An Inclusive Judiciary for Sustainable Development: Connecting the Dots

Dr. Christopher Mbazira

Associate Professor & Ag Principal

School of Law

Makerere University

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1. Introduction

Initially, I was asked to discuss the topic: **Justice for All: Applicability of Article 126(2) of the Constitution of Uganda by Courts of Record.** However, when I was requested to give the Keynote Address, I decided to craft this address broadly around the theme of this Conference: **An Inclusive Judiciary for Sustainable Development**.

I would like to start by appreciating the organizers of this Conference for honoring me to address this esteemed group of eminent jurists and the top legal brains this country has to offer. I consider this to be a privilege and a rare opportunity. The organizers are also commended for the selection of the theme. There has been a lot of talk about development, which has also become the focus of humanity at all levels, global, national and community. What is true though is that development agendas have largely been imbued with inequity and marginalization. These agendas have not achieved much as a result. They have for instance not succeeded in reducing poverty. This arose among others from the apathy of development scientists - they were obsessed with figures and focused largely on economic growth and development. Social and political development was locked out. Realizing that this was not achieving much, and with the increasing multi-disciplinary interest in development, stakeholders interested in development went back to the drawing board. As a result, gradually, and as we shall see, new elements of development started making their way into development agendas. One element which had recently made tremendous inroads is "inclusiveness". This, as is indicated below, is what has defined the Sustainable Development Goals (SDGs). The discussion of this theme is therefore timely.

To address the theme requires one to pose and answer two questions:

i. **What is an inclusive judiciary?**
ii. **What is the nexus between an inclusive judiciary and sustainable development?**

It should be noted, however, that the above questions can only effectively be answered by first understanding the context within which the judiciary operates. What then is this context in the case of Uganda.

2. The Context

The context in my view is around understanding the place of the Judiciary in society today. As we may all already be aware, the position of the judiciary in society is very much ingrained in its traditional role within the architecture of the state, guided by the doctrine of separation of powers. To understand separation of powers, one has to go back to Montesquieu, who was of the view that tyranny could not be stemmed if legislative, executive and judicial powers were united in the same person. In his famous quote, Montesquieu stated:

When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty; because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner. Again, there is no liberty, if the judicial power be not separated from the legislative and executive. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would be then the legislator. Were it joined to the executive power, the judge might behave with violence and oppression.

From this philosophical position, Montesquieu constructed the judiciary arm as a mere mouthpiece of the law. Indeed, he has been quoted as saying that **"national judges are no more than the mouth that pronounces the words of the law, mere passive beings, incapable of moderating either its force or rigor"**. The reason Montesquieu put the judiciary in this position was to remove any personal attributes from the law, which in view would otherwise contaminate it.

It should not be noted, however, that as much as the separation of powers has been entrenched, contemporary application of the doctrine has been evolving, so has the role of the judiciary. The evolution embraced checks and balances. For the judiciary, its role has gone beyond what Montesquieu contemplated, of judges being mere mouthpieces. In contemporary terms, it is no longer true that judges are mere passive beings, incapable of moderating either its **force or rigor**. In the modern world, judges do not appear to have this option, even if they wanted to. It is for instance true that judge made law, especially in the commonwealth, has taken a center stage. The inappropriateness of Montesquieu's conception of a judge is seen in a 1961 movie entitled

Judgment at Nuremberg. The emotionally charged movie depicts the 1947 trial of 16 German jurists, who included judges, for their acts that furthered the Holocaust. The jurists were charged with implementing and furthering Nazi racial purity through the eugenic and racial laws Germany adopted. In defense, one of the judges made the following statement:

I followed the concept that I believed to be the highest in my profession – to sacrifice one's own sense of justice to the authority of the legal order – to ask only what the law is – not whether it is also justice.

In 2010, the University Of Toledo College Of Law, in a tribute to its alumni in the judiciary, published in its Newsletter, **The Transcript**, identified and elaborated seven roles of a judge. These included:

1) Link between government, laws and people
2) Face of justice system to the citizens who appear before you
3) Face of fairness in our society
4) Decision maker
5) You serve our society as a teacher.
6) Life-long learners.
7) Community role models.

Time does not allow one to elaborate each of these seven roles. It is however clear from them that the traditional role of the judge as envisaged by Montesquieu has fundamentally changed.

In the case of Uganda, the context defining the role of the judiciary needs to be given a historical spin. Before falling into the hands of the colonial imperial state, what is now Uganda society was governed by traditional rules and customs. Justice was dispended using these rules through traditional institutions. What followed though is that the advent of the British was characterized with gradual erosion of these rules, customs and the traditional institutions that enforced them. The 1900 Agreement for instance while pretending to preserve the native courts in Buganda

fundamentally limited their powers. According to the Agreement, the courts would try only natives and their sentences could be reviewed at the insistence of her Majesty's Government if found to be "inconsistent with humane principles".

Gradually, the judicial institution became an instruments for enforcing the draconian laws of the state. Professor Oloka-Onyango his 1994 Chapter entitled **"Judicial Power and Colonialism in Uganda: A Historical Perspective"** published in a book he co-edited with Professor Mahmood Mamdani entitled: **Uganda: Studies in Living Conditions, Popular Movements and Constitutionalism** (1994: JEP and Centre for Basic Research, Kampala) summarizes the policy motivation of the law and the role which the Judiciary played:

"In almost every case which sought to challenge the status quo, the Judiciary rendered decisions that simply served to emphasize the fact that the colonial "native" was not the subject of rights. (p 472)"

As a result, there was resentment of the judicial institution, as much as there was resistance to all forms of foreign domination. This was the case in Uganda as well as other African countries. To the African natives, these were foreign institutions which came with foreign procedures. In one of his novels, Chinua Achebe illustrates this. His novel, Arrow of God, set in colonial Nigeria depicts how colonialism was undermining and sweeping away traditional native institution and introducing ways of organizing society. In the Novel, Ezeulu, the Chief Priest of Umuaro is detained for disobeying the "white man". He actually does not understand that he is facing a criminal charge, he does not even understand that he was in prison, the concept having been foreign to him. He just does not why the white man is keep him in one place for days and postponing their meeting day after day. The natives who guarded the Chief Priest tried as much as possible to make it look like he was only a guest waiting to meet the white man.

Although colonial rule ended with independence, perceptions regarding the place of the judiciary and other law enforcement agencies in relation to society have remained mixed. While there could be a feeling that the judiciary is a necessary institution for resolving disputes, there are also perceptions that it is an alien institution removed from society. In Uganda, there is evidence to

suggest negative public perceptions in this line. Indeed, this forced the then Chief Justice Benjamin Odoki to appoint a team of judicial officers to gather views on public perceptions of Judiciary. The object of this exercise was to use the findings to devise strategies to improve the image of the Judiciary and the delivery of services.

The most common perception has been that of the Judiciary is one of the most corrupt institutions in the county. This has over the years entrenched the feeling that there is no fairness in the courts, thus the Luganda saying *omwavu tasinga musango* (a poor person can never win in a case). Some sections of society therefore do not believe that the judiciary is an institution where justice can be dispensed fairly. This perception has been exacerbated by the huge case backlog, which has affected the effectiveness of the courts to resolve disputes in a timely manner. 2008 figures show that 120,000 cases were pending before the courts. By 2015, the figure was at over 170,000. I know that several measures have been put in place to deal with the problem. The question though is whether these are bearing fruits.

In addition to the above, there are other perceptions that have undermined the judiciary. Most important here is the perceived political role of the Judiciary. Globally, there has been a trend for courts to take positions as important political actors, in what has been described as "judicialisation of politics". Ran Hirschl in his Chapter entitled: "**The Judicialization of Politics"** published in the *Oxford Handbook of Law and Politics* edited by Gregory Caldeira, Daniel Kelemen, and Keith Whittington describes “judicialisation of politics” as the reliance on courts and judicial means for addressing core moral predicaments, public policy questions, and political controversies. He argues that this is one of the most significant phenomena of late twentieth- and early twenty-first-century government. Increasing judicialisation of politics is associated with increasing confidence in the courts as arenas for resolving political disputes and promoting democracy. Interestingly, herein lies the paradox. This is because this is one area where negative perceptions regarding the political role of the judiciary have blossomed. In the case of Uganda, Kanyongolo, a Malawian Professor and Glopen Siri, a political scientists who has dedicated her career time to researching and writing about judiciaries and litigation, have traced the raise of judicialisation of politics to the approach of the courts in the 1990s when they

started giving assertive constitutional interpretations. According to these scholars, this rendered the courts "more attractive as an arena for the political opposition to contest legislation and executive actions" **("Judicial independence and judicialization of electoral politics in Malawi and Uganda" in Danwood Chirwa, Lia Nijzink (eds)** ***Accountable Goverment in Africa*** (2012) United Nations University Press. The distinguished authors however argue that the will of Government to allow the judiciary to promote accountability in politics is determined by the extent of the fear of the losing political power. The more the likelihood of such loss, the more the Government constrains and interferes with the Judiciary. The authors thus illustrate that in the case of Uganda, attempts to reign in on the judiciary were part of the constitutional reform package accompanying the multiparty reforms. These reforms came with a real threat of losing power.

The analysis by Siri and Kanyongolo could explain why there have been perceptions that the judiciary in Uganda is not independent when adjudicating politically charged cases, and especially those that have serious negative implications on political power. The Constitutional Court and the Supreme Court have been the most affected, with some people for instance recently describing the Constitutional Court as a "graveyard of constitutional petitions", a place where petitions go to die.

Going forward, it is important for the judiciary to deal with the perceptions described above. We know that something is being done to deal with the problem of corruption, reduce case-backlogs and revamp the image of the judiciary. The question which remains though is whether these measures are actually bearing fruits. Yet, on top of this, the Judiciary has to cultivate itself as an inclusive institution.

It is against the above background that I would like to connect the dots by addressing the first question I raised at the start: **What is an inclusive judiciary?**

3. Inclusive judiciary?

Inclusiveness of the judiciary in my view has two connotations. First is the inclusiveness of the judiciary itself as an institution. The second, relates to the extent to which the Judiciary promotes

inclusiveness and is alive to the diverse needs in society as it dispenses justice and discharges its mandate.

3.1. First connotation of inclusion

To address the first connotation, it should be understood that the term inclusiveness is no-long simply a generic word with its literal meaning, which comes from the word "include". Rather, the term is now a technical one, and one that is used in different contexts. In this technical sense, inclusiveness as a technical term cannot be understood unless viewed together with the notion of diversity. The meaning of this term can be found in the term "diverse", which the *Merriam Webster English Dictionary* defines as **"Different from each other"**, **"made up of people or things that are different from each other"**. In the context of society, diversity means that society is made up of people, needs, interests and even challenges which are not the same but different from each other. This I believe is a natural make-up of any society. It is on the basis of this that both social and political scientists have investigated the extent to which various institutions in society have reflected this diversity. In this context, the concept of representation has been used to determine the extent to which diverse groups and interests are represented in the institutions. In 1967, Hanna Pitkin in her book ***The Concept of Representation***, used the concept of a mirror to explain "representation", to quote, she wrote "the making present something absent by resemblance or reflection, as in a mirror or in art". (at 11). What this means for instance is that the composition of the judiciary should be a mirror of our society. It must reflect the diversity of our society. The question at stage therefore is whether the Uganda Judiciary is a mirror of Uganda's diversity? In my view, the following is what I see in the mirror and what characterises our diversity:

- Culture
- Religion
- Ethnicity
- Gender
- Disability
- Regional interests
- Political beliefs

- Age groups
- etc

One issue of interest with respect to the above is "disability". **Does our judiciary represent the disability diversity of our society?** Our Constitution in several provisions recognizes and deals with disability as part of our diversity. Article 21 for instance lists disability as one of the prohibited grounds of discrimination. Similarly, Article 35(1) recognizes the right of persons with disabilities to respect and human dignity, and requires both the state and society to take appropriate measures to ensure that persons with disabilities realize their full mental and physical potential. These provisions should be read together with the concept of "equal opportunities" as defined in the Equal Opportunities Act, 2007. The Act defines **"equal opportunities"** as having the same treatment or consideration in the enjoyment of rights and freedoms, attainment of access to social services, education, employment and physical environment or the participation in social, cultural and political activities regardless of sex, age, race, colour, ethnic origin, tribe, birth, creed, religion, health status, social or economic standing, political opinion or disability.

The questions that could be asked here include the following: Is the disability diversity reflected in judicial appointments? Do the working environment and facilities in the Judiciary accommodate this diversity? Would the environment allow those from this group to effectively do their work?

3.2. Second connotation of inclusiveness

I would now like to address the second element of the question, which pertains to inclusiveness on the part of the Judiciary in dispensing justice. Inclusiveness in this regard requires the Judiciary to ensure that all those in need access justice and have their cases resolved in a fair manner. To understand access to justice, one can borrow from the access to justice indicators crafted by the United Nations Development Programme Asia-Pacific Justice Initiative:

(1) Existence of a remedy;

(2) Capacity to seek a remedy; and

(3) Capacity to provide effective remedies.

Indicator (1) relates mainly to the existence of laws that guarantee access to justice as part of the legal framework. With respect to Uganda, the Constitution is key. In Chapter Four, as part of the Bill of Rights, the Constitution defines several rights that guarantee access to justice. This includes the rights in Article 28, which include: the right to a fair, speedy and public hearing before an independent and impartial court or tribunal established by law and the several rights guaranteed to those charged with criminal offences. Article 126 too is relevant. It requires among others the following:

(a) Justice shall be done to all irrespective of their social or economic status;

(b) Justice shall not be delayed;

(c) Adequate compensation shall be awarded to victims of wrongs;

(d) Reconciliation between parties shall be promoted; and

(e) Substantive justice shall be administered without undue regard to technicalities.

Indicator (2) is mainly concerned with the capacity of those who have suffered injustices to seek remedies. Their capacity could be determined by a number of factors, including:

- Legal awareness
- Access to legal representations
- Physical access to courts, and
- Availability of resources to pursue the remedies.

Attention in this regard has always been put on the disadvantaged in society. It is these that most times live in conditions that compromise their capacity to access to justice. What this means is that inclusiveness in the context of the judiciary should mainly focus on addressing the justice

needs of this group. One would then ask the question, how best can this be done by the Judiciary? One complexity is these people may not even be in position to come before the judiciary. Yet, the judiciary, as we know it, is reactive and only works with those who come before it. Indeed, by tradition judges are expected to be secluded from society and to only wait for disputes to be brought to them. It has however increasingly become clear that judges need to be proactive in some contexts and should be involved in enhancing the capacity of those who seek justice. Judges should for instance be involved in promoting legal awareness and involving themselves in schemes that enhance the capacity of the disadvantaged. Some judges have done this successfully. As an example, I would like to pay special tribute to Justice Remy Kasule, who has committed a big part of his career to promoting legal aid. He is indeed considered to be the grandfather of legal aid in Uganda

Indicator (3) is concerned mainly with the institutions mandated to ensure access to justice. These institutions must have the resources, including expertise and other materials to enable them provide effective remedies. It is therefore for instance of little value if the courts are inclusive to the extent that their doors are open to whoever seeks justice, yet they do not have the facilities, expertise and the right attitude to ensure that effective remedies are given.

Unless indicator (3) is available, it may not be possible for the judiciary to contribute to sustainable development, and this defines my second question: **What is the nexus between an inclusive judiciary and sustainable development?**

4. Inclusive judiciary and sustainable development

To answer the question above requires one to first understand what sustainable development means. The United Nations World Commission on Environment and Development was the first international agency to use the phrase "sustainable development". The Commission in 1987 defined sustainable development as **"development that meets the needs of the present without compromising the ability of future generations to meet their own needs".** In this, sustainable development was imbued with what has been described as "generational equity". At conception and subsequently, the term was used mainly in defining principles for the protection of the environment, which saw a move away from conservation of nature without touching it to

embrace means of use which are sustainable. The term therefore became more pronounced within the environmental protection movement. It was argued then that sustainable development aims to maintain economic advancement and progress while protecting the long-term value of the environment.[1]

With time, the concept of sustainable development has been expanded to go beyond conservation of the environment. In this regard, for instance, Rachel Emas argues that the overall goal of sustainable development (SD) is the long-term stability of the economy and environment. That this is only achievable through the integration and acknowledgement of economic, environmental, and social concerns. Emas concludes that the key principle of sustainable development underlying all others is the integration of environmental, social, and economic concerns into all aspects of decision making.

This evolution of the definition of sustainable development has been influenced by other notions which have emerged to guide development. One such notion is the Human Rights Based Approach (HRBA) to development. At this juncture I would like to reflect a bit on the HRBA.

In 1997, through the UN Programme for Reform, the UN Secretary-General called on all entities of the UN system to mainstream human rights into their various activities and programmes. This position was officially adopted in 2003 as a principle to guide United Nations Agencies in their work, especially with respect to development co-operation. One of the things which were agreed on was that all programmes of development co-operation, policies and technical assistance should further the realization of human rights as laid down in the Universal Declaration of Human Rights and other international human rights instruments.

The HRBA was immediately embraced by some UN Agencies, including, among others, the Office of the High Commissioner for Human Rights (OHCHR). OHCHR argued that the

[1] Rachel Emas *The Concept of Sustainable Development: Definition and Defining Principles* Brief for the Global Sustainable Development Report (2015).

principle was relevant in poverty reduction strategies. It is on this basis that it defined the HRBA **as underlining the multidimensional nature of poverty by describing it in terms of a range of interrelated and mutually reinforcing deprivations**. The Commission came to the conclusion that **policies and institutions for poverty reduction should be based explicitly on the norms and values set out in international human rights law**. Since then, a number of agencies, including UNDP and OHCHR, as well s civil society organisations, have urged states to embrace the HRBA. Although initially some states resisted, many have now embraced the concept in their development planning. In the case of Uganda, this can be seen in the poverty eradication strategies the country has adopted in the last 15 years, including the Plan for the Eradication of Poverty (PEAP), the National Development Plan I and the National Development Plan II. While the crafters of the first two plans did not want to hear at all of the word "human rights", NDP II fully embraces the concept and the HRBA has become one of the working principles of the National Planning Authority (NPA).

The following have been agreed on as the attributes of the HRBA:

1. **As policies and programmes are formulated, the main objective should be to fulfil human rights;**

2. **A human rights-based approach identifies rights-holders and their entitlements and corresponding duty bearers and their obligations, and works towards strengthening the capacities of rights-holders to make their claims and of duty bearers to meet their obligations;**

3. **Principles and standards derived from international human rights treaties should guide all programming in all sectors and in all phases of the programming process.**

The following are the principles which define the HRBA:

(a) Equality and non-discrimination;

(b) Definition of rights and obligations;

(c) Accountability

(d) Participation and empowerment of rights beneficiaries; and

(e) Monitoring and evaluation.

Accountability of obligations bearers is key in using the HRBA and this is what puts the judiciary at the centre.

It is in the context of integrating sustainable development and the HRBA that the Sustainable Development Goals (SDGs) were born. The SDGs were adopted by states under the auspices of the United Nations at the 2012 *Rio+ Conference on Sustainable Development*. Like the Millennium Development Goals (MGDs), which the SDGs replaced, the SDGs are part of the progressive consensus to guide development which states have agreed on in the last over 20 years. The SDGs were adopted as a tool to realise what states described as Agenda 2030 - **"Transforming our World: the 2030 Agenda for Sustainable Development"**. The SDGs define a set of 17 Goals to be achieved by 2030. Each goal is guided by a number of targets. One of the foundations of the SDGs is to promote inclusive development, **development which leaves no one behind**. It is on the basis of this that the principle of inclusiveness is streamlined through the 17 goals. Notions of equity, justice, equality and fairness in both human interaction and access to and use of resources are key drivers for the implementation of the goals.

The goals are related to such things as reducing poverty, realizing quality education, good health and wellbeing, gender equality, clean sanitation, affordable energy, decent work, reduced inequality, and peace, justice and rule of law, among others. These are goals that look at development in a comprehensive, holistic and multi-dimensional manner. Indeed, the goals

acknowledge the fact that they "balance the three dimensions of sustainable development: the economic, social and environmental.

The judiciary as the protector of justice, equity and fairness is an important institution in the realisation of the goals. This is because these notions underlie all the goals. Yet, there are specific goals were the role of the courts is pronounced and the judiciary has to take centre stage in their realisation. These include:

Goal 5: **Achieve Gender Equality and Empower all Women And Girls**

Realizing gender equality and the empowerment of women and girls will make a crucial contribution to progress across all the Goals and targets. The achievement of full human potential and of sustainable development is not possible if one half of humanity continues to be denied its full human rights and opportunities. Women and girls must enjoy equal access to quality education, economic resources and political participation as well as equal opportunities with men and boys for employment, leadership and decision-making at all levels [para 20]

Goal 8: **Promote Sustained, Inclusive and Sustainable Economic Growth, Full and Productive Employment and Decent Work for All**

We will seek to build strong economic foundations for all our countries. Sustained, inclusive and sustainable economic growth is essential for prosperity. This will only be possible if wealth is shared and income inequality is addressed. We will work to build dynamic, sustainable, innovative and people centered economies, promoting youth employment and women's economic empowerment, in particular, and decent work for all [para 27]

Goal 16: Promote Peaceful and Inclusive Societies for Sustainable Development, Provide Access to Justice for All and Build Effective, Accountable and Inclusive Institutions at All Levels

Is noted in the resolution containing the declaration of the Goals that Sustainable development cannot be realized without peace and security; and peace and security will be at risk without sustainable development. The new Agenda recognizes the need to build peaceful, just and inclusive societies that provide equal access to justice and that are based on respect for human rights (including the right to development),on effective rule of law and good governance at all levels and on transparent, effective and accountable institutions. [Para 35]

From the above, it is clear that without justice, equity and inclusiveness, sustainable development as defined by the SDGs and imbued in the goals and targets they set cannot be realized. Yet, there is no other institution that is by virtue of its mandate to protect justice, equity and inclusiveness other than the judiciary.

In the case of Uganda, something has been achieved. Yet, a lot more needs to be done. On a positive note, the Uganda jurisprudence includes cases which promote equity and inclusiveness. The most pronounced is the equality jurisprudence of the courts. Yet, even then, this remains small and has only been seen in the following areas:

- Divorce - Uganda Association of Women Lawyers and Others v AG [2004] UGCC 1 (10 March 2004);

- Succession - Law Advocacy for Women in Uganda v AG [2007] UGCC 1 (5 April 2007)

- Genital female circumcision - *Law & Advocacy for women in Uganda v AG* [2010] UGCC 4 (28 July 2010)

- Rights of Offenders with mental disabilities - *Bushoborozi v Uganda (HCT-01-CV-MC-0011 OF 2015)*; and *Centre for Health, Human Rights & Development & Anor. V Attorney General* [2015] UGCC 14 (30 October 2015)

- Jurisprudence, though still limited, is also starting to emerge in the area of access to services. One area which is pronounced is access to maternal health services - *Centre for Health, Human Rights & Development & Anor. V Attorney General* Constitutional Appeal No. 1 of 2013; and *Centre for Health, Human Rights & Development & Ors. V Mulago Hospital & Anor* Civil Suit No 212 of 2013 [High Court]

However, considering the age of our constitution and that the Judiciary, these are still limited cases. This could be explained by such factors as the perceptions described above, bottlenecks in access to justice as well as the ineffectiveness of the judiciary itself.

5. Way Forward

It is on the basis of the above that the judiciary should set its agenda as it begins a new law year. The agenda of the judiciary should in view be guided by the following actions:

1) Far too much time has been spent on repairing the image of the Judiciary, yet not much has changed. This is therefore the time for the Judiciary to take decisive action to study and deal with the perceptions mentioned above. Inclusiveness of the judicial institution itself should be reviewed seriously, to ensure that the judiciary is a mirror of our society. We for instance, we need judicial officers with disabilities on the Bench, as well as members from marginalized groups

2) It should be acknowledged that the judiciary has a central role to play in the promotion of the SDGs. The Judicial mandate puts it at the centre of imbuing inclusiveness in the development processes. The Judiciary would be failing in its role for instance if the following go unchecked even when brought to its attention:

- Land grabbing characterized by inhumane forceful and arbitrary evictions
- Human rights violations - arbitrary detention, torture, property deprivation, exclusion from social services etc
- Political persecution
- Unaccountable leadership laced with impunity
- Draconian anti-people laws designed to strengthen inequality, social, political and economic injustice
- etc

3) The Judiciary needs to work on its effectiveness to ensure fairness and speedy disposition of cases. Delays in disposing cases constrain access to justice with multifarious implications for inclusiveness.