

BMSF NGO Institute

GOOD GOVERNANCE
MODULE 1

Good Governance Module 1

Units

- 4.1 Relevance of Governance to NGOs and CBOs**
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Course Objectives

To enable candidates to identify and manage corporate governance issues and to implement and control corporate governance procedures within their organizations, whether they operate in the corporate, public or NGO sectors.

To develop knowledge and understanding of the main theoretical perspectives and frameworks of corporate governance, integrating regulatory, international, ethical environmental and social dimensions.

In completion of the course, candidates should:

1. Appreciate the range and scope of topics and issues contributing to the area of corporate governance.
2. Understand the role which corporate governance plays in maintaining the stability of markets and retaining public confidence in public institutions
3. Describe the principal elements which constitute corporate governance
4. Explain the role of audit in corporate governance
5. Compare approaches to corporate governance internationally
6. Understand the implications of the nature and scope of social and environmental accountability for corporate governance practice
7. Understand the role and responsibilities of executive directors, non-executive directors, institution secretaries and auditors in ensuring effective corporate governance.
8. Understand the ethical responsibilities of senior management, describe key theories and discuss relevant ethical dilemmas in practice
9. Understand the external reporting requirements relating to corporate governance to which an organization

4.1 Relevance of Governance to NGOs and CBOs

Key Concepts in this Unit

Non-governmental organization	Community-based Organization
Civil Society	Governance
Sustainability	Non-profit-making organization
Internal Environment	External Environment
Domestic Environment	Global Environment
Accountability	Stewardship
Leadership	Management
Stakeholders	Shareholders
Responsibility	Social Responsibility

Participants Definitions (Complete and then discuss in groups before choosing the best definitions to share corporately)

Non-governmental Organization –
Governance –
Leadership –
Stakeholder –
Social Responsibility –

Non-governmental Organizations (NGOs) and Community-based Organizations (CBOs) play a vital role in the participation of civil society in the socio-economic development of domestic and global economies. The purpose of this module is therefore to help the leadership of these institutions to understand the role NGOs and CBOs in enhancing governance in Swaziland.

Good **Governance** is required in both the internal and external environment of any institution. Below are definitions which are applicable to governance in the internal, external, domestic and global environments.

Though not in whole, but in part, the principles of corporate governance are applicable to NGO governance. McLeish argues that many non-profit organizations must change the way they operate, the way they view themselves, and the way they manage their resources. The same logic applies to the way **nonprofit organizations** are governed. A change of mindset in governance is required to ensure that strategic questions are properly addressed. These include:

- How a nonprofit organization is going to undertake business
- How it will deliver its services in a manner that gets the organization positively noticed and supported
- How it will identify its goals; and
- Outlining the systems and policies needed to carry them out. (McLeish 1995:7)

Contending that non-profits are businesses, McLeish states that nonprofits resemble businesses in the following ways:

- " Product lines: many nonprofit organizations, especially larger ones, are developing new products and services designed to appeal to only certain parts of their constituencies
- Donation Level: Almost all nonprofit organizations are trying to get their donors to give more
- Customer and Donor convenience: technology-based service and receipting delivery systems, 24-hour-a-day-week operations are becoming the norm in order to compete. And the individuals manning these systems are increasingly better paid professionals and skilled workers
- Marketing: There is tremendous "sameness" in style, scope and delivery of nonprofit promotional materials." (McLeish 1995:38,39)

The governance of profits is therefore not irrelevant to the governance of nonprofits.

There is no single definition for governance. Writing on the subject of corporate governance, Sir Adrian Cadbury defines states that governance "is concerned with holding the balance between economic and social goals and between individual and communal goals. The governance framework is there to encourage the efficient use of resources and equally to require **accountability** for the **stewardship** of those resources. The aim is to align as nearly as possible the interests of individuals, corporations and society." (Sir Adrian Cadbury in a foreword to the World Bank Publication, Corporate Governance: A framework for Implementation.)

Ramani Naidoo who states that

"...Corporate Governance is essentially the practice by which [institutions] are managed and controlled. It encompasses:

1. the creation and ongoing monitoring of a system of checks and balances to ensure a balanced exercise of power within a institution
2. The implementation of a system to ensure compliance by the [institution] with its legal and regulatory obligations
3. The implementation of a process whereby risks to the **sustainability** of the company's business are identified and managed within agreed parameters; and
4. The development of practices which make and keep the institution accountable to the broader society in which it operates. (Naidoo 1992:1)

From the above points, Naidoo concludes that:

"Corporate governance, then, is essentially about the responsible **leadership** of [institutions]. This is leadership that is transparent, answerable and accountable towards the company's identified stakeholders. It aims at achieving a balance between economic, social, individual and collective goals, seeking to align as closely as possible the interests of individuals, the [institution] and society as a whole. The definition of key **stakeholders** to whom the institution must give account is an important step in the governance process." (Naidoo 1992:2).

Governance concerns are not only legal but, ethical in nature. They have to do with certain standards dictated by both the **domestic and global stakeholders** of each institution. At the heart of governance are the issues of accountability and responsibility for the decisions and actions that affect not only the internal stakeholders, but the also what may be called innocent third parties or interest groups whose rights are intentionally or accidentally infringed upon directly or indirectly by the operations of any institution. These groups are commonly known as civil society. "**CIVIL SOCIETY** is the arena in which people come together to pursue the interests they hold common – not for profit or political power, but because they care enough about something to take collective action" (Michael Edwards Nailing the Jelly to the Wall: NGOs, Civil Society and International Development 2000:2).

One of the important documents in South African corporate governance is the King II Report. The **King II Report** states that primary characteristics of good governance include discipline, transparency, independence, accountability, **responsibility**, fairness and **social responsibility**. (King II Report 2001:14)

On the principles of Accountability and Responsibility, the King II Report on Corporate Governance states that:

“Individuals or groups in an institution who make decisions and take actions on specific issues need to be accountable for their decisions and actions. Mechanisms must exist and be effective to allow **accountability**. This provides investors with the means to query and assess the actions of the Board and its committees.

With regard to management, responsibility pertains to behavior that allows for corrective action and penalizing mismanagement. Responsible **management** would, when necessary, put in place what it would take to set the institution on the right path. While the Board is accountable to the institution, it must act responsibly to and with responsibility towards all stakeholders of the institution.” (King II Report 2001:14)

King II further contends that corporate governance is essentially about Leadership:

1. Leadership for efficiency in the global economy
2. 4.6.2 Leadership for probity/integrity because donors require confidence and assurance that management of an NGO will behave honestly and with integrity with regard to their donor constituency
3. Leadership with responsibility as NGOs are increasingly called upon to address legitimate social concerns relating to their activities
4. Leadership which is both transparent and accountable because otherwise NGO leaders cannot be trusted and this will lead to the decline of the NGO and the economy as a whole.

World Vision, one of the largest NGOs in Swaziland defines governance as:

1. The process and structures used to lead an organization’s operations and activities
2. It is corporate in nature (governing body)
3. There is moral ownership (entrusted responsibility)
4. Focus on the ends (outcomes and expectations)
5. Operates through policies
6. Governance (MED Board Governance Power-point Presentation)

Contrasting governance with management, Miriam Wood states that “governance is a broader concept than management...it consists of decisions and actions linked to defining organization’s mission to establishing its policies and to determining the control mechanisms it will use to allocate power, establishing decision-making processes, and to set up procedures for the performance of specific tasks” (Non-profit Boards and Leadership – A quote from MED Board Governance Power-point Presentation)

Personal Reflections (Discuss Corporately)

What is the difference between Non-governmental Organizations and Community base-organizations?

What is the difference between Governance and leadership?

What is the difference between Leadership and Management?

What is the difference between Stakeholders and shareholders?

What can NGOs/CBOs do a part of their Social Responsibility?

Best Practice

Write a one page essay on the relationships within your NGO/CBO and then read this to your group for discussion.

Questions – True or False (Discuss in groups once completed)

Some Non-governmental organizations are funded by government	
Civil Society includes football clubs	
NGOs and CBOs can be a means by which Corporations extend social responsibility	
The Internal Environment of an NGO excludes NGO Board Members	
Domestic Environment refers to the local country context	
Accountability refers to financial accounting	
Leadership is management	
Stakeholders are shareholders of an NGO	
Responsibility is owning up to the consequences of your actions	

Community-based Organizations are controlled by foreign donors	
Governance is responsible leadership which ensures alignment to vision and mission, statutory compliance and positive impact of NGO activity to the larger society	
Non-profit-making organizations are not supposed to engage in income generating activities	
The External Environment includes the global environment	
Global Environmental issues are not part of NGO governance	
Stewardship is accountability for stakeholders interests	
Management is creating order out of chaos	
Shareholders share profits from their return on investment	
Social Responsibility implies concern for the social impact of business activity.	

4.2 Internal Legal Environment

Key Concepts

Constitution	Rights
Statute	Power
Directors	Justice
Internal control	Duty
Advocacy	Environment

The previous unit has noted that governance includes leadership that takes serious consideration of the internal environment which includes stakeholders, board members and staff members of an NGO. There ought to be a high level of trust between and among these groups. Systems have to be designed that spell out the relationship between and among these groups. Some CBOs and NGOs embrace donors as part of their stakeholders. These donors sometimes include domestic and global government and corporate entities which sometimes exert political control equivalent to their financial contribution to that particular NGO. Of major interest in the area of governance is the legal issues within the internal environment.

Participants Definitions (Complete and then discuss in groups before choosing the best definitions to share corporately)

Advocacy
Justice
Power
Internal Control
Legal Relationships/Jural relations

The internal legal structure of NGOs differ in many respects. Fowler (Fowler 37) notes that a “crude division governing identity can be made between an NGO’s

1. Formal owners: those recognized as accountable in law
2. Its Constituency: the organizations social base
3. The Leadership: the chief executive and senior management
4. The staff at different levels

All these groups exert power in their own way and to a different degree.”

Fowler further notes that there are three common governing structures:

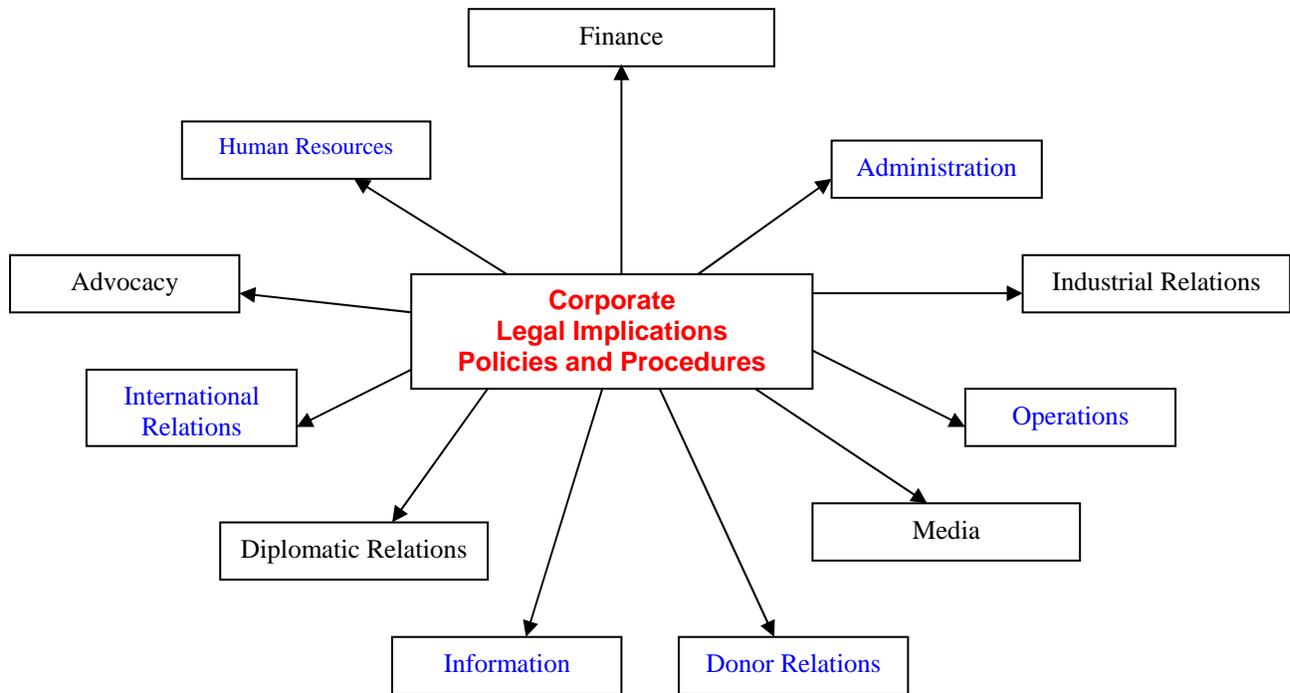
- ❖ Self-regulated, with or without membership
- ❖ Self-selected oligarchy, and
- ❖ Constituency-based

Most NGOs in Swaziland are constituency based and therefore have some kind of membership. These NGOs are established on the basis of some kind of constitution.

A majority of these NGOs are registered though NGO Registration is not statutory or mandatory. NGO Governance is therefore not well defined; hence the need to borrow from corporate governance in the stuffy of the subject of NGO governance. In order to meet the demands of their donor constituencies, most NGOs conduct Annual General Meetings and regular Board Meetings. The profile of Directors is increasingly taken very seriously and NGO Officers operated in a professional manner.

To ensure risk management and internal control, NGOs are increasing taking the issue of financial systems, audits professional ethics and employment equity seriously.

The internal legal environment within which NGOs operate is made up of a web of intricate legal functions as illustrated below. Board members therefore have to either be broad minded or constituted of a myriad of knowledge, competencies, experiences and attitudes.



The picture painted above embraces what DL Cuthbert describes as Board functions. These include fundraising, Financial Management, Human Resource Management, Information Management, Planning and Operations. Cuthbert however notes that there are overlaps in the functions of Boards and Management.

Board Responsibilities	Overlaps	Management Responsibilities
<ul style="list-style-type: none"> • Determining Policy • Setting Mission and Strategies • Selecting Board Members • Financial Oversight • Managing the CEO • Allocating Resources 	<ul style="list-style-type: none"> • Preparing Policies • Strategic Planning <ul style="list-style-type: none"> • Fundraising • Public Relations • Budgeting and Financial Reporting 	<ul style="list-style-type: none"> • Program Management • HR Management • Day to day Operations

The internal legal environment consists of a web of legal rights duties and related legal relationships legally termed jural relations. The issue of legal rights cannot be discussed effectively without a clear understanding of the concept of rights. Like most legal concepts, however, it has never been possible for lawyers to agree on the definitions for concepts of rights. May we consider the views of two of the many ideas that have been advanced on the subject. First the ideas of Hohfelden, and American scholar and Hosten a South African jurist, are what we need to view in this text.

Hohfelden identified three other concepts related to the word rights. These are privilege, power and immunity.

By ordinary dictionary definition, the word **RIGHT** means a first claim. A **PRIVILEGE** is a special favour or benefit. **POWER** is the ability to influence certain events. **IMMUNITY** is resistance to detrimental forces. Hohfelden went on to argue that the concept of rights was always used in legal relationships. These he termed **JURAL RELATIONS**. From this argument he stated that where one person had a right, the other had a **DUTY**; where one person had a right, the other had **NO RIGHT**; where one person had power the other had **LIABILITY**; where one person had **IMMUNITY**, the other had **DISABILITY**.

Hosten's reasoning on rights. Hosten distinguished rights in the sense of **JUSTICE** and rights in the sense of **POWER**. Where rights are thought of in terms of justice, the conclusion becomes that rights are **RIGHTS ARE NATURAL**. Where rights are thought of in terms of power, the conclusion becomes that rights are thought of in terms of power the conclusion becomes that rights have to be **ARIGHTS HAVE TO BE ACQUIRED**.

An application of the Hohfelden analysis, may lead to the following conclusion on trade related matters: civil society is a right, engaging with specific communities is a privilege, community organization is a power and tax exemption and rebates are an immunity.

Making a step further on the Hohfelden analysis, may we consider examples relating to NGO operations. Local NGOs have a right to engage in civil society; the converse is that government has a duty to provide a conducive environment for civil society. Foreign NGOs may not have such a privilege. NGOs have power to mobilize communities and communities find themselves liable to the former. These conclusions are however not hard and fast.

Best Practices (Please share and discuss with your group)

Draw your organizational chart on a flipchart and then share with your small group.

Make a lists of the Strengths, Weaknesses, Opportunities and Threats in the area of legal relationships within your organization.

What are the three inalienable Rights of your NGO/CBO Stakeholders

What are the three major duties of your Board Members/Committees

What are the three powers of the National Director/Manager of your NGO/CBO

Does your Board control your Director or is it the other way round?

What benefits are the staff members in your NGO entitled to?

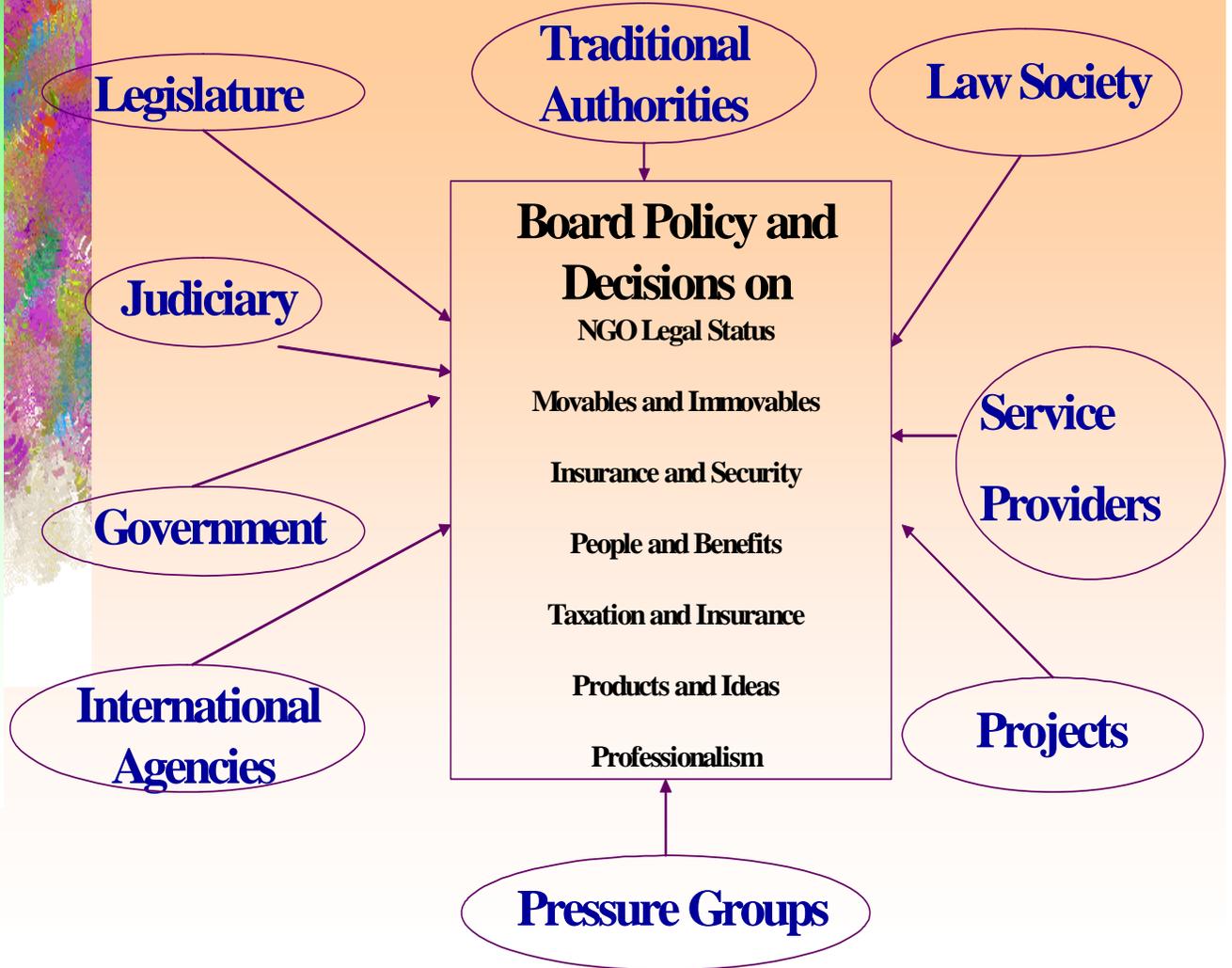
4.3 External Legal Environment

Key Concepts in this Unit

Legislature	Memorandum of Association
Judiciary	Articles of Association
Government	Constitution
Pressure Groups	Authoritative Legal sources
Code of ethics	Persuasive Legal sources
NGO Policy	NGO Legislation
Common Law	Statute law

Internal legal relations are one side of the legal considerations in NGO governance. Besides, NGO operations are a highly dynamic phenomenon. Every new day sees changes in NGO activity and changes in the external legal environment within which NGOs operate. To survive, NGOs have a challenge to shape **legislation** and legal systems. We should in discussing the subject of NGO governance, not only focus on the existing laws; but focus on bringing about necessary changes to those laws. Such changes can be brought about by no one else but the NGO leadership. In order to do this NGO leaders have to understand the nature of their external environment as illustrated below:

NGO LEGAL LINKAGES



In discussing NGO governance, it would be restrictive to focus only on **statutory laws** relating to NGOs. We should therefore consider the broad spectrum of such phenomena as legal rights (See previous discussion on jural relations) , business regulations, sources of law, statute law, business establishment, business operations and possibly, common law and international law. All of these have a great impact on the operations of NGOs.

Participants Definitions (Complete and then discuss in groups before choosing the best definitions to share corporately)

Constitution
Memorandum and Articles of Association
Gazette
Trading Licence
Human Rights Protocols

BUSINESS REGULATIONS

In the minds of many observers, there is very little doubt as to the reality of business ethics. Writing on the subject, however, Baumbach argues that:

“Business is part of a social process, and the business community, as with any other group that must work in harmony for the public good, has a need for rules and regulations concerning the conduct of its members.”

NGOs are divided primarily by competition and, to a lesser extent, by size and operational emphasis. This makes it difficult for them to observe any prescribed **CODE OF ETHICS**. NGOs within the membership of the Coordinating assembly of NGOs have however commenced discussions towards a common **NGO POLICY** and legislation that will regulate their business.

The custodians of rules governing NGO operations are wide and varied. This includes NGO associations, public authorities, government authorities, courts and the legislature. The impact of pressure groups can also not be ignored in this area. It is also important to note that there is a significant role played by international agencies which deal with NGOs at local, regional and international level.

The control of NGO business should include the control of such phenomena as registration, permits, restrictions, competition, consumer protection, environment protection, labour relations, insolvency and liquidation.

These modes of business control together with the various institutions that regulate businesses, are based on legal provisions which emanate from three main sources.

This leads to the discussion of the sources of law.

SOURCES OF LAW

There are these sources from which we may identify the laws relating to business control. These are statute law, common law and international law. Statute law is law derived from parliament, common law is law derived from the judiciary, and international law is law formulated from international business traditions by international organizations.

A question that may be pertinent at this point is the authority or weight of the three forms of law in our legal system. Statute law is by far the most supreme form of law. It is under statute law that all other forms of law come to be recognized. Both common law and international law are inferior to statute law in the sense that they are regarded as merely persuasive in our legal system, and only come to be regarded as authoritative where the highest court of the land or the legislature pronounces or recognizes them as such.

It is important to understand several classifications of law in considering the generic subject of law in the context of NGOs. These include but are not limited to common law, statute law, customary law, bye laws, constitutional law, administrative law, company law, labour law and the law of contract. All these classifications are applicable in the context of NGOs. Here some descriptions of each of these classifications in this section.

Board members should have a clear understanding of this web of legal implications of corporate governance. Below are some helpful definitions of the various branches of law.

1. Common Law

The concept of common law has several meanings at law. In the context of sources of law or authority of law, common law refers to judge made law.

"the Common Law school favors case by case analysis. Essentially common law judges look to prior cases rather than abstract rules in resolving legal disputes. Thus they tend to be more concerned about the merits of the case at hand than they are with the formulation of general principles of law. The emphasis here is on individual case results in which lawyers and juries perform extremely important roles in the formulation of law." (P38 Richards Eric L. Irwin USA. Law for Global Business 1994.)

2. Statute law

Statute law derives from parliament, common law derives from the courts of law and international law from international organization.

3. Customary law

Customary law is found by examining the actual practices...Certain conduct that has been carried on for a long period eventually receives the approval of the world community" (Richards Eric L. Irwin USA. Law for Global Business 1994:33.

4. Bye laws

Bye laws are subsidiary regulations formulated to give a degree of specificity and relevance to general legislative enactments.

5. Constitutional law

According to Hosten, constitutional law is "...the branch of law that regulates in the first place the exercise of various powers which vest in the authoritative bodies and persons which constitute the government and in the second place, the relationships between these authoritative bodies and persons inter se on the one hand and the relationship between the latter and the subject on the other hand". (Hosten 1977 598)

6. Administrative law

Hosten defines Administrative law as “consisting of the rules which regulate the relationship between the various limbs of the executive organ inter se as well as between the latter and the individual” (Hosten 1977 645)

7. Company law

The company law practice of Swaziland is such that organizations which wish to register as companies have to memoranda of association stating the main object of their business. They also have to submit articles of association outlining the internal structure and operations of their organization. It is also important that they prepare other critical documents such as books of account, deeds, lease agreements and shareholders certificates in line with the provisions of the Companies Act. NGOs have just developed a policy which may lead to a unique registration process for NGOs and ADPs.

8. Labor law

Labour law is the body of law that regulates relationships between employers and employees. Gibson et al provide us with three categories of labour law. There is in our view a fourth category of labour law, international labour law.

- a. General labour law “consists of those legal rules that govern the relationship between a) employer and employee, b) employers and trade unions and c) trade unions, trade union federations, employers organizations, and the state.
- b. Contemporary labour law has an individual and collective aspect.
- c. Individual labour law is usually seen as consisting of those legal rules which govern the relationship between an individual employee and an individual employer
- d. Collective labour law embraces the law relating to groups, the formation of trade unions, the conduct of trade unions, collective bargaining between employers (or employers organizations) and trade unions, and strikes and lockouts.’ (Gibson JTR South African Mercantile Law, Juta South Africa. p604)
- e. International labour law is an embodiment of the universally accepted labour standards set by the International Labour Organization in the form of declarations and conventions.

Gibson states however that it would be mistaken to regard individual and collective labour law as totally distinct.

9. Law of Contract

Gibson states that the law of contract is "chiefly concerned with the determination of the limits within which persons may bind themselves contractually, with construction of the rules (or terms) agreed upon by the parties, and with providing remedies where one of the parties has not lived up to the expectation of good faith which has grown in the minds of men of average right-mindedness. (Gibson p9)

NGO RELATED STATUTE

Some of the most important statutes on NGO operations are the **Companies Act of 1912** and the **Protection of Names Uniforms and Badges Act 10 of 1969** as amended which are readily available from the Attorney General's Chambers and are self explanatory. This view is by no means intended to belittle the task of statutory interpretation. This is a difficult task better executed by trained specialists. It is however no harm for the layman to purchase his own copy of laws relating to NGO governance from the **Attorney General's Office in the Ministry of Justice**. The Domestic Trade Section of the Ministry of Commerce may, of course be readily available to explain the practical application of these laws. Another relevant office is of course the Registrar General's Office. The most relevant groups of persons to be consulted on these issues, are the locally Registered Lawyers and Business consultants.

ESTABLISHMENT OF BUSINESSES

NGOs which opt for registration as companies have to submit **Memoranda of Association** stating the main object of their outlining the internal structure and operations of their companies. It is also important that they prepare **formal books and papers** including **books of accounts, deeds, lease agreements** and **shareholder's certificates**. All of these documents should be in line with the companies Act. The name of a business is also provided for both under the Companies Act and Protection of Names Uniforms and Badges Act 10 of 1969. It is not permissible for any two institutions to have the same name or to use names which are contrary to public policy or government policy.

The first name and surname of a license holder or that of his partner may be used as a business or trade name. In order to ensure that there is no conflict of interest in the trade name the person seeking to establish a business ought to advertise his business name in a nation wide newspaper and in the Government Gazette for objections. Consent should be sought from the Minister of Commerce for the use of word like, "Royal," "Crown," "Government" and other state names as part of a trade name.

The registration of NGOs should ideally follow legal processes similar to the one followed by businesses. The registration of businesses is either done by a **licensing officer** who issues **trading licenses** or by the **Registrar of Companies** who issues **Certificates of Incorporation**. Copies of both the trading licenses and the Certificate of Incorporation are kept by the Registrar of Companies. Every time a company or a business is registered, the Registrar of Companies has to publish such company in the government gazette. It would therefore be recommended that an NGO Act establish an office of the Registrar of NGOs which will issue legal instruments required for constitution and operation.

LEGAL OPERATIONS

Once a business has been fully registered it may however not commence business until it has obtained trading licenses relevant for its business operations. This process is governed by the **Trading Licenses Act of 1939**. This status has a list of licenses for different occupations in its schedule. A similar procedure should apply to NGOs.

Like in the case of businesses, persons who carry out NGO type operations business without relevant licenses are deemed to be committing statutory offences as they in most cases do not make payment of the necessary taxes to the government. The penalty is three times the duty not paid or a maximum of three months in prison or both fine and sentence together. Police officers, Revenue officers and licensing officers and other government officers should have the power and duty to inspect premises and charge certain stipulated fines for unlicensed NGOs.

Revenue is not the only reason for the inspection of premises. There are a lot of other public policy considerations which are regulated by licenses in the interest of social responsibility to the environments with which institutions interface. These may include public health, protection of, and basic livelihood.

All institutions are required by law to observe the provisions of their licenses. Failure to do this is punishable by stipulated on the spot fines and, at times, lead to suspension of license or total withdrawal of the same. There are a number of government tribunals, public tribunals, public institutions responsible for the granting, removal and transfer of licenses.

Extracts from the Constitution of the Coordinating Assembly of NGOs

The preamble states that CANGO is a private, non-profit association of organizations whose primary goal is to improve the quality of life for all people in the kingdom of Swaziland. These organizations recognize the need to work closely and in harmony with each other, with the people they serve and under the establishment of the laws of the kingdom of Swaziland.

One of the objectives of CANGO relevant to governance is to encourage and promote transparency and accountability in accordance with internationally accepted protocols on human rights and dignity of human kind. CANGO and her members have to be NGOs registered under the laws of the land. In line with this objective CANGO seeks to develop a code of conduct and a disciplinary to ensure adherence to professional standards.

Extracts for the Report on the Enabling Environment for Swaziland NGOs

In his analysis of Policy framework for NGOs in African Countries, Rams Ramashia states that the policy framework for NGOs in most African countries ranges from *liazes faire* on the one hand of the spectrum to draconian on the other depending on whether a given state is a constitutional democracy or an authoritarian state. (Ramashia 1998:2) Swazi NGOs largely fall under to former category of NGOs. No special licences and permission are required for NGO operations in Swaziland. In contrast Ramashia notes that in South Africa, NGOs are required to produce accounting records of their income, expenditure, assets and liabilities within 6 months after the end of each fiscal year. The accounts have to be audited and presented to the Director of NGOs together with a narrative report. This is however not a requirement in Swaziland for NGOs registered under the Protection of **Names Uniforms and Badges Act 10 of 1969**. Ramashia notes that though some of these practices are common with Swazi NGOs, annual audits, annual general meetings and constitutions are not mandatory for them by virtue of common law. These practices are however mandatory for the few NGOs that have been registered under **Section 21 of the Company's Act 7 of 1912**.

Ramashia recommends NGO specific legislation in the kingdom with government as the custodian and administrator of the legislation. The proposed legislation would require that each NGO operate on the basis of a constitution, have independent governing boards who are however not entitled to dividends or other benefit from the NGO. The NGOs would have to be subject to statutory audits and would have to prepare sound financial reports and hold annual general meetings. The legislation would further have to provide for a Statutory Board that includes members of civil society to regulate the operations of NGOs.

Personal Reflections (Discuss Corporately)

Under which law are NGO/CBO to be registered and why?

Do NGOs need a Legal Secretary, Company Secretarys, or Lawyers?

What legal resource material do organizations need to have?

What is your understanding of the difference between a constitution and a Memorandum and Articles of Association?

Which laws govern the operation of NGOs?

4.5 Board Rights and Responsibilities

Board members and committees should have a clear understanding of their rights, duties, roles, tasks and responsibilities within the context of the internal and external environments.

Key Concepts in this Unit

Roles	Standards
Responsibilities	Competencies
Functions	Values
Strategy	fiduciary duty
Tasks	Mission

To further clarify jurial relations (legal relationships) DL Cuthbert gives the following definitions of roles, functions, tasks and responsibilities:

- a. Role – describes broad areas of responsibilities in a non-profit organization, of governing and management
- b. Functions – refers to the categories of the work that need to be performed
- c. Tasks – refers to pieces of work that need to be performed
- d. Responsibilities - refers to the duties that are expected of the members of the board and members of staff.

Do Recall the picture below from the previous unit?

Board Responsibilities	Overlaps	Management Responsibilities
<ul style="list-style-type: none"> • Determining Policy • Setting Mission and Strategies <ul style="list-style-type: none"> • Selecting Board Members • Financial Oversight • Managing the CEO • Allocating Resources 	<ul style="list-style-type: none"> • Preparing Policies • Strategic Planning <ul style="list-style-type: none"> • Fundraising • Public Relations • Budgeting and Financial Reporting 	<ul style="list-style-type: none"> • Program Management • HR Management • Day to day Operations

The roles, functions, tasks and responsibilities of Boards are outlined in detail in the King II document. Below is a summary of the rights and duties of Board Members as spelt out in King II

Board Responsibilities

1. **Development of a Charter that sets out its responsibilities** and which should be disclosed in its annual report.
2. **Determination of purpose and values of institution** which includes setting policies and developing the organization's mission statement.
3. **Determination of strategy** to achieve the purpose of the institution and implementation of its values in order to ensure that the institution survives and thrives
4. The board should also **set financial and accounting standards**, review and approve budgets, create internal controls and develop an adequate funding base.
5. Monitoring and evaluating the implementation of strategies, policies, management performance criteria and business plans
6. Ensuring that **technology and systems** used in the institution are adequate to properly run the business for it to compete through the efficient use of its assets and human resources
7. Identifying key risk areas and key **performance indicators** of the business enterprise in order for the institution to meet stakeholder expectations and social interests in the long term.
8. Ensuring that the institution has developed a **succession plan** for its executive directors and senior management.
9. The Board has a **fiduciary duty to the members** – the duty to act with good faith, diligence and loyalty with regard to the resources of the organization. A fiduciary duty imposes a higher level of care and loyalty than the law ordinarily requires. The duty of loyalty requires that corporate interests be placed ahead of any personal interests. Directors should therefore declare any conflict of interest. Directors have a fiduciary duty to be thorough and vigilant in their decision-making. The law requires them to use the amount of care as
10. The Board should also be responsible for the **external representation of the organization**. This includes developing a public relations and advocacy policy and engaging in public relations activities.
11. The board should **define levels of materiality, reserving specific powers** to itself and delegating other matters with the necessary written authority to management. These matters should be monitored and evaluated on a regular basis
12. Every board should **determine whether its size makes it effective**.

The roles of NGO Boards are very similar to those of the corporate sector. In their book, non-profit Answer Book, Robert C. Andriga and Ted Engstrom Ted shed some more light on the responsibilities of non-profit Boards.

Here is a summary of the Adriga and Engstrom description of Board roles and responsibilities:

1. Determines the organization's mission and purposes
2. Select Chief Executive or the national Director and define what is expected of such a person.
3. Support the Chief Executive in the planning process and assess his or her performance
4. Ensure effective strategic organizational planning and performance management
5. Ensure adequate resources and allocation of the same
6. Manage resources effectively
7. Set operational standards and determine, monitor and strengthen the organization's programming, budgeting and service standards for accountability purposes
8. Enhance the organization's public standing, encouraging positive relationships with the community and promoting public accountability
9. As part of its fiduciary responsibility, the Board has to ensure legal and ethical integrity and maintain accountability through compliance with performance standards and local legislation
10. Recruit and orient new board members; ensure effective self-management of the Board and assess its performance
11. Upholding the core documents through Policy-focused leadership

For Boards to effectively execute their responsibilities, it is important to ensure a combination of competences in the membership. Some of the required competencies are Strategic Management, Financial Management, Knowledge of Business Processes, Marketing, Public Administration, Law, Human Resources Management, Technical Skills, Public Relations, Information Management, etc.

Given the need for a broad spectrum of competencies within the Board, it is important to have an idea of the current profile and desired profile of Board members. The following table may be used for this purpose:

Best Practices (Please write the names of your Board members and state their qualifications and talents and competencies)

Name	Qualifications	Competencies & Talents

Write a list of critical competencies that are missing in your Board

Desired competencies and talents

In order to ensure Board efficiency and effectiveness, it is important to develop a Board Development Training Program which should include the following items:

Board Development Items

1. History and Profile of the organization
2. Strategic Plan of the organization
3. Constitution or memo and articles of the organization
4. Policy documents
5. Minutes from three last Annual General Meetings
6. Three sets of recent minutes
7. Current Operational Plan
8. Description of projects
9. Recent Business Report
10. Recent Financial Report
11. Previous Audit Reports and Management Letters
12. Current Financial Plan
13. Current Human Resource Plan
14. Profile of donors and beneficiaries
15. Project Evaluation Reports
16. Sample of Court Cases

4.6 Board Processes

Knowledge of Board responsibilities is futile without efficient processes to harness the talents of the Board and engage them in critical governance issues.

Key Concepts

Monitoring	Policy
Evaluation	Strategy

Participants Definitions

(Read each of the processes stated below and discuss in groups before choosing the best definitions to share corporately)

The King II Report presents this comprehensive list of board processes:

1. Boards should encourage **ATTENDANCE OF ANNUAL GENERAL MEETINGS**, at which the directors should be present, and more particularly the chairpersons of the board's committees – especially the audit and remuneration committees.
2. The board should **MAINTAIN AN ATTENDANCE REGISTER** since they have to meet regularly, at least once a quarter if not more frequently as circumstances require, and should disclose in the annual report the number of meetings each year and the details of attendance of each director at such meetings.
3. Boards should **ENSURE THAT EACH ITEM OF BUSINESS IS INCLUDED IN THE NOTICE OF GENERAL MEETING**, or any other members' meeting, is accompanied by a full explanation of the effects of any proposed resolutions.
4. **A BIOGRAPHY OF EACH DIRECTOR** standing for election or re-election at the annual general meeting should accompany the notice contained in the annual report.

5. Giving **STRATEGIC DIRECTION** and **APPOINTING THE CHIEF EXECUTIVE OFFICER** and ensure that succession is planned.
6. Exercising **LEADERSHIP**, enterprise, integrity and judgment in directing the institution based on fairness, accountability, responsibility and transparency.
7. Ensuring **MONITORING AND EVALUATION** of the implementation of its strategies, policies, senior management performance criteria and business plans.
8. The board should **ENSURE THAT THE INSTITUTION COMPLIES WITH RELEVANT LAWS, REGULATIONS AND CODES**, regulations and codes of best business practice and, communicates with its members and relevant stakeholders openly and promptly with substance prevailing over form
9. The board should regularly **REVIEW PROCESSES AND PROCEDURES** to ensure the effectiveness of its internal systems of control, so that its decision making capability and the accuracy of its reporting and financial results are maintained at a high level at all times.
10. The board should have an agreed procedure whereby directors may **TAKE INDEPENDENT PROFESSIONAL ADVICE**, if necessary, at the institution's expense.
11. The board should **HAVE TIMELY AND UNRESTRICTED ACCESS TO ALL COMPANY INFORMATION**, records, documents and property. The information needs of the board should be well-defined and regularly monitored.
12. Non-executive directors should have access to management and it may even be deemed appropriate by the non-executive directors to, but this should be a carefully managed process agreed by the board.
13. The board must **IDENTIFY KEY RISK AREAS AND KEY PERFORMANCE INDICATORS** of the business enterprise, which should be constantly monitored, with particular attention given to technology and systems.
14. The board should identify and **MONITOR NON-FINANCIAL ASPECTS** to the business of the institution.

15. The board should **RECORD FACTS AND ASSUMPTIONS RELATING TO THE CONTINUITY OF THE COMPANY**; that the business will continue as a going concern in the financial year ahead, or why it will not, and what steps the board is taking.
16. The board must **BALANCE GOVERNANCE CONSTRAINTS WITH PERFORMANCE**
17. Regularly **ASSESSMENT OF BOARD PERFORMANCE** and effectiveness as a whole and that of individual directors, including the Chief Executive Officer.

Here are some other definitions and descriptions of the processes listed above.

- **Policy making** - Policies are the operational guidelines for an organizational regulation. They act as parameters for operation. Policies are made by Board members in consultation with top management who in turn have to consult with staff. It may be difficult to say whether policy-making a right or a duty to any of the stakeholders. The Board and Management has the duty to enforce policy and all stakeholders have to execute policy to the letter.

The purpose of policy is to protect and steer the staff. It acts as a reference tool for appropriate action, ethical decision making and eliminates potential and actual conflict

- **Strategic Planning** - Strategic management is a set of decisions and actions that result in the formulation and implementation of plans designed to achieve corporate objectives. It covers the components of Vision, Mission, Philosophy, Profile, Goals, Long term and short term strategies (tactics) (John Pearce and Richard Robinson)
- **Leadership** - Leadership is about upholding values, articulating mission and strategic direction, maintaining alignment with mission and strategy, providing vision, motivation of staff, team formation and capacity-building. (Patrick Siame)

- **Monitoring and Evaluation - Monitoring** can be defined as the provision of verifiable information to participants, staff and managers for making informed judgments about the merit or worth of program implementation. Monitoring should assist stakeholders avoid problems in implementation, as well as recognize potential that should be encouraged. Program **evaluation** is defined as the facilitation of informed judgments by stakeholders about the merit or worth of a program based on verifiable evidence.

Best Practices

(Please give examples of how your Board members are involved in these processes; discuss with your group)

Process	Example of Board involvement
Strategic Planning	
Policy making	
Leadership	
Monitoring	
Evaluation	
Financial Management	
Performance Management	

4.5 Functions of the Chief Executive Officer

Boards have to pay careful attention to the operations of the CEO of an organization because an organization can only be as good as its CEO. The profile and duties and conditions of service of the CEO should therefore be clearly spelt out. Experience has shown that an incompetent CEO costs more than what he is worth. His compensation is unjustifiably high, his training costs also relatively high and his terminal benefits and replacement costs very costly to the organization. Board members should therefore be very careful in the recruitment, management and dismissal of a CEO.

Participants Description

(Please give examples of activities that a good CEO should focus on. Discuss in groups before sharing corporately)

Best Practices

(Please share your Board's experiences with good and bad CEOs; discuss with your group)



King II outlines what the Board should understand about the CEO.

The chief executive officer has a critical and strategic role to play in the operational success of a institution's business. For this reason as has been indicated, the role of the chief executive officer should be separate from that of the chairperson.

Some of the important functions that a chief executive officer fulfils are usually to:

1. develop and recommend to the board a **long-term strategy** and vision for the institution that will generate satisfactory levels of shareowner value and positive, reciprocal relations with relevant stakeholders;
2. develop and recommend to the board **annual business plans and budgets** that support the institution's long-term strategy;

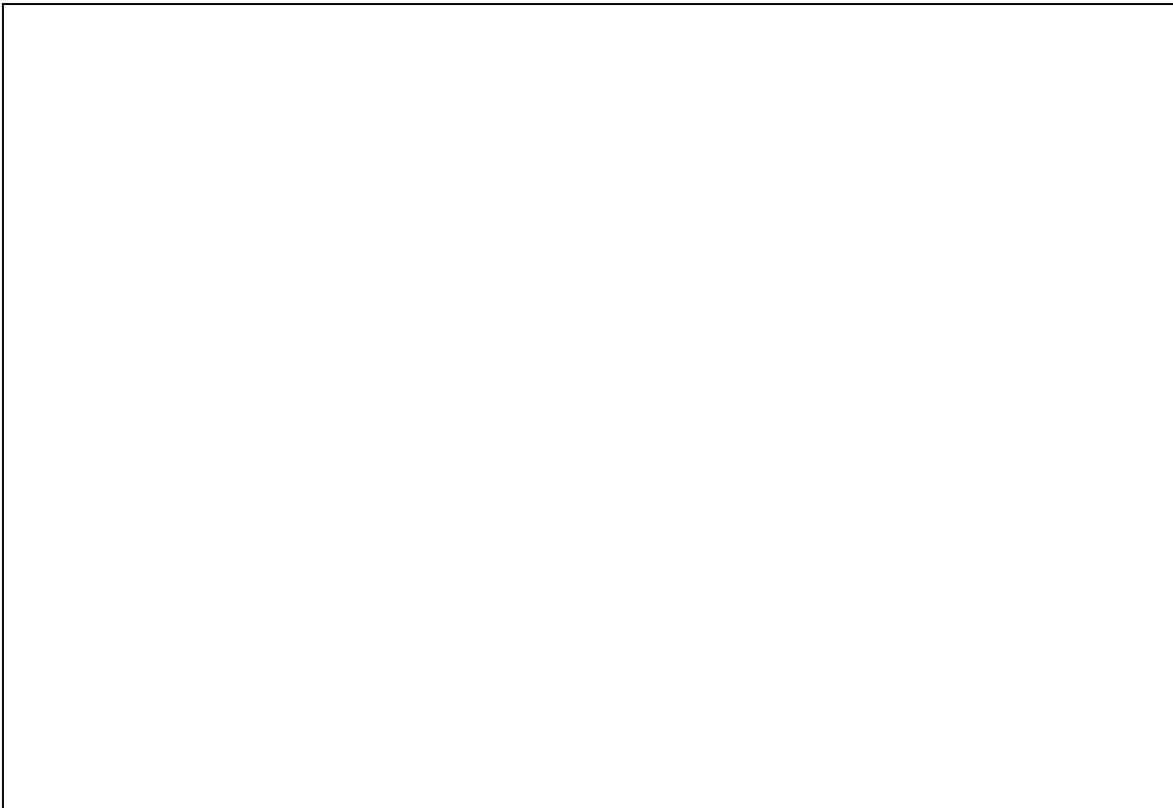
3. consistently strive to **achieve the institution's financial and operating goals and objectives**, and ensure that the day-to-day business affairs of the institution are appropriately monitored and managed;
4. ensure continuous **improvement in the quality** and value of the products and services provided by the institution, and that the institution achieves and maintains a satisfactory competitive position within its industry (ies);
5. ensure that the institution has an effective management team and actively participate in the **development of management and succession planning** (this would also include the chief executive officer's own position);
6. formulate and oversee the **implementation of major corporate policies**; and
7. serve as the **chief spokesperson for the institution**.
8. The chief executive officer should also **maintain a positive and ethical work climate** that is conducive to attracting, retaining and motivating a diverse group of top-quality employees at all levels of the institution. In addition, the chief executive officer is expected to **foster an corporate culture** that promotes ethical practices, encourages individual integrity, and fulfils social responsibility objectives and imperatives.

4.6 Role and Function of the Board's Company Secretary

One of the major mistakes that Boards make is to combine the role of the CEO with the role of the Company Secretary. This mistake makes it difficult for the Board to be independent of the CEO. Once objectivity is blurred, the CEO goes to bed with the Board and the unscrupulous CEO takes advantage of organizational resources and exposes the organization to significant risks. The company secretary helps the board to stay on course as a distinct entity from the CEO. This prevents the undesirable scenario where the tail wags the dog. The company secretary also ensures that the entire organization operates within existing legal requirements. Corporate governance is primarily the responsibility of the Company Secretary.

Participants' Discussion

In what ways may the CEO manipulate the Board



King II addresses the role of the Company Secretary in relation to the Board, the entire organization and its stakeholders.

While the role of the Company Secretary will vary from institution to institution and can be very diverse, the core role concerns three primary areas:

In Relation to The Board

1. The Board's Company Secretary must **guide the board, collectively, and each director, individually, as to their duties and responsibilities** and make them aware of all legislation and regulations relevant to the institution on which the directors serve.
2. The Board's Company Secretary must **ensure that the procedure for the appointment of directors is properly carried out** and they should assist in the proper induction and orientation of directors, including assessing the specific training needs of directors and executive management as to their fiduciary and other responsibilities.
3. They need also to be available to **provide comprehensive practical support and guidance to directors**, with particular emphasis on supporting the non-executive directors and chairperson.
4. They should also **ensure unhindered access to information** by all board and committee members so that they can contribute to board meetings and other discussions.
5. The Board's Company Secretary is responsible for the **compilation of board papers** and to filter them to ensure compliance with the required standards of good governance. It may also be part of the Board's Company Secretary's role to raise matters that may warrant the attention of the board.

In Relation to the Institution

1. The Board's Company Secretary should **ensure compliance with all relevant statutory and regulatory requirements** having due regard to the specific business interests of the institution. In particular the Board's Company Secretary must also be aware of the duties set out in the Companies Act.
2. They should also **help carry out corporate strategies** by ensuring that the board's decisions and instructions are clearly communicated to the relevant persons.
3. The Board's Company Secretary should be available to **provide a central source of guidance and advice within the institution on matters of business ethics and good governance.**

In Relation to the Members

1. The Board's Company Secretary needs to communicate with the members as appropriate and to **ensure that due regard is paid to their interests**
2. They also need to act as a primary point of contact for corporate and other members, especially with regard to matters of governance. It is of particular importance to **ensure that all members are treated in a fair and equal manner.**
3. The Board's Company Secretary has a pivotal role to play in the **governance** of a institution, through the board.
4. The chairperson is entitled to the strong and positive support of the Board's Company Secretary in **ensuring the effective functioning of the board.** All directors on the board should have access to the advice and services of the Board's Company Secretary.
5. In addition to extensive statutory duties, the Board's Company Secretary must **provide the board as a whole and directors individually with detailed guidance as to how their responsibilities should be properly discharged** in the best interests of the institution.

6. The Board's Company Secretary has an important role in the **induction** of new or inexperienced directors, and in assisting the chairperson and chief executive officer in determining the annual board plan and other strategic issues of an administrative nature.
7. The Board's Company Secretary should provide a central source of **guidance and advice to the board**, and within the institution, on matters of business ethics and good governance.

Participants Discussion

Assuming your organization is unable to afford a company secretary, to which staff members or Board members can you assign each of the responsibilities of the company secretary?

4.6 Strategy for Ensuring NGO Board Efficiency and Effectiveness

The topics covered in the previous units provide a framework for the development of a corporate governance plan. The plan should include the following actions:

1. Conducting a situational analysis of the status of your current Board – including the internal and external environment.

2. Redefining the Boards Mandate in the founding documents – Momo and Articles or constitution.
3. Developing a Selection Criteria for Board Members
4. Selecting the Right People.
 - Character – wisdom, integrity, good judgment, team-players
 - Skills – management skills,
 - Experience
 - Representation
5. Providing Orientation
6. Developing Processes for Board Involvement
7. Setting standards for Good Governance
8. Developing a system for monitoring Board Performance
9. Developing a Comprehensive Board Capacity Assessment and Capacity Building Program
10. Developing a system that enables the Board to be evaluated by the stakeholders.

Written Assignment

Using points 1 to 10 Develop a Corporate Governance Plan for your organization

4.7 Evaluation and Grading

Activity	Grade Weight
Reading	20%
Written class work	20%
Participation in Discussions	30%
Final Written Assignment	30%

b. Course Resources

1. Cilliers Benade – **Company Law**
2. **Company's Act**
3. Cuthbert David L. – **Building Funding Sustainability Through Planning and Donor Relations.**
4. Cuthbert David L. - **Strengthening NGO Governing Boards**
5. Fowler Alan - **Striking a Balance**
6. **King II Report, 2001**
7. Kelleher David - **Grabbing the Tiger by the Tail**
8. McLeish B.J. **Marketing Strategies for Nonprofit Organizations.**
John Wiley & Sons USA 1995
9. Marchand Donald A. et al **Mastering Information Management**
Prentice Hall. USA 2000.
10. Naidoo Ramani – **Corporate Governance**
11. **Names Uniforms and Badges Act**
12. National Centre for Non-profit Boards
13. NGO Policy
14. Ramashia Rams Advocate **Report on the Enabling Environment for Swaziland NGOs.** 1998 (Unpublished)
15. Small and Micro Enterprise Training Curriculum for Swaziland
16. World Vision's Structure and Governance
17. Wysocki, Robert K., Beck, Robert., Crane, David B., (2000) **Effective Project Management**, New York, John Wiley & Sons