a tool of commerce.	○ Conception of Law as a Means to An End **(LMEANS);** ○ Economic Efficiency (**EFFICIENCY):** Commercialism and Wealth Maximisation: Including Business Efficacy.

				protected by enforcing them as separate contracts independent of the underlying contract. o Defences under the main contract are irrelevant, save in a few exceptions such as fraud, which was the case here for there was no payment after the guarantee yet it was concealed.		
78.	Sendege, Senyondo & Co. Advocates v. Kampala Capital City Authority	[2017] UGCOMMC 22(3/3/2017)	HC-Madrama, J.	The plaintiff, a firm of lawyers rendered legal services to the defendant, including litigation representation. The defendant, a capital city authority refused to pay for the services, alleging that the contract was illegal in far as: it was not approved by the Attorney General as constitutionally required; the procurement did not follow the procedure in the Public Procurement law; The contract did not comply with the procedure required under section 51 of the advocates Act, to wit, being notarised and filed with the Law Council; The contract had expired when some of the work was done. Court held and reasoned that: o The contract provided that	o Judicial Interventionism in Contract (**JINTERV**) Considerations of ***fairness*** invoked to interfere with contract terms, and ***Interests of justice*** invoked to enforce a contract that would otherwise be illegal; o Judicial Interventionism in Contract (**JINTERV**) ***Equity*** and **Fairness** invoked to interfere with Contract.: used to find a remedy and avoid injustice from statute.	o Legal Pluralism (**LP**): Equity as overriding and corrective of statutory law; o Substantive Justice **(SJ);** o Contractual Justice (**CONJUS)**, through Judicial Interventionism; o Public Interest as a Rule of Recognition, the basis of obligation and enforceability of in Private Contracts **(PUBLIC INTEREST).**

				the scale of advocates would be used in remuneration with a discount, as such the Supreme Court authority of Kituuma Magala declaring illegal not entered under section 51 of the advocates Act was not applicable; ○ Even if the contract was void, as long as the defendant consumed the services in equity, the plaintiff is entitled to a quantum meruit; ○ As decided in *Finishing Touches Ltd v. Attorney General, HCCS 144/2010*, non-compliance with the Procurement Law should not be used against the plaintiff, but the government officers who did not comply; ○ Public interest and the ends of justice that the consumer who consumed the services and appreciated them should pay for them.		
79.	Uganda Railways Corporation v. Bushenyi Commercial Agencies & 2 Others	[2012] CACA 31 (14/12/12)	CA	The appellant as carrier, was a third party to the contract between the respondents, but the High Court found it liable for breach of contract without a duty to indemnify being	○ Undue regard to technical or procedural defects to do substantive justice (**PROC-DISREGARD).**	○ Substantive Justice (**SJ**): ***Ubuntu concept of justice***.

				found. The Court of Appeal held that the trial judge's orders caused injustice and therefore had to be set aside.		
80.	Commodity Export International Ltd & Another v. MKM Trading Co. Ltd	[2015] CACA 81(6/10/2015)	CA-Aweri Opio, JA; Ekirikubinza, JA, & Kiryabwire, JA.	At the time the High Court heard the case, there was no law in Uganda on admissibility of computer-generated evidence. The issue was whether computer records should be admitted as best evidence, as counsel for the appellant claimed that it was only admissible when there was a way to verify it, such as diskettes being tendered. The Court of Appeal held that: ○ Computer generated evidence was admissible, relying on common law position from England, Canada and the US; ○ The best evidence rule had long lost value, the only remainder being that if the original document is in the hands of someone, then he must produce it. The court further reasoned that it was justifiable to admit	○ The judge making law **(LAW MAKING)**: Gap in legislation filled; ○ Guidelines (**JUDGING GUIDE**): consensus with U.K and Canadian Court Practices; ○ Contractual Obligations and rights determined Purposively (**PURPOSIVE**): Practicality and Functionality used guide the applicability and meaning of parties' actions, i.e., Sustainability of practice invoked to justify flexibility in admission of computer evidence and ***Practical Reality and Necessity*** grounds for new	○ Conception of Law as a means to an end **(LMEANS**); Legal Validity and Contractual Obligation judged by ***Practical Utility* :** Sustainability as criteria for determining limits of rules/Rule of Recognition of Norm Validity; ○ Conception of Law as Experience (**LEXP):**Practical Reality and Necessity as a source of imperative normativity; ○ Tension Management Mechanism (**MGT**): Judging Guideline, i.e. International Best Practices sources of imperative

				computer evidence because: ○ To require more verification was to push the matter beyond sustainable boundaries; ○ The information had been recorded and stored by an accountant in the ordinary course of business; ○ Practical reality made it necessary to recognise electronic evidence as primary evidence.	rule of evidence.	normativity.
81.	Postbank (U) Ltd v. Ssozi	[2017] SCCA 1(9/1/2017)	SC-	The issue was whether the trial judge was right in allowing a suit for breach of contract to be maintained under Summary Procedure (Order 36 Rule of the Civil Procedure Rules), when it pleaded and particularised fraud. The Court of Appeal held that the trial judge would have been wrong if the claim was for fraud, however in this case fraud was not essential to the claim, which was for a liquidated sum. The court reasoned that: ○ Order 36 was enacted to facilitate expeditious disposal of contract and debt suits of a commercial	○ The judge making law (**LAW MAKING**): ***Stretching the meaning*** and Applicability of a rule, i.e. Rule applied generously and flexibly to make litigation expeditious; ○ Contractual Obligations and rights determined Purposively (**PURPOSIVE)**: Summary procedure accepted to help the economy remove obstructions to financial and	○ Economic Efficiency (**EFFICIENCY):** Commercialism and Wealth Maximisation: Including Business Efficacy; ○ Conceptual Flexibility (**CONCEPT FLEXTY):** Including Legal Indeterminacy: dependent on market forces; ○ Conception of Law as A Means to An End **(LMEANS),** the end being commercial expediency, plus

				nature and avoid unreasonable prolonging of litigation through frivolous and vexatious defences; ○ The summary procedure also helps the economy by removing unnecessary obstructions in financial or commercial dealings.	commercial dealings.	facilitating commercialism and Economic Efficiency.
82.	Eden International School Ltd v. East African Development Bank Ltd	HCCS271/2015 (7/2/2017)	HC-Wangutusi, J.	The plaintiff challenged the compounding of interest of ½ levied by the defendant on a loan as harsh and unconscionable. The defendant claimed that it could not be sued because its creating statute gave it immunity. **The court**: ○ Relied on *Concorp International Ltd vs. East and Southern Development Bank SC No.19 of 2010*, in which such immunity was held to be restricted to suits involving member states and not private companies, to hold that if such immunity protected the defendant, it would be against public policy; and ○ Held that the ½% compound interest was not harsh and unconscionable, further	○ Contextual Interpretation of Contracts and Application of Rules (**CONTEXTUAL*): Public policy invoked*** to determine Contractual Obligations and Enforceability and ***Business Reality*** used to determine if interest terms were harsh and unconscionable and Private business protected against immunity of public corporations from legal action.**;** ○ Contractual Obligations and rights determined Purposively (**PURPOSIVE**):	○ Public Interest as a Rule of Recognition, the basis of obligation and enforceability of in Private Contracts (**PUBLIC INTEREST**): But State Policy as representing Public Interest; ○ Economic Efficiency (**EFFICIENCY):** Commercialism and Wealth Maximisation**:** Including the protection of a market economy**;** ○ Conception of Law as experience (**LEXP**); ○ Substantive Justice (**SJ**): ***Ubuntu concept***

				reasoning that, interest was low and the compounding was meant to protect and compensate the defendant against the economic vagaries and consequences of delayed payment, namely loss of opportunity cost, depreciation of the currency, risk and inflation.	Practicality and Functionality used guide the applicability and meaning of parties' actions.	***of justice***; ○ Responsiveness Parties Expectations; ○ Conception of Law as a means to an end **(LMEANS)**; Legal Validity and Contractual Obligation judged by ***Practical Utility*****:** Rule of Recognition of Norm validity.
83.	Steam Aviation FZC v. Attorney General (N.B. Both Formalism and Flexibility were applied in this decision)	HCCS 9/2010 (25/1/2015)	HC-Adonyo, J.	The plaintiff sued the defendant for non-payment, being breach of a contract she made with the Uganda Ministry of Defence to carry equipment and logistics to war zones in neighbouring countries. Admissions of the contract by both parties were presented to court. **Court dismissed the suit, reasoning that:** ○ Under section 6 of the Sale of Goods Act, and its amendment in section 10(5) of the Contract Act, 2010 contracts above	○ Literalism in contract interpretation (**LITERALISM):** ○ Applying Formalism with flexible ends in mind (**OPPORTUNISTIC FORMALISM):** high value contracts for sale of goods literally interpreted and strictly enforced; ○ The judge making law (**LAW MAKING**): Modifying a rule in	○ Opportunism (**OPPORTUNISM**); ○ Systematic Flexibility (**SYSTEM-FLEXTY**): Lack of value for legal certainty; ○ Judicial Absolutism (**JA);** ○ Conceptual Formalism (**CONCEPT-FORMAL**); ○ Conception of Law as A Means to An End (**LMEANS)**;

				200= and 25 Currency points respectively, had to be in writing to be enforced; ○ Although the parties had agreed to existence of the contract, evidence of existence of the contract should have been adduced by the plaintiff, even if it was sensitive for security reasons; ○ It is a great danger to the public for litigants to come to court with agreed positions for court to merely stamp; ○ Allowing the above would reduce the role of courts to become administrative organs and not courts of law, since not putting such contracts into writing can lead to serious consequences, such as lawyers failing to recover their fees; ○ The plaintiff did not adduce evidence of its registration in Uganda as a foreign company yet section 370 of the Companies Act required businesses to be registered before doing business or trading in Uganda; ○ No evidence was adduced	a Supreme Court Precedent, i.e. *United Assurance Co. Ltd v. Attorney General [1995] VI KALR 109*, that even without a resolution a company can authorise an act contradicted; ○ Pacta Sunt Servanda (**PACTA):** Plea of illegality ignored to enforce Contract; ○ The judge making law (**LAW MAKING**): ***Stretching the meaning*** and Applicability of a rule i.e., that writing was mandatory; pilots are required to get work permits; and a foreign unregistered company cannot enter a contract in Uganda; ○ Public interest invoked to determine Contractual Obligations and Enforceability	○ Judicial Self Preservation (**JSELF-PRESERV): S**ensitivity of Judges to Judicial Role and Relevancy; ○ Public Interest as a Rule of Recognition, the basis of obligation and enforceability of in Private Contracts (**PUBLIC INTEREST**); ○ Conception of Law as Predictions (**LPREDICTIONS**): judge's prejudices intuitions and preferences.

				that the company had passed a resolution authorising the contract; ○ The director of the plaintiff did not tender evidence of his directorship and work permit since he was at all times flying the aircrafts from Uganda.	(**PUBLIC INTEREST);** ○ Exercising Unrestrained Judicial Authority (**UNRESTRAINED AUTHORITY**): Jealously Guarding Jurisdiction, i.e., Inherent Jurisdiction: Protection of Court's role and relevancy in the legal system cited to insist on adversarial and non-compromising litigation.	
84.	SDV Transami (U) Limited v Agrimag Limited & Jubilee Insurance Co. of Uganda.	HCT-00-CC-AB-002-2006 [2008]UG COMM. 33	HC- Egonda-Ntende, J.	A contract of carriage between the parties provided that goods were carried at owner's risk and no liability was to arise save in cases of gross negligence. The arbitrator's decision was that no negligence had been proved but he had to invoke the doctrine of res ipsa loquitor and infer gross negligence thus making the award. An application was then brought before the Commercial Court to set	○ Legal Classificatory Categories ignored **(NO CATEGORIES)**: Treating Economic Negligence as Contractual and used to justify liability; ○ Using indeterminate doctrines (**INDETERM-DOCTRINE),** i.e. contemplation of contracting parties	○ Conceptual Flexibility (**CONCEPT FLEXTY):** Including Legal Indeterminacy; Law as a Means to an End (**LMEANS**); ○ Law as Neutral; ○ Systematic Flexibility (**SYSTEM-FLEXTY);** ○ Judicial Absolutism (**JA**); ○ Conception of Contract as

				aside the arbitral award under section 34 of the Ugandan Arbitration Act, which allows setting aside where the arbitrator deals with issues not contemplated by the parties; or not falling within his/her terms of reference; and where the award is contrary to the Act or public policy. **The judge upheld** the arbitrator's award, **reasoning that**, in such cases, the "apt" question is whether the special and general damages awarded 'conformed to the considerations of justice and fairness	and public policy under Section 34 of the Arbitration Act; ○ Judicial Interventionism in Contract (**JINTERV**) Considerations of ***fairness*** invoked to interfere with contract; ○ Abductive Reasoning in interpretation of statute or precedents (**ABDUCTIVE**)**:** Judge's sense of justice and fairness used to override terms enforceability.	Relational (**RELATIONAL**): Including contractual obligations being based on ***Reliance***; ○ Conception of Law as Predictions (**LPREDICTIONS**); ○ Contractual Justice (**CONJUS)**, through Judicial Interventionism: Fairness and justice as criteria for enforceability of contracts.
85.	Hydro Engineering Services Co. Uganda Limited v. Thorne International Boiler Services Limited.	HCCS No. 818/ 2003 (Unreported)	HC-Bamwine, J.	The defendant contracted the plaintiff to carry out construction under a fixed price contract, but the defendant failed to complete the works and instead demanded more money as a condition for completion, leading the plaintiff to rescind the contract. While applying the doctrine of substantial performance enunciated in *Bolton v.*	○ Using indeterminate doctrines (**INDETERM-DOCTRINE**): An open textured rule- the substantiality test used to create legal indeterminacy and uncertainty; ○ Judicial Interventionism in Contract	○ Contractual Justice (CONJUS**)**, through Judicial Interventionism: Fairness as a criteria for enforceability of contracts; ○ (**SYSTEM-FLEXTY**); ○ Conceptual Flexibility (**CONCEPT FLEXTY):**

				Mahadeva, *[1972] 1 WLR 1009,* having noted that the plaintiff had breached the construction contract, **the Judge held and reasoned that:** ○ The plaintiff was entitled to the full contract price on grounds of fairness, since 'full performance was made impossible… by the defendant's uncompromising and unreasonable inflexibility towards the contractor.'	(**JINTERV**) Considerations of ***fairness*** invoked to interfere with contract terms; ○ Flexibility recognised as a judging paradigm **FLEXIBILITY).**	Including Legal Indeterminacy;
86.	Traces SA v. Attorney General	HCCS No 525 of 2006	HC-Kabiito, J.	A foreign investor was invited by the government through a public bidding process and contracted to collect TV Licence fees. However, after investing in preparatory works and collecting for only nine days, the President abolished the fees at a political rally. The Judge found for the foreign investor (plaintiff), but declined to grant the remedies stipulated in the contract or declare specific performance. In reasoning, the judge cited the President's pronouncement as having	○ Judicial Interventionism in Contract (**JINTERV**) Considerations of ***fairness*** invoked to interfere with contract terms: reading into and finding wider implications in contracts whose express provisions say otherwise; ○ Contextual Interpretation of Contracts and Application of Rules **(CONTEXTUAL**): Substituted the agreement of the	○ Judicial Absolutism **(JA);** ○ Conception of Law as Experience (**LEXP):** Responsiveness to executive political wishes as condition for enforceability of Contracts; ○ Conception of Law as a Means to An End **(LMEANS**); ○ Legal Pluralism **(LP**): i.e. Responsiveness to Public policy as condition for enforceability of

				changed government 'policy' that TV licences should not be paid by non-commercial viewers, despite statutory law that still says that they should.	parties with what would best serve the political wishes of the president.	Contracts; ○ Public Interest as a Rule of Recognition, the basis of obligation and enforceability of in Private Contracts (**PUBLIC INTEREST**): But State Policy as representing Public Interest. ○
87.	Equinox Global Trading Co Ltd Vs. Panalpina Uganda Ltd (N.B. Both Formalism and Flexibility were applied in this decision).	HCCS 0314 of 2008	HC-Arach-Amoko, J.	A Bill of Lading was issued by and reflected the carrier as Paintainer Express Line and the place of delivery as Kampala-Uganda. The issue was whether there was a contract with the defendant to transport the goods from Mombasa to Kampala. **The Judge held that** the Bill of Lading summarises the terms of the contract of carriage and therefore, the carrier was Pantainer Express Line Ltd and not the defendant. Attempts to prove the terms, other than those written in the contract, were rejected.	○ Judicial Interventionism in Contract (**JINTERV**): Filling gaps in contracts with implied terms;	○ Contractual Justice (**CONJUS**), through Judicial Interventionism. ○ Inequality under the law (**INEQUALITY**); ○ Conception of Contract as Discrete (**DISCRETE**);

88.	Jjagwe v. Standard Chartered Bank (U) Ltd.	HCCS 375/2004	HC-Bamwine. J.	The bank was proved and held as having sold the plaintiff's security upon default to repay a loan in a hurried manner. The court reasoned that: ○ At equity the fairness of each such transaction is a question of the particular circumstances. The flexibility created by equity is not too much, therefore lenders have a duty to ensure that they get good advice and use proper agents, to get a good price.	○ Contextual Interpretation of Contracts and Application of Rules (**CONTEXTUAL**): Invoking ***Business Reality and Commercial Sense***; ○ Flexibility recognised as a judging paradigm **FLEXIBILITY**); ○ Contract Law understood as including Practices (**PRACTICES**): commercial practice of using agents to get a good price as superior to sanctity of contract.	○ Economic Efficiency (**EFFICIENCY**); ○ Substantive Justice (SJ): *Ubuntu concept of justice*; ○ Contractual Justice **(CONJUS**), through Judicial Interventionism.
89.	Matovu & Others V. Attorney General	M.A 143/2008 (from HCCS 248/2003)	Kibuuka Musoke J,	The 475 plaintiffs were former employees of a government corporation. Their services had been terminated but their retirement benefits and gratuity not fully paid, thus the claim. Government had admitted liability through several letters but refused to pay the claim without court	○ Undue regard to technical or procedural defects to do substantive justice (**PROC-DISREGARD**); ○ Contextual Interpretation of Contracts and Application of Rules (**CONTEXTUAL**):	○ Substantive Justice Superior to Procedural Justice **(SJ**): ***And Ubuntu Conception of Justice***; ○ Judicial Absolutism (**JA**); ○ Tension Management Mechanism

				making a finding. An application was made for judgment on admission, which the Attorney General opposed on ground that the admissions were internal classified government communication and not unequivocal. The judge held in favour of the plaintiffs, reasoning that: o For purposes of court receiving admissions, Government was equal to private parties, therefore admissions against it receivable; o The form of admissions and the manner in which they were made was immaterial, quoting with approval, *R v. Simon (1834) 6 C & P 540; and Halsbury's Laws of England, 3rd edn. Vol. 15, par. 536-539;* o Where admissions were unequivocal, court loses discretion whether to enter judgment or not. It must enter judgment; o The award of damages is in the sole discretion of the court; o The case had spent 9 years in court while the plaintiff being denied their	the 9 year delay in the case, and the aging and dying of many plaintiffs considered; o Exercising Unrestrained Judicial Authority (**UNRESTRAINED AUTHORITY)**: Exercise of Unfettered Discretion i.e., award of general damages; o Internal Judicial Guidelines (**JUDGING GUIDE**): Unequivocal admissions take away discretion of court, i.e. ***discretion limited by unequivocal proof***.	**(MGT**): Judicial Absolutism Limited By Unequivocal Admissions/Proof .

				gratuity, therefore court had to award general damages. ○ **NB. The researcher having been counsel for the plaintiffs adds that at the trial, the judge commented off record that, it was inhuman for the defendant to see people aging and other dying while still insisting on not paying them gratuity for having served the country for so long.**		
90.	R.L Jain v. Kamugisha (N.B. Both Formalism and Flexibility were applied in this decision)	[2015] UGCOMMC 77 (Dated 14/4/2015)	Madrama J,	The plaintiff sued challenging interest levied under the terms of a loan agreement as harsh and unconscionable, and that court should interfere under section 12 of the Money Lenders Act and 26 of the Civil Procedure Act. It had been agreed that in the event of default of repayment, the outstanding amounts would attract 15% interest per month. Court held and reasoned that: ○ Under section 21 of the Money Lenders Act, transactions secured by mortgages are excluded from the provisions of the	○ Judicial Interventionism in Contract (**JINTERV**) Considerations of ***fairness*** invoked to interfere with contract terms; ○ Exercising Unrestrained Judicial Authority (**UNRESTRAINED AUTHORITY**): Exercise of Unfettered Discretion i.e., to determine what interest is harsh and unconscionable; ○ Using indeterminate	○ Conceptual Flexibility (**CONCEPT FLEXTY**): The statute emitting flexibility by giving courts unfettered discretion to determine indeterminate doctrines i.e. harsh and unconscionable; ○ Judicial Absolutism (**JA);** ○ Contractual Justice through Judicial Interventionism (**CONJUS**); ○ Procedural Justice

				said law; ○ Although section 12 of the Money Lenders Act was not applicable, section 26 of the Civil Procedure Act was invoked to reduce the interest rate, as it gave courts the discretion to interfere with interest they deemed ***harsh and unconscionable***; ○ The ***notions of sanctity and freedom of contract*** expounded in *Sharif Osman v. Haji Haruna Mulanga, SCA 38/1995* commanded courts to give effect to the clear intentions of the parties gathered from the agreement and not make a contract for them, such as interfering interest. However, the ***case was distinguishable*** as it did not have a penal interest clause.	doctrines (**INDETERM-DOCTRINE**): unconscionable; ○ Giving Procedural Justice Sway (**PROCED-SWAY**): Restricting litigant's case to Pleadings.	as Superior to Substantive Justice (**PJ).**
91.	Graphic Systems (U) Limited v. SDV Transami (U) Limited	HCCS No. 468 of 2012 (**Unreported-Judgment dated 15/10/2014)**	HC-Wangutusi, J.	The plaintiff brought a subrogation suit, having been paid by the insurer, for damages under a carriage contract, for loss arising from alleged short landing of goods transported. The defendant denied existence of a contract of carriage, alleging that she acted as a local collecting and	○ Exercising Unrestrained Judicial Authority (**UNRESTRAINED AUTHORITY**): Exercise of Unfettered Discretion; ○ Judicial Interventionism in Contract (**JINTERV**): Filling	○ Judicial Absolutism (**JA**); ○ Contractual Justice (**CONJUS**), through Judicial Interventionism, i.e. writing a contract for the parties, where none can be proved;

				coordination agent, the carriage contract having been between the plaintiff and a Dutch company. The Plaintiff tendered an invoice from the defendant dated after the goods had arrived, for services alleging that it was the contract. Further, the defendant, represented by the researcher adduced evidence proving that documents authored by the plaintiff's carrier and clearing agents indicated no short landing of goods. During cross-examination, the insurer's loss assessor, a part from admitting that he had lied about his qualifications, disowned the report he had given to the insurer as the basis of proof of lost goods and their value, confessing that he was embarrassed by it, for being full of contradictions, and that the insurer should never have relied on it to pay. **The judge held and reasoned that:** o One would be tempted to think that by the time the goods arrived in the country no contract existed between the	gaps in contracts with implied terms; o Undue regard to technical or procedural defects to do substantive justice (**PROC-DISREGARD**): Rules of evidence and proof disregarded and the judge becoming the litigant; o Abductive Reasoning in interpretation of statute or precedents (**ABDUCTIVE):** Judge's sense of justice used to override terms enforceability.	o Conception of Law as Predictions (**LPREDICTIONS**).

				parties, however since the Dutch received instructions to transport the goods through the defendant, the presumption is that the invoice was the reduction into writing what had been agreed already; ○ Although the expert admitted shortfalls in his report, and never spoke to potential suppliers that issued him an invoice for value of lost goods, the invoice should be trusted. **N.B**, in this case, the judge suppressed evidence proving that all the goods were carried by the Dutch company, and if any loss occurred, it was in the hands of the plaintiff' local agents, and he ignored admissions by the expert that his report was not believable.		
92.	Kavuma v. First Insurance Co. Limited	HCCS No. 442/2013 (**Unreported- Judgement of 16/5/2018**).	HC- Kainamura, J.	The insured claimed indemnity for the value of his Mercedes Benz G 300 completely destroyed in a fire. The defendant had repudiated liability on ground that the vehicle had been a G50, that was upgraded to a G300, by adding parts for the latter model, a fact not	○ Judicial Interventionism in Contract (**JINTERV**) Considerations of ***fairness and equity*** invoked to interfere with contract terms.	○ Contractual Justice through Judicial Interventionism (**CONJUS);** ○ Substantive Justice as superior to even rules on judicial authority (**SJ)**;

				brought to the attention of the insurer, and which would have affected the decision to enter the insurance contract including the premium. **The court held and reasoned that:** Changing the model of the vehicle and concealing the fact from the insurer was a breach of good faith, an implied term in every insurance contract, an act of fraud and a ground for the insurer to repudiate the claim/liability. The judge relied on *Pan Atlantic Insurance C. Limited v. Pine Top Ins. Co. [1995] A.C. 501; HIH Casuality and general Insurance v. Chase Manhattan Bank [2003] UKHL, and Carter v. Boehm (1766) 3 Burr 1905.*		
93.	Barclays Bank of Uganda v. Geofrey Mubiru	S.C.C.A 1/ 1998 (judgement of 24/2/1999).	Kanyeihamba, J.S.C.	The Respondent sued for unlawful dismissal having worked with the respondent since 1969, but dismissed without notice for failing to abide by the Appellant bank's lending limits. The High Court held that his contract could not be terminated before he reached retirement age and awarded him salary for the	○ Contextual Interpretation of Contracts and Application of Rules (**CONTEXTUAL**); ○ Contractual Obligations and rights determined Purposively (**PURPOSIVE**): Practicality and	○ Conception of Contract as Relational (**RELATIONAL**): Including contractual obligations being based on ***Reliance***; ○ Contractual Justice through Judicial

				time left to his retirement and general damages. In the Supreme Court, **the judge held and reasoned that:** ○ The banks manage and control money belonging to other people and institutions in their thousands and in a fiduciary relationship with customers; ○ The employee of a bank should exercise reasonable skill and competence since he was employed on the basis that he held out himself as being skilled to do that type of work; ○ In the judge's opinion, in the banking business any careless act or omission if not quickly remedied is likely to cause great losses to the bank and its customers plus loss of reputation to the bank and therefore loss to its customers and investors upon which the existence and business of a bank depends; ○ Notwithstanding a fixed term contract, a bank employee can be dismissed summarily before expiry of the term;	Functionality used guide the applicability and meaning of parties' actions, i.e., Business reality used; ○ Using indeterminate doctrines (**INDETERM-DOCTRINE)**: reasonableness of notice period; ○ Judicial Interventionism in Contract (**JINTERV**): that it was proper to invoke Considerations of ***equity (fiduciary relationship notion)*** to interfere with contract terms; ○ Contract viewed as a network of or other relations (**RELATIONS):** Intention to Create a Long Term Relationship of Parties Recognised. ○ Abductive Reasoning to resolve competing interests or in	Interventionism (**CONJUS);** ○ Conception of Law as Predictions (**LPREDICTIONS**); ○ Economic Efficiency (**EFFICIENCY):** Commercialism and Wealth Maximisation**:** Business Efficacy; ○ Conception of Law as Experience (**LEXP):** Responsiveness to business reality and stakeholder interests as condition for enforceability of bank-employee Contracts; ○ Conception of Law as a Means to An End **(LMEANS**); ○ Conceptual Flexibility (**CONCEPT FLEXTY):** Including Legal Indeterminacy;

				○ The employee having exceeded his lending limits was a serious and negligent act which the trial judge should have considered; ○ Since a notice period for termination had been agreed under the terms of the contract, the proper remedy should have been damages for payment in lieu of reasonable notice and not lost income, which has no foundation in law; ○ Reasonable notice would depend on the nature of the employment and its duration.	interpretation of statute or precedents (**ABDUCTIVE):** Intuition and preference of the judge used, i.e., the Judge's sense banking of business used.	Conception of Law as a means to an end **(LMEANS**); Legal Validity and Contractual Obligation judged by ***Practical Utility*****:** Rule of Recognition of Norm validity.
94.	Post Bank (U) Limited v. Abdu Ssozi	[2017] SCCA 1 (19/1/2017)	Tumwesigye, JSC,	In a summary suit to recover money, the bank pleaded fraud in the plaint. The issue was whether the plea of fraud disqualified the plaint from Order 36 Rule 2 permitting summary procedure for liquidated amounts where no clear defence exists and all claims arise from contract. Notwithstanding the law in precedents on summary suits that any plea that requires proof beyond the contract and; pleadings takes the case out of Order 36, **the Judge held and reasoned**	○ Abductive Reasoning to resolve competing interests or in interpretation of statute or precedents (**ABDUCTIVE):** Intuition and preference of the judge on the role of courts in the economy used; ○ Contextual Interpretation of Contracts and Application of Rules (**CONTEXTUAL**);	○ Economic Efficiency (**EFFICIENCY):** Commercialism and Wealth Maximisation**:** Business Efficacy; ○ Conception of Law as a Means to An End **(LMEANS**); ○ Conceptual Flexibility (**CONCEPT FLEXTY):** Including Legal Indeterminacy; ○ Conception of

				that: ○ The plaint fulfilled the requirements since the claim was based on breach of contract and not fraud, fraud not being essential in the case and merely incidental; ○ The purpose of Order 36 was to facilitate expeditious disposal of cases involving debts and commercial contracts, by preventing frivolous and vexatious defences to unreasonably delay litigation; ○ Order 36 was also intended to help the economy by removing unnecessary obstructions.	○ Contractual Obligations and rights determined Purposively (**PURPOSIVE**): Practicality and Functionality used guide the applicability and meaning of parties' actions: Business reality used.	Law as a means to an end **(LMEANS**); Legal Validity and Contractual Obligation judged by ***Practical Utility*****:** Rule of Recognition of Norm validity; ○ Systematic Flexibility (**SYSTEM-FLEXTY);** ○ Conception of Law as Experience (**LEXP**).

APPENDIX 6: Presentation of Findings in Tables and Figures

Table 2: Prevalence of Judging Approaches during Uganda's Political Historical Epochs (Percentages)

	Colonial	1962-1986	1986-2018
Formalistic	44.29	32.93	20.27
Flexibility	48.57	45.12	45.27
Flexibility and	7.14	21.95	34.46

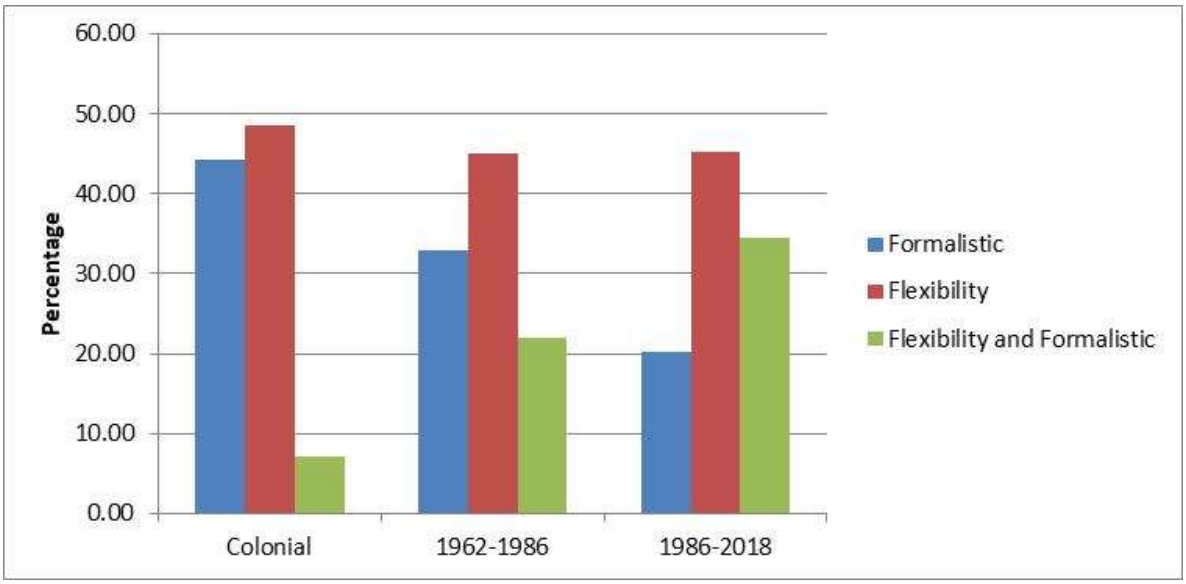

Figure 13: Prevalence of Judging Approaches during Uganda's Political Historical Epochs

Table 3: Frequency of Reference to Judging Guidelines in the Various Periods (percentages)

	Colonial	1962-1986	1986-2018
MGT	2.86	6.10	8.78
Judging Guide	2.86	0.00	7.43

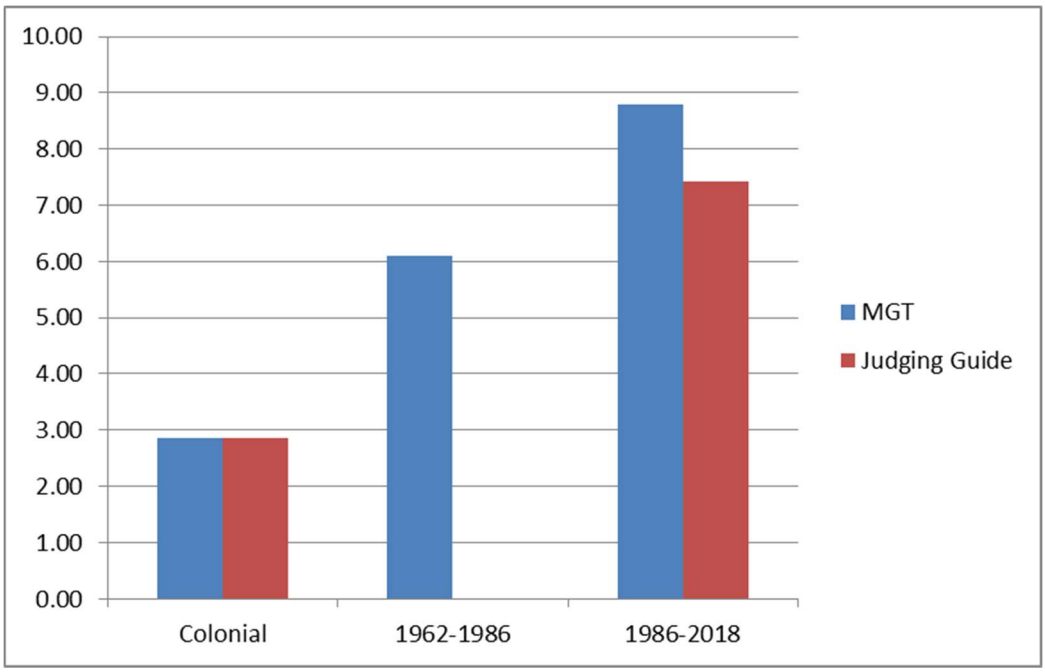

Figure 14: Frequency of Reference to Judging Guidelines in the Various Periods (percentages)

Table 4: Prevalence of Internal Values behind Flexibility in the Various Periods

	Colonial	1962-1986	1986-2018
CONTEXTUAL	45.45	29.73	40.00
JINTERV	33.33	27.03	27.69
LAW MAKING	24.24	37.84	27.69
PROC-DISREGARD	24.24	8.11	16.92
PRACTICES	21.21	10.81	9.23
PURPOSIVE	18.18	16.22	27.69
INDETERM-DOCTRINE	15.15	21.62	16.92
NO-EQUALITY	9.09	8.11	3.08
UNRESTRAINED AUTHORITY	9.09	0.00	13.85
ABDUCTIVE	6.06	8.11	12.31
INDUCTIVE	6.06	0.00	0.00
NO CATEGORIES	6.06	8.11	9.23
RESTORATION	3.03	2.70	0.00
CRIMINALISING	0.00	10.81	0.00
FLEXIBILITY	0.00	0.00	6.15
OPPORTUNISTIC FORMALISM	0.00	0.00	1.54
RELATIONS	0.00	16.22	9.23
SINTERV	0.00	13.51	0.00

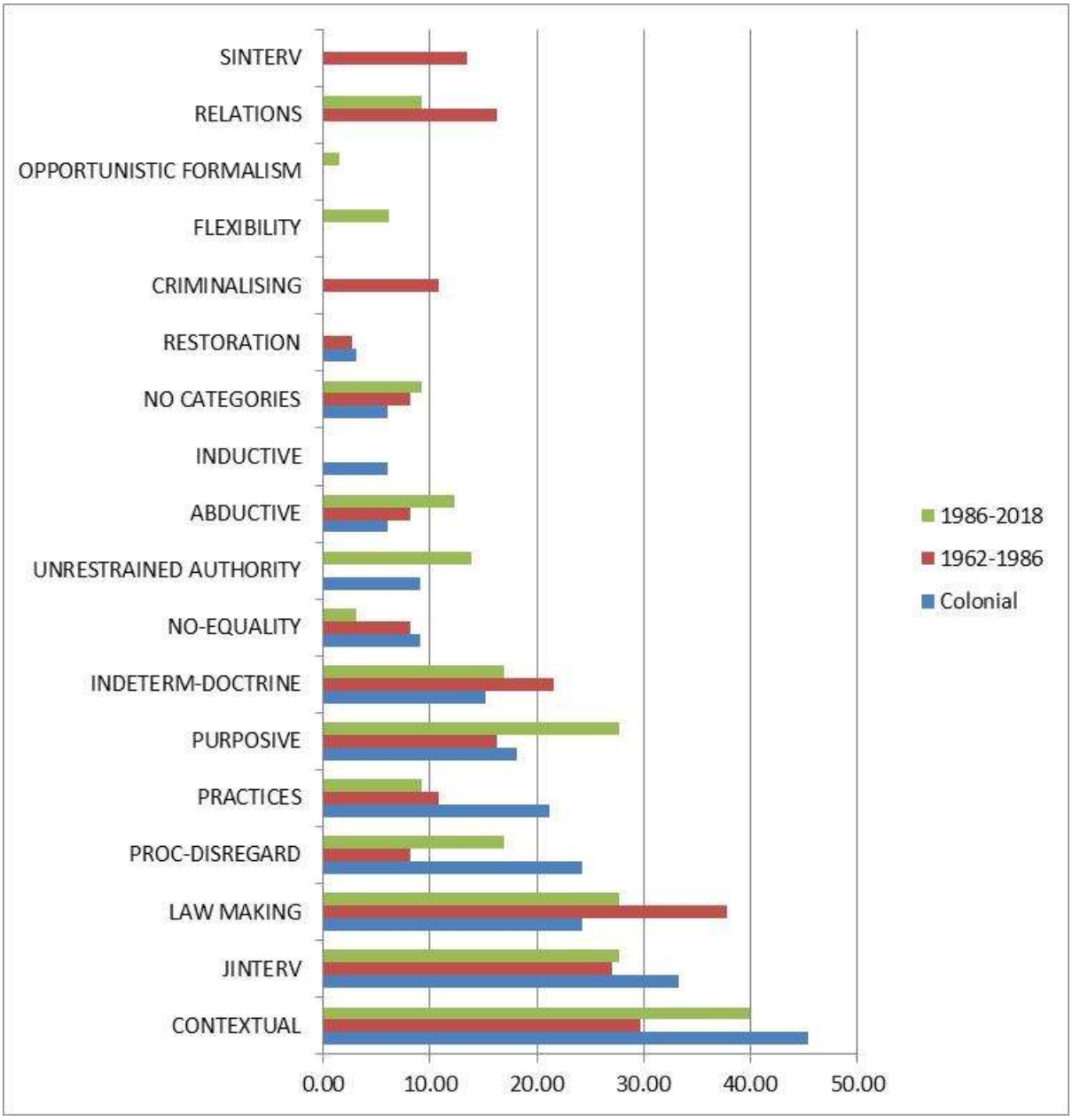

Figure 15: Prevalence of Internal Values behind Flexibility in the Various Periods

Table 5: Prevalence of External Values Behind Flexibility in the Various Periods

	Colonial	1962-1986	1986-2018
CONJUS	51.52	32.43	33.85
JA	48.48	37.84	33.85
SJ	39.39	35.14	46.15
EFFICIENCY	36.36	27.03	32.31
LPREDICTIONS	27.27	10.81	27.69
LMEANS	24.24	32.43	43.08
CONCEPT-FLEXTY	24.24	29.73	32.31
LEXP	24.24	29.73	20.00
RELATIONAL	9.09	24.32	20.00
SOCIAL SUPPORT	9.09	13.51	4.62
INEQUALITY	9.09	13.51	3.08
SYSTEM-FLEXTY	6.06	8.11	16.92
LP	6.06	10.81	6.15
JSELF-PRESERV	6.06	0.00	4.62
OPPORTUNISM	3.03	0.00	1.54
RESTITUTION	3.03	2.70	0.00
PUBLIC INTEREST	0.00	13.51	10.77
COMM-ECON	0.00	10.81	0.00
COORD-ECON	0.00	2.70	0.00

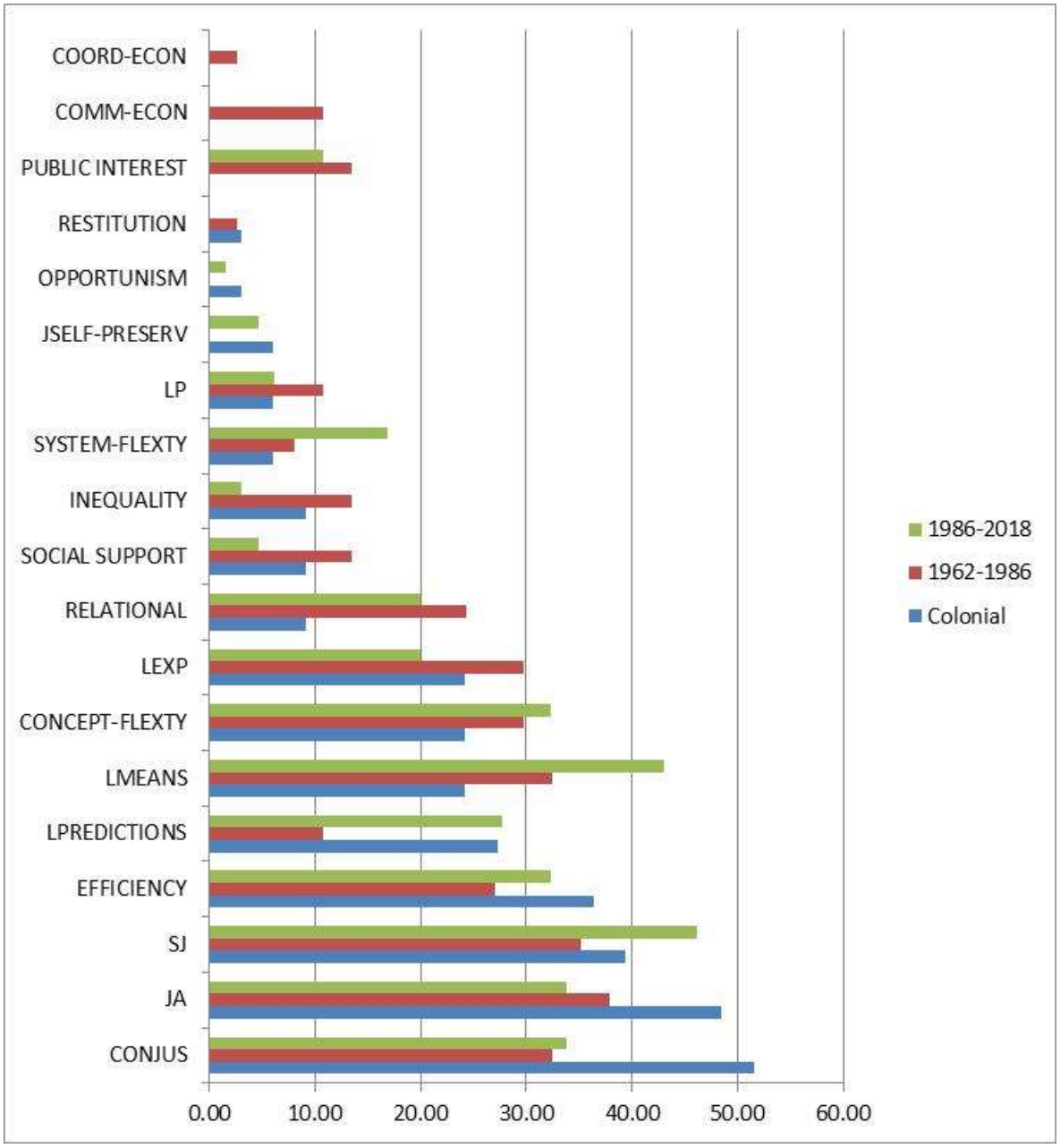

Figure 16: Prevalence of External Values Behind Flexibility in the Various Periods

Table 6: Prevalence of Internal Values behind Formalism in the Various Periods

	Colonial	1962-1986	1986-2018
LOGICAL-MECHANIC	48.28	29.17	28.57
PACTA	34.48	54.17	50.00
PROCED-SWAY	31.03	45.83	39.29
LITERALISM	20.69	25.00	14.29
MONEY-VALUE	13.79	0.00	0.00
EXPECTANCY	3.45	0.00	0.00
ACTURAL LOSS	0.00	4.17	7.14
CERTAINTY	0.00	0.00	3.57
EQUALITY PRESUMPTION	0.00	4.17	17.86
GENERAL PRINCIPLES	0.00	12.50	14.29
LCATEGOTIN	0.00	4.17	0.00
NON-LEGAL INFERIOR	0.00	0.00	7.14

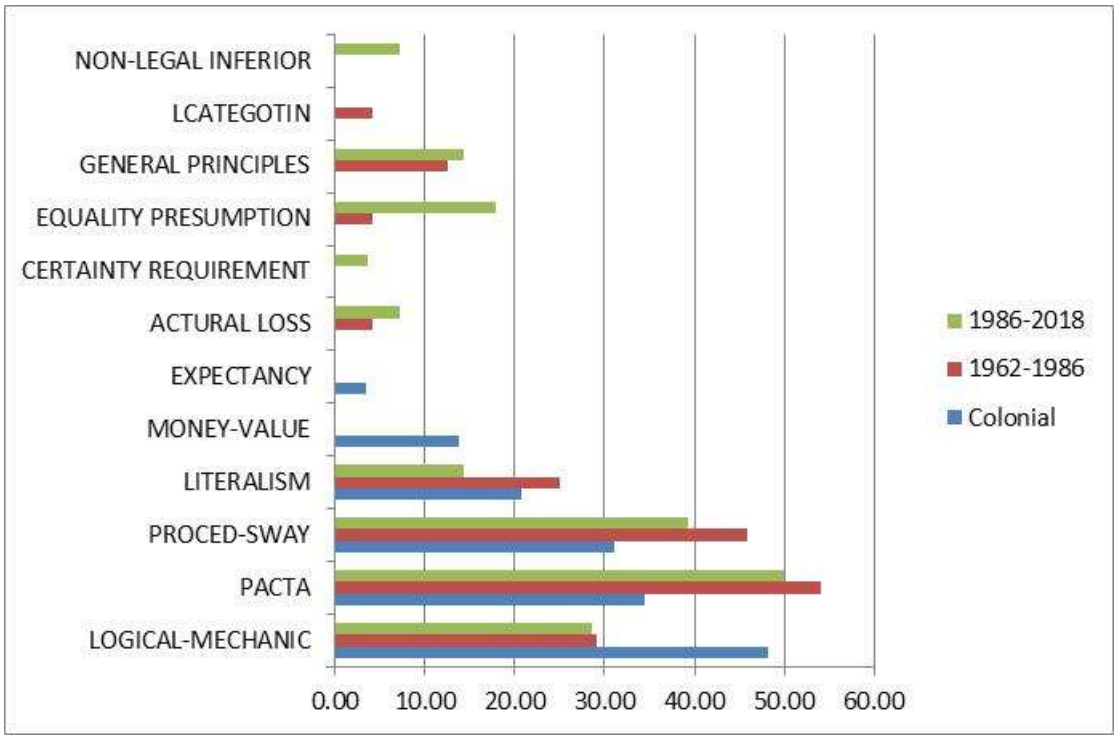

Figure 17: Prevalence of Internal Values behind Formalism in the various periods

Table 7: Prevalence of External Values behind Formalism in the Various Periods

	Colonial	1962-1986	1986-2018
POSITIVISM	44.83	37.50	39.29
FOC	37.93	54.17	46.43
SANCTITY	34.48	41.67	42.86
COL	31.03	12.50	28.57
PJ	31.03	41.67	25.00
CONCEPT-FORMAL	27.59	29.17	42.86
DISCRETE	24.14	33.33	42.86
ACCURACY	13.79	4.17	7.14
ROC-NONMAKERS	10.34	16.67	28.57
PROMISE	6.90	0.00	0.00
PAROL EVIDENCE	3.45	12.50	10.71
FORMALITY	3.45	0.00	0.00
EQUALITY	0.00	4.17	17.86
DETERMINACY	0.00	0.00	3.57
EXPEDIENCY	0.00	0.00	3.57

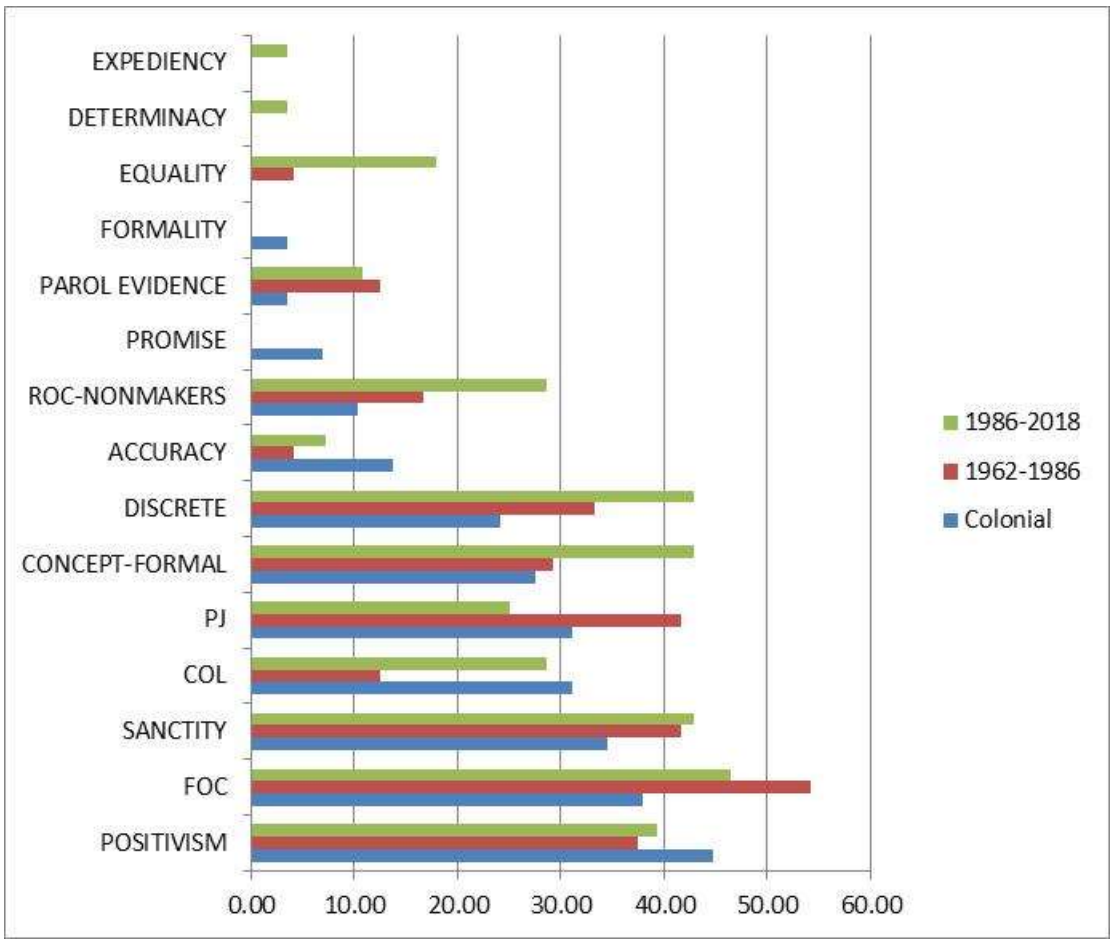

Figure 18: Prevalence of External Values behind Formalism in the various periods

Table 8: Prevalence of Internal Values behind the Mixed Approach in the Various Periods

	Colonial	1962-1986	1986-2018
LOGICAL-MECHANIC	50.00	33.33	14.55
RELATIONS	50.00	14.29	12.73
CONTEXTUAL	37.50	38.10	16.36
PROCED-SWAY	37.50	23.81	29.09
LAW MAKING	25.00	9.52	25.45
MONEY-VALUE	25.00	0.00	0.00
PACTA	25.00	28.57	38.18
FLEXIBILITY	12.50	0.00	0.00
INDETERM-DOCTRINE	12.50	9.52	14.55
LITERALISM	12.50	19.05	10.91
PURPOSIVE	12.50	0.00	18.18
ABDUCTIVE	0.00	4.76	7.27
ACTUAL LOSS	0.00	14.29	3.64
CONS-CONFORM	0.00	4.76	5.45
CONTRACT-CERTAINTY	0.00	0.00	5.45
EQUALITY PRESUMPTION	0.00	9.52	1.82
EXPECTANCY	0.00	4.76	1.82
GENERAL PRINCIPLES	0.00	4.76	1.82
JINTERV	0.00	9.52	10.91
LCATEGOTIN	0.00	0.00	7.27
NO CATEGORIES	0.00	19.05	5.45
NO-EQUALITY	0.00	14.29	9.09
NO-FAIRNESS	0.00	0.00	1.82
NON-LEGAL INFERIOR	0.00	0.00	1.82
OPPORTUNISTIC FORMALISM	0.00	4.76	18.18
ORDER-UNCERTAIN	0.00	0.00	1.82
PRACTICES	0.00	14.29	9.09
PROC-DISREGARD	0.00	0.00	9.09
RESTORATION	0.00	0.00	3.64
UNRESTRAINED AUTHORITY	0.00	9.52	21.82

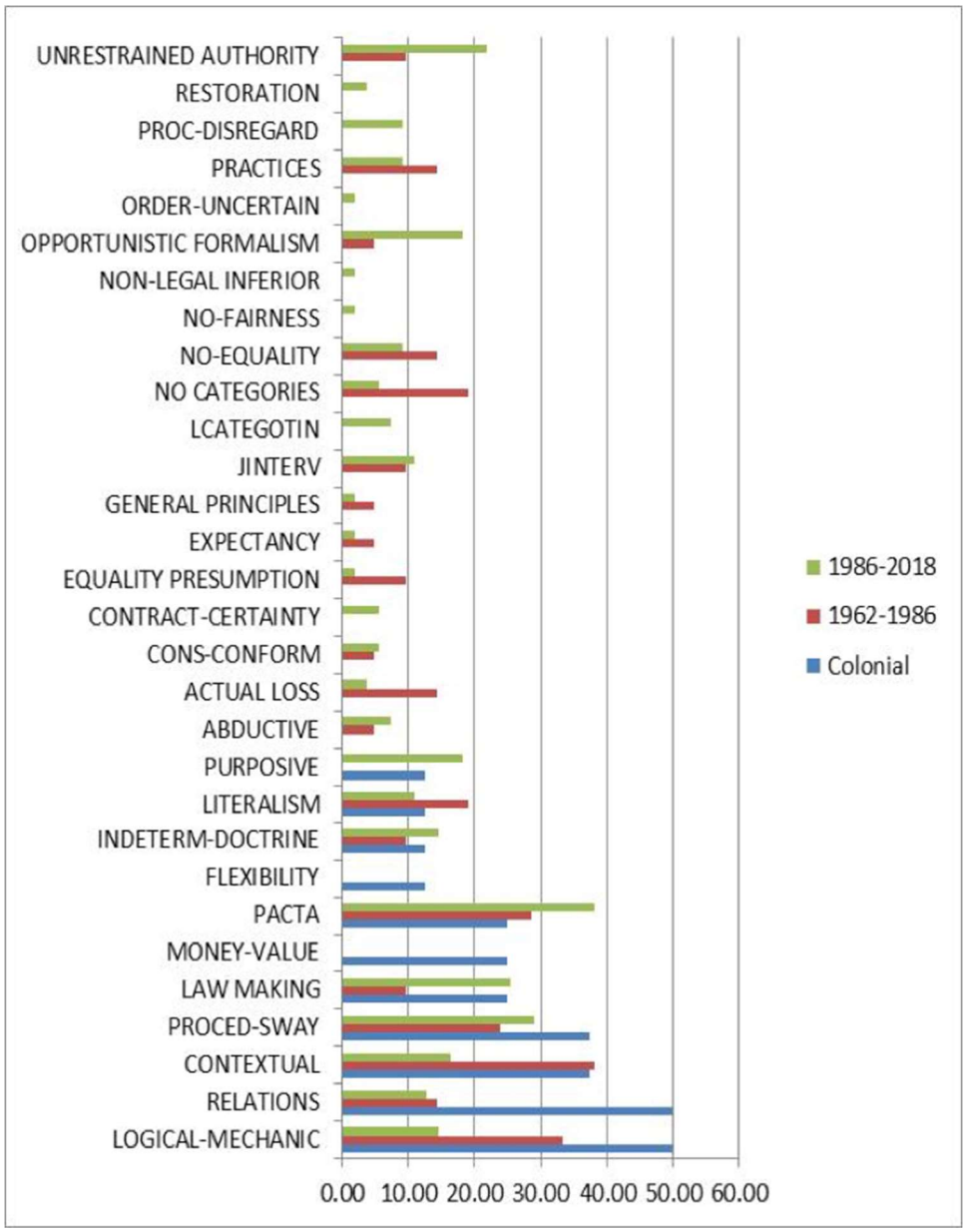

Figure 19: Prevalence of Internal Values behind the Mixed Approach in the Various Periods

Table 9: Prevalence of External Values behind the Mixed Approach in the Various Periods

	Colonial	1962-1986	1986-2018
RELATIONAL	50.00	23.81	10.91
CONCEPT-FLEXTY	37.50	33.33	18.18
EFFICIENCY	37.50	23.81	23.64
POSITIVISM	37.50	47.62	21.82
ACCURACY	25.00	19.05	3.64
FOC	25.00	33.33	25.45
LMEANS	25.00	33.33	30.91
LPREDICTIONS	25.00	4.76	20.00
PJ	25.00	19.05	14.55
SANCTITY	25.00	9.52	32.73
COL	12.50	9.52	12.73
CONCEPT-FORMAL	12.50	19.05	20.00
JA	12.50	14.29	23.64
LEXP	12.50	19.05	12.73
OPPORTUNISM	12.50	9.52	23.64
ROC-NONMAKERS	12.50	4.76	3.64
SJ	12.50	4.76	21.82
SYSTEM-FLEXTY	12.50	9.52	10.91
CLASSFICATION	0.00	4.76	0.00
CONJUS	0.00	14.29	14.55
DETERMINACY	0.00	0.00	7.27
DISCRETE	0.00	19.05	18.18
EQUALITY	0.00	9.52	1.82
EXPEDIENCY	0.00	0.00	1.82
INACCURACY	0.00	0.00	3.64
INEQUALITY	0.00	28.57	10.91
JSELF-PRESERV	0.00	14.29	10.91
LP	0.00	14.29	3.64
PAROL EVIDENCE	0.00	4.76	3.64
PROMISE	0.00	9.52	5.45
PUBLIC INTEREST	0.00	0.00	7.27
PURPOSIVE	0.00	4.76	0.00
RESTITUTION	0.00	0.00	5.45
SINTERV	0.00	14.29	1.82
SOCIAL SUPPORT	0.00	4.76	7.27

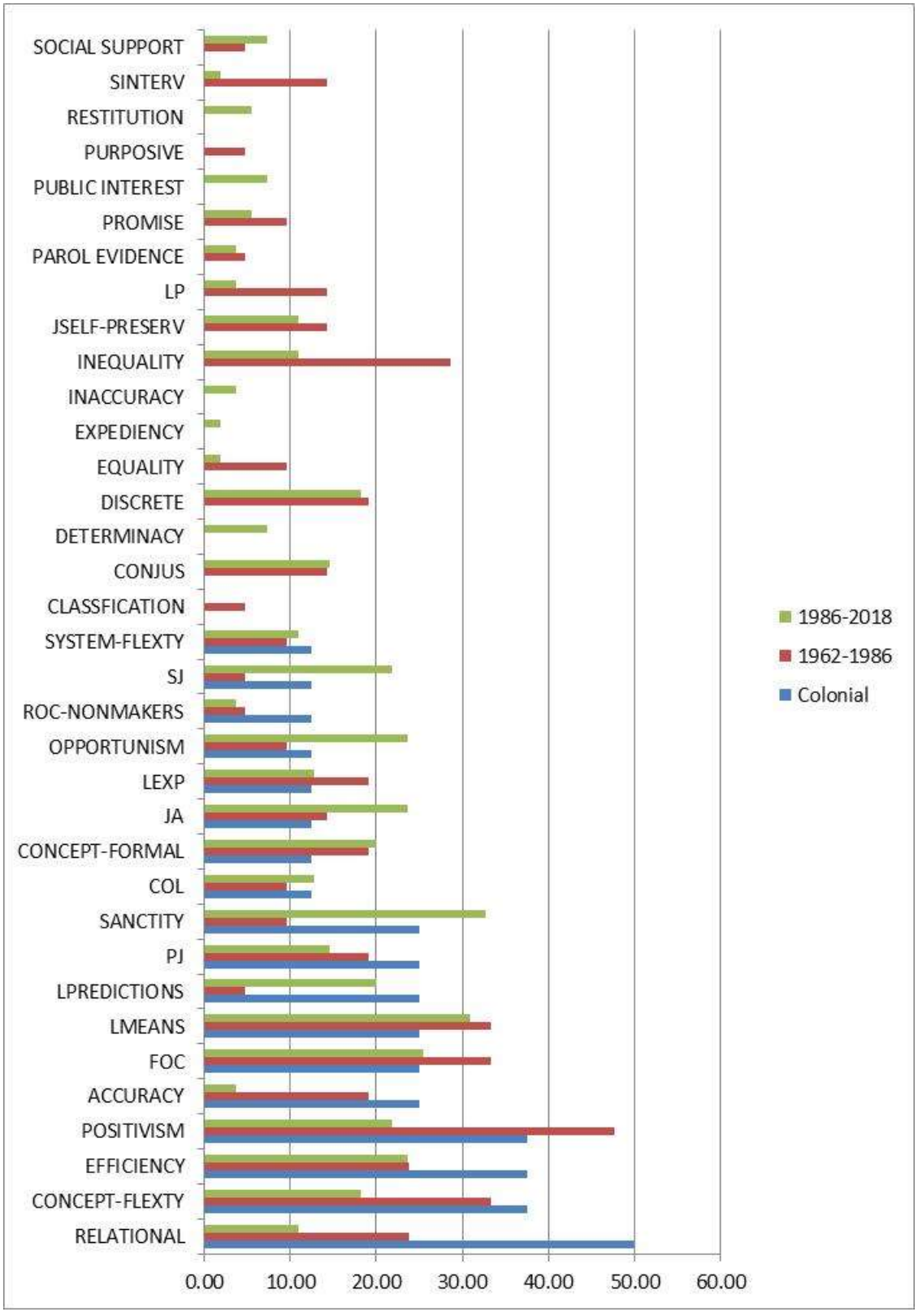

Figure 20: Prevalence of External Values behind the Mixed Approach in the Various Periods

Table 10: Distribution of cases among courts during colonial period (frequencies)

	Flexibility	Formalism	Flexibility &	Total
HC	30	28	6	64
EACA	3	1	1	5
Privy Council Appeal	0	1	0	1

Table 11: Distribution of cases among courts during colonial period (percentages)

	Flexibility	Formalism	Flexibility &
HC	46.88	42.19	10.94
EACA	60.00	20.00	20.00
Privy Council Appeal	0.00	100.00	0.00

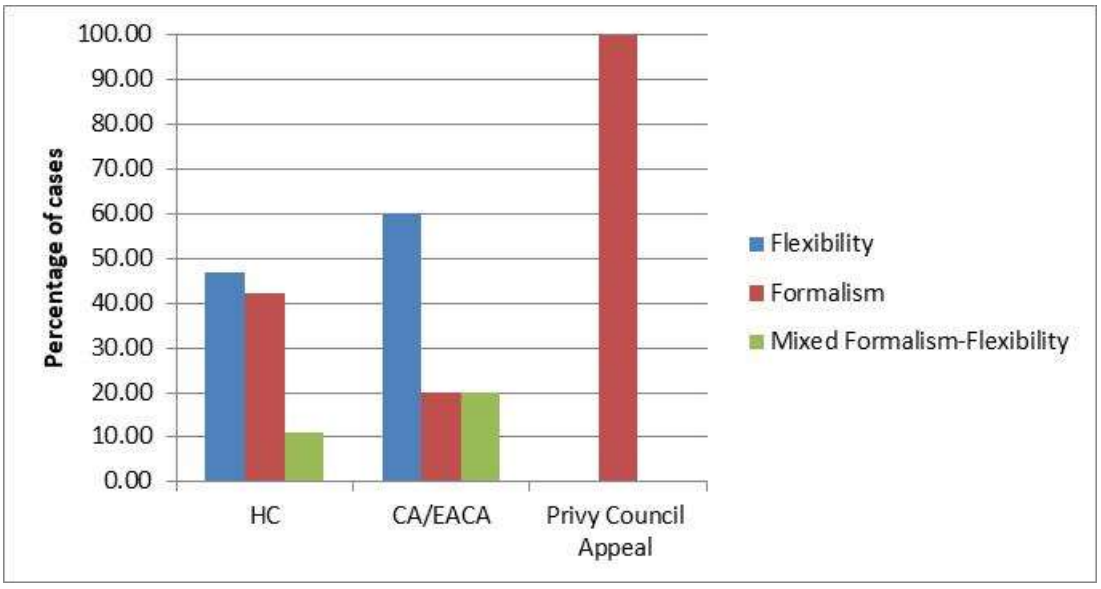

Figure 21: Distribution of cases among courts during colonial period

Table 12: Distribution of cases among courts during 1962-1986 (percentages)

	Flexibility	Formalism	Flexibility & Formalism
HC	46.15	28.21	25.64
SC	0.00	0.00	0.00
EACA	25.00	50.00	25.00
CA	0.00	0.00	0.00

Table 13: Distribution of cases among courts during 1962-1986 (frequencies)

	Flexibility	Formalism	Flexibility & Formalism	Total
HC	36	22	20	78
SC	0	0	0	0
EACA	1	2	1	4
CA	0	0	0	0

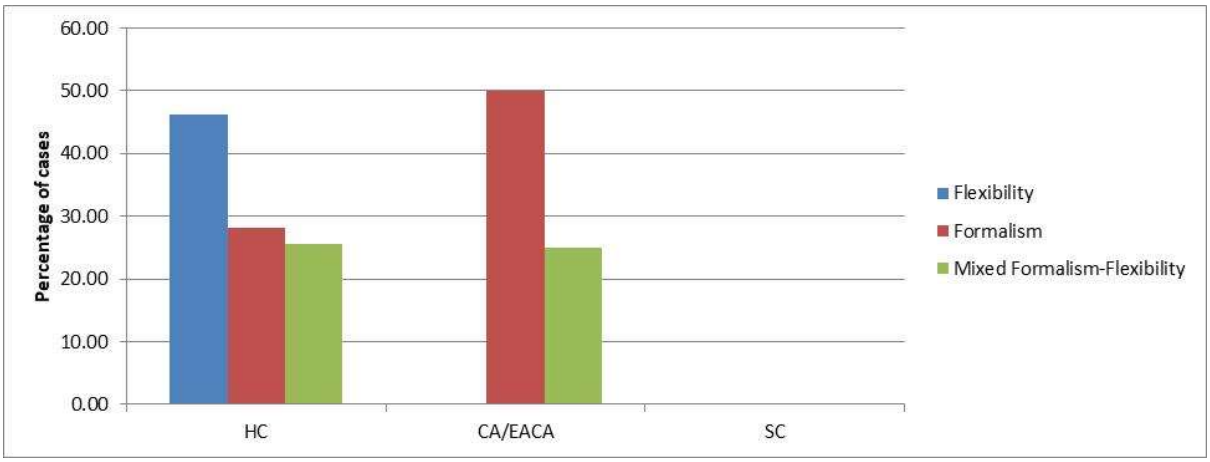

Figure 22: Distribution of cases among courts during 1962-1986

Table 14: Distribution of cases among courts during 1986-2018 (frequencies)

	Flexibility	Formalism	Flexibility & Formalism	Total
HC	40	17	31	88
SC	16	6	15	37
CA	9	5	9	23

Table 15: Distribution of cases among courts during 1986-2018 (percentages)

	Flexibility	Formalism	Flexibility & Formalism
HC	45.45	19.32	35.23
SC	43.24	16.22	40.54
CA	39.13	21.74	39.13

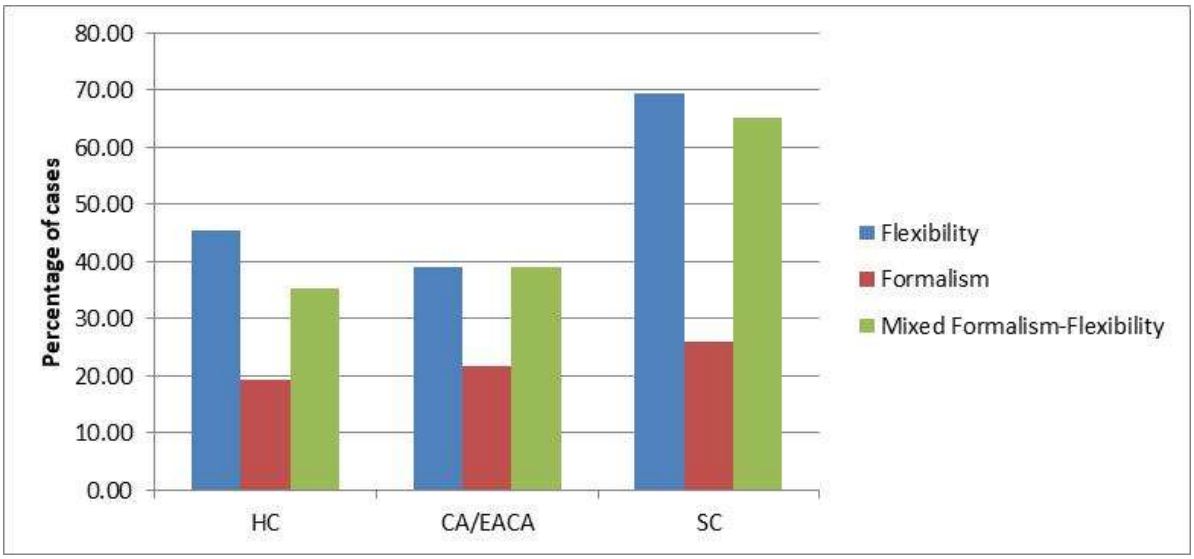

Figure 23: Distribution of cases among courts during 1986-2018

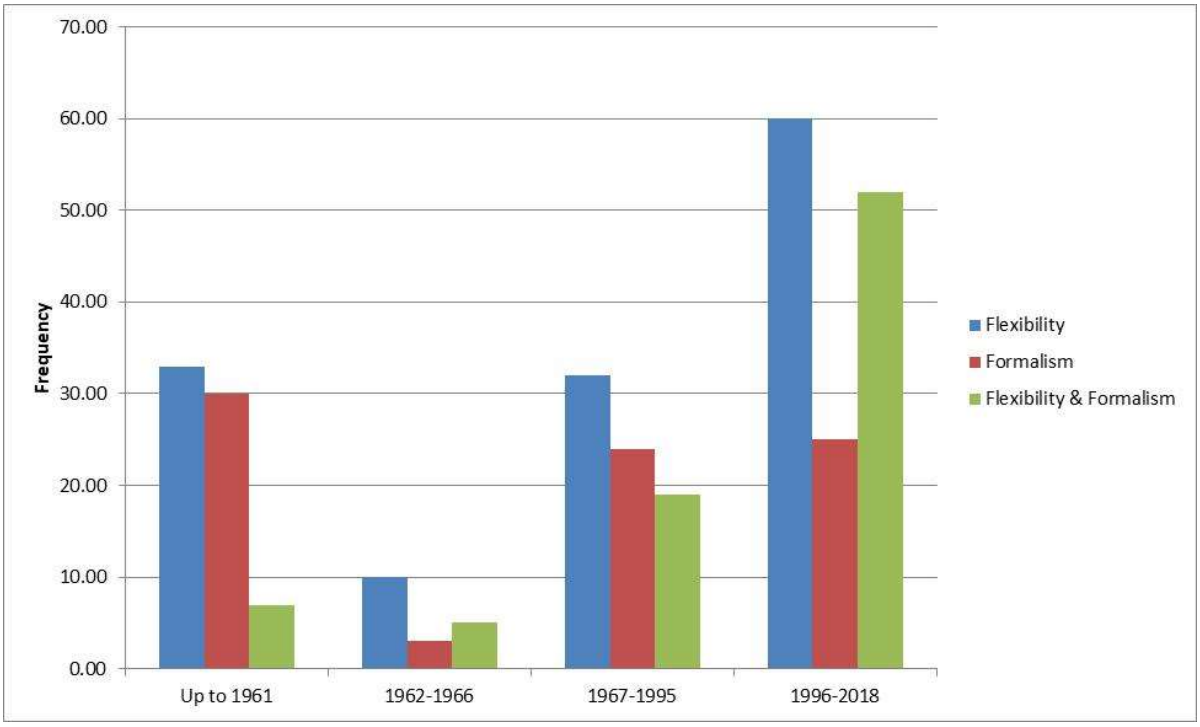

Figure 24: Variation of categories for different categories (frequencies)

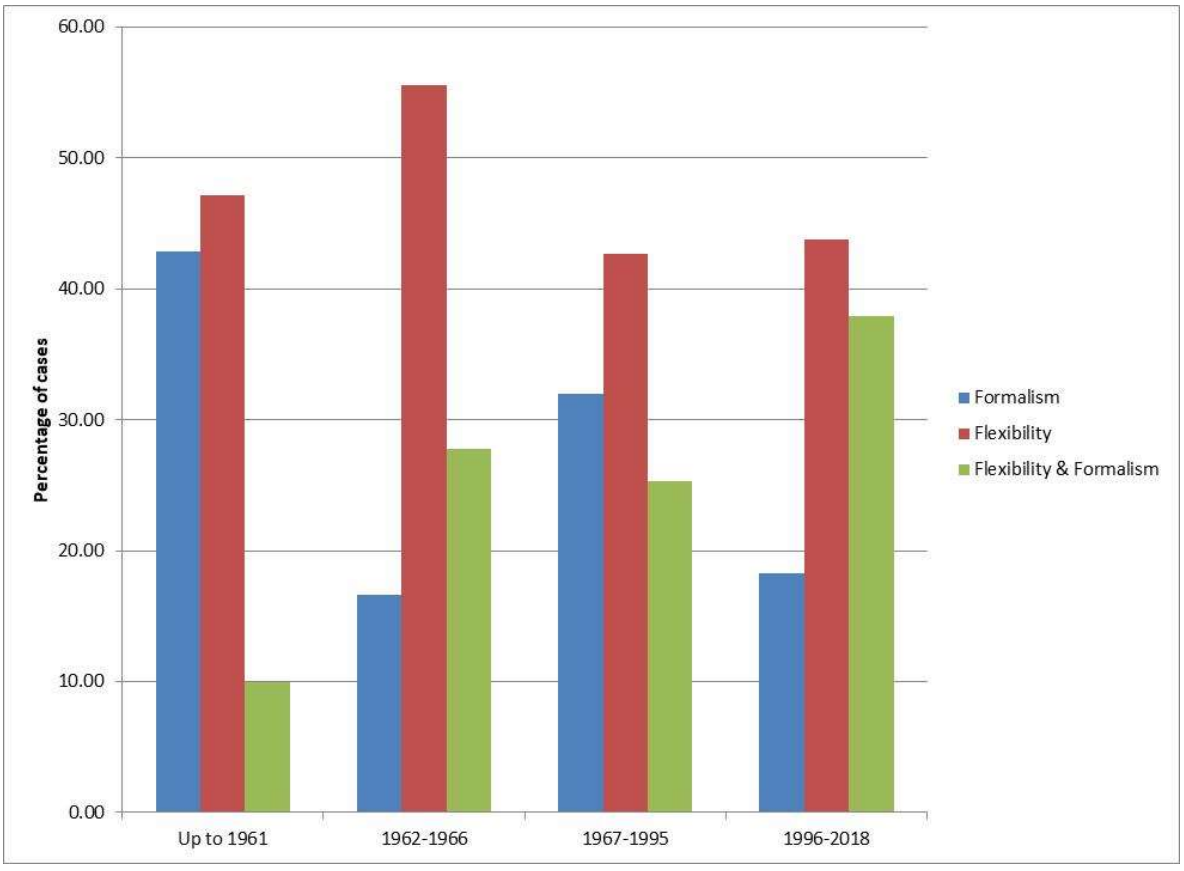

Figure 25: Variation of categories for different categories (percentages)

Table 16: Flexibility indicative practices for 1986-2018

FLEXIBILITY INDICATIVE	PERCENTAGES	FREQUENCY
CONTEXTUAL	40.00	26
PURPOSIVE	27.69	18
LAW MAKING	27.69	18
JINTERV	27.69	18
INDETERM-DOCTRINE	16.92	11
PROC-DISREGARD	16.92	11
UNRESTRAINED AUTHORITY	13.85	9
ABDUCTIVE	12.31	8
NO CATEGORIES	9.23	6
PRACTICES	9.23	6
RELATIONS	9.23	6
FLEXIBILITY	6.15	4
NO-EQUALITY	3.08	2
OPPORTUNISTIC FORMALISM	1.54	1

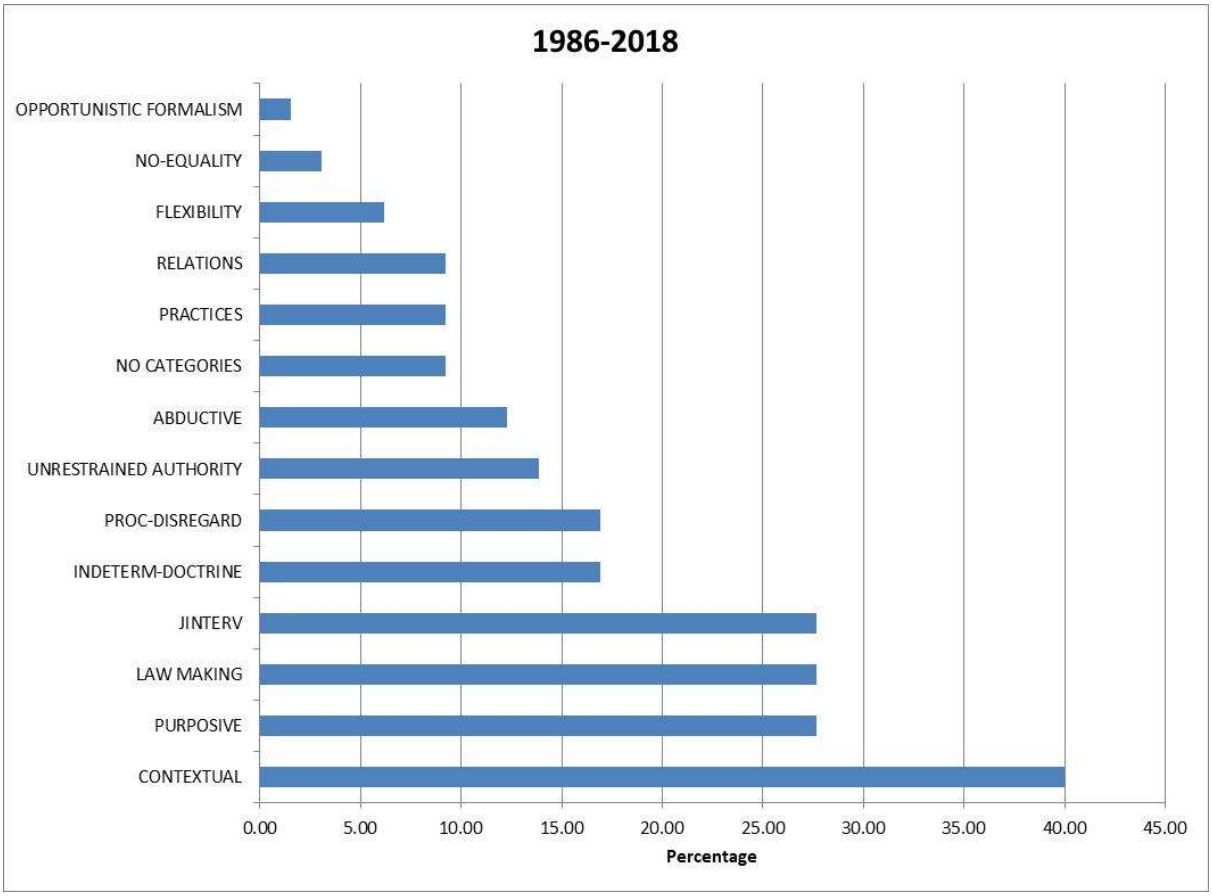

Figure 26: Flexibility indicative practices for 1986-2018

Table 17: Flexibility motivating values for 1986-2018

FLEXIBILITY MOTIVATING	PERCENTAGE	FREQUENCY
SJ	46.15	30
LMEANS	43.08	28
CONJUS	33.85	22
JA	33.85	22
CONCEPT-FLEXTY	32.31	21
EFFICIENCY	32.31	21
LPREDICTIONS	27.69	18
LEXP	20.00	13
RELATIONAL	20.00	13
SYSTEM-FLEXTY	16.92	11
PUBLIC INTEREST	10.77	7
LP	6.15	4
JSELF-PRESERV	4.62	3
SOCIAL SUPPORT	4.62	3
INEQUALITY	3.08	2
OPPORTUNISM	1.54	1

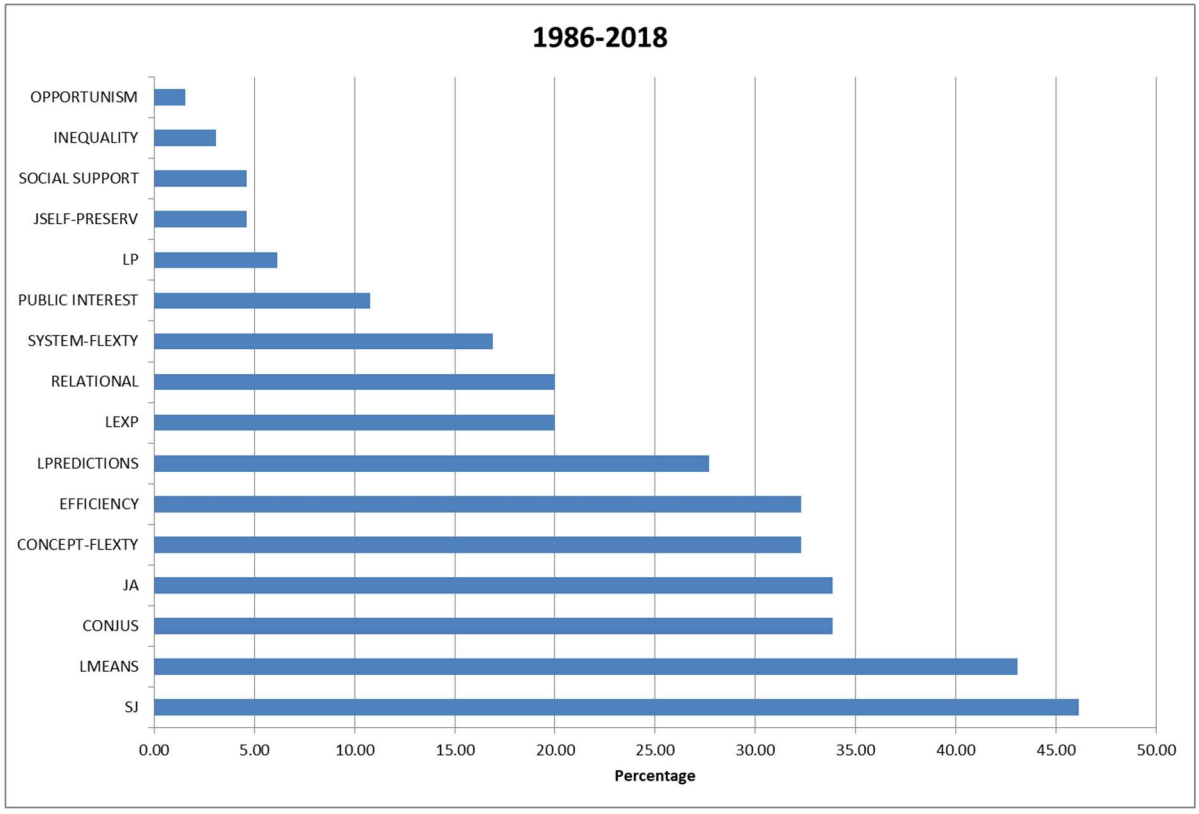

Figure 27: Flexibility motivating values for 1986-2018

Table 18: Formalistic indicative practices for 1986-2018

FORMALISTIC INDICATIVE	PERCENTAGE	FREQUENCY
PACTA	50.00	14
PROCED-SWAY	39.29	11
LOGICAL-MECHANIC	28.57	8
EQUALITY PRESUMPTION	17.86	5
LITERALISM	14.29	4
GENERAL PRINCIPLES	14.29	4
ACTURAL LOSS	7.14	2
NON-LEGAL INFERIOR	7.14	2
CERTAINTY REQUIREMENT	3.57	1

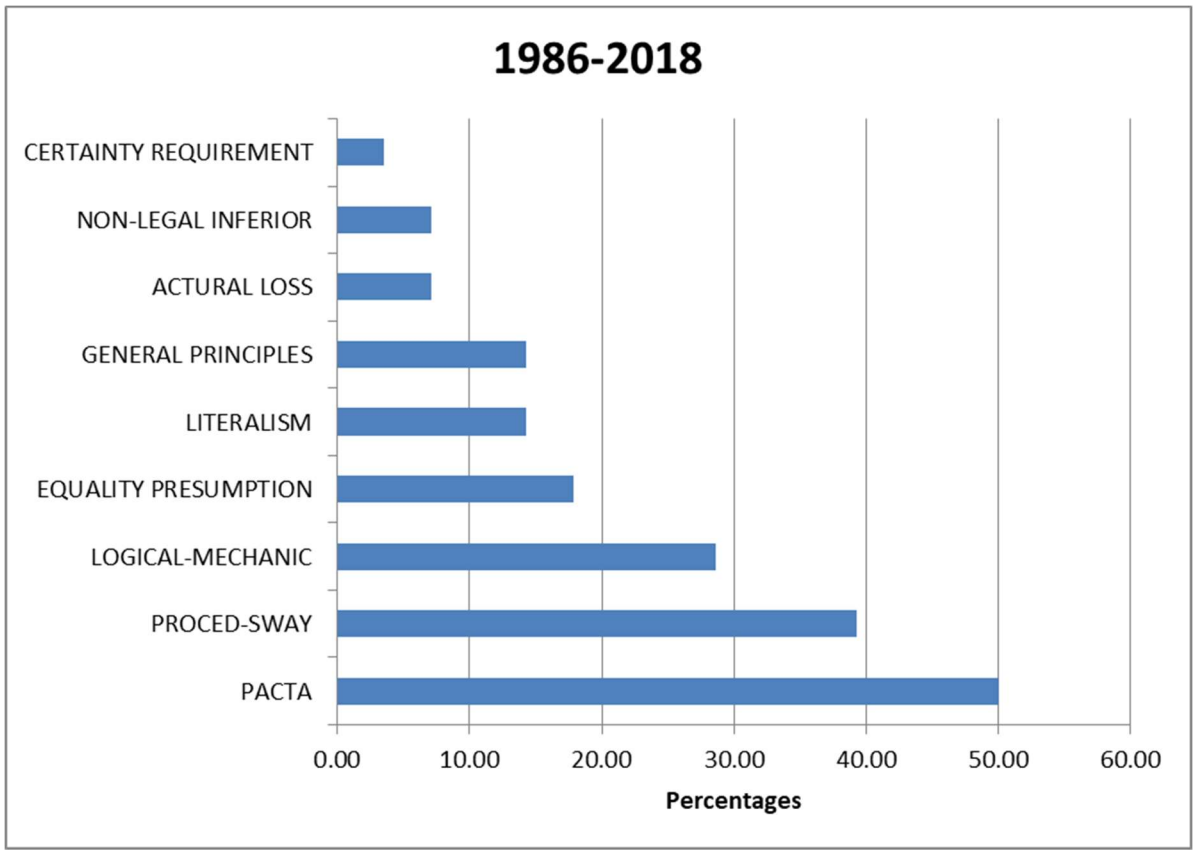

Figure 28: Formalistic indicative practices for 1986-2018

Table 19: Formalistic motivating values for 1986-2018

FORMALISTIC MOTIVATING VALUES	PERCENTAGE	FREQUENCY
FOC	46.43	13
DISCRETE	42.86	12
SANCTITY	42.86	12
CONCEPT-FORMAL	42.86	12
POSITIVISM	39.29	11
ROC-NONMAKERS	28.57	8
COL	28.57	8
PJ	25.00	7
EQUALITY	17.86	5
PAROL EVIDENCE	10.71	3
ACCURACY	7.14	2
DETERMINACY	3.57	1
EXPEDIENCY	3.57	1

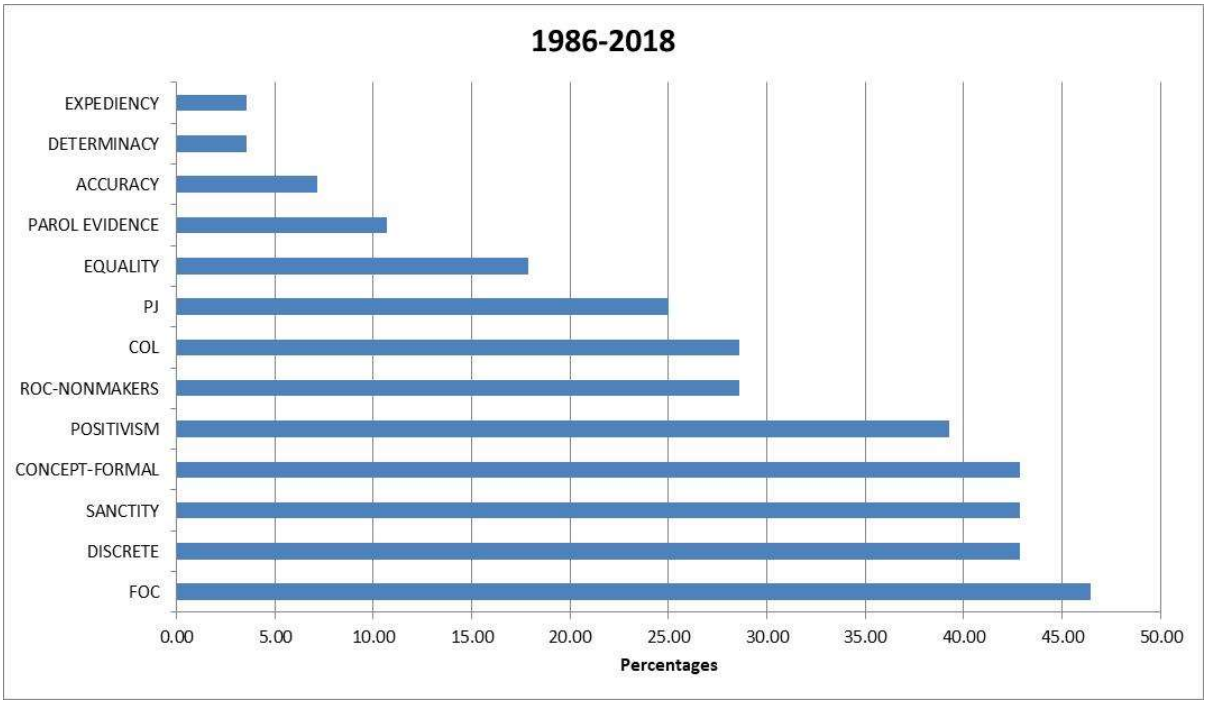

Figure 29: Formalistic motivating values for 1986-2018

Table 20: Flexibility indicative practices for 1962-1986

FLEXIBILITY INDICATIVE PRACTICES	PERCENTAGE	FREQUENCY
LAW MAKING	35.90	14.00
CONTEXTUAL	28.21	11.00
JINTERV	25.64	10.00
INDETERM-DOCTRINE	20.51	8.00
PURPOSIVE	15.38	6.00
RELATIONS	15.38	6.00
SINTERV	12.82	5.00
CRIMINALISING	10.26	4.00
PRACTICES	10.26	4.00
ABDUCTIVE	7.69	3.00
NO CATEGORIES	7.69	3.00
NO-EQUALITY	7.69	3.00
PROC-DISREGARD	7.69	3.00
RESTORATION	2.56	1.00

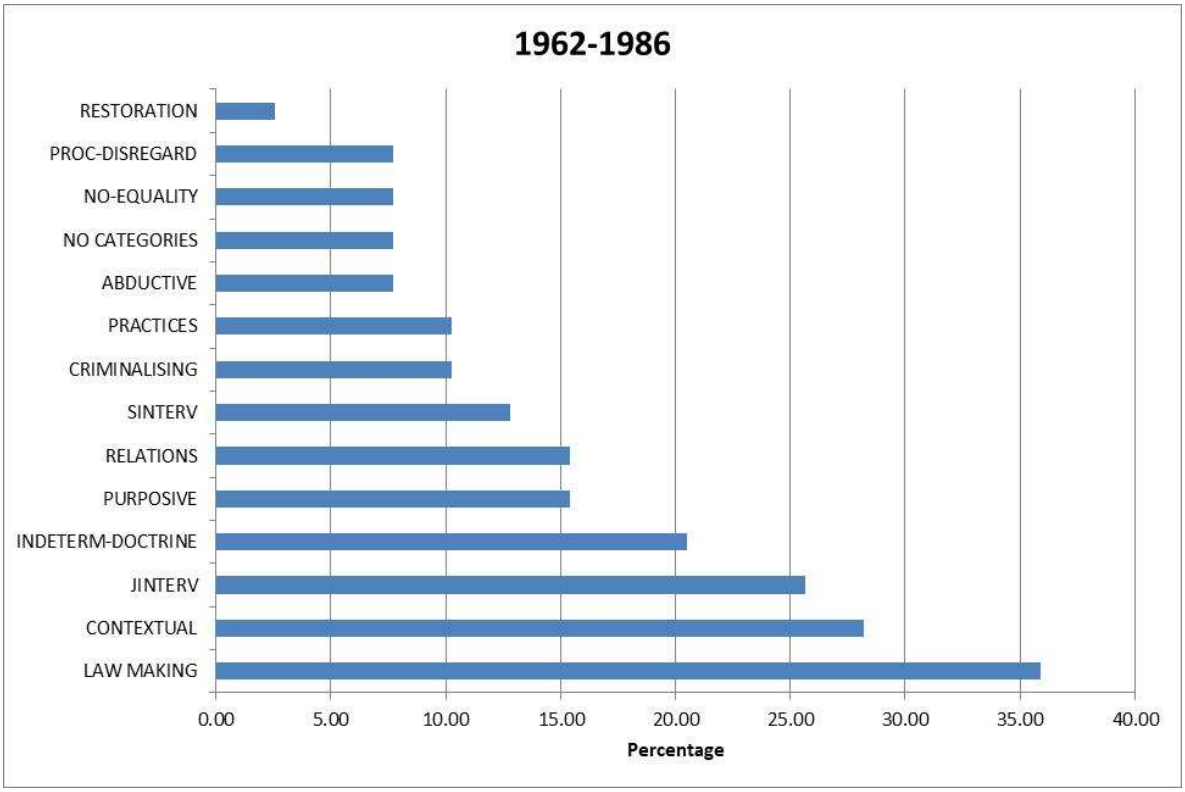

Figure 30: Flexibility indicative practices for 1962-1986

Table 21: Flexibility motivating values for 1962-1986

FLEXIBILITY MOTIVATING	PERCENTAGE	FREQUENCY
JA	35.90	14
SJ	33.33	13
CONJUS	30.77	12
LMEANS	30.77	12
CONCEPT-FLEXTY	28.21	11
LEXP	28.21	11
EFFICIENCY	25.64	10
RELATIONAL	23.08	9
INEQUALITY	12.82	5
PUBLIC INTEREST	12.82	5
SOCIAL SUPPORT	12.82	5
COMM-ECON	10.26	4
LP	10.26	4
LPREDICTIONS	10.26	4
SYSTEM-FLEXTY	7.69	3
COORD-ECON	2.56	1
RESTITUTION	2.56	1

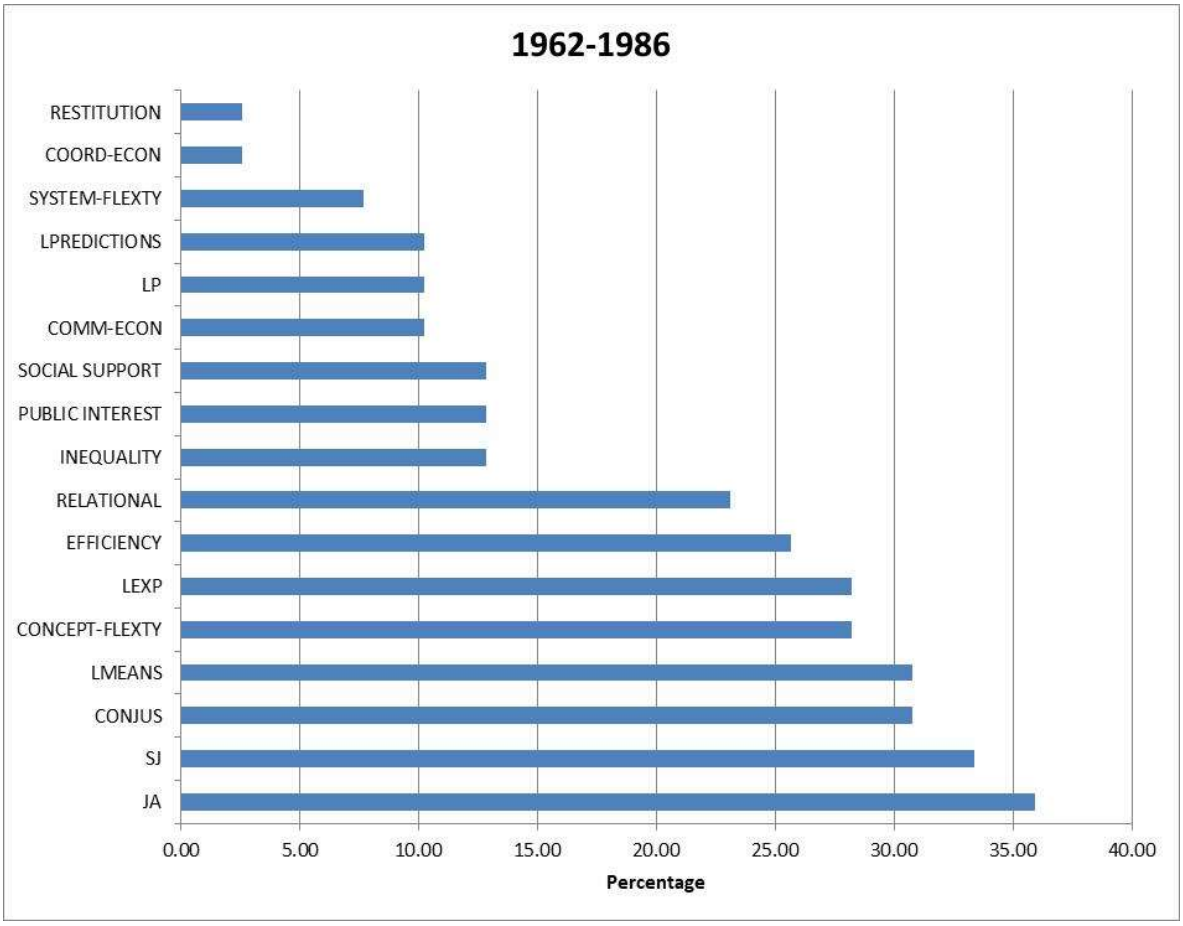

Figure 31: Flexibility motivating values for 1962-1986

Table 22: Formalistic indicative practices for 1962-1986

FORMALISTIC INDICATIVE	PERCENTAGE	FREQUENCY
PACTA	54.17	13
PROCED-SWAY	45.83	11
LOGICAL-MECHANIC	29.17	7
LITERALISM	25.00	6
GENERAL PRINCIPLES	12.50	3
EQUALITY PRESUMPTION	4.17	1
ACTURAL LOSS	4.17	1
LCATEGOTIN	4.17	1

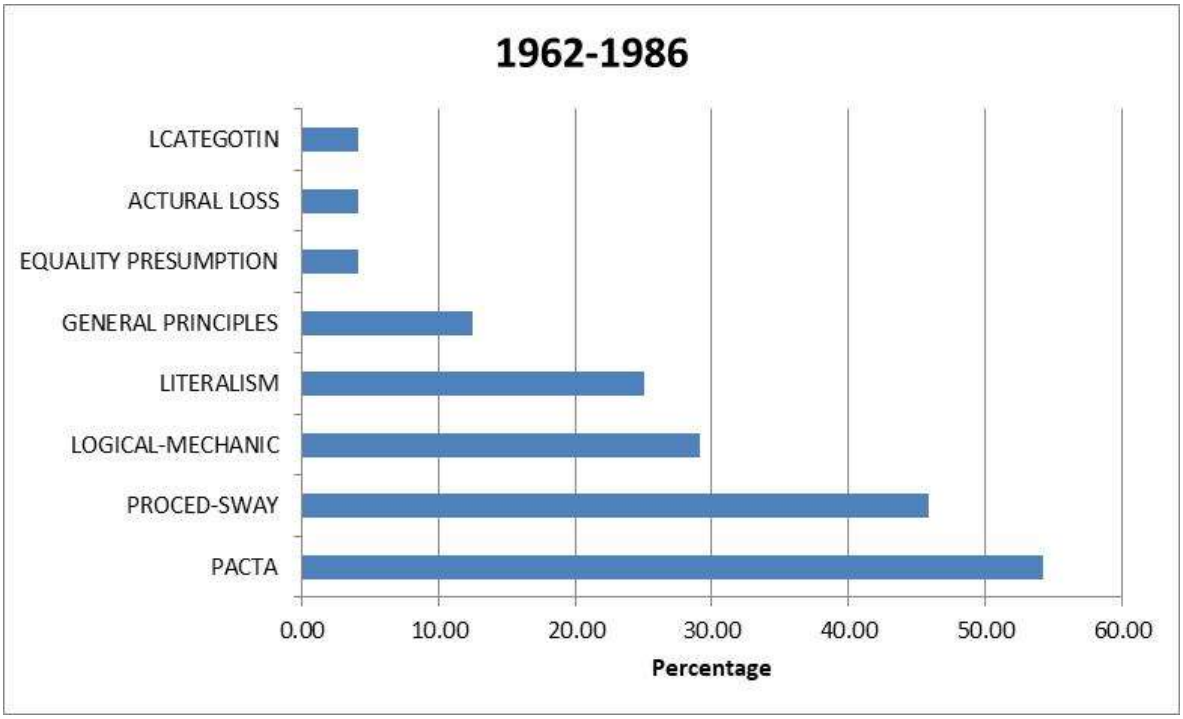

Figure 32: Formalistic indicative practices for 1962-1986

Table 23: Formalistic motivating values for 1962-1986

FORMALISTIC MOTIVATING	PERCENTAGE	FREQUENCY
FOC	54.17	13
PJ	41.67	10
SANCTITY	41.67	10
POSITIVISM	37.50	9
DISCRETE	33.33	8
CONCEPT-FORMAL	29.17	7
ROC-NONMAKERS	16.67	4
COL	12.50	3
PAROL EVIDENCE	12.50	3
ACCURACY	4.17	1
EQUALITY	4.17	1

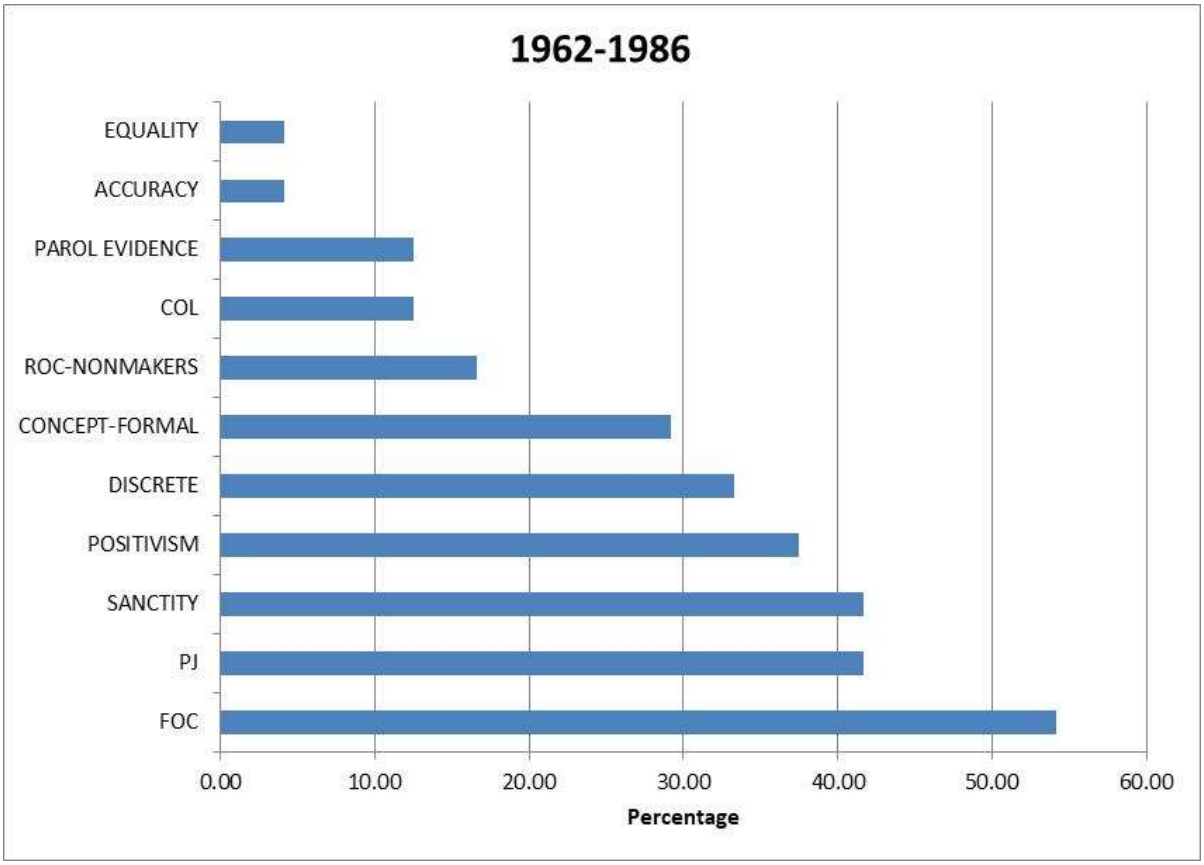

Figure 33: Formalistic motivating values for 1962-1986

Table 24: Formalistic indicative practices for the colonial period

FORMALISTIC INDICATIVE	PERCENTAGE	FREQUENCY
LOGICAL-MECHANIC	48.28	14
PACTA	34.48	10
PROCED-SWAY	31.03	9
LITERALISM	20.69	6
MONEY-VALUE	13.79	4
EXPECTANCY	3.45	1

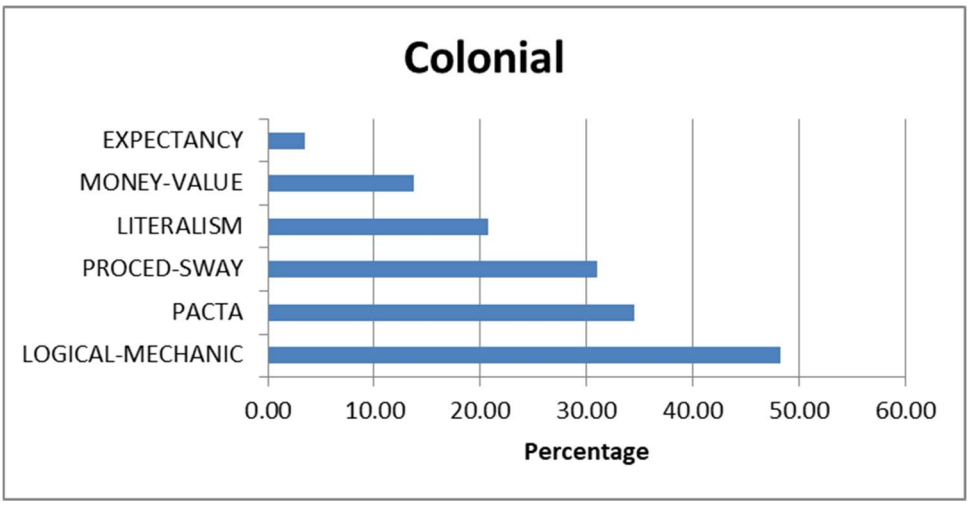

Figure 34: Formalistic indicative practices for the colonial period

Table 25: Formalistic motivating values for the colonial period

FORMALISTIC MOTIVATING VALUES	PERCENTAGE	FREQUENCY
POSITIVISM	44.83	13
FOC	37.93	11
SANCTITY	34.48	10
COL	31.03	9
PJ	31.03	9
CONCEPT-FORMAL	27.59	8
DISCRETE	24.14	7
ACCURACY	13.79	4
ROC-NONMAKERS	10.34	3
PROMISE	6.90	2
FORMALITY	3.45	1
PAROL EVIDENCE	3.45	1

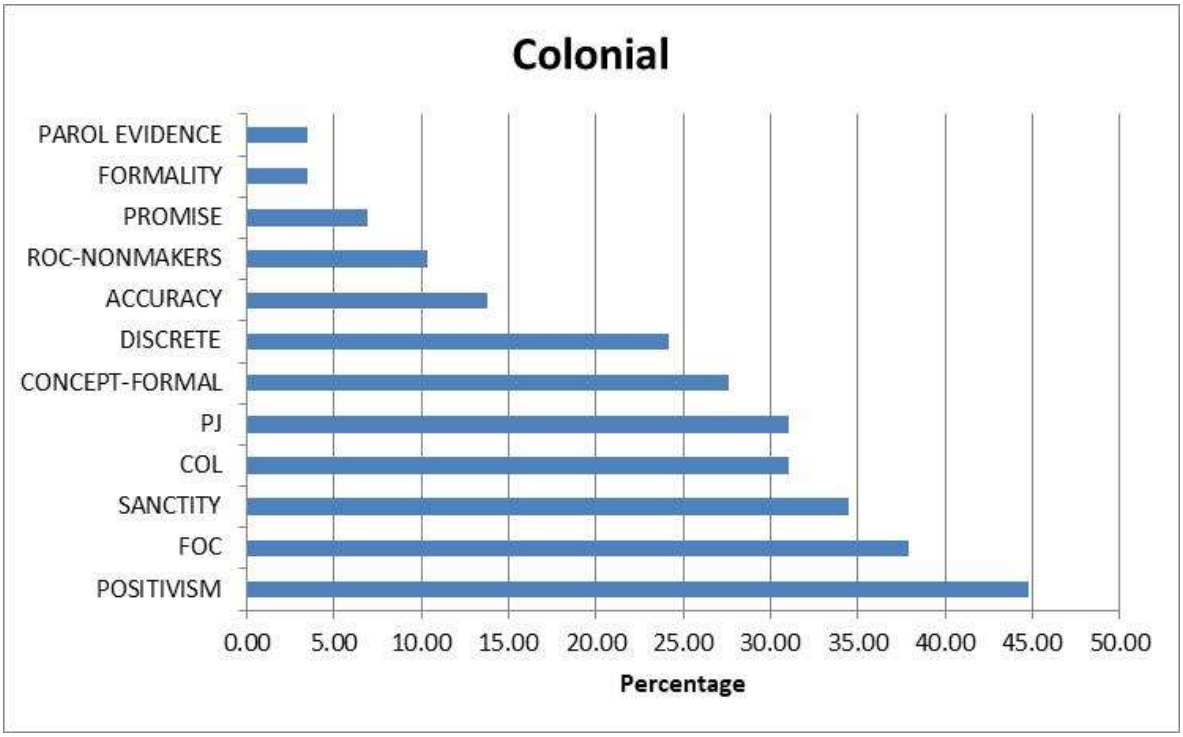

Figure 35: Formalistic motivating values for the colonial period

Table 26: Flexibility indicative practices for colonial period

FLEXIBILITY INDICATIVE PRACTICES	PERCENTAGE	FREQUENCY
CONTEXTUAL	45.45	15
JINTERV	33.33	11
LAW MAKING	24.24	8
PROC-DISREGARD	24.24	8
PRACTICES	21.21	7
PURPOSIVE	18.18	6
INDETERM-DOCTRINE	15.15	5
UNRESTRAINED AUTHORITY	9.09	3
NO-EQUALITY	9.09	3
ABDUCTIVE	6.06	2
INDUCTIVE	6.06	2
NO CATEGORIES	6.06	2
RESTORATION	3.03	1

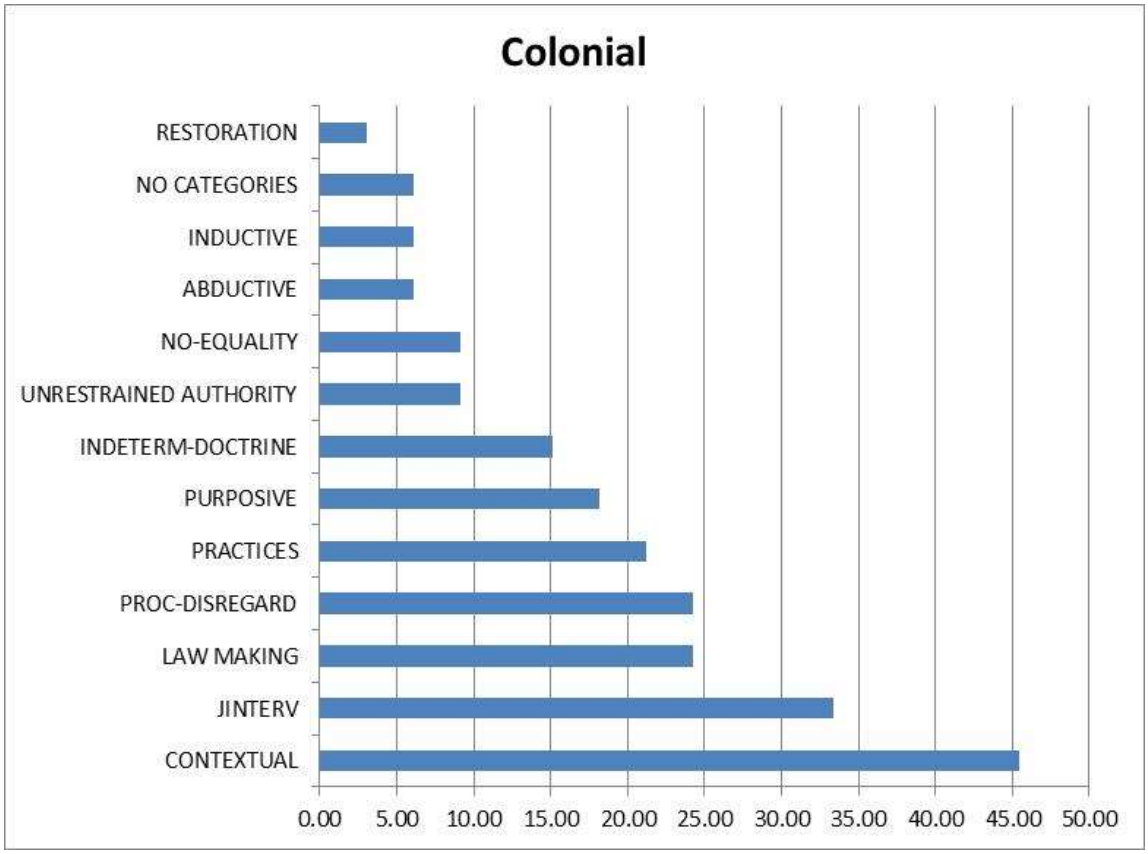

Figure 36: Flexibility indicative practices for colonial period

Table 27: Flexibility motivating values for colonial period

FLEXIBILITY MOTIVATING VALUES	PERCENTAGE	FREQUENCY
CONJUS	51.52	17
JA	48.48	16
SJ	39.39	13
EFFICIENCY	36.36	12
LPREDICTIONS	27.27	9
CONCEPT-FLEXTY	24.24	8
LEXP	24.24	8
LMEANS	24.24	8
RELATIONAL	9.09	3
SOCIAL SUPPORT	9.09	3
INEQUALITY	9.09	3
JSELF- PRESERV	6.06	2
LP	6.06	2
SYSTEM-FLEXTY	6.06	2
OPPORTUNISM	3.03	1
RESTITUTION	3.03	1

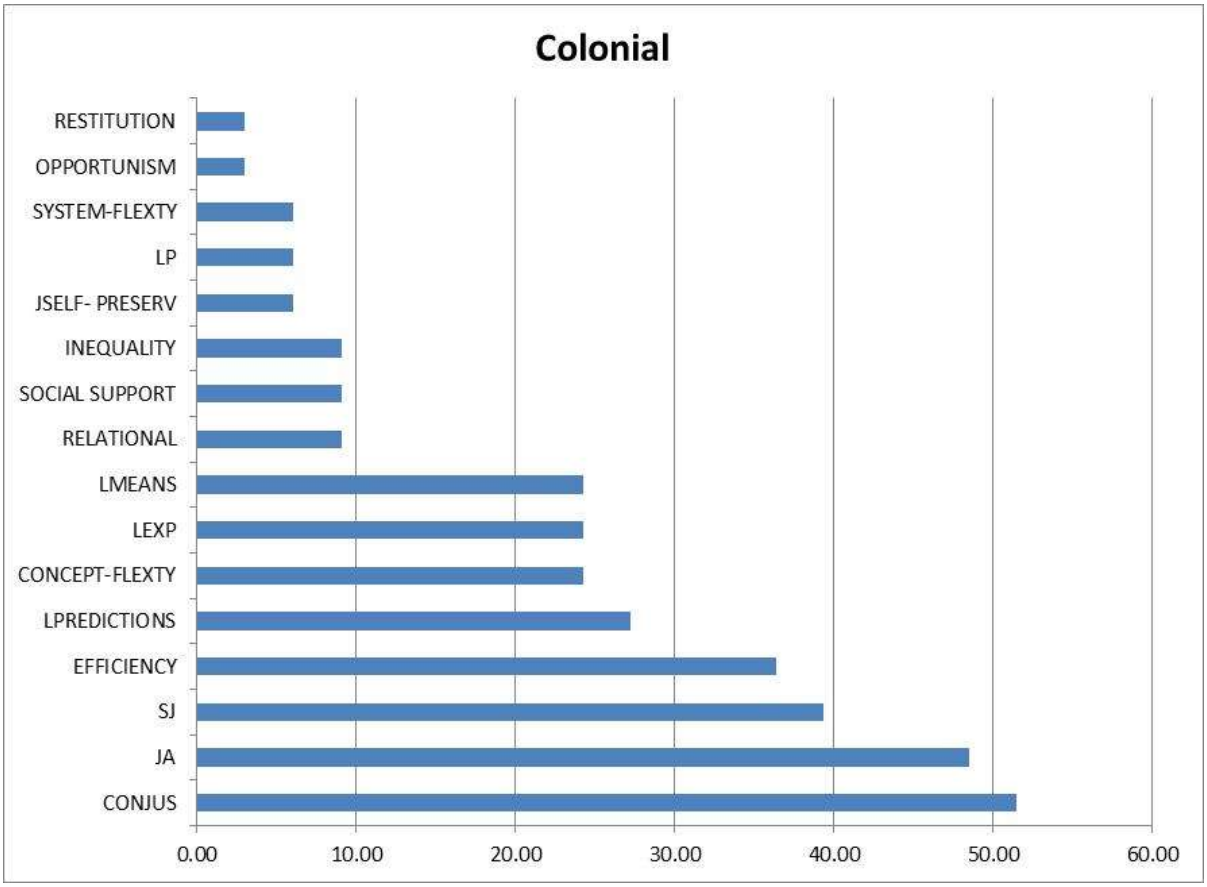

Figure 37: Flexibility motivating values for colonial period

Table 28: Mixed formalism-flexibility flexibility motivating values for colonial period

MOTIVATING VALUES	PERCENTAGE	FREQUENCY
RELATIONAL	50	4
POSITIVISM	37.5	3
CONCEPT-FLEXTY	37.5	3
EFFICIENCY	37.5	3
FOC	25	2
PJ	25	2
SANCTITY	25	2
ACCURACY	25	2
LMEANS	25	2
LPREDICTIONS	25	2
CONCEPT-FORMAL	12.5	1
ROC-NONMAKERS	12.5	1

COL	12.5	1
JA	12.5	1
LEXP	12.5	1
OPPORTUNISM	12.5	1
SJ	12.5	1
SYSTEM-FLEXTY	12.5	1

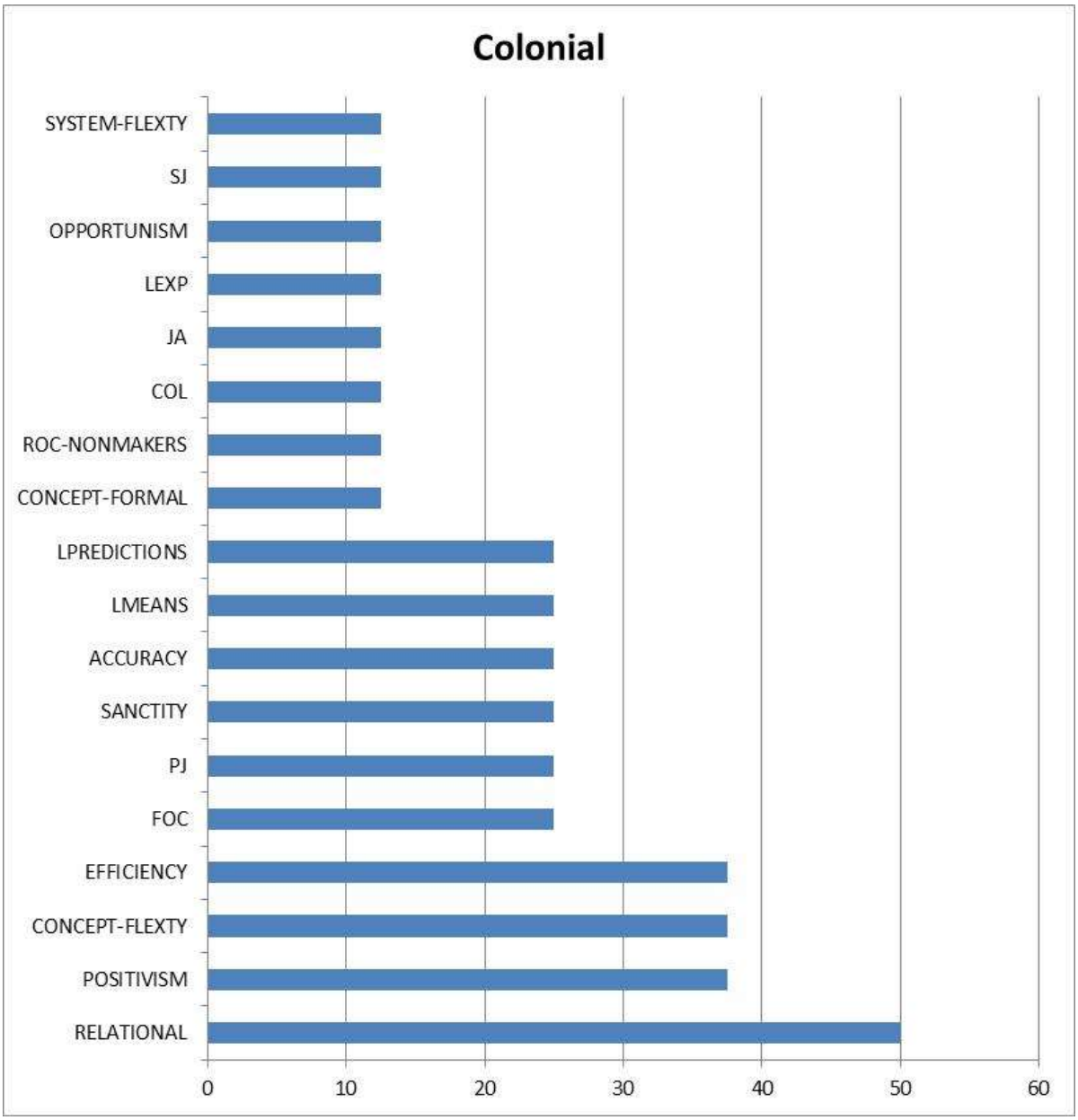

Figure 38: Mixed formalism-flexibility motivating values for colonial period

Table 29: Mixed formalism-flexibility indicative practices for colonial period

INDICATIVE PRACTICES	PERCENTAGE	FREQUENCY
RELATIONS	50	4
LOGICAL-MECHANIC	50	4
CONTEXTUAL	37.5	3
PROCED-SWAY	37.5	3
LAW MAKING	25	2
MONEY-VALUE	25	2
PACTA	25	2
INDETERM-DOCTRINE	12.5	1
PURPOSIVE	12.5	1
FLEXIBILITY	12.5	1
LITERALISM	12.5	1

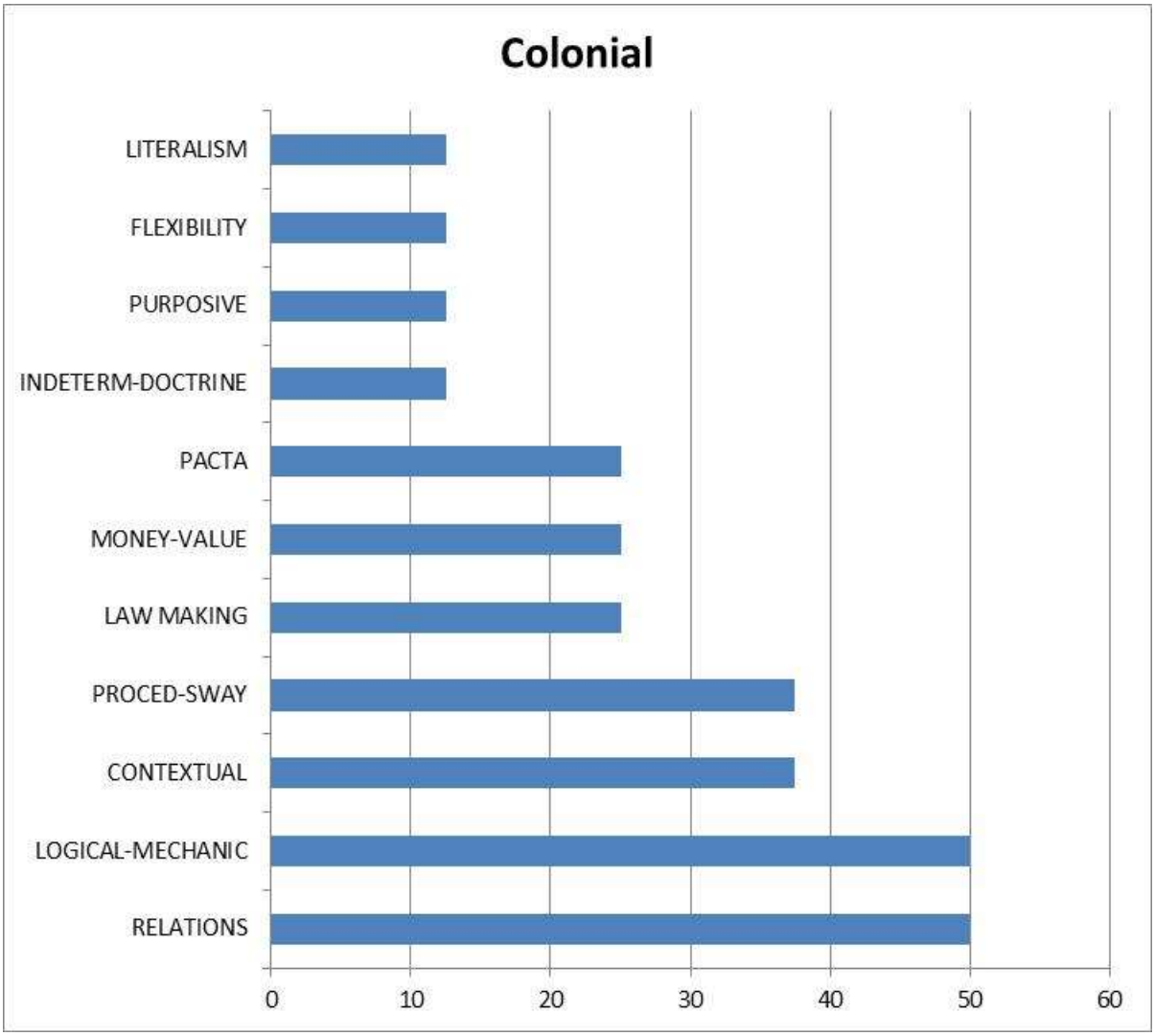

Figure 39: Mixed formalism-flexibility indicative practices for colonial period

Table 30: Mixed formalism-flexibility indicative practices for 1986-2018

INDICATIVE PRACTICES	PERCENTAGE	FREQUENCY
PACTA	38.18	21
PROCED-SWAY	29.09	16
LAW MAKING	25.45	14
UNRESTRAINED AUTHORITY	21.82	12
OPPORTUNISTIC FORMALISM	18.18	10
PURPOSIVE	18.18	10
CONTEXTUAL	16.36	9
LOGICAL-MECHANIC	14.55	8
INDETERM-DOCTRINE	14.55	8
RELATIONS	12.73	7
LITERALISM	10.91	6

JINTERV	10.91	6
NO-EQUALITY	9.09	5
PRACTICES	9.09	5
PROC-DISREGARD	9.09	5
LCATEGOTIN	7.27	4
ABDUCTIVE	7.27	4
CONS-CONFORM	5.45	3
CONTRACT-CERTAINTY	5.45	3
NO CATEGORIES	3.64	3
ACTUAL LOSS	5.45	2
RESTORATION	3.64	2
EQUALITY PRESUMPTION	5.45	1
EXPECTANCY	1.82	1
GENERAL PRINCIPLES	1.82	1
NO-FAIRNESS	1.82	1
NON-LEGAL INFERIOR	1.82	1
ORDER-UNCERTAIN	1.82	1

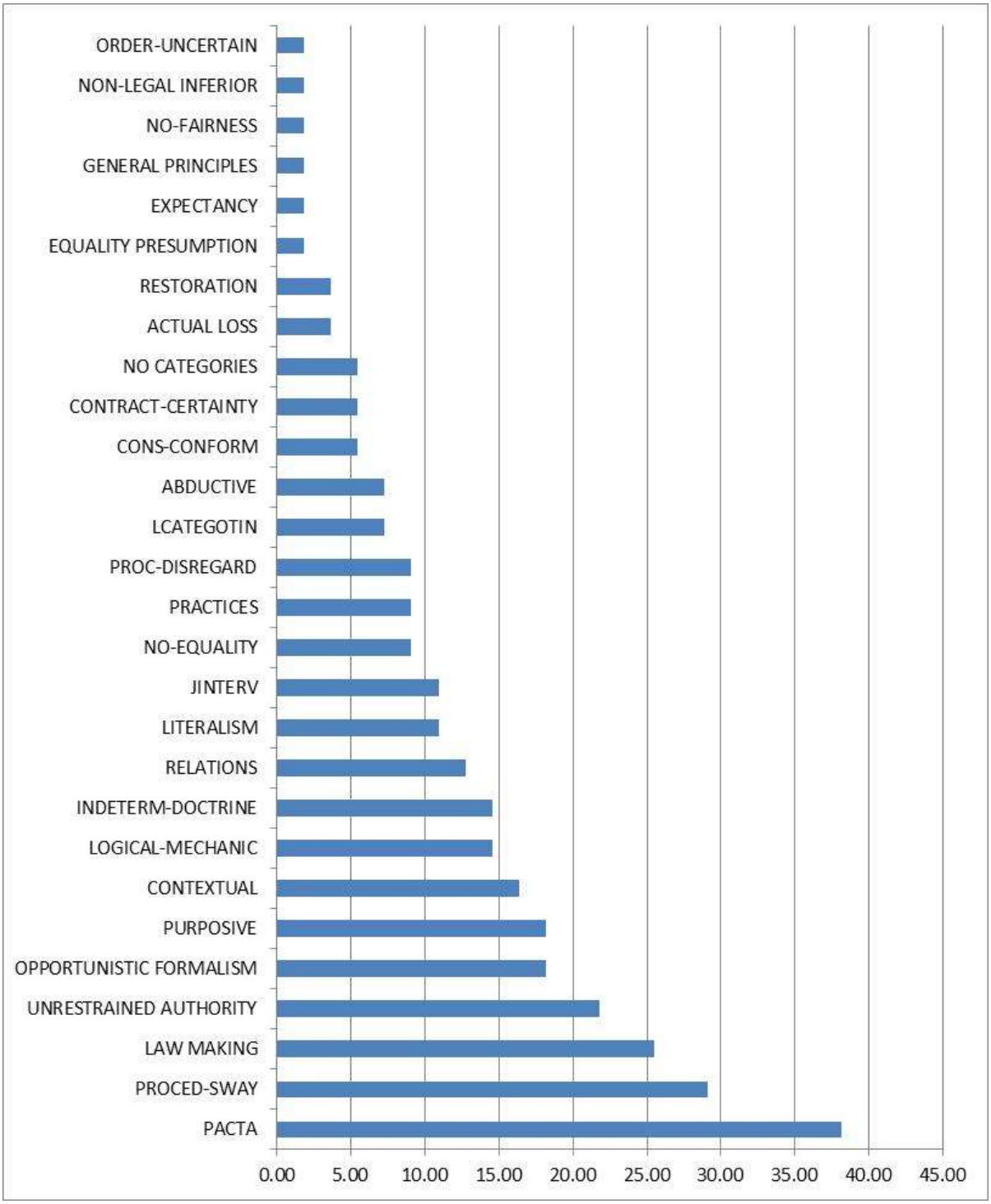

Figure 40: Mixed formalism-flexibility indicative practices for 1986-2018

Table 31: Mixed formalism-flexibility motivating values for 1986-2018

MOTIVATING VALUES	PERCENTAGE	FREQUENCY
SANCTITY	32.73	18
LMEANS	30.91	17
FOC	25.45	14
EFFICIENCY	23.64	13
JA	23.64	13
OPPORTUNISM	23.64	13
POSITIVISM	21.82	12
SJ	21.82	12
CONCEPT-FORMAL	20.00	11
LPREDICTIONS	20.00	11
DISCRETE	18.18	10
CONCEPT-FLEXTY	18.18	10
PJ	14.55	8
CONJUS	14.55	8
COL	12.73	7
LEXP	12.73	7
INEQUALITY	10.91	6
JSELF-PRESERV	10.91	6
RELATIONAL	10.91	6
SYSTEM-FLEXTY	10.91	6
DETERMINACY	7.27	4
PUBLIC INTEREST	7.27	4
SOCIAL SUPPORT	7.27	4
PROMISE	5.45	3
RESTITUTION	5.45	3
ACCURACY	3.64	2
PAROL EVIDENCE	3.64	2
ROC-NONMAKERS	3.64	2
LP	3.64	2
INACCURACY	3.64	2
EQUALITY	1.82	1
EXPEDIENCY	1.82	1
SINTERV	1.96	1

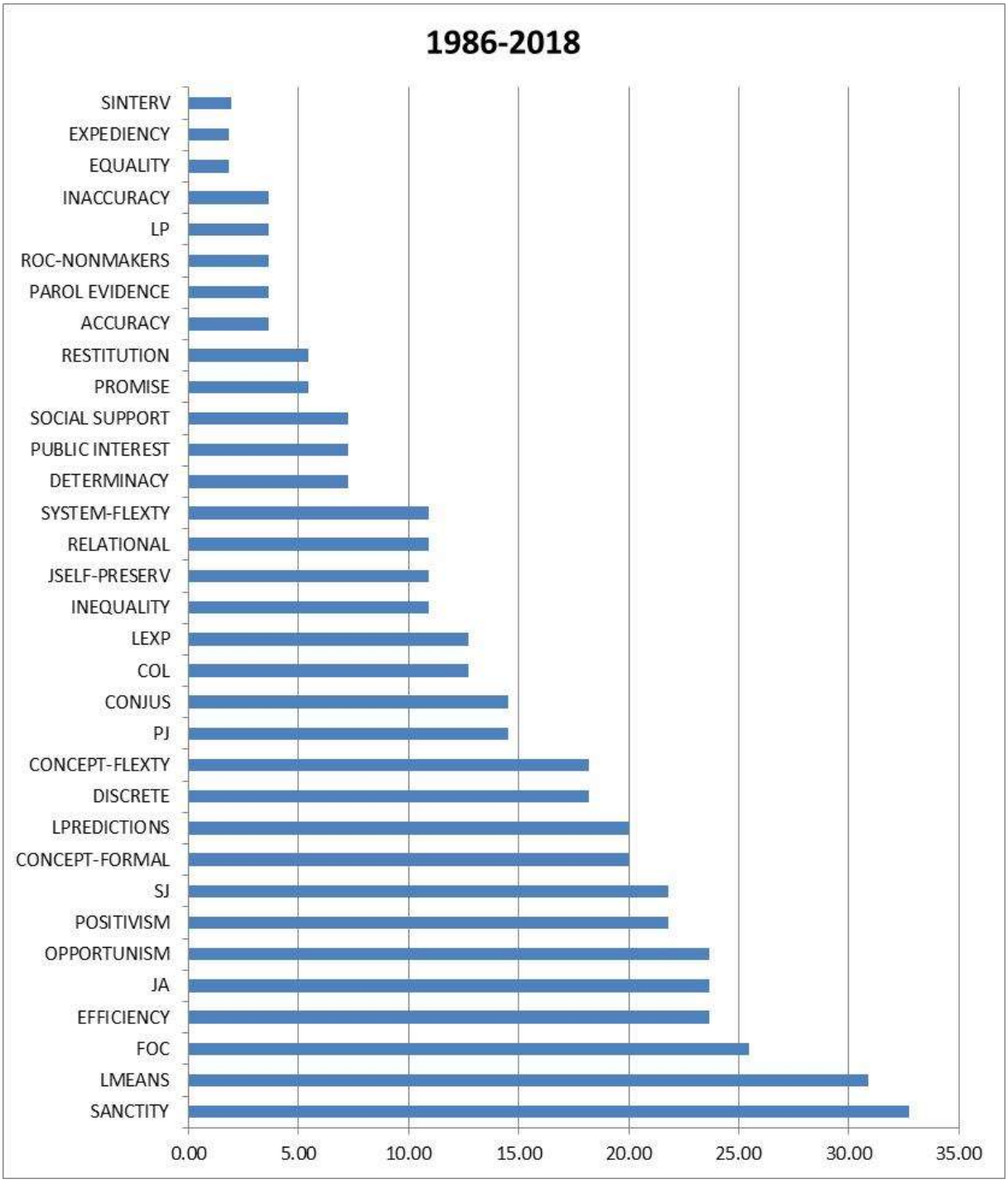

Figure 41: Mixed formalism-flexibility motivating values for 1986-2018

Table 32: Mixed formalism-flexibility indicative practices for 1962-1986

INDICATIVE PRACTICES	PERCENTAGE	FREQUENCY
CONTEXTUAL	38.10	8
LOGICAL-MECHANIC	33.33	7
PACTA	28.57	6
PROCED-SWAY	23.81	5
NO CATEGORIES	19.05	4
LITERALISM	19.05	4
NO-EQUALITY	14.29	3
PRACTICES	14.29	3
RELATIONS	14.29	3
ACTUAL LOSS	14.29	3
INDETERM-DOCTRINE	9.52	2
JINTERV	9.52	2
LAW MAKING	9.52	2
UNRESTRAINED AUTHORITY	9.52	2
EQUALITY PRESUMPTION	9.52	2
ABDUCTIVE	4.76	1
OPPORTUNISTIC FORMALISM	4.76	1
CONS-CONFORM	4.76	1
EXPECTANCY	4.76	1
GENERAL PRINCIPLES	4.76	1
EXPECTANCY	4.76	1
GENERAL PRINCIPLES	4.76	1

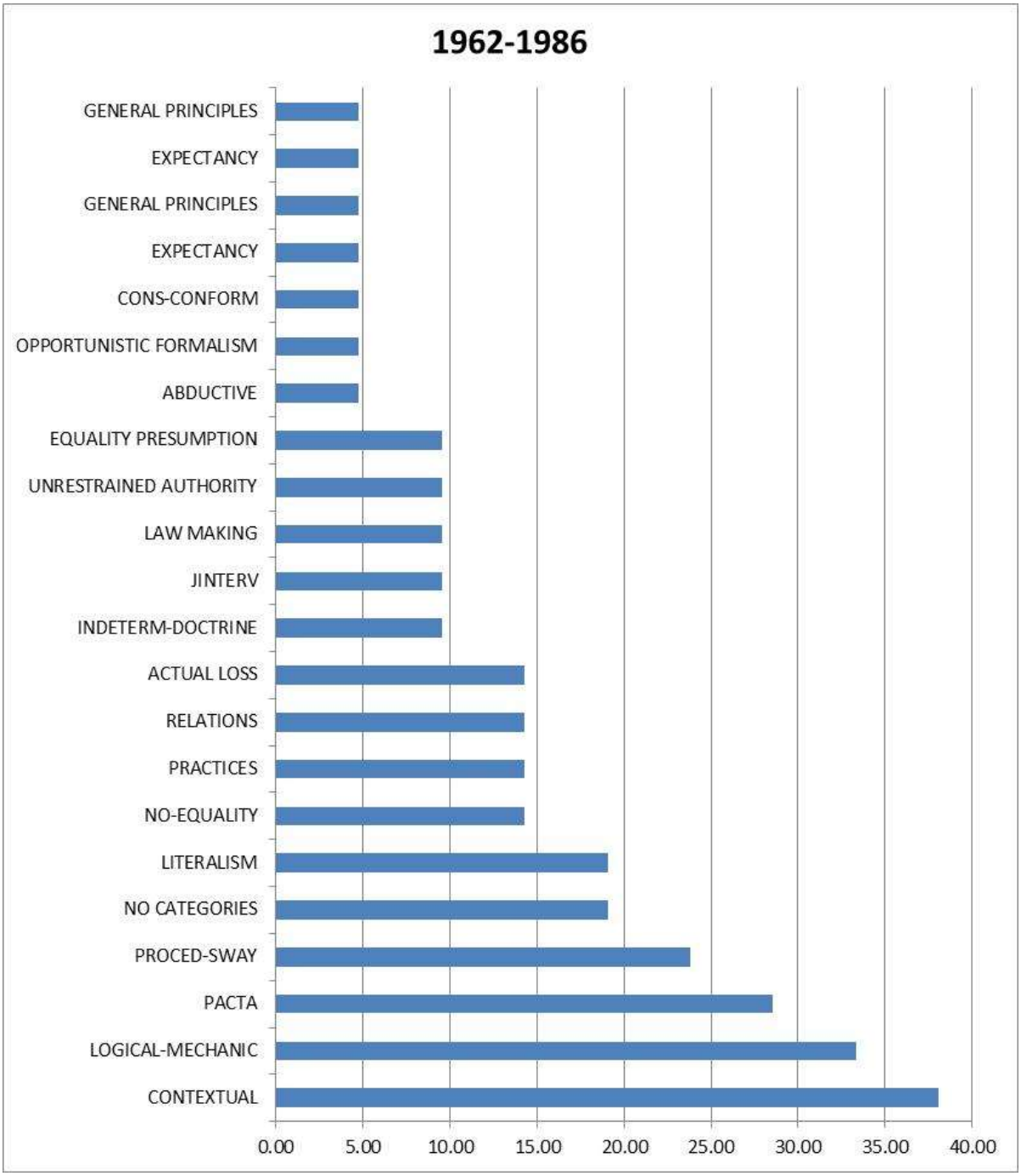

Figure 42: Mixed formalism-flexibility indicative practices for 1962-1986

Table 33: Mixed formalism-flexibility motivating values for 1962-1986

MOTIVATING VALUES	PERCENTAGE	FREQUENCY
POSITIVISM	47.62	10
CONCEPT-FLEXTY	33.33	7
LMEANS	33.33	7
FOC	33.33	7
INEQUALITY	28.57	6
EFFICIENCY	23.81	5
RELATIONAL	23.81	5
LEXP	19.05	4
ACCURACY	19.05	4
CONCEPT-FORMAL	19.05	4
PJ	19.05	4
DISCRETE	19.05	4
CONJUS	14.29	3
JA	14.29	3
JSELF-PRESERV	14.29	3
LP	14.29	3
SINTERV	14.29	3
OPPORTUNISM	9.52	2
SYSTEM-FLEXTY	9.52	2
COL	9.52	2
EQUALITY	9.52	2
PROMISE	9.52	2
SANCTITY	9.52	2
CLASSFICATION	4.76	1
LPREDICTIONS	4.76	1
PURPOSIVE	4.76	1
SJ	4.76	1
SOCIAL SUPPORT	4.76	1
ROC-NONMAKERS	4.76	1

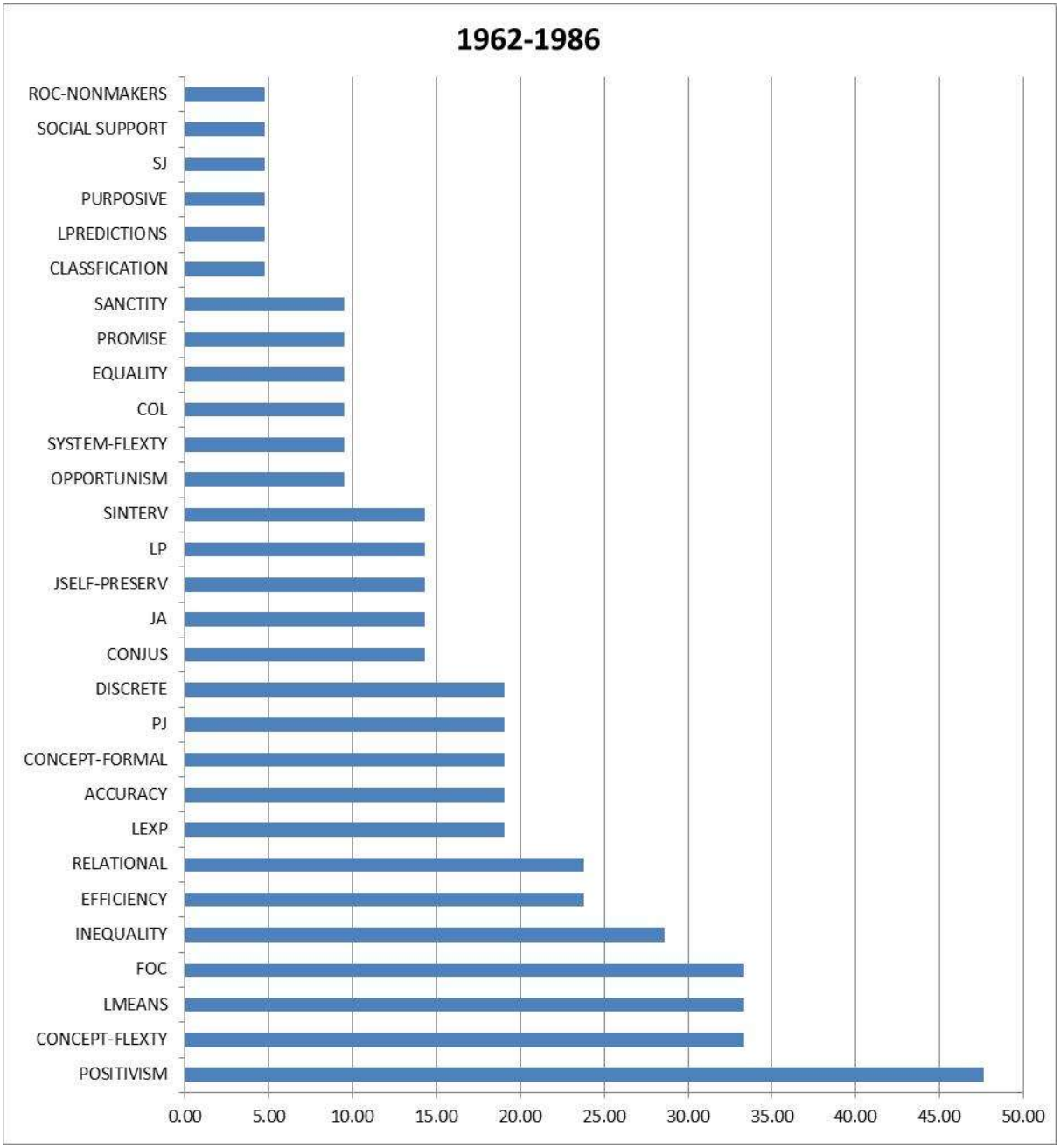

Figure 43: Mixed formalism-flexibility motivating values for 1962-1986

APPENDIX 7: Inferred Internal Formalism Engendering Higher Values

Table 1: Judicial Perception Values

HIGHER VALUE INFERRED	JUDGING PERIOD	LOWER VALUE (S) OBSERVED	MANIFESTATIONS	SOURCE (CASE NUMBERS)
1. Non-Interventionism and Judges as Legal Mechanics	Colonial	1. Sanctity of Contract (**PACTA**)	Written terms perceived sacrosanct	25, 29, 31, 37, 46, 50, 51, 67
		2. Literalism (**LITERALISM**)	Literal Meaning taken	4, 25, 29, 53, 67
		3. Judges as legal mechanics	Rulism	8, 27, 38
	Early Post-Colonial	1. Sanctity of Contract (**PACTA**)	Written terms perceived sacrosanct	3, 5, 6, 7, 9, 13, 23, 33, 34, 35
			Refusal to intervene	Rejection of equity (3, 23); Rejection of implied terms (7, 9, 41); Rejection of vitiating factors (13, 34, 35); Rejection of context/business reality (33, 35).

		2. Literalism (**LITERALISM**)	Literal Meaning taken	4, 5, 13, 34
		3. Judges as legal mechanics	Rulism	2, 9, 10, 22, 14
	Late Post-Colonial	Sanctity of Contract (**PACTA**)	Written terms perceived sacrosanct	2, 3, 7, 11, 14, 15, 18, 24, 25, 27, 37, 53, 49, 50
			Refusal to intervene	Rejection of equity (4, 32); Rejection of fairness (4, 9, 10, 16, 19, 33, 36, 43); Rejection of implied terms (3, 12, 30, 41, 42, 47, 49, 50); Rejection of illegality (21, 23); Rejection of other vitiating factors (23, 21, 48)
		Literalism	Literal Meaning taken	2, 7, 25, 27, 50
		Judges as legal mechanics	Rulism	1, 8, 29, 35
2.Perception of law as logic	Colonial	Positivism	Logical deduction of law and treating law as discoverable	1, 3, 8, 11, 40, 41, 48, 49
			Law as value free-disregard of	40, 48

			extra-legal considerations	
			Legalism and Formality	19
		2. Adherence to Conceptual Formalism	Strict Enforcement of Statutory Regulations of contract	40, 41, 49, 50, 51, 60
			Strict Enforcement of Process and Procedural Laws	27, 47, 68
			Strictly Enforcing contract doctrine	27, 69
		3. Equalitarianism	None	
		4. Certainty	Certainty in litigation	18
			Certainty of Law	8, 19, 40, 41, 47, 52
			Certainty of Contract	53
	Early Post-Colonial	1. Positivism	Logical deduction of law and treating law as discoverable	9, 10, 11, 16, 17, 28, 31, 39, 40

			Law as value free (disregard of extra-legal considerations)	9, 10, 36
			Legalism and Formality	1, 12, 28, 31, 36, 40
		Adherence to Conceptual Formalism	Strict Enforcement of Statutory Regulations of contract	9, 14, 15, 27
			Strict Enforcement of Process and Procedural Laws	27, 37
			Strictly Enforcing contract doctrine-rejection of other considerations	14, 22, 24, 28, 37
			Treating law as conceptually ordered-a matter of principles	15, 31
		Equalitarianism	Presuming the equality of contracting parties	23, 27
		Certainty	Certainty of contract	1
			Certainty in litigation	2, 8, 30, 37
	Late Post-Colonial	Positivism	Logical deduction of law and treating law as discoverable	10, 38, 41, 43, 53, 54

			Law as value free-disregard of extra-legal considerations	4, 13, 1626, 29, 46
			Legalism and Formality	1, 3, 14, 16, 26, 33, 53
			Law as conceptually ordered	26-categorisation, 33, 36-general principles
		Adherence to Conceptual Formalism	Strict Enforcement of Statutory Regulations of contract	10, 11, 13, 41, 42, 44, 48 **plus Table 5 of Appendix 1: Cases** 10, 20, 31, and 83
			Strictly Enforcing contract doctrine-rejection of other considerations	10, 13, 40, 41
			Treating law as conceptually ordered-a matter of principles	5, 28, 32, 36, 40, 41
		Equalitarianism	Presuming the equality of contracting parties	11, 13, 18-literacy presumed, 49-equal bargaining power
		Certainty	Certainty in Litigation	1, 5, 8, 12, 13, 21, 26, 31, 35, 44, **And in Table 5 of Appendix 1: Case 66**

			Certainty of Contract	13, 23, **And in Table 5 of Appendix 1**: Case 21
			Certainty of Law	13

TABLE 2: RULE OF LAW VALUES

HIGHER VALUE INFERRED	**JUDGING PERIOD**	**LOWER VALUE (S) OBSERVED**	**MANIFESTATIONS**	**SOURCE (CASE NUMBERS)**
Justice as Legality	Colonial	Procedural Justice	Civil procedure technicalities determined cases	11, 18, 19, 21, 47
			Contract due process and formalities superior to intention	53
		Superiority of positive law	Law as value free-disregard of extra-legal considerations	40, 48

		Formality	Conformity to formalities determined disputes	53
	Early Post-Colonial	Procedural Justice	Civil procedure technicalities determined cases	1, 2, 9, 10, 17, 28, 30, 31, 33, 37, 39, 40
			Contract due process and formalities superior to intention	8, 38, 41
		Superiority of positive law	Law as value free	9, 10, 36
		Formality	Conformity to formalities determined disputes	8, 38, 41
	Late Post-Colonial	Procedural Justice	Civil procedure technicalities determined cases	1, 5, 8, 12, 13, 20, 21, 26, 31, 44, 54
			Contract due process and formalities superior to intention or fairness	14, 16, 22, 30, 34, 48
			Technical rules of proof determined valid and enforceable contract	39, 40, 51, 52
		Superiority of positive law	Law as value free	4, 13, 16, 26, 29, 33, 46, 48
		Formality	Conformity to formalities determined disputes	14, 16, 22, 30, 34, 48

Judicial Objectivity	Colonial	Law as logic	treating law as discoverable fact	1, 3, 8, 11, 40, 41, 48, 49
		Sanctity of Contract	Written terms perceived sacrosanct	25, 29, 31, 37, 46, 50, 51, 67
		Literalism	Literal Meaning taken	4, 25, 29, 53, 67
	Early Post-Colonial	Law as logic	treating law as discoverable fact	9, 10, 11, 16, 17, 28, 31, 39, 40
		Sanctity of Contract	Written terms perceived sacrosanct	3, 5, 6, 7, 9, 13, 23, 33, 34, 35
		Literalism	Refusal to intervene	3, 23, 7, 9, 13, 34, 33, 35, 41
	Late Post-Colonial	Law as logic	treating law as discoverable fact	10, 38, 41, 43, 53, 54
		Sanctity of Contract	Written terms perceived sacrosanct	2, 3, 7, 11, 14, 15, 18, 24, 25, 27, 37, 53, 49, 50
		Literalism	Refusal to intervene	3, 4, 9, 10, 12, 16, 19, 21, 23, 30, 32, 33, 36, 43, 41, 42, 47, 48, 49, 50
Judicial Rationality	Colonial	Contract law as derivable from General Fundamental Principles	Recognition of general principles applicable to all contracts	27
	Early Post-Colonial	Contract law as derivable from General Fundamental Principles	Recognition of general principles applicable to all contracts	14, 15, 31.

	Late Post-Colonial	Categorisation of Law	Adherence to categorization and classification of law	26, 31, 39
		Contract law as derivable from General Fundamental Principles	Recognition of general principles applicable to all contracts	3, (parol evidence rule), 5, 26 (privity rule), 28, 32, 36, 40, 53 (parol evidence rule).
Predictability and Certainty	Colonial	Certainty in litigation		18
		Certainty of Law		8, 19, 40, 41, 47, 52
		Certainty of Contract		53
	Early Post-Colonial	Certainty of contract		1
		Certainty in litigation		2, 8, 30, 37
	Late Post-Colonial	Certainty in Litigation		1, 5, 8, 12, 13, 21, 26, 31, 35, 44, **And in Table 5 of Appendix 1: Case 66**
		Certainty of Contract		13, 23, **And in Table 5 of Appendix 1**: Case 21
		Certainty of Law		13

Table 3: Judicial Responsiveness

HIGHER VALUE INFERRED	JUDGING PERIOD	LOWER VALUE (S) OBSERVED	MANIFESTATIONS	SOURCE (CASE NUMBERS)
Judicial Responsiveness	Colonial	Adherence to the Legal Order	Judges refusing to make or change law	8, 27, 38
			Strict Enforcement of Process and Procedural Laws	27, 47, 68
			Strictly Enforcing contract doctrine	27, 69
	Early Post-Colonial	Adherence to the Legal Order	Judges refusing to make or change law	2, 9, 10, 14, 22
			Strict Enforcement of formality, including Process and Procedural Laws	1, 2, 8, 9, 10, 17, 27, 28, 30, 31, 33, 37, 38, 39, 40, 41
			Strictly Enforcing contract doctrine-rejection of other considerations	14, 22, 24, 28, 37
	Late Post-Colonial	Adherence to the Legal Order	Judges refusing to make or change law	1, 8, 29, 35
			Strict Enforcement of Statutory Regulations of contract	10, 11, 13, 41, 42, 44, 48 **plus Table 5 of Appendix 1: Cases** 10, 20, 31, and 83

			Strict Enforcement of process and Procedural Laws	1, 5, 13, 20, 22, 26, 36, 42, 44
			Strictly Enforcing contract doctrine-rejection of other considerations	10, 13, 40, 41

SECTION B Inferred External Formalism Engendering Higher Values

Table 4: Systematic Legal Values

HIGHER VALUE INFERRED	JUDGING PERIOD	LOWER VALUE (S) OBSERVED	MANIFESTATIONS	SOURCE (CASE NUMBERS)
Perfectionism-value of legality	Colonial to late post-colonial	Comprehensiveness	Determinism and Certainty of law	As above (Tables 1-3)
		Completeness or Clarity of the Legal system	Deductive Reasoning and positivism	As above (Tables 1-3)
		Conceptual Ordering of law	Recognition of General Principles of contract law plus general categorisation and classification of law	As above (Tables 1-3)
		Formality of the legal system	Strict Enforcement of process and Procedural Laws	

		Acceptability	Responsiveness	As above (Table 3)
The Legal Power Value: Judicial Authority Restraint	Colonial	The *Parol* Evidence Rule	Adherence to the *Parol* Evidence Rule	31
		Legal Restraints	Judicial power restrained by Rules	27, 47, 68
	Early Post-Colonial	The *Parol* Evidence Rule	Adherence to the *Parol* Evidence Rule	4, 5,9
		Legal Restraints	Judicial power restrained by Rules	1, 2, 8, 9, 10, 17, 27, 28, 30, 31, 33, 37, 38, 39, 40, 41
	Late Post-Colonial	The *Parol* Evidence Rule	Adherence to the *Parol* Evidence Rule	3, 30, 39, 43, 53
		Legal Restraints	Judicial power restrained by Rules	1, 5, 8, 12, 13, 20, 21, 22, 26, 31, 36, 42, 44, 45
Conceptual Formalism	Colonial to Late Post-colonial	Positive law commanding or oriented towards formalism	Adherence to legal requirements for formalism	As in Table 1 (under adherence to conceptual formalism).

Table 5: Doctrinal Values

HIGHER VALUE INFERRED	JUDGING PERIOD	LOWER VALUE (S) OBSERVED	MANIFESTATIONS	SOURCE (CASE NUMBERS)
Market Conformism	Colonial	Non-Interventionism	Adherence to freedom of contract	**4**, 25, 29, 37, 47, 49, 50, 67
			Adherence to Sanctity of contract	
		2.Certainty of Law and Contract	As Above	As above
		Superiority of positive law	As Above	
		Transaction Security	Represented by sanctity of contract	As Above
		Generality of contract law	Represented by the conceptual ordering of law	As above.
	Early Post-Colonial	Non-Interventionism	Adherence to freedom and Sanctity of contract	5, 6, 7, 9, 13, 21, 22, 23, 24, 35, 41,
	Late Post-Colonial	Non-Interventionism	Adherence to freedom and Sanctity of contract	3, 9, 14, 19, 23, 24, 27, 28, 39, 43, 47, 48, 49, 50
2 Individualism	Colonial to late post-	Freedom and sanctity of	Adherence to freedom and	As Above

	colonial	contract	Sanctity of contract	

Table 6: Extra-Legal Values

HIGHER VALUE INFERRED	**JUDGING PERIOD**	**LOWER VALUE (S) OBSERVED**	**MANIFESTATIONS**	**SOURCE (CASE NUMBERS)**
Discreteness of contracting	Colonial	Contract not a network of relations	No Relations recognized beyond agreed terms	4, 46, 53, 60
		Rights and Obligations are defined at time of contracting	Rejection of Vitiating factors	25, 49
		No Relations to future transactions	No relations recognized between parent and antecedent contracts	29
	Early post-colonial	Contract not a network of relations	No Relations recognized beyond agreed terms	**Case 29 of Appendix 3**
	Late post-colonial	Contract not a network of relations	No Relations recognized beyond agreed terms	3, 6, 10, 41
		Rights and Obligations are defined at time of contracting	Rejection of Vitiating factors	23, 42, 54
		No Relations to future	No relations recognized between	11, 14, 15, 19, 25, 27, 36, 44,

		transactions	parent and antecedent contracts	49, 50
Accuracy	Colonial	Accuracy in contracting and adjudication	Damages used to give relief	16, 27, 32, 46, 60, 69
	Early post-colonial	Accuracy in contracting and adjudication	Actual loss used to measure damages	26, 18, 28, **and Case 26 of Appendix 3**
	Late post-colonial	Accuracy in contracting and adjudication	Actual loss used to measure damages	6, 13, 32

APPENDIX 8: Inferred Internal Flexibility Engendering Higher Values

Table 1: Values of Law's Perception

HIGHER VALUE INFERRED	JUDGING PERIOD	LOWER VALUE (S) OBSERVED	MANIFESTATIONS	SOURCE (CASE NUMBERS)
Adaptability, Retroactivity and Elasticity of Law	Colonial	Pursuit of efficiency	Normative recognition of trade usage and custom	34, 64
			Normative recognition of ordinary course of business	12, 59, 64
		Normative recognition of normative standards	Adherence to commercial reasonableness	34
	Early Post-Colonial	Pursuit of efficiency	Normative recognition of trade usage and custom	22, 28, 29, 34, 42,
			Normative recognition of ordinary course of business	4, 25
		Normative recognition of normative standards	Adherence to commercial reasonableness	4, 17, 20, 25, 28, 29, 32, 34, 38, 42
			Intervention on harsh and unconscionable grounds	27

			Intervention in public interest	32
	Late Post-Colonial	Pursuit of efficiency	Normative recognition of trade usage and custom	10, 44, 49, 55, 58, 69, 88
			Normative recognition of ordinary course of business	14, 38,
		Normative recognition of normative standards	Adherence to commercial reasonableness	1, 14, 15, 30, 38, 41, 44, 59, 75, 93
			Intervention on harsh and unconscionable grounds	70, 90
			Intervention in public interest	33, 84
			Invoking substantialism	28, 33, 39, 43, 44, 61, 66,
Utilitarian Instrumentalism	Colonial	Conception of Law as a Means to an end	Invoking law's purposes	7, 10, 12, 20, 36, 58,
			Invoking contractual purposes	
			Invoking functionality and practicality of decisions	56, 63
		Conception of Law as Experience	Invoking the circumstances of the contract, its performance or the dispute	10, 12, 13, 16, 28, 32, 33, 34, 35, 36, 39

		Economic efficiency and wealth maximisation as ends of law	Normative recognition of trade usage and custom	34, 64
			Normative recognition of ordinary course of business	12, 59, 64
			Adherence to commercial reasonableness	34
	Early Post-Colonial	Conception of Law as a Means to an end	Invoking law's purposes	14
			Invoking contractual purposes	21
			Invoking functionality and practicality of decisions	41, 42, 43
		Conception of Law as Experience	Invoking the circumstances of the contract, its performance or the dispute	General circumstances (11, 19, 23, 24, 25, 26, 30, 31); Contractual context (20, 32, 37, 38, 39, 43, 47)
		Economic efficiency and wealth maximisation as ends of law	Normative recognition of trade usage and custom	22, 28, 29, 34, 42,
			Normative recognition of ordinary course of business	4, 25
			Adherence to commercial reasonableness	4, 17, 20, 25, 28, 29, 32, 34, 38, 42

	Late Post-Colonial	Conception of Law as a Means to an end	Invoking law's purposes	11, 13, 17, 45, 72, 75, 80, 81, 93, 94
			Invoking contractual purposes	11, 15, 16, 21,
			Invoking functionality and practicality of decisions	1, 5, 11, 14, 18, 25, 31, 41, 46, 51, 59, 77, 82, 93
		Conception of Law as Experience	Invoking the circumstances of the contract, its performance or the dispute	General circumstances (15, 27, 38, 40, 44, 55, 86, 89); Contractual context (16, 86)
		Economic efficiency and wealth maximisation As ends of law	Normative recognition of trade usage and custom	10, 44, 49, 55, 58, 69, 88
			Normative recognition of ordinary course of business	14, 38,
			Adherence to commercial reasonableness	1, 14, 15, 30, 38, 41, 44, 59, 75, 93

TABLE 2: VALUES OF THE JUDICIAL ROLE

HIGHER VALUE INFERRED	JUDGING PERIOD	LOWER VALUE (S) OBSERVED	MANIFESTATIONS	SOURCE (CASE NUMBERS)
Interventionism in Contract	Colonial	Contractual fairness	Invocation of Fairness and ubuntu (as fairness)	5, 42, 44, 56, 58, 62
			Invocation of equity	5, 39
		Courts as contract gap fillers	Filling gaps in contracts	6, 34, 55
	Early Post-Colonial	Contractual fairness	Invocation of Fairness and ubuntu (as fairness)	16, 17, 27
			Invocation of equity	13, 35
		Courts as contract gap fillers	Filling gaps in contracts	23, 41, 42, 47
	Late Post-Colonial	Contractual fairness	Invocation of Fairness and ubuntu (as fairness)	2, 27, 29, 47, 52, 57, 65, 70, 72, 84, 85, 86, 90, 92
			Invocation of equity	2, 3, 47, 48, 49, 63, 74, 92, 93
		Courts as contract gap fillers	Filling gaps in contracts	7, 27, 69, 87, 91

Judicial Law making	Colonial	Judges as law gap fillers	Rule gap filling	9, 12, 20, 36, 57
		Judges as law modifiers	Rule sidestepping	5, 23, 24, 45
			Stretching the meaning of rules	None
	Early Post-Colonial	Judges as law gap fillers	Rule gap filling	None
		Judges as law modifiers	Rule sidestepping	1, 2, 10, 12, 32, 38
			Stretching the meaning of rules	5, 6, 9, 13, 14, 18, 21, 27
	Late Post-Colonial	Judges as law gap fillers	Rule gap filling	6, 10, 19, 30, 35, 40, 72, 74, 80, 83,
		Judges as law modifiers	Rule sidestepping	2, 3, 9, 13, 22, 27, 33, 39, 41, 44, 45, 47, 50, 64, 72
			Stretching the meaning of rules	6, 19, 81, 83
Law as Predictions	Colonial	Judging by Hunch-abductive reasoning	Judging by personal intuition or preferences	2
			Reliance on Judges' personal cognitive attributes	None
	Early Post-	Judging by Hunch- abductive	Judging by personal intuition or	14, 27, 32,

	Colonial	reasoning	preferences	
			Reliance on Judges' personal cognitive attributes	None
	Late Post-Colonial	Judging by Hunch - abductive reasoning	Judging by personal intuition or preferences	21, 22, 26, 65, 93, 94
			Reliance on Judges' personal cognitive attributes	26 (personal knowledge); 21 (personal sense of justice); 30 (personal emotions); 44 (personal sentiments); 65 (personal common sense); 84 (Personal sense of fairness); 91(Personal sense of justice).

Table 3: Judicial Responsiveness

HIGHER VALUE INFERRED	JUDGING PERIOD	LOWER VALUE (S) OBSERVED	MANIFESTATIONS	SOURCE (CASE NUMBERS)
Judicial Responsiveness	Colonial	Contextual responsiveness	Responsiveness to judging environment	10, 12, 16, 28, 32, 33, 34, 35, 36, 39
			Responsiveness to circumstances surrounding the contract	13, 34
		Purposive responsiveness	Responsiveness to law's purposes	7, 10, 12, 20, 36, 58,
			Responsiveness to contractual purposes	None
	Early Post-Colonial	Contextual responsiveness	Responsiveness to judging environment	11, 19, 23, 24, 25, 26, 30, 31
			Responsiveness to circumstances surrounding the contract	20, 32, 37, 38 39, 43, 47
		Purposive responsiveness	Responsiveness to law's purposes	21
			Responsiveness to contractual purposes	41, 42, 43
	Late Post-Colonial	Contextual responsiveness	Responsiveness to judging environment	15, 27, 38, 40, 44, 55, 86, 89

			Responsiveness to circumstances surrounding the contract	16, 86
		Purposive responsiveness	Responsiveness to law's purposes	11, 13, 17, 45, 72, 75, 80, 81, 93, 94
			Responsiveness to contractual purposes	11, 15, 16, 21,

SECTION B Inferred External Formalism Engendering Higher Values

Table 4: Systematic Legal Values

HIGHER VALUE INFERRED	JUDGING PERIOD	LOWER VALUE (S) OBSERVED	MANIFESTATIONS	SOURCE (CASE NUMBERS)
Substantive Justice	Colonial	Substantive justice and substantialism overrides procedural justice	Substantive justice cures legal defects	15, 22, 45, 55, 62, 65
			Invocation of equity	
			Invocation of fairness	42, 44
			Taking into account the totality of circumstances	32, 34, 36, 44, 45 and **Case 15 of Appendix 5**

	Early Post Colonial	Substantive justice and substantialism overrides procedural justice	Substantive justice cures legal defects	10,
			Invocation of equity	13, 35,
			Invocation of fairness	15, 16,
			Taking into account the totality of circumstances	2, 17,
	Late Post Colonial	Substantive justice and substantialism overrides procedural justice	Substantive justice cures legal defects	6, 12, 13,24, 28, 32, 33, 39, 44, 53, 61, 67, 72, 76, 7.8, 79
			Invocation of equity	2, 47, 48, 49, 65, 63, 68, 70, 78,
			Invocation of fairness	47 (ubuntu), 48(ubuntu), 49(ubuntu), 50(ubuntu), 56(ubuntu), 65(ubuntu), 67(ubuntu), 70(ubuntu), 78(ubuntu), 88
			Taking into account the totality of circumstances	1 (ubuntu), 2 (ubuntu), 15, 16, 17, 21, 26(ubuntu), 29, 44, 45, 48, 58, 64, 68, 72, 88, 89

Legal Pluralism	Colonial, early post-colonial and late post-colonial	Recognition of non-legal norms	Normativity of business practices	As above
			Taking into Uganda's experiences	As above
			Taking into account contractual contexts	As above
			Taking into account public interest	As above
Conceptual Flexibility	Colonial to Late Post-colonial	Conceptual flexibility as a rule of recognition	Adherence to purposive judging, commercial reasonableness and substantialism	As in Tables 1-4 above.

Table 5: Doctrinal Values

HIGHER VALUE INFERRED	**JUDGING PERIOD**	**LOWER VALUE (S) OBSERVED**	**MANIFESTATIONS**	**SOURCE (CASE NUMBERS)**
Consumer Welfarism	Colonial	Fairness in exchange	Invocation of contractual fairness	5, 42, 44, 56, 58, 62
		Reliance	Normative recognition of reliance	26, 32, 51
		Equity	Invocation of equity	5, 39
		Good faith	Invocation of good faith	None

	Early Post-Colonial	Fairness in exchange	Invocation of contractual fairness	16, 17, 27
		Reliance	Normative recognition of reliance	9, 11, 18, 31, 33, 36, 44
		Equity	Invocation of equity	13, 35
		Good faith	Invocation of good faith	None
	Late Post-Colonial	Fairness in exchange	Invocation of contractual fairness	2, 27, 29, 47, 52, 57, 65, 70, 72, 84, 85, 86, 90, 92
		Reliance	Normative recognition of reliance	6, 11, 14, 17, 21, 23, 42, 59, 69, 84, 93
		Equity	Invocation of equity	2, 3, 47, 48, 49, 63, 74, 92, 93
		Good faith	Invocation of good faith	92
Commercialism	Colonial to late post-colonial	Economic efficiency	Custom and trade usage, ordinary course of dealings and commercial reasonableness	As above under efficiency and wealth maximization
		Wealth maximization	Ordinary course of dealings and commercial reasonableness	As above under efficiency and wealth maximization

Table 6: Extra-Legal Values

HIGHER VALUE INFERRED	JUDGING PERIOD	LOWER VALUE (S) OBSERVED	MANIFESTATIONS	SOURCE (CASE NUMBERS)
Relational Contracting	Colonial	Contract a network of long-term relations	Relations recognized beyond agreed terms	None
		Trust and Cooperation	Reliance recognised	25, 49
		Contract source of social relations	Normative recognition of social relations from contract	29
	Early post-colonial	Contract a network of long-term relations	Relations recognized beyond agreed terms	9, 17,27, 44
		Trust and Cooperation	Reliance recognised	11, 16, 18, 19,
		Contract source of social relations	Normative recognition of social relations from contract	9, 24
	Late post-colonial	Contract a network of long-term relations	Relations recognized beyond agreed terms	93
		Trust and Cooperation	Reliance recognised	14, 17, 48, 59, 69
		Contract source of social relations	Normative recognition of social relations from contract	36, 38, 68, 72

Social Support	Colonial	Public Policy or Interest	Social or state policy	9, 36
		Normativity of community standards	Common sense, reasonableness, unconscionability, and sensibleness	As indicated above
	Early post-colonial	Public Policy or Interest	Social or state policy	None
		Normativity of community standards	Common sense, reasonableness, unconscionability, and sensibleness	As indicated above
	Late post-colonial	Public Policy or Interest	Social or state policy	5, 6, 7, 8, 32
		Normativity of community standards	Common sense, reasonableness, unconscionability, and sensibleness	As indicated above
Judicial Absoluteness	Colonial to late post-colonial	Judging by hunch	Reliance on personal preferences or prejudices-such as citing no law and reliance on convenience or common sense	As indicated above
		normative recognition of experiences	Being motivated by of business, political or social realities	As indicated above

APPENDIX 9: Content Code Book/Table

No.	CONTENT CATEGORY	CODE
A.	**NAME OF COURT**	
1.	Supreme Court	**SC**
2.	Court Of Appeal	**CA**
3.	High Court	**HC**
4.	East African Court of Appeal	**EACA**
5.	Constitutional Court	**CC**
B.	**LAW REPORT**	
1.	Uganda Law Report	**ULR**
2.	East African Law Reports	**EALR**
3.	East African Court of Appeal Law Reports	**EACA**
4.	High Court Bulletin	**HCB**
5.	Kampala Law Reports	**KLR**
6.	Ulii Commercial Law Reports	**UGCOMMC**
7.	Uganda Protectorate Law Reports	**UPLR**
8.	Law Development Centre Monthly Bulletins	**LDC**

C.	**UNREPORTED CASE CITATIONS**	
1.	Supreme Court Civil Appeal	**SCCA**
2.	Supreme Court Miscellaneous Applications	**SCMA**
3.	Court of Appeal Civil Appeal	**CACA**
4.	High Court Civil Appeals	**HCCA**
5.	High Court Civil Suit	**HCCS**
6.	High Court Miscellaneous Application	**HCMA**
7.	High Court Company Cause	**HCCC**
8.	Constitutional Court Petition	**CP**
9.	Criminal Revision Number	**CR.REV.NO.**
D.	**CALIBER OF JUDGES**	
1.	Chief Justice	**CJ**
2.	Deputy Chief Justice	**DCJ**
3.	Principle Judge	**PJ**
4.	Supreme Court Justice	**SCJ**
5.	Court of Appeal Justice	**JA**

6.	High Court Judge	**J**
7.	Acting Judge	**Ag. J**
E.	**FORMALISM INDICATIVE PRACTICES**	
1.	**Literalism in contract interpretation:** Represents: o Judging that assigns the ordinary or literal meaning to words used in the contract, and its terms; o Judging that ignored or refused to take into account the context under which the contract was entered, had to be performed, or enforced; o It covers the ignoring of the law's or contract purposes, as well as; o Refusal to take into account institutions that constitute the judging environment or otherwise the reality that would call for flexibility**.**	**LITERALISM**
2.	**Considering money as the measure of value**	**VALUE-MONEY**
3.	**Giving Procedural Justice Sway:** Stands for judges paying strict adherence to and blind application of: o Procedural rules, such as regulate the manner of filing actions, pleadings, and process of litigation. It for instance involves instances where judges denied the aggrieved party access to justice on grounds of defective or inadequate pleadings**;** o It also covers strict enforcement and adherence to rules on form during contracting and litigation**.**	**PROCED-SWAY**
4.	**Pacta Sunt Servanda Applied:** Stands for the practice of deciding in favour of the strict and blind enforcement of contracts as made by the parties. This includes the refusal to fill gaps in terms of contracts or otherwise implying terms; treating written terms as sacrosanct; and refusal to interfere in contracts in the face of pleas of illegality, equity, unfairness,	**PACTA**

	unconscionability, or vitiating factors**.**	
5.	**Positive Law Superior to non-legal orders:** Refers to: o Incidents where judges, while asserting the applicability of positive law, rejected the relevancy and normative value of practice, business knowledge, custom, usage, ordinary course of dealing and other non-legal orders**;** and o Includes the presumption of legality, where anything not expressly declared by law to be illegal is deemed legal**.**	**NON-LEGAL INFERIOR**
6	**Assessing damages based on actual financial loss from non-performance**	**ACTURAL LOSS**
7.	**Presumption of Equality of Contracting Parties**	**EQUALITY PRESUMPTION**
8.	**No Filling gaps in Contract terms:** This covers all judging that refuses to interfere with the parties' freedom of contract, by rejecting pleas challenging the contractual terms on grounds like fairness, unconscionability, unreasonableness, equity, worthlessness, and the like**.**	**NO- CORRECTING**
9.	**Recognition of general principles applicable to all manner of contracts:** o Covers the application of general contractual principles, such as the *privet of contract doctrine*, to solve a range different contractual disputes**;** o It includes using the same general principles to resolve contracts falling in different categories, such as sale of goods, bailment, banking and the like.	**GENERAL PRINCIPLES**
10.	**Certainty of terms as a requirement for a valid contract:** Refers to the practice of judges declaring contracts as void or	**CERTAINTY**

	otherwise unenforceable for being uncertain in their terms.	**REQUIREMENT**
11.	**Literal and Logical deductive interpretation, or mechanical application of rules,** stands for: o Judicial approach that views the law as positive law, logically deducible from the words of a statute or precedent, with consistence, and free of consideration for its underlying values; o The practice of judges applying rules of law in statutes or precedent as if a mechanic fixing a part in a pre-designed and built machine, with mathematical precision and inflexibility; o This includes practices that ignore any contextual, purposive or other extra-legal considerations in the application of law to given facts; and o It also covers the tendencies to look at law as always providing a single correct answer to any given dispute	**LOGICAL-MECHANIC**
12	**Conformity with the Constitution as a Rule of Recognition:** Judging that recognises the constitution as the higher norm to which all other norms must conform to.	**CONS-CONFORM**
13.	**Legal Classification Categorisation Recognised:** This stand for: o The judicial recognition of classification and categorisation of law into contract, tort and the like, in the sense that negligence was for instance rejected as a source of rights and obligations in contract; o It also covers the distinction between different types of contracts, thereby giving more force to specific rules relating to such contracts than fundamental general principles applicable to all manner of contracts.	**LCATEGOTIN**
14.	**Parties' consent and expectations at the time of the contract used to determine validity of norms.** This includes:	**EXPECTANCY**

	o The judges treating the heart of contract as consent of the parties, thereby the search for rights and obligations being a search for what the parties consented to; o Even when judges opt to intervene, their choices are governed by what the parties consented or are taken as having consented to**; and** o Remedies are based on what the parties expected or agreed to be bound to, and nothing more.	
F	**FORMALISM MOTIVATING VALUES**	
1.	**Positivist Conception of Law:** Covers: o Judicial perception that the law is value free, neutral and objective by nature. Therefore, it should not be construed contextually or purposively; and o The perception that for every legal dispute or question, including hard case, the law provides an answer that is discoverable by logical deduction. Judges will therefore simply reason out the answers to legal issues from positive law, without external aids**;** o Kelsey's Pure Theory of law as true and using it to guide adjudication, especially the recognition of normativity**.**	**POSITIVISM**
2.	**Freedom and Autonomy of Contract:** It covers judicial worship of the freedom of contract idol by refusing to accommodate anything that would amount to court or legislative intervention in the terms of the contract. It includes the practice and culture of judges choosing not to interfere in contracts to do fairness and justice.	**FOC**
4.	**Certainty of Law:** Covers: o Judicial tendency to pursue certainty in the legal system including the institutions of litigation and adjudication, This is exhibited in practices like intolerance to uncertain pleadings, non-contextual judging, and paying due regard to certainty of issues and law in litigation and adjudication**;** o It also includes the concept/ideal of certainty of contracts, being that subscribers to it view contract as a source of private law.	**COL**
5.	**Constitutionalism:** Refers to the culture of compliance to and	**CONSTILISM**

	basing all legal decisions on the validity as defined by the constitution. The constitution is looked at as the emitter of ultimate norms to guide judicial decisions**.**	
6.	○ **Procedural Justice as superior to substantive justice:** This covers the paying of emphasis to matters of form, technical rules, matters of procedure and evidential rules, over and sometimes in substitution for the substantive fairness and justice of the case.	**PJ**
7.	**Role of Courts as implementers not makers of the law:** This covers all tendencies by judges to make law by modifying existing rules, enlarging their scope/premises, or outright promulgation of new rules.	**ROC-NONMAKERS**
8.	**Writing as the best evidence of parties' intentions:**	**PAROL EVIDENCE**
9.	**Sanctity of Contract:** Represents the adaption and observance of the pact sent servant notion, the essence of which is that contracts have to be enforced, with the parties' intentions reflected by the ordinary meaning of the terms being given full effect.	**SANCTITY**
10.	**Conception of Law as determinate:** ○ Covers the recognition and promotion of certainty in law's corpus and applicability. ○ It is the view that the law is complete and judges can always get the right answer to disputes within the legal order, without reference to social policy or other extra-legal considerations.	**DETRMINATE**

11.	**Contract viewed as Discrete:** Represents the conception that contracts are entered and completed discretely and create no future or relational obligations not expressly agreed to.	**DISCRETE** ○
12.	**Tension Management Mechanism:** Represents internal mechanisms of managing the tension between formalism and flexibility, including restraining judges in what appears absolutism emitted by unfettered and unguided discretions often allowed by the law. The restraints act as a management tool in the tension between formalism and flexibility**.**	**MGT**
13.	**Equality before the law:** It represents judicial treatment of parties to a contract as having been equal both at the time of contracting and during the trial, including adjudication.	**EQUALITY**
14.	○ **The Conception of Law as Conceptually Ordered:** Represents the treatment of contract law as being made up of neutral objective and consistent fundamental general principles and concepts, that apply to all manner of contracts; ○ It also covers the treatment of different classifications and categories of law as vital and rigid, such that torts like negligence cannot be used to find obligation in contract.	**CONCEPT-ORDERED**
15.	**Conception of Contractual Obligation as Promise:** This includes the conception that contractual obligation is based on a self-imposed promise, creating a voluntary obligation to be bound. It includes the view that damages should be based on what the parties expected and nothing more, and excludes considerations outside the real intentions verifiable by the four	**PROMISE**

	corners of the contract.	
16.	**Conceptual Formalism:** This represents formalism as an inherent character of rules applicable to commercial contracts in Uganda. It includes: o The strict regulation of contracts; o Requirements for formalities or form; and o The conceptual shutting out of contextual and other non-legal considerations when enforcing contracts.	**CONCEPT FORMAL**
17.	**Others: These cover the one-off or otherwise values that have been observed. They include:** o **Courts need to end disputes/litigation expeditiously (EXPEDIENCY);** o **Dehumanisation of law (DEHUMAN);** o **Accuracy in contracting and adjudication:** It refers to the value of accuracy that came with the introduction of money, finding its way into adjudication's culture of insisting on measurable claims and awards of relief (**ACCURACY).**	**OTHERS**
G.	**FLEXIBILITY INDICATIVE PRACTICES**	
1.	**Inductive Reasoning in interpretation of statute or precedents**: These are instances when a judge started with a conclusion or explanation, and sought to apply law as a justification. The finding does not flow from a logical application or literal interpretation of the rule of law.	**INDUCTIVE**
2.	**Abductive Reasoning in interpretation of statute or precedents**: Judges applied personal intuition, preferences, or other forms of abductive reasoning like their sense of justice or reasonableness.	**ABDUCTIVE**
3.	o **Sidestepping the Rules of Law:** This represents instances where the judge circumvented a rule in a statute or precedent, either by misinterpreting facts so as to put the dispute beyond the rule, or cases of simply doing so in the name of finding fairness, equity or	**SSTR**

	justice.	
4.	**Judicial Interventionism in Contract**: Represents judicial interference to write into or otherwise modify terms of contracts and substitute the parties' intentions with what judges deem fair, just or equitable in the circumstances**.** It includes cases where ubuntu was invoked to interfere with contract**.**	**IINTERV**
5.	**Recorgnising inequality amongst contracting parties:** Covers cases where the economic, political or social class or position of a party to the contract was part of the motivation for a judicial decision.	**NO-EQUALITY**
6.	**Practicality and Functionality used guide the applicability and meaning of parties' actions:** Stands for judging that focuses on how realistic, practical, useful or effective a decision would be, and then flexibly use the law to justify it. The practice starts with the end of practical utility in mind, and works backwards to make the law serve such ends.	**PRACTICAL**
7.	**Law understood and Applied Purposively or Contractual Obligations and rights determined Purposively:** Stands for judging that is purposeful, the purposes pursued being extra-legal considerations such as political ends, the facilitation or promotion of state policies, social goals and economic/commercial ends. It is the process of using law instrumentally as means to other ends.	**PURPOSIVE**
8.	**Contextual interpretation or enforcement of a contract, or law**: o Covers searching for the intention of the parties to the contract from outside its four corners, by looking at the social, economic or political context within which the contract was made;	**CONTEXTUAL.**

	○ It also covers interpretation or application of the law by reference to and having the goal of satisfying such contextual considerations of the time, as opposed to the ordinary meaning and applicability of the words used by the lawmakers; and ○ Interpretation or application of rules based on Necessities of the time; and ○ Interpretation or application of rules based on Political Interests.	
9.	**The judge making law:** Representing the Filling of gaps in Laws with new rules; creation of new rules; and amending Laws,	**LAW MAKING**
10.	○ **Flexibility recognised as a judging paradigm:** Expressing approval for flexibility as a notion in law and judging**.**	**FLEXIBILITY**
11.	**Undue regard to procedural defects to do substantive justice:** Covers judges disregard of procedural or other technical defects that would otherwise impede access to substantive justice of a case, such as: ○ Defective pleading; ○ Following the wrong procedure during contracting or litigation; ○ Using wrong forms or otherwise non-compliance with stated formalities in contracting or litigation and the like.	**PROC-DISREGARD**
13.	**Filling gaps in contracts in Contracts:** This covers all incidences of judges treating written terms as rebuttable and only *primafacie;* implying terms to fill gaps or correct what they deem as unworthy, unreasonable, unconscionable or unfair terms.	**CFILLING**
14.	**Using indeterminate doctrines:** This covers the use of doctrines like reasonableness, 'substantiality', 'contemplation of parties'**,** the standard of a reasonable man, unconscionable, unworthiness, and bad faith to allocate rights and duties amongst parties to the contract.	**INDETERM- DOCTRINE**
15.	**Stretching the meaning and Applicability of a rule**: Represents instances where owing to the ordinary or literal meaning a particular rule would not extend to cover and apply in the way a judge has	**STRETCH-MEANING**

	used it.	
16.	**Criminalising civil wrongs:** All decisions that recognised and enforced laws that contained criminal sanctions for what would otherwise be civil wrongs**.**	**CRIMINALISING**
17.	**Legal Classificatory Categories ignored**: Stands for judges ignoring the categorisation of law into different subjects. This includes invoking negligence to justify liability in Contract**.**	**NO CATEGORIES**
18.	**Contract viewed as a network of or other relations:** Includes judges ignoring the doctrine of privet of contract; and the discrete nature of contracting, and instead giving effect to intentions for the contractual benefits to last beyond its immediate performance. It includes practices that look at contract as creating a network of relations, long term relation, and where cooperation and trust are expected by contracting parties**.**	**RELATIONS**
19.	**Applying Formalism with flexible ends in mind:** Represents judging that applied formalism instrumentally to justify an answer already reached by a judge, or other flexibility ends.	**OPPORTUNISTIC FORMALISM**
20.	**Jealously Guarding Jurisdiction of Court:** Covers practices where judges insist on having jurisdiction to hear disputes in the face of disabling laws or facts.	**JEALOS-GUARD:**
21.	**Using Reliance to find contractual obligation**: Stands for judges finding contractual obligations on the basis of parties having relied on the promises made by the other, as opposed to the promise being	**RELIANCE-USED**

	the end point at which obligation arises.	
22.	**Contract Law understood as including Practices**: This covers judging that allocates rights and obligations from commercial practices, ordinary usage, custom, trade usage, and other types of social or commercial practices. These practices are looked at the source of social policy that moves the law from being dead letters to living law.	**PRACTICES**
23.	**Public policy invoked to determine Contractual Obligations and Enforceability:** Covers judging by reference to public policy as a source of normativity. It includes references to public interest**.**	**PUBLIC POLICY**
24.	**Internal Judicial Guidelines:** Represents attempts by judges to lay out guides for judging in hard cases**.**	**JUDGING GUIDE**
25.	**Public interest invoked to determine Contractual Obligations and Enforceability:** Covers judging based on giving value to public interest.	**PUBLIC INTEREST**
26.	**Viewing remedies as restoration**	**RESTORATION**
27.	**Exercise of Unfettered Discretion**	**ABSOLUTE- DISCRETION**
H.	**FLEXIBILITY MOTIVATING VALUES**	
1.	**Judicial Absolutism:** Covers all forms of non-recognition of	**JA**

	restraint to judicial authority**,** such as the exercise of unfettered discretion, refusal to recognise contractual ouster of jurisdiction, judges looking at themselves as the emitters of and authority over law rather than its subjects, and the like**.**	
2.	**Law as Predictions of What Judges Will Do:** This includes occurrences of radical realist perceptions, especially the use of judges' intuitions, preferences, and or prejudices to choose between competing answers, and thereby looking at rules of law and dead letters, only becoming alive depending on what judges do about them.	**LPREDICTIONS**
3.	○ **Conception of Law as Experience:** The perception of law as including the dictates of the time's Necessities, Political, social or economic/commercial reality, commercial sense and reality, business reality or other considerations rooted in Uganda's history and contextual reality, being the environment within which the contract was entered, performed or is adjudicated upon.	**LEXP**
4.	○ **Social Support as a Rule of Validity and Recognition of Law:** Includes the recognition of public opinion, and other forms of public or social acceptance, being viewed as a rule of recognition and applicability of law.	**SOCIAL SUPPORT**
5.	○ **Legal Pluralism**: Represents the recognition of extra-legal orders that are sources of normativity.	**LP**
6.	○ **Contractual Justice through Judicial Interventionism:** this cover all forms of judges interfering with freedom of contract, to: o Write into, by filling gaps, adding or amending terms; o Correct what they deem improper terms; or o Otherwise to find fairness, justice or rewrite what they fell should have been the appropriate contract.	**CONJUS**
7.	○ **Opportunism:** Covers judging that is formalistic but purposive, motivated by the instrumental use of law as a means to and end, or flexible but motivated by formalistic goals. Either approach is in	**OPPORTUNISM**

	that sense used opportunistically.	
8.	○ **Economic Efficacy as the Criteria for Enforceability/Validity of Contracts:** Covers judicial reasoning that used the guiding norm, worthlessness of the contract, and measure of fairness of the terms. Economic Efficiency then stands for what makes business, commercial or general economic sense rather a conceptual analysis and application of positive law. It is represented by references to practices such as trade usage, and direct reference to economic, commercial or business reality.	**EFFICIENCY**
9.	○ **Inequality before The Law**: The recognition of social and economic inequality and classification as a reality that forms part of the institutions from which contracts, the legal order and commercial adjudicatory approach arise.	**INEQUALITY**
10.	○ Informal Contracting as a source of enforceable bargains	**INFORMALITY**
11.	**Law as a Means to An End:** Indicates traces of applying law as instruments to fulfil underlying goals that are not the enforcement of bargains as stated in contracts, or the application of contract doctrine to facts of a case with neutral and purely legal mind.	**LMEANS**
13.	**The Restitution Measure of Damages:**	**RESTITUTION**
14.	○ **Role of Courts as Law Makers and Reformers:** Covers the trend of judges seeing their role as that of law reformers, gap fillers or otherwise emitters of law**.**	**LMAKERS**
15.	○ **Perception of Law as Indeterminate:** Covers judges' perceptions of contract doctrine as capable of adaptability to regulate changing circumstances, through the use of tools like conceptual flexibility in rules, and the adoption of negligence remedies to resolve contract disputes. It is the perception that the law is incapable of certainty, especially when applied in hard cases that often have a bearing on	**INDETERMINANCY**

	complex and dynamic social, economic and political contexts.	
16.	○ **Judicial Self Preservation:** Covers the culture of judges deciding against most efforts to oust their jurisdiction or giving effect to restraints to their authority.	**JSELF-PRESERV**
17.	○ **Legal validity and Contractual Obligation to be judged by Practical Utility:** It covers cases where judges were motivated by: o How practical it was to allocate certain rights or obligations in a dispute; or o Which line of interpretation or application of legal rules produced the most practical outcome; o Mere Convenience of the court or the parties.	**PRACT-UTILITY**
18.	**Substantive Justice as superior to procedural justice:** This represents the substantive justice principle embedded in Article 126 of the Uganda Constitution, to the effect that during adjudication, substantive justice shall always be done without due regard to technicalities. Technicalities here cover procedural rules, matters of form and other non-substantive rules, including positive law as opposed to what the substance of a dispute would call for.	**SJ**
19.	**Ubuntu Concept of Fairness and Justice:** This covers all cases where the notions of fairness or justice were perceived by judges in line with African culture, which looks at the plight of the human being as the primary goal of legal norms.	**UBUNTU**
20.	**Contractual Justice:** This covers judicial interventionism in contract. Judges interfered with the terms by filling gaps, adding; substituting or setting aside terms to find what created fairness or justice, especially in favour of the weaker party.	**CONJUS**
21.	**Conformity with Public Interest**: as a rule of recognition of legal	**PUBLIC INTEREST**

	norms and enforceability of contracts.	
22.	**Conformity with Government Policy:** as a rule of recognition of legal norms and enforceability of contracts. It covers all cases where judges recognised normativity in government policy that was not law, in the sense that it was not commanded by known sources of law, i.e. legislation, local precedent, custom, trade usage or common law.	**GOVT-POLICY**
23.	**The Command Economy:** Represents the judges' recognition and being motivated by the state regulation of production, distribution, sale, and terms of contracts of sale of goods and services, including price.	**COMM-ECON.**
24.	**Conception of Contract as Relational:** Covers the viewing of contracts as extending beyond the transaction to cover long-term relations, third party relations, and social relations**.**	**RELATIONAL**
25.	**Public Opinion as Criteria for contractual Obligation and Enforceability:** o This covers instances of judges basing contractual obligation on communal standards such as reasonableness, the reasonable man, unconscionability, unsoundness; and o A direct use of public opinion by whatever name called, such as public interest.	**PUBLIC OPINION**
26.	o **Commercialism and Wealth Maximisation:** Represents the quest for allocating contractual rights and obligations with a view to promoting commerce and creation or multiplying of wealth.	**COMM-WEALTH.**
27.	o **Conceptual Flexibility:** Represents tendencies to: o Ignore the categorisation of law into subjects like contract, tort and the like; o The refusal to see contract law as being made up of fundamental abstract but few principles and concepts from which the detailed rules emerge and can derive their ability to keep changing; and	**CONCEPT-FLEXTY**

	○ It therefore includes the refusal to consider contract law principles as universal, neutral and objective that can apply in whatever context and set of facts.	
28.	**State Policy as criteria for Contractual Obligation and Rule of Recognition of Law:** Covers the perception that public policy and public interest mean state policy, as defined by the executive arm of government.	**STATE POLICY**
29.	**Conception of contractual obligations based on Reliance**: Relates to the conception that the enforcement of promises should be viewed as compensating a plaintiff because he relied on the promise of the defendant, and covers the use of torts like negligence to find liability in contract. ○	**RELIANCE**
	○	
30.	○ **Protection of free market economy:** Refers to the belief in and practices of protecting and promoting the free market economy as the ideal.	○ **MARKET ECONOMY**
31.	○ **Systematic Flexibility:** Covers the practice and conception of condoning and giving weight to uncertainty in litigation and adjudication, such as accommodating uncertainty in pleadings, and selectively adhering to procedural rules. It also extends to flexibility in the machinery of the legal system such as jurisdictional flexibility.	**SYSTEM-FLEXTY**
	○ **MANAGEMENT MECHANISMS**	
1.	○ **Tension Management Mechanism:** Refers to the mechanisms judges have used to try and manage the tension between formalism and flexibility.	**MGT**

TABLE OF AUTHORITIES

Principal Legislation

Bilateral Investment Treaty between Ugandan and the Netherlands

Civil Procedure Act, Laws of Uganda

Legal Notice Number 1 of 1971

Legal Notice Number 1 of 1986

Resolutions of the G8 Foreign Ministers' Meeting of 2007 in Potsdam

The Bills of Exchange Act, 1933

The Chattels Transfer Act, 1978

The Constitution of Uganda, 1995

The Constitution of Uganda, 1967

The Constitution of Uganda, 1962

The Constitution of Uganda, 1966

The Contracts Act of Uganda 2010

The Employment Act, 2006

The Employment Decree 1975

The Evidence Act (Chapter 6 of The Laws of Uganda)

The Hire Purchase Act of Uganda 2009

The Insolvency Act, 2011

The Insurance Act, Chapter 213 Laws of Uganda

The Insurance Act, Number 6 of 2017

The Judicature Act of Uganda (Laws of Uganda) 2000

The Judicature Acts of September 1962, and 1967(11/1967)

The Lint Marketing Board Act, 1959

The Local Council Courts Act 2006

The Marketing of Produce Act 1953

Tier 4 Microfinance Institutions and Money Lenders Act

The Money Lenders Act, Chapter 273 Laws of Uganda

The Mortgage Act, Chapter 229 Laws of Uganda

Traffic and Road Safety Act of 1970

Uganda Contract Act 2010

Uganda Agreement and The Distribution and Price of Goods Act 1952

Uganda Code of Judicial Conduct, 2003

Uganda Sale of Goods Act, 1932

Uganda Sale of Goods and Supply of Services Act 2017

UNCITRAL Model Law on Cross-Border Insolvency 1997

1900 Uganda Agreement and the 1902 Uganda Order in Council

Subsidiary legislation

Civil Procedure Rules

The Civil Procedure Rules, SI 71-1 Laws of Uganda

The Constitution (Sentencing Guidelines for Courts of Judicature) (Practice) Directions 2013

The Court of Appeal Rules

The Judicature Act (Court of Appeal) Rules

Uganda Code of Judicial Conduct 2003

Uniform Commercial Code of the United States

Cases

England

Barrow V Isaac & Sons [1891] 1 QB 417

Bowden v London, Edinburgh and Glasgow Life Insurance Co. (1892) 2 QB 534

Burma Oil Co. V Fox [1976] QB 503

Central London Property Trust Ltd v. High Trees House Ltd [1947] 1 KB 130

Chiverton v Ede [1921] 2 KB at 44-45

Dyson Holdings Limited V Fox [1976] QB 503

Esso Petroleum Co. Ltd v Mardon (1976) 2 ALLER, (1976) EWCA 4

George Mitchell (Chesterhall) Ltd v Finney Lock Seeds Ltd (1983) QB 284

Golden Strait Corporation v Nippon Yusen Kubishika Kaisha [2007] UKHL 12

Hadley v Baxendale (1854) 9 Exch. 341

King v Victoria (1896) AC 250

Mirehouse V Rennell (1833) 1 Cl& Fin 537, 546

Newsholme Brothers v Road Transport and General Insurance Co. Ltd [1929] ALLER 442, 444.

Pontin v Wood [1962] 1 QB Ltd v Advocate [1965] AC 75

Reardon Smith Line Ltd v Hansen Tangen [1976] WLR 995

Stockloser v Johnson [1954] 1 ALLER 630

South Africa

Afri-Forum & Another v Mulema & Another [2011] ZAEQC 2

Everfresh Market Virgina (PTY) Limited v Shorprite Checkers (2012) (1) SA 256

Tanzania

Auto Garage V. Motokov (1971) EA 392

USA

Jacob & Young Inc. v Kent, 129 NE 8898 (NY 1921)

Uganda

A. H. Kaderbhoy & Co. v. C. Parakah & Co. [1920-29] 3 ULR 200

A. Kambe v. African United Auto Engineers & Another [1976] H.C.B. 105

A.M. Jabi v. Mbale municipal Council [1975] H.C.B 190

Abdul Rahman Elamin v Dhabi Group, Warid Telecom Ltd & Others [2017] CACA 60(16/11/2017)

Access Financial Services Plc Ltd v. Kayongo Rutiba HCCS 61/2007

Adam Bin Ramadhan v. East African Railways Corporation [1975] E.A. 195

Akkermans Industrial Engineering Ltd v. Attorney General HCCS 333/2004(19/01/2009)

Ali j. Dhanji v. William O'Swald & Company [1920-29] 3 ULR 191

Alibhai Virji v R. Merrryweather (1910-20) ULR 363

Aloysius Kakande v Edward Nsimbi [1975] E.A. 195

Alpha International Investments Ltd v. Kizito HCCS 131/2001 (22/4/2003).

Alphonse Odido v Lebel (EA) Ltd & 2 others [1987] HCB 58

AM Dharas & Sons Ltd v Elys Ltd [1963] 1 EA 573

Amin Electrical Services v Ashok Theatres Limited [1960] 1 EA 298

Amis Olaboro t/a Lopai Hardware v. Kumi District Local Government Council MA 479/2005

Amosh.S. Ghata v Tarbhain Haji Jamal & Co. Limited HCCS 354/68, LDC 82/70

Amrit Goyal v. Hari Chand Goyal & Others HCMA 649/2001 (25/9/2003)

Aniello Ciella v Cassman Brown & Co. Limited HCCS 596/72, LDC-M.B, July 1972

Aqua Plumbing (U) Ltd v. United Assurance Co. Ltd HCCS 431/2002 (Judgment of 15/3/2004)

Arim v Stanbic Bank [2015] CACA 113(17/4/2015

Arim v Stanbic Bank [2016] SCCA 6 (22/12/2016)

Arnold Brooklyn & Company v. Kampala City Council C P No. 23/2013(4/4/2014).

Asante Aviation Ltd v. Star of Africa Air Charters Ltd & 3 Others [2017] UGCOMMC 125(2/11/2017)

Atom Outdoor Ltd v. Arrow Centre (U) Ltd HCCS 448/2003 (17/12/2004)

Attorney General V Gladys Nakibuule Kisekka [2018] UGSC 30

Attorney General v. Africa Cooperative Society Ltd SCM.A 6/2012

Avone v Uganda [1969] EA 129

Bagoka v Kibwaijana [1976] HCB 364

Bakulu-Mpagi Wamala v The Electoral Commission (HCCS No. 606 of 1980 (Unreported)

Banax Ltd v Gold Trust Bank Ltd [1997) HCB 37

Bank of Africa Uganda Ltd v. Clive Mutiso & Others HCCS 152/2007(28/7/2009).

Bank of Uganda v Masaba [1999] 1 EA 2

Barclays Bank of Uganda v. Geofrey Mubiru S.C.C.A 1/ 1998 (judgement of 24/2/1999)

Batanda v. Bollore Africa Logistics Limited HCCS 182/2009 (Unreported-Judgment dated 23/1/2017)

Begumisa Financial Services Ltd v. General Mouldings Ltd & Another [2007] 1 EA 28

Belex Tours & Travel v. Crane Bank Ltd & Another [2013] CACA 13 (24/10/2013)

Bhimjani v. Patel (1956-57) 8 ULR 164

Bibonde v. Waiswa [1974] H.C.B. 120

Bloedow v. Renton (1910-20) 2 ULR 44

Boustead & Clarke Limited v. Ralaram Narandas (1910-20) 2 ULR 349

Brazafric Enterprises Ltd HCCA No. 16 of 2014 (UG COMMC 135/2015)

British American Tobacco (U) Ltd v. Francis Mulindwa & Others HCCS 767/2004 (24/4/2013)

British American Tobacco Ltd v. Sedrach Mwijakubi & 4 Others [2013] HCB 35

British Trading Co. v The Governor of the Uganda Protectorate (1910-20) 2 ULR 1

Budaka Ginners Limited V. Maganlal Kalidas Hathi (1956) EACA 65.

Buildtrust Construction (U) Ltd v. Martha Rugasira HCCS 288/2005(30/01/2008)

Busongola Stores Limited v. Barclays Bank D.C.O. (1956-57) 8 ULR 143

C.M Imam Din the Japan Cotton Trading Co. [1920-29] 3 ULR 25

Central Purchasing Corporation v. Hon. Major General (RTD) Kahinda Otafiire HCCS 627/2003(31/08/2007)

Chatrubhuj Nagji v. Abdulla Bin Abdulla [1936-51] ULR 43

Child & Joseph v. Damoder & Karsanji (1920-29) 3 ULR 66

Chotabhai M. Patel v Chaturbhai M. Patel & Another [1958] 1 E.A. 743

Christopher Sekimpi v Uganda Breweries Limited [1972] HCB 216

City Council of Kampala v Mukiibi [1967] EA 368

Coffee Works (Mugambi) Limited v Coffee Marketing Board [1963] 1 EA 148

Commissioner of Income Tax v Jaffer Brothers Limited [1957] 1 EA 519

Commodity Export International Ltd & Another v. MKM Trading Co. Ltd [2015] CACA 81(6/10/2015)

Concorp International Ltd v. East & Southern African Trade & Development Bank [2010] 1 HCB 1

Congolese Rally for Democracy v. Palm Beach Hotel HCMA 279/2000

Construction Engineers and Builders Limited v Attorney General SCCA 24/94, (2/9/95)

Cooper Motors Corporation (U) Ltd v. Genesis Transporters Ltd & Others HCCS 93/2008 (28/11/2008)

Credit Finance Corporation Ltd v Alalani [1964] EA 317

Damani v. Salim Abid Zangie [1936-51] UPLR 179

Damas Mulagwe v. Lanex Forex Bureau Ltd & others HCCS 358/2006(10/01/2011)

Daudi Busulwa v Texas C. (South Africa) Ltd (1933) 5 ULR 55

David Dungu v East African Posts & Telecommunications HCCA No. 84 of 1973

Deo Mabiiho v Fred Kaijabwangu [1972] HCB 176

DFCU Bank (U) Ltd v. Ndibazza & Others [2016] UGCOMMC 2 (11/1/2016)

DFCU Bank v. Kasozi [2003] 2 EA 414

DFCU Ltd & DFCU Leasing Co. Ltd v. Sam Mutongole CA 56/2007

Doola Singh & Son v The Uganda Foundry & Machinery Works (1945) 12 EACA 33

Douglas v. Carr Lawson & Co. [1920-29] 3 UPLR 234

Dr. Syedna Mohamed Burhannudin Saheb & 2 others v Jamil Din & Others [1973] 1 EA 254

Dr. Vincent Karuhanga t/a Friends Polyclinic v. National Insurance Corporation and Uganda Revenue Authority [2008] HCB 151

E.M. Paul v The Kenya Trading Corporation Co. Limited (1920-29) 3 ULR 96

East African Development Bank v. Ziwa Horticultural Exporters Ltd HCMA 1048/2000

East African Plans Ltd v Roger Allan Rickford Smith HCCS No. 426 of 1969

Eastern and Southern African Trade and Development Bank v. Hassan Bassajjabalaba & Aisha Basajja [2007] UGCommC 30

Eclipse Edil Soil JVC Co. Ltd v. Kampala City Council HCCS 256/2005 (9/2/2007)

Ecumenical Church Loan Fund (U) ECLOFF v. John Bwiza & Others t/a Kamabare Women's Development HCCS 614/2004(31/10/2007

Eden International School Ltd v. East African Development Bank Ltd HCCS271/2015 (7/2/2017)

Edmund Schluter & Co. (Uganda) Ltd v Patel [1969] EA 239

Edward Makubuya t/a Edward Engineering Works v. Kampala City Council, Kawempe Division HCCS 59/2003 (1/3/2004)

Egypt Air Corporation v. Suffish International Food processors (U) Ltd & Pan World Insurance Co. Ltd. [1999] 1 EA 69

Eldam Enterprises Ltd v. SGS (U) Ltd & 2 Others [2007] HCB 37

Equinox Global Trading Co Ltd v Panalpina Uganda Ltd HCCS 0314 of 2008

Ernest Windt v Gordon Parrot [1976] HCB 30

Esso Standard (U) Ltd v. Opio (1992-93) HCB 107

Establishments L. Besson De L' Est Africa v. F.C. Holmes (1920-29) 3 ULR 220

Ethiopian Airlines v. Motunrola [2005]2 EA 57

Fabiano Bukenya v David Mutebi & Another [1959] 1 EA 366

George Hall v. Chas O.F. Drani [1972] U.L.R 65

Gitway Investments Ltd v. Tajmal Ltd & Others [2006] 2 EA 76

Goustar Enterprises Ltd v. Oumo [2006] 1 EA 77

Graphic Systems (U) Limited v. SDV Transami (U) Limited HCCS No. 468 of 2012 (Unreported-Judgment dated 15/10/2014)

Grayson & Co. Ltd v AH Wardle (Uganda) Ltd and Others [1963] EA 582

Greenboat Entertainment Ltd v. City Council of Kampala [2007] UGCOMMC 20

Greenland Bank ltd (In Liquidation) v. Express Sports Club Ltd HCCS 232/2006 (1/6/2007)

Grindlays Bank (U) Limited v Kasozi [1982] HCB 54

Grindlays Bank (U) Limited v Kayondo (1976) HCB 147, 148

Gulam Mohammed v E.Ethel (1932-35) Vol. 5 ULR 290

H. White Wilson & Co. v. Jamal Walji (1920-29) 3 ULR 61

H. White Wilson & Co. v. the Barnet Soda Factory (1920-29) 3 ULR 56

Hajji Asadu Lutale v. Michael Ssegawa HCCS 292/2006 (15/2/2008

Halai Construction Ltd v. Coil Ltd HCCS 785/2014

Hamud Bin Suleman v. Visinji ganji (1920-29) 3 ULR 46.

Hansa & Lloyds Ltd & Emmanuel Onyango v. Aya Investments Ltd &Mohammad Hamid HCCS 857/2007 (26/8/2010)

Harshad Limited v Globe Cinema Limited and Others [1960] 1 EA 1046

Hassan Merali v. Nanji Khimji UHCA 4/1917

HCT-00-CC-AB-002-2006 [2008] UG COMM. 33

Henckell Du Buisson (E.A) Limited v. Twentsche Overseas Trading Co. Limited (T/A Victoria Motors) (1956-57) 8 ULR 221

Highland & Agriculture Export Ltd & Another v. Alpha Global 21ST Joint Venture & 5 Others [2017] UGCOMMC 113(18/8/2017)

Honday Ellab v Attorney General [2011] 1 HCB 38

Hope Mukankusi v. Uganda Revenue Authority HCCS 438/2005(19/7/2010)

Huq v Islamic University in Uganda [1995-98] 2 EA 117

Hydro Engineering Services Co. Uganda Limited v. Thorne International Boiler Services Limited HCCS No. 818/ 2003 (Unreported)

I.T.Patel v. R. Noormahomed (1920-29) 3 ULR 80

Ian Peters Limited v. House of Novelties Limited (1968) E.A 19

Interfreight Forwarders (U) Ltd v. East African Development Bank (1994-95) HCB 54

Interfreight Forwarders (U) Ltd v. East African Development Bank [1990-94] 1 EA 117

Iron & Steel Wares Limited v C.W. Martyr & Co [1956] 23 EACA 175

Jade Petroleum Ltd v. Salim Ramzanli & Another [2017] UGCOMMC 114(18/8/2017)

Jamal Ramji & Company v. Erukana Musoke [1920-29] 3 ULR 197

Jamba Soita Ali v. David Salaam HCCS 400/2005 (3/7/2006)

Jane Bwiriza v. Osapil [2001-2005] HCB 52

Jayuntilal S. Shah v Attorney General [1970] LDC 47/70, P.53

Jjagwe v. Standard Chartered Bank (U) Ltd HCCS 375/2004

John Kawanga, Remmy Kasule both t/a Kasule and Kawanga Advocates v. Stanbic Bank Uganda Ltd HCCS 410/2002(27/6/2003)

Jubilee Insurance Co. Ltd v John Sematengo [1965] 1 EA 233

Julian Mbalile t/a Julian Mbalile & Family v Transocean (U) Limited [1985] HCB 82

Julian Mbalule & Family v Transocean (U) Ltd. [1985] HCB 82

Jupiter General Insurance Co. v Kasanda Cotton Co. [1966] 1 EA 252

K.B. Kalu v. Ambalal Shankerbhai & Co. [1920-29] 3 ULR 27

K.B. Parekh v. F. Mahomed and J. Esmail (Objector) [1920-29] 3 ULR 224

Kabona Brothers Agencies v Uganda Metal Products & Enamelling Co. Ltd [1981-1982] HCB 74

Kafuma v. Masaka District Cooperative Union Limited [1975] H.C.B. 285

Kajubi v Kabali (1944) 11 EACA 37

Kampala Cycle Trading Co., Limited v. Universal traders [1952-57] ULR 193

Kamugisha v. Uganda Revenue Authority [2012] UGCOMMC 149

Kanji Naranji Lakhani v Salim Mohamed Bin Name [1960] 1 EA 358

Kanyomozi v Motor Hart (U) Ltd [1999] 2 EA 114

Karangwa v. Kulanju HCCA 3/2016 [2017] UGCOMMC 91(24/8/2017)

Kasirye Byaruhanga & Company Advocates v Uganda Development Bank (SCCA 2/1997).

Katate v. Nyakatukura (1952-56) ULR 47

Kavuma v First Insurance Co. Limited HCCS No. 442/2013 (Unreported-Judgement of 16/5/2018)

Kayanja v. India Assurance Company Ltd [1968] EA 295

Kenkom Limited v. Saracen Uganda Ltd HCCS 134/2003 (Judgment of 18/7/2007)

Kenya Airways Ltd v. Ronald Katumba [2006] HCB 106

Kibalama v. Alfasan Belgie CVBA [2004] 2 EA 146

Kibyami v. Mission and Relief Transport HCCS 263/2006 (30/11/2005).

Kifuse v Binzali (1952-56) ULR 157, 158

Kiirya v East African Railways Corporation [1976] HCB 229

Kiiza Besigye v Yoweri Museveni Supreme Court Electoral Commission (SCEC) No. 1 of 2006, and SCEC No. 1 of 2011

Kintu v Kyotera Coffee Growers Limited [1976] HCB 362

Kirasha v. United Assurance Co. Ltd HCCS 861/2004 (10/5/2006)

Kirparam & Sons v. K.C. Chopra [1920-29] 3 ULR 71

Kitaka v. Uganda Transport Corporation [1977] H.C.B. 158

Kitayimbwa Salongo v. Peggy Garments Ltd HCCS 345/2003(22/5/2009)

Kituuma Magala & Co. Advocates v. Celtel (Uganda) Ltd CA 39/2003 SCCA 9/2010

Kurji Anandji & Co. v Sojpal Punja Shah & Others [1964] 1 EA 3

Lalji Naranji & Co. v. Laxman Kanji [1920-29] 3 ULR 159

Larco Concrete Products Ltd v. Transair Ltd [1987] HCB 39

Lewis Ralph Dodd v Chanirakant M. Nandha HCCS 8/70, LDC 180/70

Lint Marketing Board v. Kampala Oil & Soap Manufacturing Co. Limited (1956-57) 8 ULR 178

Lubega v. Barclays Bank (U) Limited [1990-94] 1 EA 294

Lugalambi v. Board of Governors Namilyango [1975] HCB 321

Lulume v Coffee Marketing Board [1970] 1 EA 155

Mabirizi and others v Attorney General (Consolidated Constitutional Petitions 49 of 2017, 3 of 18, 5 of 2018, 10 of 2018 and 13 of 2018) [2018] UGCC 4 (26/7/2018).

Magezi & Another v. Ruparelia [2005] 2 EA 156

Magezi v. Multichoice Uganda Ltd [2007] 1 EA 164

Mainuka & Sons v Abasaija Kyeyamba [1982] HCB 50

Manasseh Kamugisha v Uganda Prefabrication Building HCCS 115/1994, Judgement of 5/12/95

Mariam Naigaga v. Orient Bank Ltd HCCS 464/2013 (7/4/2015)

Matovu & Others V. Attorney General M.A 143/2008 (from HCCS 248/2003)

Mazinga v. Baganda Co-operative Society [1952-57] ULR 12

MB Nandala v Father Lyding [1963] 1EA 706

Mbale Exporters & Importers v. IBERO (U) Ltd [2007] 1 HCB 95

Mbale United Transporters Ltd v. Town Clerk, Mbale Municipal Local Government Council & Others HCCS 267/2004(30/9/2005)

Mengo Builders & Contractors Limited v Kasibante [1953] 1 EA 591

Mirembe Wire Products Ltd v. Goldstar Insurance Co. Ltd HCCS 54/2002 (Judgment of 18/7/2007

Mistry Amar Singh v Serwano Wofunira Kulubya [1963] 1 EA 408

Mobil (U) Limited v Uganda Commercial Bank [1982] HCB 64

Mogas (U) Ltd v. Benzina (U) Ltd) HCCS 88/2013 [2017] UGCOMMC 92 (5/9 2017)

Mohamed Azim v Ladha Kassam (1932-35) ULR Vol. 5 130, 133

Mohanlal Gandhi v Suleman Mithah (1932-35) ULR Vol. 5 193

Mohmood Sebagala v Musayi t/a Musayi's Garage Co. [1979] HCB 180

Monas (U) Limited v Benzene (u) Limited HCCS 88/2013 [2017] UGCOMMC 92 (5/9 2017)

Monday Eliab v. Attorney General S.C.C.A 16/2010 (Judgment of 14/11/2011).

Motor Union Insurance Co. Limited V Ddamba (1963)1 EA 271

Moulvi Shah v. Farley & Tranter (1910-20) 2 ULR 189

Ms Peter SS Kirumira Oil Millers v. American Insurance Company [1976] HCB 56

Mugumuza v Agip Petrol Station (1975) HCB 290, 293

Multiholdings Limited & Multi Constructors Limited v Uganda Commercial Bank HCCS 459/70, LDC Case 160/70

Multiple Industries Ltd v. Alam Construction EA Ltd HCCS 300/2006

Muwema & Mugerwa Advocates v. Shell (U) Ltd CA 18/2011

Mwenge v Migadde (1932-35) ULR Vol. 5, 98

N.R. Lakhani v. H.J. Vaitha & Another Limited [1965] E.A. 452

Nahurira v Baguma and 2 others [2015] UGCOMMC 76 (30/4/2015)

Nakana Trading Co. Limited v. Coffee Marketing Board [1990-94] 1 EA 448

Nanji Khodabhai v Sohan Singh & Another [1956-57] 8 ULR 304

Nanji v. Queensland Insurance Co. Limited [1952-57] ULR 60

Nantumbwe Shamira v. Kampala City Council & Others HCCS 33/2007(30/3/2009)

Nasanairi Kibuuka v A.E. Bertie Smith (1908) ULR Vol. 1 41

National Housing & Construction Corporation v. Lion Assurance Co. Ltd [2017] UGCOMMC 14(17/2/2017)

National industrial Credit (Uganda) Limited v. C.D. Patel t/a Western Transport Co. (1972) U.L.R 85

National Industrial Credit Uganda Ltd v PM Nsibirwa HCCS No. 735 of 1971

National Social Security Fund & Sentoogo v. Alcon International Ltd, decision of 8/2/2013 SCCA 15/2009

National trading Corporation v. Moses Kityo (1972) U.L.R 63

NEC Health World Pharmaceuticals Ltd v. Engineering Construction Co. Ltd. HCCS 809/2012(24/4/2013)

Ngege (U) Limited v. SDV Transami (U) Limited HCCS 579/2003

Nile Bank Ltd & Another v. Thomas Kato & Others HCMA 1190/1999 from HCCS 685/99, Ruling of 30/8/2000

Nile Bank Ltd v. Translink [2005] 2 EA 237

Nipunnoratiam Bhatia v. Crane Bank Ltd [2013] HCB 76

NIS Protection (U) Ltd v. Nkumba University HCCS 604/2004(16/5/2006)

Noor Mohamed Jan Mohamed v Kassamali Virji Madhani (1953) 20 E.A.C.A 8

Obed Tashobya v. DFCU Bank Ltd HCCS 742/2004 (9/5/2007)

Olinda De Souza Figueiredo v Kassamali Nanji [1963] 1 EA 381

Omega Construction Co. Ltd v. Kampala Capital City Authority HCCS 780/2015(28/4/2017)

Oriental Insurance Brokers Limited v Transocean (U) Limited [1999] 2 EA 260

Osapil v. Kaddu [2000] 1 EA 193

Osman v. Mulangwa [1995-98] 2 EA 275

Oyster International Limited v Air Guide Services Limited HCCS 424/1994, Judgment of 12/06/95

Pan African Insurance Co. (U) Ltd v International Air Transport Association HCCS 667/2003 (25/01/2008)

Patel & Others v National & Grindlays Bank Ltd [1970] 1 EA 121

Patel and 2 Others v. Budaka Ginners Limited (1968) E.A. 104

Patel v Gajjar [1964] EA 27

Petrocity Enterprises (U) Ltd v. Security Group (U) Ltd HCCS 869/2004(27/4/2010)

Pioneer General Assurance Society Ltd v Ziwa [1974] 1 EA 161

Pioneer General Assurance Society v Mukasa [1974] 1 EA 165

Pirani Properties & Agencies Ltd v Tajdin Kara [1962] 1 EA 285

Pollen (U) Limited v. Associated Match Co. Limited (1973) HCB 111

Portland International (PTY) Ltd v Sembule Steel Mills Ltd & 2 Others [2017] UGCOMMC 118 (3/10/2017)

Post Bank (U) Limited v. Abdu Ssozi S.C.C.A 8/2015 (Judgement of 19/1/2017)

Postbank (U) Ltd v. Ssozi [2017] SCCA 1(9/1/2017)

Prof. Egbert De SMET v. Juliet Nakassaga [2017] UGCOMMC 135(1/8/2017)

Pyarali Kuverji v. the British India General Insurance Co. Limited [1956] 7 ULR 194

R. Rouge v. L. Besson & Co. (1920-29) 3 ULR 90

R.L Jain v. Kamugisha [2015] UGCOMMC 77 (Dated 14/4/2015)

Rashid Reich and David William Rwamafa v Uganda [1975] HCB 327

Robbialac Paints (U) Limited v K.B Construction Limited [1976] HCB 49-50

Ruby General Insurance Co. Ltd v General Land and Insurance Agencies Ltd [1963] 1 EA 154

Ruhemba v. Skanka Jensen (U) Ltd [2002] 1 EA 25

Rwakatooke Muchope v. Caltex Oil (U) Ltd HCCS 809/1999(Judgment of 21/10/2004)

S. Kiggundu v. Barclays Bank of Uganda Limited (1972) U.L.R 169

S.K Ndugwa, Gulu v. The Buganda Butchers Limited (1936-51) ULR 150.

Samuel Hawaga v Christopher Bisutu HCCS No. 839 of 1973

Sanghani & Co. v. Karmali Dharamshi & Co. [1936-51] 6 UPLR 179

Sara Kagoro t/z Twengoma & Quality Tailoring Groups, Nyamurambi Women Group v. ECLOF HCCS 104/2002(16/4/2007)

Saroj Gandesha v. Transroad Ltd SCCA 13/2009

SDV Transami (U) Limited v Agrimag Limited & Jubilee Insurance Company of Uganda

SDV Transami (U) Ltd v. Nsibambi Enterprises Ltd [2008] HCB 93

Sekayombya v Uganda Steel Corporation [1984] HCB 42

Semu Kiseka Mukwaba & Others v Daudi Musoke Mukubira (1952-56) ULR 74

Sendege, Senyondo & Co. Advocates v. Kampala Capital City Authority [2017] UGCOMMC 22(3/3/2017)

Sengooba & 4 Others (Minors) v. Stanbic Bank Ltd HCCS 184/2001

Setramaco International Ltd v. Board of Directors/Headmaster, Lubiri Secondary Scholl & Others HCCS 478/2005 (20/01/2009)

Shell Uganda Ltd v. Captain Naeem Chaudry HCCS 179/2004(10/2/2008)

Shenoi & Another v. Maximov [2005] 2 EA 280

Shine Pay (U) Ltd v. Kiyonga Francis HCCS 547/2004(27/3/2006)

Shiv Construction Co. Limited v Endesha Enterprises Limited [1999] 1 EA 329

Stanbic Bank Uganda Limited v. Atabya Agencies Ltd [2006] 1 EA 386

Standish v. Sunderji [1920-29] 3 UPLR 187

Steam Aviation FZC v. Attorney General HCCS 9/2010 (25/1/2015)

Suffish International Food processors (U) Ltd & Pan World Insurance Company Limited v. Egypt Air Corporation [2002] SCCA 6 (19/6/2002

Sugar Corporation Uganda Ltd v Lawsam Chemicals (U) Ltd [2003] 2 EA 679

Swaibu Katongole v. Spear Tourism and Cargo (U) Limited HCCS 225/2006(7/4/2008)

Tajdin Hussein & 2 Others v. Hwan Sung Industries Ltd [2006] HCB 101

Take Me Home Limited v Apollo Construction Co. Limited [1981] HCB 43.

Tamp Engineering Consultants Ltd v. MacDowell Ltd HCCS 224/2010(25/01/2016

Tejani & Another v. Life Insurance Corporation of India [1968] E.A 242

The Busoga Millers & Industries Limited v. P. C. Patel [1955] 1 EALR 348

The Motor Union Insurance Co. Ltd v Ddamba [1963] 1 EA 271

The Official Receiver v. United Stores Limited & Another [1962] E.A. 180

The Universal Cold Storage Limited v Sabena Belgian World Airlines [1965] 1 EA 418

Thunderbolt Technical Services Ltd v Apedu Joseph & K.K Security (U) Ltd HCCS No. 340 of 2009

Tobacco and Commodity Traders International Inc. v. Mastermind Tobacco (U) Ltd H.C.C. C 18/2002(9/5/2003)

Tota Ram v Mistry Waryam Singh [1933] 5 ULR 76

Traces SA v. Attorney General HCCS No 525 of 2006

TransAfrica Assurance Co. Ltd v. Cimbria (EA) Ltd [2002] 2 EA 64

Triad Holdings Ltd v. Networks Exports PVT Ltd & Others HCCS 358/2000(Judgment of 19/8/2005.

Twentsche Overseas Trading Company Limited v Uganda Sugar Factory Limited (1945) 12 EACA 1

Uganda Printing & Publishing Co. v. Yokana Kabangala (1920-29) 3 ULR 77

Uganda Railways Corporation v. Bushenyi Commercial Agencies & 2 Others [2012] CACA 31 (14/12/12)

Uganda Revenue Authority v. Wanume [2012] 1 HCB 43

Uganda Telecom Ltd v. Tanzanite Corporation [2005] 2 EA 331

Uganda Telecom v. ZTE Corporation [2016] CACA 59(1/12/2016)

Uganda v Alafairi Kagezi Criminal Revision No. 21 of 1974

Uganda v Ali Matovu Criminal Revision No. 35 of 1974

Uganda v Gerald Ngulumi (Crim. Rev No. 175 of 1975).

Uganda v Stephen Kafeero Criminal Revision No. 106 of 1974

Uganda v. Kenyi and Others [1975] HCB, Cr. Rev. No. 70 of 1975

Uganda Wildlife Authority v. Hon. Francis Mukama CA 78/2002; (2/2/2010)

United Assurance Co. Ltd v. Attorney General [1995] VI KALR 109

United Garment Industry Limited v. Notco [1977] HCB 151

Universal Cold Storage Ltd v Kenya Co-operative Creameries Ltd [1964] 1 EA 719

Utex Industries Limited v Attorney General (S.C.C.Application 52/1995)

Viram v. Chorley (1920-29) 3 ULR 63

Vithaldas Haridas & Co. v. Valji Bhanji & Co. [1920-29] 3 ULR 217

Walker Bros. Limited v. Norman Godinho & M. Moses (1920) 3 ULR 149

Wapenyi v Kimbowa CA 53/1970, LDC-Case 84/71, Page 79

Waswa v. Kikungwe [1952-57] ULR 1

Were Fred v. Kaga Ltd HCCS 530/2004(23/12/2005)

William Menezes v. Saraswati Gangaram (1960) EALR 313

Yokana Sekandi v Yafesi Semakula HCCS 152/70, LDC-Case 181/70

Yoweri Mukasa v. Gulkam Mussein Velji [1920-29] 3 UPLR 260

Zaabwe vs. Orient Bank Ltd & 5 Others SSCA 4/2006

Zakariya Wotoitidde v Patrisi Kivubuka (1932-35) ULR 138

BIBLIOGRAPHY

Online and Other General Sources

https://www.export.gov/apex/article2?Id=Uganda.Market-review, accessed on September 6, 2017

'30 Poorest Countries in the World - Business Insider' (*Business Insider*) <https://www.businessinsider.com/the-25-poorest-countries-in-the-world-2017-3?IR=T> accessed 6 September 2017

'2017 World Population Review' (*World Population Review*, 6 September 2017) <www.worldpopulationreview/countries/Uganda-population/>

'About ULII | Uganda Legal Information Institute' <https://ulii.org/content/about-ulii> accessed 6 September 2017

'Commercialism' <https://en.oxforddictionaries.com/definition/commercialism> accessed 27 April 2019

'Expository Jurisprudence Law and Legal Definition | USLegal, Inc.' <https://definitions.uslegal.com/e/expository-jurisprudence/> accessed 19 October 2018

Henkin L, 'The United States Constitution as Social Contract', *Proceedings of the American Philosophical Society* (The American Philosophical Society, 1987)

Kane M, Oloka-Onyango J and Tejan Cole A, 'Reassessing Customary Law Systems as a Vehicle for Providing Equitable Access To Justice for the Poor (Arusha Conference: New Frontiers of Social Policy, December 12-15, 2005)' (31 January 2017) <https://landportal.org/library/resources/landwiserecord2246item2265/reassessing-customary-law-systems-vehicle-providing>

Ogoola J, 'The Rape of the Temple' *The New Vision Daily* (8 October 2006) <http://www.newvision.co.ug/new_vision/news/1139267/ogoola-eur-poem-black-mambas> accessed 15 November 2018

Schwab K and Sala-i-Martin X, 'Global Competitiveness Report 2014-2015' (The World Economic Forum) <www.Weforum.org/doc/WEF_GlobalCompetitivenessReport_2014-2015> accessed 30 September 2015

'The Global Competitiveness Report 2014–2015 - WEForum - World' (World Economic Forum) <www3.weforum.org/docs/WEF_GlobalCompetitivenessReport_2014-15.pdf>

'Transparency International, 2016 Report' (2016) <http://www.transparency.org/country/UGA> accessed 6 September 2017

'TRIPS Agreement' <https://www.wto.org/english/tratop_e/trips_e/intel2_e.htm>

Twining W and Miers D, 'How to Do Things with Rules by William Twining' (*Cambridge Core*, 2010) </core/books/how-to-do-things-with-rules/402324B7FDDE4A52D6EAA6875E8443F4>

'Uganda Corruption Report' (*GAN Business Anti-Corruption Portal*) <https:// www.business-anti-corruption.com/country-profile/uganda> accessed 23 March 2018

'Uganda Protectorate Government Annual Report of 20th April 1893'

Wesaka A, ‘Ugandans Will Suffer for Ban on Judges, CJ Warns’ *Daily Monitor* (30 January 2019) <https://mobile.monitor.co.ug/News/Ugandans-will-suffer-ban-on-judges-CJ-warns-Museveni/2466686-4957418-format-xhtml-1xciusz/index.html> accessed 16 July 2019

‘E-News Letter of the Commercial Court 2011’

‘The Chief Justice of Uganda B Katureebe’s Speech to the 18th Annual Judges Conference on 20/01/2016, in Kampala Uganda.’

Books

Adams J and Brownsword R, *Understanding Contract Law* (5th ed, Sweet & Maxwell 2007)

Aguda T and Odoki B, ‘The Judge in Developing Countries’, *An Introduction to Judicial Conduct and Practice* (Law Development Centre Printing Press 1984)

Alexy R, ‘Legal Certainty and Correctness’, *The argument from injustice: a reply to legal positivism* (Clarendon Press 2002)

Allot A, Kuper H and Kuper L (eds), ‘The Future of African Law’, *African Law: Adaptation and Development* (University of California Press 1965)

Allott AN, *The Limits of Law* (Butterworth 1980)

Aseka EM, *Transformational Leadership in East Africa: Politics, Ideology, and Community* (Fountain Publishers 2005)

Atiyah PS, *The Rise and Fall of Freedom of Contract* (Clarendon Press ; Oxford University Press 1985)

Austin J, *Lectures on Jurisprudence or The Philosophy of Positive Law* (R Campbell ed, J Murray 1875)

——, *The Province of Jurisprudence Determined: And, The Uses of the Study of Jurisprudence* (Hackett Pub 1998)

Baker JH, *An Introduction to English Legal History* (2d ed, Butterworths 1979)

Beirne P and Beirneand SR Pashukanis, *Selected Writings on Marxism and Law* (Academic Press Inc. (London) Ltd 1980)

Benson P, ‘The Unity of Contract Law’ in Peter Benson (ed), *The theory of contract law: new essays* (1st edn, Cambridge University Press 2001)

Botoshi H, ‘Striking the Balance Between the Considerations of Certainty and Fairness in the Law Governing Letters of Credit’ (Dcotoral, University of Sheffield 2000)

Breyer SG, *Active Liberty: Interpreting Our Democratic Constitution* (Vintage Books 2005)

Brion DJ, ‘Norms and Values in Law and Economics’, *Encyclopedia of Law and Economics* (1999) 1044

Burton SJ, *An Introduction to Law and Legal Reasoning* (Little, Brown & Co 1985)

——, *Judging in Good Faith* (Cambridge University Press 1992)

Cardozo BN and Kaufman AL, *The Nature of the Judicial Process* (Quid Pro Law Books 2010)

Carothers T, 'Rule of Law Temptations' in T Ginsburg, Robert L Nelson and James Joseph Heckman (eds), *Global perspectives on the rule of law* (Routledge 2010)

Chen-Wishart M, *Contract Law* (Oxford University Press 2010)

Collins H, *Marxism and Law* (Oxford University Press, 1982)

d'Sspremont J, 'Formalism versus Flexibility in The Law of Treaties' in Christian J Tams, Antonios Tzanakopoulos and Andreas Zimmermann (eds), *Research handbook on the law of treaties* (Edward Elgar 2014)

Denning ATD, *The Discipline of Law* (Butterworths : LexisNexis 1979)

Drake JH 'Editorial Preface to This Volume', in Ihering V R, (ed), *Law as a Means to an End* (Boston Book Co. 1913), xxii-xxiv

Duxbury N, *Patterns of American Jurisprudence* (Repr, Clarendon 2001)

Dworkin R, 'No Right Answer?' in PMS Hacker and J Raz (eds), *Law, Morality and Society* (Oxford University Press 1978)

Dworkin R, *Taking Rights Seriously* (Harvard University Press 1978)

——, *Law's Empire* (Harvard University Press 1986)

——, *Law's Empire* (Repr, Hart Publishing 2010)

Eisenberg MA, *The Nature of the Common Law* (Harvard University Press 1991)

Frank J, *Law & the Modern Mind (Stevens, 1949)* (Stevens & Sons Limited 1949)

Franzosi R, *From Words to Numbers: Narrative, Data, and Social Science* (Cambridge University Press 2004)

Freeman MDA and Llewellyn K, 'Institutions and Law Jobs', *Lloyd's introduction to jurisprudence* (Ninth edition, Sweet & Maxwell 2014)

Fried C, *Contract as Promise: A Theory of Contractual Obligation* (2nd edn, Oxford University Press 2015)

Fuller LL, *The Morality of Law* (Yale Univ Press 1978)

Galligan B, 'Sir Owen Dixon's 1952 Swearing in Speech', *Politics of the High Court: a study of the judicial branch of government in Australia* (University of Queensland Press 1987)

Gilmore G, *The Bramble Bush*, vol 3 (Oceana 1951)

Ginsburg T and Heckman JJ (eds), 'The Politics of Courts in Democratization', *Global perspectives on the rule of law* (Routledge 2010)

Goode RM, *Commercial Law in the next Millennium* (Sweet & Maxwell 1998)

Grey TC, *Formalism and Pragmatism in American Law* (Brill 2014)

Hart HLA, *The Concept of Law (Clarendon Law Series)* (2nd ed, Clarendon Press ; Oxford University Press 1994)

Hayek FA, *The Road to Serfdom* (University of Chicago Press 1994)

Horwitz MJ, *The Transformation of American Law: 1780-1860* (Harvard Univ Press 1977)

in 't Veld RJ and others (eds), *Autopoiesis and Configuration Theory: New Approaches to Societal Steering* (Springer Netherlands 1991) <http://link.springer.com/10.1007/978-94-011-3522-1>

James W, *The Meaning of Truth: A Sequel to Pragmatism* (Longmans, Green and Company 1909)

——, *Pragmatism: A New Name for Some Old Ways of Thinking* (Harvard Univ Press 1975)

Kalman L, *Legal Realism at Yale, 1927-1960* (University of North Carolina Press 1986)

Kanyeihamba GW, *Constitutional and Political History of Uganda from 1894 to the Present* (LawAfrica Pub 2002)

Kasozi A, *The Origins of Violence in Uganda* (Fountain Publishers Ltd 1994)

Kelsen H, *General Theory of Law and State* (Harvard University Press 2017)

Kozolchyk B, *Comparative Commercial Contracts: Law, Culture and Economic Development* (West Academic Publishing 2014)

Krippendorff K, *Content Analysis: An Introduction to Its Methodology*, vol 13 (Sage Publications Inc 2004)

Langdell CC, *A Selection of Cases on the Law of Contracts: With References and Citations* (Little, Brown & Company 1871)

Lasswell HD, *Language of Politics: Studies in Quantitative Semantics* (The MIT Press 1949)

Lista A, *International Commercial Sales: The Sale of Goods on Shipment Terms* (Informa Law from Routledge 2018)

Llewellyn K, *Jurisprudence: Realism in Theory and Practice* (Chicago University Press 1962)

Llewellyn K, *The Common Law Tradition: Deciding Appeals* (Little, Brown & Company 1960)

Lugard LFJ, *The Rise of Our East African Empire (1893): Early Efforts in Nyasaland and Uganda*, vol 1 (Routledge 2013)

MacCormick N, *Institutions of Law: An Essay in Legal Theory* (Oxford University Press 2007)

MacCormick N and Weinberger O, *An Institutional Theory of Law: New Approaches to Legal Positivism* (Springer – Science + Business Media 1986)

Macneil IR, *Contracts, Instruments for Social Cooperation, East Africa: Text, Cases, Materials* (F B Rothman 1968)

——, *The New Social Contract: An Inquiry into Modern Contractual Relations* (Yale University Press 1980)

Malloy RP, *Law and Economics: A Comparative Approach to Theory and Practice* (West Publishing Company 1990)

Manderson D, *Kangaroo Courts and the Rule of Law: The Legacy of Modernism* (Routledge 2012)

Minda G, *Postmodern Legal Movements: Law and Jurisprudence at Century's End* (New York University Press 1995)

Morison WL, *John Austin* (Stanford University Press 1982)

Mukherjee R, *Uganda, an Historical Accident? Class, Nation, State Formation* (1st American ed, Africa World Press 1985)

Mutibwa PM, *A History of Uganda: The First 100 Years, 1894-1995* (Fountain Publishers 2016)

Neuendorf KA, *The Content Analysis Guidebook* (SAGE 2002)

Oloka-Onyango J, *When Courts Do Politics: Public Interest Law and Litigation in East Africa* (2017)

Orojo J, 'The Role of the Judiciary in the New Commonwealth Countries' in BJ Odoki (ed), *An introduction to judicial conduct and practice* (Law Development Centre 1984)

Posner RA, *Economic Analysis of Law* (3rd edn, Little Brown & Co 1986)

Pound R, *Mechanical Jurisprudence...* (Columbia University Press 1908)

——, *The Formative Era of American Law* (Little Brown 1938)

——, *Interpretation of History* (Harvard University Press 1946)

——, *New Paths of The Law* (University of Nebraska Press 1950)

Proctor C, 'Change in Monetary Values and The Assessment of Damages' in Djakhongir Saidov and Ralph Cunnington (eds), *Contract damages: domestic and international perspectives* (Hart Publishing 2008)

Rawls J, *A Theory of Justice* (Harvard University Press 1971)

Ratnapala S, *Jurisprudence* (Cambridge University Press, 2017)

Schauer F, 'Formalism: Legal, Constitutional, Judicial' in Keith E Whittington, R Daniel Kelemen and Gregory A Caldeira (eds), *The Oxford handbook of law and politics* (Oxford University Press 2008)

Schoch MM, *The Jurisprudence of Interests: Selected Writings of Max Rümelin, Philipp Heck, Paul Oertmann, Heinrich Stoll, Julius Binder, Hermann Isay* (Harvard University Press 1948)

Schwartz A, 'Efficiency and The Ex Ante Perspective' in Jody S Kraus and Steven D Walt (eds), *The Jurisprudential Foundations of Corporate and Commercial Law* (Cambridge University Press 2000)

Seidman R, *The State, Law and Development* (St Martin's Press 1978)

Sourdin T and Zariski A, *The Responsive Judge: International Perspectives* (2018)

Spaeth H, 'Reflections about Judicial Politics' in Keith E Whittington, R Daniel Kelemen and Gregory A Caldeira (eds), *The Oxford handbook of law and politics* (Oxford University Press 2008)

Spiller T and Gely R, 'Strategic Judicial Decision-Making' in Keith E Whittington, R Daniel Kelemen and Gregory A Caldeira (eds), *The Oxford handbook of law and politics* (Oxford University Press 2008)

Tamanaha BZ, *On the Rule of Law: History, Politics, Theory* (Cambridge University Press 2004)

——, *Law as a Means to an End: Threat to the Rule of Law* (Cambridge University Press 2006)

Trebilcock MJ, *The Limits of Freedom of Contract* (Harvard University Press 1993)

Vermeule A, *Judging under Uncertainty: An Institutional Theory of Legal Interpretation* (Harvard University Press 2006)

Wambuzi SWW, *The Odyssey of a Judicial Career in Precarious Times: My Trials and Triumphs as a Three-Time Chief Justice of Uganda* (Christian House Books 2014)

Weber M, *Economy and Society: An Outline of Interpretative Sociology, (*Edited by Gutenther Roth & Claus Wittich) (Bedminister, 1968)

Weingast B and others, 'Why Developing Countries Prove so Resistant to the Rule of Law', *Global perspectives on the rule of law* (Routledge 2010)

Wengi RO, *Founding the Constitution of Uganda: Essays and Materials* (LawAfrica Pub (K) Limited 2011)

Zuckert M, 'Hobbes, Locke, and The Problem of The Rule of Law' in I Shapira (ed), *The Rule of Law* (New York University Press 1994)

Zywicki T and Stringham E, 'Common Law and Economic Efficiency', *Encyclopaedia of Law & Economics* (2010)

Journal Articles

Abyad ID, 'Commercial Resonableness in Karl Llewellyn's Uniform Commercial Code Jurisprudence' (1997) 83 Virginia Law Review 429

Adams JN and Brownsword R, 'The Ideologies of Contract' (1987) 7 Legal Studies 205

Adrian Chandler, James Devenney, and Jill Poole 'Common Mistake: Theoretical Justification and Remedial Inflexibility' (2004) 1, Journal of Business Law, 34-58

Allott AN, 'The People as Law-Makers: Custom, Practice, and Public Opinion as Sources of Law in Africa and England' (1977) 21 Journal of African Law 1

Antieau CJ, 'The Jurisprudence of Interests as a Method of Constitutional Adjudication' (1976) 27 Case Western Reserve Law Review 823

Anyanwu JC and Erhijakpor AE, 'Trends and Determinants of Foreign Direct Investment in Africa' (2004) 2 West African Journal of Monetary and Economic Integration 21

Barber NW, 'Legal Pluralism and the European Union' (2006) 12 European Law Journal 306

Barnett RE, 'Consent Theory of Contract, A' (1986) 86 Columbia Law Review 269

——, 'Conflicting Visions: A Critique of Ian Macneil's Relational Theory of Contract' (1992) 78 Virginia Law Review 1175

——, ‘Contracts Is Not Promise; Contract Is Consent’ (2011) 45 Suffolk University Law Review 647

Barzun CL, ‘Jerome Frank, Lon Fuller, and a Romantic Pragmatism’ (2017) 29 Yale JL & Human. 129

Bennett TW, ‘Ubuntu: An African Equity’ (2011) 14 Potchefstroom Electronic Law Journal/Potchefstroomse Elektroniese Regsblad

Ben-Shahar O, ‘The Tentative Case Against Flexibility in Commercial Law’ (1999) 66 The University of Chicago Law Review 781

Brown D, ‘The Award of Compensation in Criminal Cases in East Africa’ (1966) 10 Journal of African Law 33

Buckley FH, ‘Three Theories of Sunstantive Fariness’ (1990) 19 Hofstra L. Rev. 33

Chandler A, Devenney J, and Poole J‘Common Mistake: Theoretical Justification and Remedial Inflexibility’ (2004) 1, Journal of Business Law, 34

Campbell D and Devenney J ‘Damages at the Borders of Legal Reasoning’, [2006] The Cambridge Law Journal, 208

Cannon RW, ‘Law, Bench and Bar in the Protectorate of Uganda’ (1961) 10 International & Comparative Law Quarterly 877

Collins H, ‘Distributive Justice through Contracts’ (1992) 45 Current Legal Problems 49

Croce M, ‘Does Legal Institutionalism Rule out Legal Pluralism-Schmitt’s Institutional Theory and the Problem of the Concrete Order’ (2011) 7 Utrecht Law Review 42

D’Amato A, ‘Legal Uncertainty’ (1983) 71 California Law Review 1

Devenney J and Kenny M, ‘Unfair Terms and the Draft Common Frame of Reference: the role of non-legislative harmonisation and administrative cooperation? (2012), In: Devenney, J. and Kenny, M. (eds). *European Consumer Protection* (Cambridge University Press, 2012), 99-120

Di Filippo T, ‘Pragmatism, Interest Theory and Legal Philosophy: The Relation of James and Dewey to Roscoe Pound’ (1988) 24 Transactions of the Charles S. Peirce Society 487

Di Matteo LA, ‘The Norms of Contract: The Fairness Inquiry and the Law of Satisfaction–A Nonunified Theory’ (1995) 24 Hofstra Law Review 349

Dorf M, ‘Predictions and the Rule of Law (1994-1995)’ 42 UCLA Law Review 680

Dorfman R, ‘The Regulation of Fairness and Duty of Good Faith in English Contract Law: A Relational Contract Theory Assessment’ (2013) 1 Leeds Journal of Law & Criminology Vol. 1 No 98

Dworkin R, ‘Hard Cases’ (1975) 88 Harv. L. Rev. 1057

——, ‘Why Efficiency-A Response to Professors Calabresi and Posner’ (1981) 8 Hofstra Law Review 563

Dworkin RM, ‘Is Wealth a Value?’ (1980) 9 The journal of legal studies 191

Eisenberg MA, ‘Participation, Responsiveness, and the Consultative Process: An Essay for Lon Fuller’ (1978) 92 Harvard Law Review 410

——, ‘Participation, Responsiveness, and the Consultative Process: An Essay for Lon Fuller’ (1978) 92 Harvard Law Review 410

Epstein RA, ‘Unconscionability: A Critical Reappraisal’ (1975) 18 The Journal of Law and Economics 293

Evans JW and Gabel AL, ‘Legal Competitive Advantage and Legal Entrepreneurship: A Preliminary International Framework’ (2013) 39 North Carolina Journal of International Law 333

Fiss OM, ‘Objectivity and Interpretation’ (1981) 34 Stanford Law Review 739

Flango VE, Wenner LM and Wenner MW, ‘The Concept of Judicial Role: A Methodological Note’ (1975) 19 American Journal of Political Science 277

Frank J, ‘Say It with Music’ (1947) 61 Harvard Law Review 921

Franzosi R, ‘Content Analysis: Objective, Systematic, and Quantitative Description of Content’ 1 Content Analysis 21

Friedman LM, ‘Contract Law and Contract Research (Part I)’ (1968) 20 Journal of Legal Education 452

Fuller LL, ‘Legal Fictions’ (1930) 25 Stanford University Press 363

——, ‘American Legal Realism’ (1933) 82 University of Pennsylvania Law Review 429

——, ‘Human Purpose and Natural Law’ (1958) 3 Nat. LF 68

——, ‘The Morality of Law.’ [1964] The Philosophical Quarterly 41

——, ‘The Forms and Limits of Adjudication’ (1978) 92 Harv. L. Rev. 353

Fuller LL and Perdue Jr WR, ‘Reliance Interest in Contract Damages’ (1936) 46 Yale Law Journal 52

Gade CB, ‘The Historical Development of the Written Discourses on Ubuntu’ (2011) 30 South African Journal of Philosophy 303

Galligan B, ‘Realistic ‘Realism’and the High Court’s Political Role’ (1989) 18 Federal Law Review 40

Goetz CJ and Scott RE, ‘Enforcing Promises: An Examination of the Basis of Contract’ (1980) 89 The Yale Law Journal 1261

——, ‘Enforcing Promises: An Examination of the Basis of Contract’ (1980) 89 The Yale Law Journal 1261

Gordley J, ‘Equality in Exchange’ (1981) 69 California Law Review 1587

Grey T, ‘Langdalle’s Orthodoxy’ 45 University of Pittsburgh Law Review 2

Gribnau JLM, ‘Legitimacy of the Judiciary’ (2002) 34 Intersentia 25

Griffiths J, ‘What Is Legal Pluralism?’ (1986) 18 Journal of Legal Pluralism 1

Guthrie C, J Wistrich A and J Rachlinski J, ‘Judicial Intuition’

Hall MA, ‘Coding Case Law for Public Health Law Evaluation: A Methods Monograph’ (2011) 18 Public Health Law Research 80

Hall MA and Wright RF, ‘Systematic Content Analysis of Judicial Opinions’ (2008) 96 Califonia Law Review 83

Halperin J-L, ‘Law in Books and Law in Action: The Problem of Legal Change’ (2011) 64 Me. L. Rev. 46

Hermann DH, ‘The Fallacy of Legal Procedure as Predominant over Substantive Justice: A Critique of the Rule of Law in John Rawls’a Theory of Justice’ (1973) 24 DePaul Law Review 1408

Hillman RA, ‘Questioning the" New Consensus" on Promissory Estoppel: An Empirical and Theoretical Study’ (1998) 98 Columbia Law Review 580

Holmes OW, ‘Law in Science and Science in Law Collected Legal Papers (Harcourt, Brace and Howe, 1920)’ (1920) 105 Law in Science and Science in Law 210

——, ‘The Path of the Law’ (1997) 110 Harvard Law Review 991

Hone HR, ‘The Native of Uganda and the Criminal Law’ (1939) 21 The Journal of Comparative Legislation and international Law 179

——, ‘The Native of Uganda and the Criminal Law’ (1939) 21 Journal of Comparative Legislation and International Law 179

Huhn W, ‘The Stages of Legal Reasoning: Formalism, Analogy, and Realism’ (2003) 48 Villanova Law Review 305

Hutcheson Jr JC, ‘Judgment Intuitive The Function of the Hunch in Judicial Decision’ (1928) 14 Cornell lq 274

Hutchinson T and Duncan N, ‘Defining and Describing What We Do: Doctrinal Legal Research’ (2012) 17 Deakin Law Review 83

Hutchison A, ‘Reciprocity in Contract Law’ (2013) 24 Stellenbosch law Review 28

Johnston JS, ‘The Statute of Frauds and Business Norms: A Testable Game-Theoretic Model’ (1996) 144 University of Pennsylvania Law Review 1859

Jukier R, ‘Flexibility and Certainty as Competing Contract Values: A Civil Lawyer’s Reaction to the Ontario Law Reform Commission’s Recommendations on Amendments to the Law of Contract’ (1988) 14 Canadian Business Law Journal 13

Kenny M and Devenney J ‘A Comparative Analysis of Bank Charges in Europe: OFT v. Abbey National Plc through the looking glass’, in J Devenney and M Kenney (eds), *Consumer Credit, Debt, and Investment in Europe* (Cambridge University Press, 2012) 212

Kalevitch L, ‘Gaps in Contracts: A Critique of Consent Theory’ (1993) 54 Mont. L. Rev. 188

Kaplow L, ‘The Value of Accuracy in Adjudication: An Economic Analysis’ (1994) 23 The Journal of Legal Studies 307

Kennedy D, ‘Legal Formality’ (1973) 2 The Journal of Legal Studies 351

Khan M, ‘The Origin and Development of Consumer Protection Laws in the United Kingdom’ (2017) 38 Journal of Asian and African Social Science and Humanities

Klabbers J, ‘Towards a Culture of Formalism; Martti Koskenniemi and the Virtues’ (2013) 27 Temple International & Comparative Law Journal 417

Kritz BA, ‘Palestinian Sulha and the Rule of Law’ (2013) 27 Arab Law Quarterly 151

Kronman AT, ‘Wealth Maximization as a Normative Principle’ (1980) 9 The Journal of Legal Studies 227

Kull I, ‘Principle of Good Faith and Constitutional Values in Contract Law’ (2002) 7 Juridica International 142

Laube HD, ‘Jurisprudence of Interests’ (1949) 34 Cornell Law Review 13

Lind D, ‘Constitutional Adjudication as a Craft-Bound Excellence’ (1994) 6 Yale Journal of Law & Humanities 353

Lyons D, ‘Legal Formalism and Instrumentalism-a Pathological Study’ (1980) 66 Cornell Law Review 949

Macneil IR, ‘Contracts: Adjustment of Long-Term Economic Relations under Classical, Neoclassical, and Relational Contract Law’ (1977) 72 Northwestern University Law Review 854

——, ‘Values in Contract: Internal and External’ (1983) 78 New York University Law Review 340

——, ‘Relational Contract: What We Do and Do Not Know’ [1985] Wisconsin Law Review 483

——, ‘Relational Contract Theory as Sociology: A Reply to Professors Lindenberg and de Vos’ (1987) 143 Journal of Institutional and Theoretical Economics (JITE)/Zeitschrift für die gesamte Staatswissenschaft 272

MacNeil IR, ‘Relational Contract Theory: Challenges and Queries’ (1999) 94 Northwestern University Law Review 877

McDougal MS, ‘Jurisprudence for a Free Society’ (1966) 1 Georgia Law Review 1

McLauchlan D, ‘Objectivity in Contract’ (2005) 28 University of Queensland Law Journal <http://classic.austlii.edu.au/au/journals/UQLawJl/2005/28.html>

Morris HF, ‘Two Early Surveys of Native Courts in Uganda’ (1967) 11 Journal of African Law 159

Murray JEJ, ‘Contract Theories and the Rise of Neoformalism’ (2002) 71 Fordham Law Review 869

Nelken D, ‘Eugen Ehrlich, Living Law, and Plural Legalities’ (2008) 9 Theoretical Inquiries in Law <https://www.degruyter.com/view/j/til.2008.9.issue-2/til.2008.9.2.1193/til.2008.9.2.1193.xml>

Nussbaum B, ‘African Culture and Ubuntu Reflections of a South African in America’ (2003) 17

Oldfather CM, ‘Defining Judicial Inactivism: Models of Adjudication and the Duty to Decide’ (2005) 94 The Georgetown Law Journal 121

Oldfather CM, Bockhorst JP and Dimmer BP, ‘Triangulating Judicial Responsiveness: Automated Content Analysis, Judicial Opinions, and the Methodology of Legal Scholarship’ (2012) 64 Florida Law Review 1189

Ostrom BJ and Hanson RA, ‘Understanding and Diagnosing Court Culture’ (2009) 45 Court Review: The Journal of The American Judges Association 104

Perillo JM, ‘The Origins of the Objective Theory of Contract Formation and Interpretation’ (2000) 69 Fordham Law Review 427

Perry A, ‘An Ideal Legal System for Attracting Foreign Direct Investment? Some Theory and Reality’ (1999) 15 American University of International Law Review 1627

Phang A, ‘The Uses of Unconscionability’ (1995) 111 LQR 559

Phang A, ‘A Passion for Justice: The Natural Law Foundations of Lord Denning’s Thought and Work’ (2006) 2 Global Journal of Classical Theology

——, ‘The Natural Law Foundations of Lord Denning’s Thought and Work’ (2006) 2 Global Journal of Classical Theology

Posner RA, ‘Some Uses and Abuses of Economics in Law’ (1979) 46 The University of Chicago Law Review 281

——, ‘The Ethical and Political Basis of the Efficiency Norm in Common Law Adjudication’ (1979) 8 Hofstra Law Review 487

——, ‘Utilitarianism, Economics, and Legal Theory’ (1979) 8 The Journal of Legal Studies 103

——, ‘Wealth Maximization and Judicial Decision-Making’ (1984) 4 International Review of Law and Economics 131

——, ‘Legal Formalism, Legal Realism, and the Interpretation of Statutes and the Constitution’ (1986) 37 Case Western Reserve Law Review 179

——, ‘The Rise and Fall of Judicial Self-Restraint’ [2012] California Law Review 519

Pound R, ‘Law in Books and Law in Action’ (1910) 44 American Law Review 12

——, ‘A Survey of Public Interests’ (1944) 58 Harvard Law Review 909

Powers FJ, ‘Some Reflections on Pound’s Jurisprudence of Interests’ (1953) 3 Catholic University Law Review 15

Raban O, ‘The Fallacy of Legal Certainty: Why Vague Legal Standards May Be Better for Capitalism and Liberalism’ (2010) 19 Boston University Public Interest Law Journal 175

Rodl F, ‘Contractual Freedom, Contractual Justice, and Contract Law (Theory)’ (2013) 76 Law and Contemporary Problems 57

Rosenfeld M, ‘Contract and Justice: The Relation between Classical Contract Law and Social Contract Theory’ (1985) 70 Iowa Law Review 769

Savageau MA, ‘Introduction to S-Systems and the Underlying Power-Law Formalism’ (1988) 11 Mathematical and Computer Modelling 546

Scalia A, ‘The Rule of Law as a Law of Rules’ (1989) 56 University of Chicago Law Review 1175

Schaefer DL, ‘Procedural Justice Versus Substantive Justice: Rawls and Nozick’ (2007) 24 Social Philosophy and Policy 164

Schauer F, ‘Formalism’ (1988) 97 Yale Law Journal 509

Schwartz A, ‘The Case for Specific Performance’ (1979) 89 Yale Law Journal 271

Schwartz A and Scott RE, ‘Contract Theory and the Limits of Contract Law’ [2003] The Yale Law Journal 81

Seagle W, ‘Rudolf von Jhering: Or Law as a Means to an End’ (1945) 13 The University of Chicago Law Review 71

Shapiro M, ‘Supreme Court and Constitutional Adjudication: Of Politics and Neutral Principles’ (1962) 31 George Washington Law Review 587

Shapiro SJ, ‘The Hart-Dworkin Debate: A Short Guide for the Perplexed’ (2007) 77 University of Michigan

Sherwin EL, ‘Law and Equity in Contract Enforcement’ (1991) 50 Maryland Law Review 253

Smith S, ‘In Defence of Substantive Fairness’ (1996) 112 Law Quarterly Review 138

——, ‘In Defence of Substantive Fairness’ (1996) 112 Law Quarterly Review 138

Stemler S, ‘An Overview of Content Analysis’ (2001) 7 Practical Assessment, Research & Evaluation 137

Stinchcombe AL, ‘Certainty of the Law: Reasons, Situation-Types, Analogy, and Equilibrium’ (1999) 7 Journal of Political Philosophy 209

Stone J, ‘A Critique of Pound’s Theory of Justice’ (1934) 20 Iowa Law Review 531

Thomas EW, ‘Fairness and Certainty in Adjudication: Formalism v Substantialism’ (1997) 9 Otago L. Rev. 459

Trakman L, ‘Pluralism in Contract Law’ (2010) 58 Buff. L. Rev. 10312

Tuzet G, ‘Legal Abductions’ [2003] Legal Knowledge and Information Systems: Jurix 41

Van Domselaar I, ‘Moral Quality in Adjudication: On Judicial Virtues and Civic Friendship’ (2015) 44 Neth. J. Legal. Phil. 24

van Domselaar I, ‘The Perceptive Judge’ (2018) 9 Jurisprudence 71

Weiler P, ‘Legal Values and Judicial Decision-Making’ (1970) 48 Canadian Bar Review 1

Wells M, ‘French and American Judicial Opinions’ (1994) 19 Yale Journal of International Law 81

Whitford WC, ‘Rule of Law’ (2000) 2000 Wisconsin Law Review 723

Wolff L-C, ‘Law and Flexibility - Rule of Law Limits of a Rhetorical Silver Bullet’ (2011) 11 Journal Jurisprudence 549

——, ‘Law and Flexibility - Rule of Law Limits of a Rhetorical Silver Bullet’ (2011) 11 Journal Jurisprudence 549

Zagler M and Zanzottera C, ‘Corporate Income Taxation Uncertainty and Foreign Direct Investment’ [2012] WU Vienna University of Economics and Business