

EVOLUTION OF BRITISH LEGAL
AUTHORITY IN UGANDA WITH SPECIAL EMPHASIS
ON BUGANDA: 1890-1938

By
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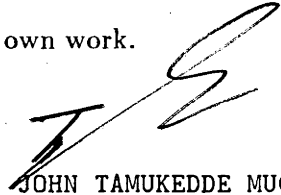
A thesis submitted for the degree of
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at the Australian National University.

January 1986



Declaration

Except where otherwise indicated
this thesis is my own work.

A handwritten signature in black ink, appearing to be 'J. T. Mugambwa', written over the printed name.

JOHN TAMUKEDDE MUGAMBWA

January 1986

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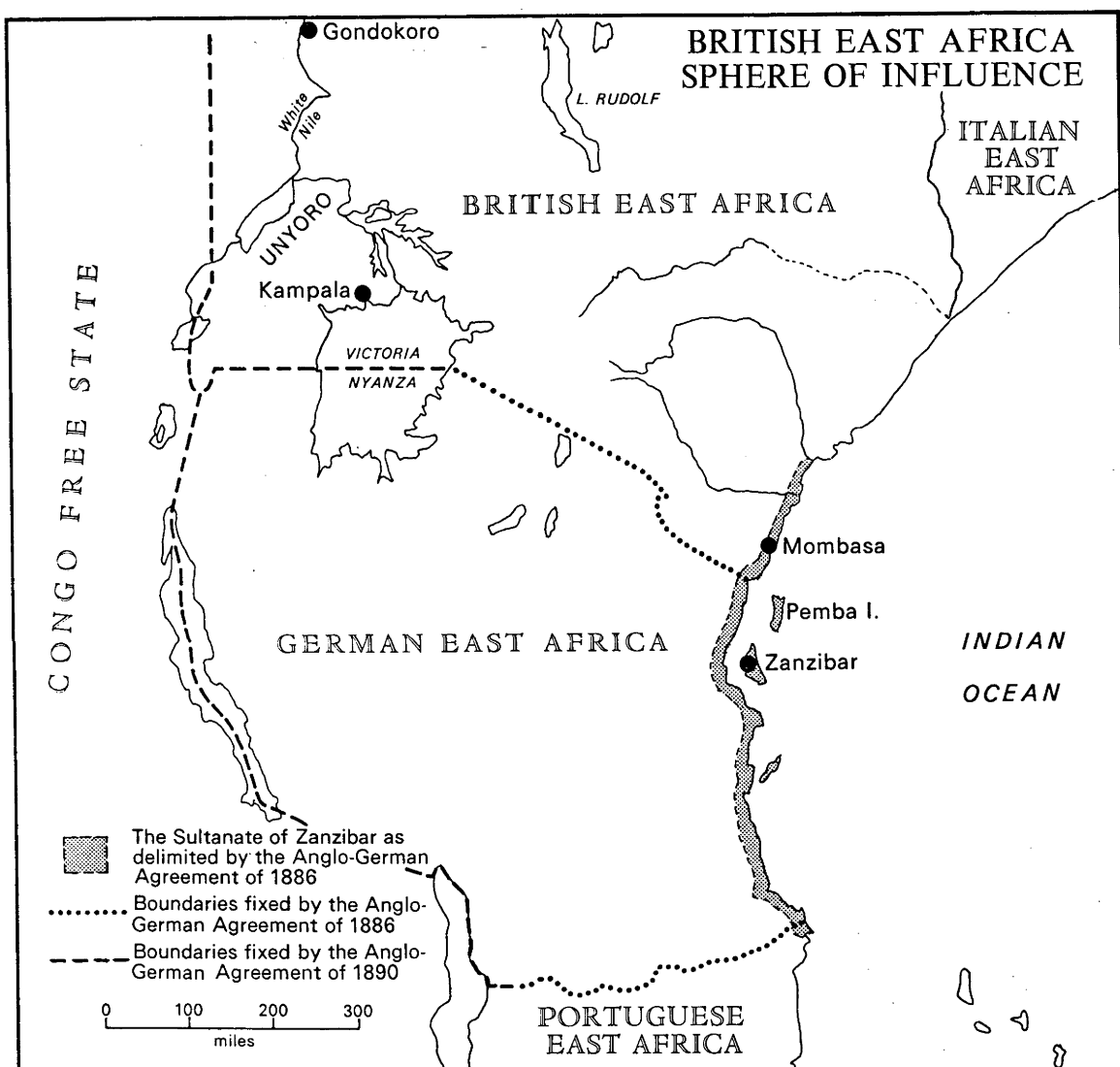
Finally, I wish to express my deep appreciation to my wife, Juliet, and our two children, Sanyu and Paul, whose patience and encouragement made it possible for me to complete this research.

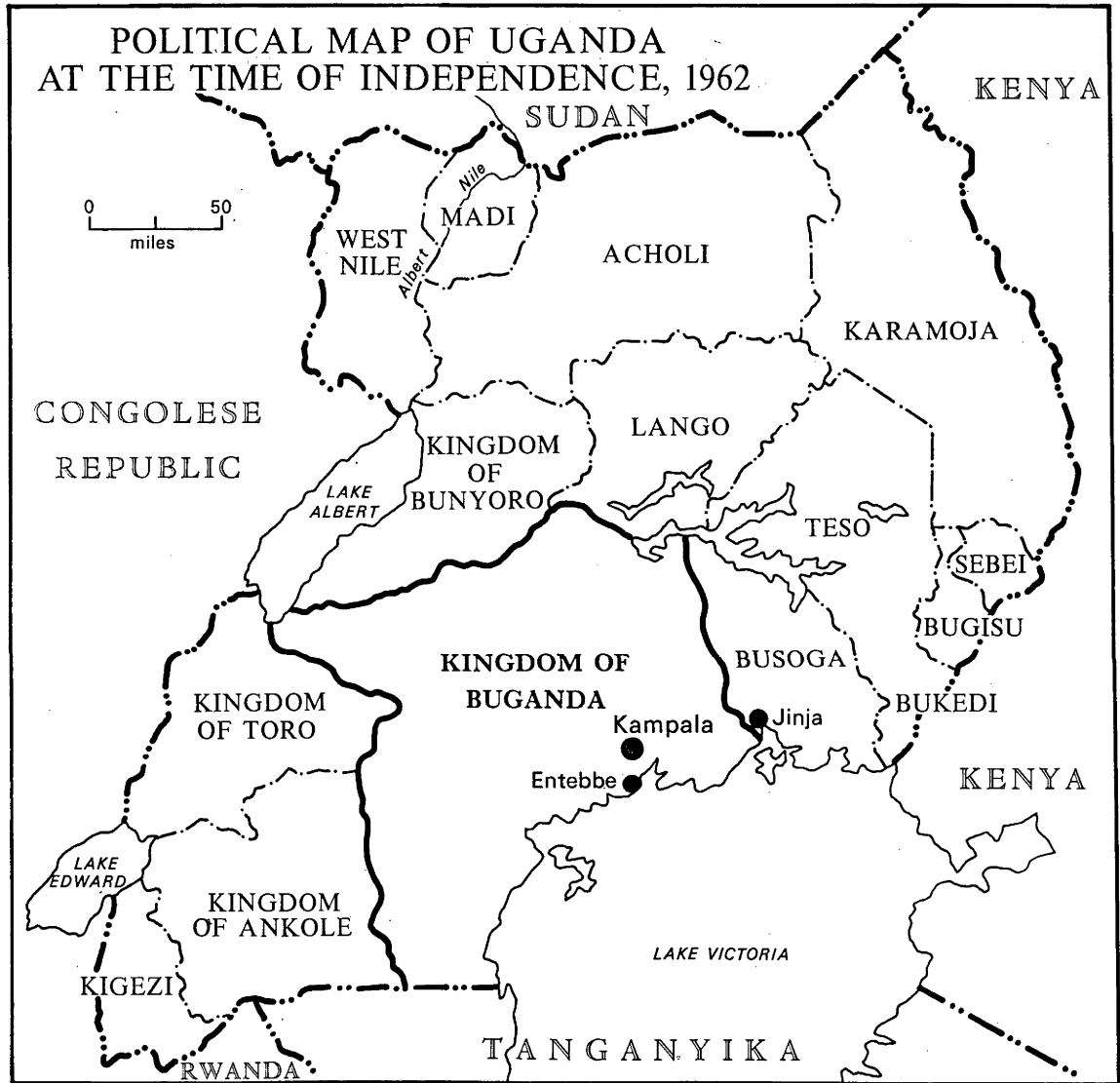
ABSTRACT

The main object of this study is to determine the basis of British legal authority in Uganda, with a special emphasis on Buganda, and to trace its development from the time the territory was declared a British sphere of influence up to 1938. I propose the thesis that, according to the prevailing view of the British administration and its legal advisers, both in England and locally, the Crown's powers were restricted by international law and/or municipal law at various stages during this period: by the concept of sphere of influence; by the theory of protectorates; and by virtue of the agreements which the Crown made with the kings and chiefs of Buganda. Through an evolutionary process which involved partly a change in the perception of the law and partly a series of subsequent agreements with the local rulers, the legal authority of the Crown was extended.

The investigation is primarily based upon official correspondence, minutes, memoranda, and contemporary documents, kept in London at the Public Records Office, the Foreign Office Library, and the British Museum Library. I also examined semi-official and private records kept at Rhodes House, Oxford. For political and other reasons it was not possible to do research in Uganda. However, I had access to Professor Anthony Low's personal notes taken at the Entebbe Secretariat Archives.

This study demonstrates that, contrary to the views of previous writers, lawyers and historians, the law acted as an impediment upon the Uganda Protectorate Government. It shows that the administrators at the time believed that they were under various inescapable legal constraints. They did not appreciate that the Crown, in the light of later advances in legal theory, had always been entitled to exercise plenary powers in Buganda; for it was only at the end of the period studied that the Uganda High Court held that, on the basis of judicial precedents from other jurisdictions, the Crown's legal powers in the Protectorate were unlimited.





ABBREVIATIONS

B.C.A.P.	The British Central Africa Protectorate (Malawi).
CO.	Colonial Office Archives, Public Records Office.
C.O.	Colonial Office.
E.A.	The East Africa Law Reports.
E.A.C.A.	The East Africa Court of Appeal Law Reports.
E.A.L.R.	East Africa Protectorate Law Reports.
E.A.P.	The East Africa Protectorate (Kenya).
E.S.A.	Entebbe Secretariat Archives
FO.	Foreign Office Archives, Public Records Office.
F.O.	Foreign Office.
FOCP.	Foreign Office Confidential Print.
I.B.E.A.C.	The Imperial British East Africa Company.
K.L.R.	Kenya Law Reports.
L.O.	Law Officers of the Crown.
L.O.R.	Law Officers' Reports.
U.J.	Uganda Journal.
U.L.R.	Uganda Law Reports.

TABLE OF CASES

Adamu Kikonyogo v The Kivuvu (Uganda) Rubber Company Ltd (1915) 2 U.L.R.36	172
Alipo Kabazi v Jemusi Kibuka (1915) 2 U.L.R. 9	174
Amodu Tijani v Murito (1921) 2 A.C. 399	105
Attorney-General v Bristowe 1880 (6) A.C. 143	107
Augusto Paolucci v The Commissioner of Mines (unreported), High Court of B.C.A. Protectorate, 1965	214, 232
Campbell v Hall 1 Cowp. 204	221
Commercial and Estates Co. of Egypt v Board of Trade [1925] K.B. 271	246
Cook v Sprigg (1899) A.C. 572	105
Cox v The African Lakes Corporation (unreported), High Court of B.C.A. Protectorate, 1965	84
Crown v Kiimba (1906-1909), 1 U.L.R. 79	172, 184
Crown Prosecutor v The British Central Africa Protectorate (unreported), High Court of B.C.A. Protectorate, 1965	106, 224
Glenwood Lumber Company v Phillips (1904) A.C. 405	112
Hoani Te Heuheu Tukino v Aotea District Maori Land Board (1941) A.C. 308	245
Imperatrix v Juma and Urzee (1898), I.L.R. (Bombay) 54	28, 46, 54, 57
Johnston v McIntosh 8 Wheaton's Supreme Court Reports 21 U.S. 543	232
Katikiro v Attorney-General (1959) E.A. 382, (1960) E.A. 784 P.C	254
Katosi v Kahizi (1906-1909), 1 U.L.R. 22	5, 166-171, 179, 187, 225, 226, 245, 248, 249, 250, 251, 253
Milirroum and Others v Nabalco Pty Ltd and Another 17 F.L.R 141	105

Mugwanya Stanislas V Lui Sensuwa (1915), 2 U.L.R. 207	.... 172
Mukwaba and others v Mukubira and others (1954), 7 U.L.R.	
74	..... 168, 179-178, 256, 260
Nasanairi Kibuka v A.E. Bertie-Smith (1908), 1 U.L.R. 41	
.....	172, 179-181
Ndibarama Daudi and Others v Enganzi of Ankole and others	
(1960) E.A. 47	..... 255
Nissan v. Attorney-General (1967) 1 K.B. 613	..... 244
Nyali Ltd v Attorney-General (1956) K.B. 1	.... 178, 224, 245
Ol le Njogo and Others v Attorney-General of the East Africa	
Protectorate (1914) 5 E.A.L.R. 70	.... 178, 245, 247, 247
Papayani v The Russian Steam Navigation and Trading Company,	
1863, 3 Moo P.C. (N.S) 161. (The Laconia)	..... 44, 87
R v Earl of Crewe Ex Parte Sekgome (1910) 2 K.B. 576	... 107,
.....	242-247
R v Jameson and Others (1896) T.L.R. 551	..... 109
R v Jiwabhai (1957/58), 8 U.L.R. 21	..... 238, 239
R v Stapple (unreported), 1899	..... 107
Regin v Burah (1878) 3 A.C. 889	..... 153
Rex v Besweri Kiwanuka (unreported), High of Court of Uganda,	
Criminal Appeal no. 38 of 1937..	5, 248, 250-256, 260, 267
Rex v Buganda Cotton Company (1930), 4 U.L.R. 34	... 201-203,
.....	248-249
Rex v Wehner (unreported), Privy Council A.C. No.690/1905.	165
Riel v Regina (1885) 10 A.C. 675	..... 153
Sadulaka Serwanga v Edward Suleimani Khaya (1938), 6 U.L.R.	
28	..... 256
Salaman v Secretary of State for India (1906) 1 K.B. 613	. 244
Secretary of State for India v Kamachee Bhoy Sohaba (1859)	
18 Moore's Cases 22	..... 1777 245
Secretary of State for India v Sirdar Rusto Khan 1941 A.C.	

356	177
Sobhuza II v Miller (1926) A.C. 518	245, 251, 253
The Administration of the Territory of Papua New Guinea and Another v Daera Guba 130 C.L.R. 353	106
The North Chaterland Exploration Company (1910) Ltd v The King (1931) 1 Ch. 169	221
The Imperial Japanese Court v Peninsular and Oriental Steam Navigation Company (1859) A.C. 357	245
Thomas v Sorrell 1673 Vaugh 330	111
Vajesingji Joravasingji v Secretary of State (1924) L.R. 51 India Appeal Cases 357	105
Wainaina v Murito (1923) 9 (2) K.L.R. 102	237
West Rand Mining Company Ltd v Rex (1905) 2 K.B.—391—	246
Western Sahara Case I.C.J.Rep., 6	6
Woolley v Attorney-General of Victoria (1877) L.R. 2	224
Ziyadi Mukasa v Musitafa Serwadda (1938), 6 U.L.R. 40 ...	256

TABLE OF CONTENTS

DECLARATION	ii
ACKNOWLEDGEMENTS	iii
ABSTRACT	iv
MAP 1: British East Africa Sphere of Influence	v
MAP 2: Political Map of Uganda at the Time of Independence, 1962	vi
ABBREVIATIONS	vii
TABLE OF CASES	viii
CHAPTER 1: INTRODUCTION	1
Statement of the Problem	1
The Structure	9
General Historical Background	10
The Kingdom of Buganda	11
The Rest of the Territory	14
Anglo-German Rivalry For East Africa	16
CHAPTER 2: THE BRITISH SPHERE OF INFLUENCE	39
Sphere and Third States	23
Authority and Obligation in the Sphere	27
IBEAC's Authority in the Sphere	29
IBEAC in Buganda	31
Legacy of IBEAC Treaties	34
Summary and Conclusion	37
CHAPTER 3: FROM A SPHERE TO A BRITISH PROTECTORATE	39
Portal's Mission	40
Outline of the Treaty	41
Declaration of the Uganda Protectorate	48
Neighbouring Countries	50
Extension of the Protectorate	54
Summary and Conclusion	64
CHAPTER 4: THE BASIS AND EXTENT OF BRITISH JURISDICTION	66

General Background to the Jurisdictional issue	66
The Foreign Jurisdiction Bill	72
Development of International Law	75
Jurisdiction over Natives of the Protectorate	77
Jurisdictional Issue in Uganda	82
Official Interpretation of the Jurisdictional Position	83
Issue Referred to the Foreign Office	90
Proposal for a New Order in Council	94
Queen's Regulations	96
Summary and Conclusion	100
CHAPTER 5: DOES THE ACQUISITION OF THE RIGHTS OF PROTECTING POWER CARRY ANY TITLE TO THE SOIL?	
General Background	103
The Position in E.A.P. and Uganda	104
The Land Question in Uganda	108
Exception to the Rule -- The Uganda Railway	112
Ternan's Reform Proposals	117
Reference to the Law Officers	119
The Outcome	123
Summary and Conclusion	129
CHAPTER 6: THE BUGANDA AGREEMENT	
Origins of the Agreement	131
Negotiations of the Agreement	134
Terms of the Agreement	136
Ratification of the Agreement	139
Summary and Conclusion	145
CHAPTER 7: ASSUMPTION OF COMPREHENSIVE LEGAL POWER:	
THE UGANDA ORDER IN COUNCIL	148
Administrative and Legislative Powers	150
Limitation of the Commissioner's Legislative	152

Powers	153
Judicial Power	156
Legal Basis of the Uganda Order	157
CHAPTER 8: JUDICIAL AND LEGISLATIVE POWERS: CONFLICT	
BETWEEN THE ORDER AND THE AGREEMENTS	160
Jurisdiction	161
Galt's Murder case	164
Katosi v Kahizi	167
Native Courts of Buganda	171
Legal Basis of the Proclamation	173
Legislative Powers	179
Summary and Conclusion	184
CHAPTER 9: LEGISLATION FOR THE RAISING OF REVENUE	186
Interior and Exterior Taxation	187
Direct Tax	190
Land Tax	192
Further Interior Taxation--the Bicycle Fee	195
Re-interpretation of Article 12	199
Rex v Buganda Cotton Company	201
Summary and Conclusion	203
CHAPTER 10: THE JUDICIAL CONTROL AND POWER OVER THE LAND:	
THE OUTCOME	204
Buganda Land Settlement	204
Crown Land in Buganda	206
Controversy Over Interpretation of Article 15	208
Government Control Over Mailo Land	213
Right Over Minerals	223
Crown Land by Virtue of the Protectorate	230
Summary and Conclusion	239
CHAPTER 11: THE JUDICIAL BREAKTHROUGH	241
Foreign Jurisdiction Act, 1890	241

The King v Crewe Ex Parte Sekgome	242
Act of State	244
The Paradox of the Judicial Role	246
The Judicial Developments in Buganda	248
Discussion at the Colonial Office	252
The Outcome	256
Summary and Conclusion	260
CHAPTER 12:CONCLUSIONS	262
APPENDIX 1:PROVISIONAL BRITISH/BUGANDA TREATY, 1893	270
APPENDIX 2:BRITISH/BUGANDA TREATY, 1894	273
APPENDIX 3:THE BUGANDA AGREEMENT, 1900	274
APPENDIX 4:THE TORO AGREEMENT, 1900	283
BIBLIOGRAPHY	286

CHAPTER 1

INTRODUCTION

The period during which Britain gained control over Uganda is known to historians as "The Scramble" because a number of European countries were competing to acquire territories in Africa and the Pacific. They used a range of legal "tools" to accomplish their imperial designs. These included: entering into bi-lateral treaties, recognising zones as in each other's sphere of influence; granting charters to private companies; declaring protectorates; and, finally, annexation. Although none of these methods was necessarily new in international relations, the circumstances under which they were applied were significantly different from those in which they were previously used. From a legal viewpoint this resulted in a complex situation with few appropriate precedents to guide the policy makers and their legal advisers. Inevitably new legal concepts in both international and metropolitan law were gradually developed in response to a series of perhaps contradictory factors, to accommodate the state of affairs. Some of the legal issues raised were: the extent of the powers and authority to which a state claiming a sphere of influence or a protectorate over a territory was entitled; the nature and extent of its obligations; whether the sovereignty of the local potentate was recognised for international law purposes, and so on.

1.1 Statement of the Problem

This study concerns the development of Britain's legal authority in Uganda, with a special emphasis on Buganda, from the time the area was declared a British sphere of influence up to 1938. The decision to concentrate on Buganda was made partly to limit the scope of the inquiry, especially in view of the available research materials, but mainly

because Buganda was the only territory in the region which came under British protection following a treaty. Thereafter its relations with Britain were regulated by an Agreement which raised a number of political and legal issues. The other parts of the Protectorate will be referred to mainly by way of contrast with Buganda. The reason for choosing 1938 as the cut-off date is explained below.

The study is not a full-scale historical investigation of the period, of which there are already several; nor is it a purely legal investigation; it is a combination of parts of both, to bridge the gap which usually exists between studies of both kinds. Its main object is to determine the basis of British legal authority in Buganda, and to trace its development. The hypothesis put forward is that, according to the prevailing view of the British administrators and their legal advisers (both in England and locally), the Crown's powers were legally restricted at various stages during this period: by the concept of sphere of influence; by the theory of protectorates; and by virtue of the agreements which the Crown made with the kings and the chiefs of Buganda. Through an evolutionary process which involved partly a change in the perception of the law and partly a series of subsequent amending agreements with the local rulers, the legal authority of the Crown was extended.

I examine the legal arguments and the decisions which were made by the administrators and their legal advisers, and show that at the material times the assumption was that the Crown's authority was legally limited by international law and/or British municipal law; and I describe the extent of such limitation. It is not, to stress the point, the object of my study to establish what the law actually was at the time, nor to prove that the administrators were right or wrong in their interpretation of the legal position. Rather I am interested in the influence, if any, according to their interpretation, which international law and/or municipal law had on Britain's policy and administration in Buganda.

There are several studies of British-Buganda relations, especially with reference to the Buganda Agreement. Invariably these studies concentrate on the socio-political and economic forces which they regard as having been the "real" limitation of Britain's authority in Buganda. Legal factors are usually not examined, since they are generally viewed as exercising, at best, an insignificant influence on the course of the policy and administration. For instance, Cranford Pratt, after a brief discussion of the legal relations between Buganda and Britain, observes that "Any consideration of the significance of the [B]uganda Agreement which limits itself to the legal aspects is bound to be most inadequate". Later in the same chapter he speculates that, if there had been any strong reasons for the British to wish to break away from the Agreement, "legal means to do so would have been found". Pratt's conclusion is that the Protectorate Government was restrained, not by the law, but by political and administrative considerations. For this reason he decided to limit his inquiry to the latter factors.¹ Pratt's comment cannot be contested, if only because the law is neither made, nor does it operate, in a vacuum. But by dismissing the legal considerations, after only a brief discussion, he leaves the impression that the law, as a semi-autonomous factor, played no part at all in these matters. It is part of the object of this study to establish whether that was indeed the case.

Anthony Low, co-author with Pratt, argues in the same book that the Buganda Agreement (which he refers to as a "quasi-treaty" because "the British had never recognised the sovereignty of the Baganda") did not deter the administrators of the Protectorate from formulating policy for Buganda. He is emphatic that the Agreement was just a political instrument which was employed to exert control over the Baganda. Low claims that, as supplementary agreements became difficult to procure, there were two possible courses of action open to the administration:

¹Anthony Low and Cranford Pratt, Buganda and British Overrule 1900-1958 (Oxford, University Press, 1960), at p.193.

They could, first of all, emulate the Baganda by insisting on British rights under the Agreements; they could either play a trump card of finding a clause in the Agreement which specifically implied support for the policy they advocated, and so close discussion promptly, or they could revert to one of the general declarations in the text. Alternatively they could pursue policies quite independently of the Buganda Government.

He concludes that in actual practice there were only two bases for a successful British/Buganda relationship: the use of force and an alliance with Buganda's ruling class.²

Similar views are expressed by other historians and political scientists.³ The only detailed study of the British/Buganda relationship within a legal framework is that by Henry Morris and James Read, in their Indirect Rule and Search For Justice: Essays in East Africa Legal History.⁴ With reference to the Buganda Agreement of 1900 Morris notes that to the Baganda it:

was in the nature of a treaty between two Kingdoms, binding upon both and unalterable save by mutual consent, by the terms of which the Kabaka had surrendered certain of his sovereign rights in return for the protection of the British Crown, whilst in respect of the rest he remained an autonomous ruler.

On the other hand he claims that even though the British did not construe the Agreement in a similar manner, and they were under no legal obligation to comply with its terms, they nevertheless followed it almost to the letter and sometimes in the spirit.⁵ Read argues that the significance of the Agreement was not to be found in legal limitations,

²Ibid., at p.155.

³For instance, Godfrey Uzoigwe, in a recent book, Godfrey Uzoigwe, ed., Uganda: The Dilemma of Nationhood (N.Y., Nok Publishers International, 1982), at p.72, asserts that: "The British ... knew that ... [the Agreement] was a curious document -- a constitutional anomaly. But they were also aware that it was dictated by military and political expediency rather than by a sense of strict constitutionality and legal legitimacy." See also generally: Samwiri Karugire, A Political History of Uganda (Nairobi, Heinemann, 1980); David Apter, The Political Kingdom in Uganda (Princeton, University Press, 1961).

⁴(Oxford, Clarendon Press, 1972). See also a more general study by the same authors, Uganda and the Development of its Laws and Constitution, (London, Stevens and Sons, 1966).

⁵Ibid., at pp. 37- 38.

which he stresses it did not have, but in the political and moral restraints it engendered.⁶

On the question of the legal significance of the Buganda Agreement in British municipal law, the conclusions of Morris and Read are indisputable. However, it must be emphasised that this issue was settled by judicial decision many years subsequent to the Agreement. In 1907 the Uganda High Court held in the case of Katosi v Kahizi,⁷ that all Protectorate legislation, including the Orders in Council, was subject to the agreements entered into by the kings and chiefs of Buganda, Ankole and Toro. It was not till 1937, in the case of Rex v Besweri Kiwanuka,⁸ that the decision was reversed by the High Court of Uganda. What was the position prior to the latter case? How did the administration construe the status of these agreements: did it regard them as legal constraints? Morris admits that for many years the decision of Katosi v Kahizi dominated the official view as to the legal efficacy of the agreements.⁹

A claim by Grace Ibingira, a Ugandan lawyer, that the British entered into the agreements knowing all along that they were not legally binding, is highly questionable.¹⁰ The decision of the High Court of Uganda referred to above is *prima facie* evidence that this was not the case. Even from an international law point of view, although many authorities in the late nineteenth century and early twentieth centuries expressed the view that agreements entered into with African rulers were not treaties in the international law

⁶Ibid., at p.277. See also Karugire, A Political History of Uganda. At p. 120, he claims that whatever concessions the British made to the Baganda and other communities, were given on grounds of "political expediency and not be[c]ause of any legal or constitutional requirement."

⁷(1907), U.L.R. 22.

⁸Unreported, Uganda High Court Criminal Appeal No. 38 of 1937.

⁹Indirect Rule and the Search for Justice, at p.55. In the same chapter, at pages 58-59, Morris notes that as late as 1960, although by then the question of the legal validity of the agreements had been clearly settled, the matter was still being argued in the Uganda courts.

¹⁰The Forging of an African Nation (N.Y., The Viking Press, 1973), at p. 17. Ibingira's views are shared by Karugire, A Political History of Uganda, at p.119, he comments that it is a mystery that British administrators found it necessary to make these agreements, "for they must have known them for the fraudulent fictions they were."

sense, a number of writers in recent years have raised queries whether that in fact was so.¹¹ Even more significant, a recent International Court of Justice advisory opinion in the Western Sahara Case has added weight to the doubts as to whether the views of the earlier writers were consistent with the state practice of the time.¹² If the legal position regarding these agreements is still considered uncertain, it could scarcely have been any clearer at the time when they were made.¹³

Although most of this investigation will focus on the agreements and their interpretation, the concept of sphere of influence and that of protectorates need to be discussed. In the late nineteenth century, the British imperial policy makers were in a dilemma with regard to Africa and the Pacific. On one hand, they were unwilling to annex territories in these regions either because they did not want Britain to assume administrative responsibility; or they did not want the indigenous people to become British subjects which would entitle them to the legal rights and privileges which that status carried; or for diplomatic reasons.¹⁴ On the other hand, although Britain already had many colonies all over the world, the British could not afford to let other European countries, notably France and Germany, colonise the whole African continent and the Pacific. The devices of sphere of influence and protectorates were employed as a half-way house solution to the problem.

¹¹For example: M.F. Lindley, The Acquisition and Government of Backward Territory in International Law (London, 1926, reprinted ed., N.Y. Negro Press, 1969), at pp. 170-77; C.H. Alexandrowicz, The European African Confrontation: A Study in Treaty Making (A.W. Sijthoff-Leiden, 1973), at pp. 47, and 99-100; See also same author, "The Partition of Africa," in K.Ingham, ed., Foreign Relations in African States (Colston Papers, no. 25, 1975) at pp. 129-133.

¹²I.C.J.Rep., p.6. The advisory opinion of the Court was sought on the question as to whether the Western Sahara at the time of its conquest by the Spanish, in 1884, was "*terra nullius*". It held that it was not. The Court declined to make any specific findings on what it said were "differing views" expressed during the proceedings on the legal value of the agreements between local chiefs and Europeans, since the issue was not within its terms. However, as Gordon Bennett comments, "it is difficult to see how such agreements can be devoid of legal effect if at one and the same time they constitute derivative roots of title." See his article "Aboriginal Rights in International Law," Occasional Paper no.37, of the Royal Anthropological Institute of Great Britain and Ireland, 1978, at pp. 5-6.

¹³The discussion of the implications of this situation for legal theory or doctrine is outside my scope of study.

¹⁴T.Baty, "Protectorates and Mandates," 1921-22 B.Y.I.L 109, at p.113.

A sphere of influence was defined by Henry Jenkyns as a "portion of non-Christian or uncivilised country, which is the subject of diplomatic arrangements between European states, but has not yet developed into a Protectorate." On the other hand, he defined a British protectorate as "a country which is not within the British dominions, but as regards its foreign relations is under the exclusive control of the King, so that its government cannot hold direct communication with any foreign power, nor a foreign power with that government."¹⁵ A British protectorate differed from a colony in that it was a foreign territory, and its inhabitants were foreigners. This distinction led to many legal issues, as will be demonstrated in this study.

British protectorates are classified by many writers into two groups: protected states and colonial protectorates.¹⁶ According to Martin Wight, a protected state was distinguished from a colonial protectorate on the ground that in the former, by treaty, the external and some of the internal sovereignty of the state were ceded to the Crown whereas in the latter, although in some cases the protectorate status might have originated by agreement with native chiefs, these agreements "are not considered as treaties in international law; neither have the treaties any validity in the constitutional law of the Empire."¹⁷ The general view of writers is that, while in protected states the Crown's powers were limited, in colonial protectorates they were absolute. It is noteworthy that, although Wight classified the Uganda Protectorate, as well as the other black Africa British protectorates and the Solomon Islands, as a colonial protectorate, he

¹⁵British Rule and Jurisdiction Beyond the Seas (London, 1902), at pp.1 and 165.

¹⁶Some classify them into three or even more groups; while others argue that classification is impossible. Generally: James Crawford, The Creation of States in International Law (Oxford, 1978), pp. 187-200; Alfred Kamanda, A Study of the Legal Status of Protectorates in Public International Law (Ambilly-Annemasse, 1961), chapters 1 and 2; J.H.W. Verzijl, International Law in Historical Perspective (A.W.Sijthoff-Leyden, 1969), 2:412-420.

¹⁷British Colonial Constitution 1947 (Oxford, Clarendon Press, 1952), at pp. 8-9. See also D.P.O'Connell, International Law (London, Stevens, 1965), 1: at p. 384. Compare Verzijl, *ibid.*, at p.414, he claims that some colonial protectorates owed their existence "to Treaties which could when they were concluded perhaps be still considered as falling within the empire of the law of nations."

commented that the Kingdom of Buganda and Northern Nigeria, represented "the colonial protectorate at its nearest approximation to the protected state ..."¹⁸ Wight did not elaborate but his statement raises the issue as to whether Buganda's "exceptional" administration could be explained merely in political and economic terms as historians claim.

Ross Johnston's study of the theory of protectorates and sovereignty in the late nineteenth century deserves a special mention.¹⁹ It was mainly his book which aroused my interest in this area. Johnston examines the evolution of the concept of protectorates and sovereignty as developed by the Foreign Office, the Colonial Office, the Law Officers of the Crown, and sometimes by the British officers on the spot. He draws his examples from all over Africa and the Pacific. But, as he points out, he does not deal with the "idiosyncrasies" of individual protectorates which might have led to the development of different laws; nor does he deal with the issue as to whether or not the local staff properly implemented London-made views about the law.²⁰ Johnston's work is invaluable, but at the same time one ought to heed Joseph Anene's warning to historians not to generalise about protectorates established by the British in Africa. Anene says that British protectorates reveal no consistent pattern; and, evidently, the action taken was dictated by local socio-political and economic circumstances rather than by any ascertainable theory.²¹

¹⁸Ibid., at p.9.

¹⁹Sovereignty and Protection: A Study of British Jurisdictional Imperialism in the Late Nineteenth Century (Duke University Press, 1973). See also Kamanda, A Study of the Legal Status of Protectorates in Public International Law.

²⁰Ibid., at p.vi.

²¹Southern Nigeria in Transition 1885-1906: Theory and Practice in a Colonial Protectorate (Cambridge University Press, 1966), at p. 63.

1.2 The Structure

It is not, of course, possible to cover the evolution of all aspects of Britain's legal authority in Buganda during the period investigated. Consequently I have selected several areas where the gravest doubt was expressed as to the nature and extent of the authority claimed. The study is divided chronologically into three parts: first, the period of the sphere of influence which ranges from 1890 to 1894; second, the period from the declaration of the Protectorate up to 1902; and finally, the period from 1902 to 1938. The significance of the year 1902, which separates parts two and three, is that it was when the first Order in Council for Uganda was promulgated. This Order spelt out the extent of the Crown's powers and authority in the Protectorate -- it became, so to speak, the new constitutional base and the measure of the Crown's legal powers. The cut-off date has been selected because in the previous year the High Court of Uganda made the important decision, mentioned above, that under municipal law the Crown was not bound by the Agreement except where incorporated in the laws of the Protectorate. Extension of the investigation to 1938 enables us to review the immediate reaction of the administration to this judicial decision.

In the second chapter I discuss the concept of sphere of influence as it applied to Buganda and the extent of the legal authority it entailed; in chapter three -- the protectorate stage -- I investigate the declaration of Buganda as a British protectorate and the incorporation of neighbouring territory in the Uganda Protectorate. Chapter four deals with the development of the jurisdictional issue in British protectorates generally and how this was interpreted in Uganda; in chapter five I tackle the question of the Crown's power to dispose of land; in chapter six I discuss the 1900 Buganda Agreement, the issue is whether or not it was regarded as a merely political or a legally binding Agreement. In chapters seven to nine I deal with the Uganda Order in Council, and the conflict between its provisions and the Agreement; in chapter ten the land question is

reviewed in the light of the 1902 Order in Council; chapter eleven discuss the judicial intervention in the interpretation of the legal position; and in the last chapter I draw some conclusions. The main theme linking all these chapters is whether at the material time the power and the authority of the Crown were regarded as legally limited and whether this factor affected the Protectorate Government's policy decisions and administration.

1.3 General Historical Background

Uganda is a land-locked country situated in the heart of Africa astride the equator, between latitude four degrees North and one degree South, and between longitudes thirty and thirty five degrees East. Its area is 93,981 square miles, with a population, at the time of independence from Britain in 1962, of six and half million people (presently its population is fifteen million). Among Uganda's most prominent natural features are Lake Victoria and the River Nile. From the Lake the Nile flows northwards, bisecting the country, *en route* to the Mediterranean. Both the Nile and Lake Victoria played an important role in determining Uganda's political future.

Uganda, like most African countries, is a creature of European imperialism. Its boundaries were determined in longitudes and latitudes by agreements among European nations, and by Britain's administrative convenience. Consequently the country is a conglomeration of over forty different communities, most of which were independent sovereign entities prior to the Protectorate. Conventionally these communities are divided into four linguistic or ethnic groups: Nilotic; Nilo-Hamitic; Hamitic; and Bantu.²² The Nilotes occupied mainly the north of the country; Nilo-Hamites part of the north and east; Hamites were found in Ankole; while the Bantu were in the south and part of the

²²Harry Johnston, *The Uganda Protectorate*, 2 volumes, (London, Hutchinson and Co., 1902), 2: chapters 15-18. Modern scholars are critical of the terms "Hamitic" and "Nilo-Hamitic" for their overly racial overtones, e.g. B.Nyeko, review of *The Forging of an African Nation*, by Grace Ibingira, in *Makerere Historical Journal*, 1 (1975), pp. 85-86.

west and east of the country. In most cases the language spoken by the communities, even within the same linguistic family, are not mutually intelligible. Besides, there were a wide diversity of political structures. They ranged from small non-centralised societies based on family ties, clans, local membership, and so on, to centralised and sometimes highly hierarchical ones. Generally, the former prevailed among Nilotic and Nilo-Hamitic, whereas the latter were more common among Bantu.²³

1.3.1 The Kingdom of Buganda

The kingdoms of Bunyoro-Kitara and Buganda were the two most powerful and important states in the interlacustrine region. However, for a number of reasons the Baganda, and Buganda related matters, dominated Britain's administration of Uganda. Firstly, the kingdom of Buganda, located around the north-west shore of Lake Victoria, was the nucleus around which the Protectorate of Uganda was built. It was declared a British Protectorate in 1894, and gradually other territories were incorporated in this "Uganda Protectorate". Secondly, Buganda had a highly organised political structure which (apart from Bunyoro-Kitara) was unique in that part of Africa. Thirdly, numerically the Baganda were (and still are) the biggest community in the region.²⁴ Fourthly, because of their earlier contact with Europeans, the Baganda had access to learning which the others acquired relatively much later. Finally, their relationship with Britain, unlike the rest of the Protectorate (with the exceptions of Toro and Ankole), were governed by a treaty and the Buganda Agreement which were followed by both parties to the letter.

²³Generally Tarsis Kabwegere, The Politics of State Formation: The Nature and Effects of Colonialism in Uganda (Nairobi, East Africa Literature Bureau, 1974), pp.21-54.

²⁴Estimates of their population by contemporary writers vary from half a million to three millions, see Gerald Portal, The Mission to Uganda in 1893 (London, Edward Arnold, 1894), pp. 187-188.

1.3.2 Buganda's Administrative Hierarchy

By the time the first Europeans arrived in Buganda in 1862, Buganda had been ruled by thirty kabakas (kings) in unbroken succession. Historical estimates of the aggregate period of their reign varies from three hundred to six hundred years.²⁵ Prior to the nineteenth century the kabakas were not very strong as they had to rely on the clan chiefs (bataka) for support. However, in the nineteenth century, mainly as a result of external trade and the acquisition of fire-arms, the kabakas became more independent and despotic. They ruled the country through a hierarchy of non-hereditary chiefs known as the "bakungu". The most senior of these chiefs was the Katikiro (Prime Minister) followed by territorial chiefs known as Saza (county) chiefs, and other lower ranking chiefs. These senior chiefs also constituted the Lukiiko (Kabaka's Council) which used to meet at the Kabaka's court to deliberate national matters. By the 1890s the bakungu chiefs were in control of the country at the expense of the bataka chiefs and, eventually, the Kabaka.

1.3.3 Foreign Contact

Buganda's earliest foreign contact, outside its immediate neighbourhood, were Arab merchants from Zanzibar. Although trade goods from the coast are known to have reached Buganda before the nineteenth century, the first Arab caravan arrived in Buganda in 1848.²⁶ This pioneered a steady trading relationship between Buganda and the east coast of Africa whose commercial centre was Zanzibar. Other Arab traders followed via the northern route from Egypt. Trading with the Arabs was not only important in terms of the goods which they brought and took, but had other consequences. The traders gave publicity to the outside world of Buganda's rich trade -- a factor which later contributed to rivalry among the imperialists to control Buganda.

²⁵Semakula Kiwanuka, A History of Buganda: From the Foundation of the Kingdom to 1900 (London, Longmans, 1971), at p.93; Anthony Low, Buganda in Modern History (London, Weidenfield and Nicolson, 1971), at 1.

²⁶Kenneth Ingham, The Making of Modern Uganda (London, George Allen and Unwin, 1958), at p. 120.

Moreover, they introduced the Islamic religion which subsequently played an important role in Buganda's politics. Finally, the Arabs brought guns which enhanced Buganda's strength as against its already weak neighbours, and which prepared the ground for the bloody internal political strife in the last two decades of the nineteenth century.

European contact with Buganda was more than a decade later. The first known European to visit Buganda was John Hanning Speke, a Briton, on an exploratory mission for the source of the Nile. Speke reached Buganda in 1862, in the reign of Kabaka Mutesa. Although he was terrified by the brutality of the Kabaka, nevertheless he was impressed by Buganda's efficient administration and level of development which was unique in that part of Africa.²⁷ Speke was convinced that Buganda was the ideal spring-board for evangelism in the interior of Africa. However, more than twelve years elapsed before another British explorer, Henry Stanley, visited Buganda. Following discussions between him and Mutesa, the latter issued an open invitation to European missionaries to start their evangelism in Buganda. By 1876 the first group of British priests, of the Church Missionary Society, had arrived. Two years later French priests, of the Roman Catholic Church, followed suit. Meanwhile, the number of Arab traders and preachers of Islam also increased in Buganda. Soon the presence of these rival foreign religions was to have an important impact on political events.

By the time Mutesa died, in 1884, dissent was already visible among his subjects, especially the youth, who were converted to one or the other of the imported religions. Mwanga, an eighteen year old juvenile, succeeded his father as the Kabaka. Being inexperienced and taking over the throne at the time he did, Mwanga was soon in trouble. He hated the missionaries' influence over his subjects. Mwanga tried to get rid of the

²⁷F.Lugard, The Rise of Our East Africa Empire, 2 volumes (London, William Blackwood and Sons, 1893), 2: at p.2.

foreign religions by executing his subjects who had become converts. His action back-fired. The religious groups consolidated into formidable political factions: the Protestant party, which was commonly known as the "*Bangeleza*" (English), the Catholics or the "*Bafransa*" (French); and the Moslems. The names of the parties are significant. They represent the imperial forces behind the so-called religious groups.

Because of the bitter rivalry, inter-factional wars were fought constantly. During the first five years of Mwanga's reign, he had mixed political fortunes. He was twice dethroned but managed to reinstate himself by allying himself with one or the other of the political/religious factions. It was in that state of political turmoil, in 1890, that the Imperial British East Africa Company, which had been granted a royal Charter to administer the British east Africa sphere, attempted to establish its government in Buganda.

1.3.4 The Rest of the Territory

Bunyoro-Kitara used to be by far the largest and strongest kingdom in the Lake Victoria region. Established around the fourteenth century, Bunyoro-Kitara dominated the entire territory of present day southern and western Uganda; and parts of northern Uganda and of north-western Tanzania.²⁸ However, by the beginning of the last century its size and power had been reduced considerably. This was partly due to internal dissensions which had led to the creation of the splinter kingdoms of Ankole and Toro; and partly to over-expansion. In the last quarter of the century, Mukama (King) Kabarega attempted to restore its prestige. He succeeded in recapturing some of the territory Bunyoro had lost, but in the end it was all in vain. Bunyoro-Kitara crumpled under the forces of imperialism.

²⁸Generally J.W. Nyakatura, *Anatomy of an African Kingdom* ed., Godfrey Uzoigwe, (N.Y., Henry Colt, 1961).

Unlike his arch-rival, Mutesa, Kabarega rejected the missionaries and was generally branded as anti-European. Throughout the last decade of the nineteenth century Kabarega was engaged in battle with British forces which were in alliance with the Baganda. The main reason for Britain's military thrust against Bunyoro was to prevent other Europeans, especially the Belgians and (later) the French, from establishing a foothold on the Nile. As for the Baganda, fighting Kabarega was an opportunity to settle old scores and to weaken him. Kabarega was eventually defeated by the combined forces, deposed, and in 1899 exiled to the Seychelles with his former enemy, then ally, Mwanga.²⁹

Bunyoro was the only kingdom in the Uganda Protectorate which the British maintained was theirs by conquest. Consequently, unlike the kingdoms of Buganda, Ankole, and Toro, they entered into no agreement with it until 1933. For Buganda's role in the conquest Britain ceded to it extensive parts of Bunyoro's territory, thus creating a bitter controversy between Buganda and Bunyoro over what came to be known as the "lost counties". The matter was not resolved until after Uganda became independent when the Government returned the counties to Bunyoro.

Toro and Ankole, the other main kingdoms in Uganda, as already said, had seceded from Bunyoro. In fact, Toro only managed to do so with the assistance of Britain in the last decade of the century. The two were much smaller and weaker than Buganda or Bunyoro. Indeed Buganda continued to claim both of them as its tributary states until 1900 when, under British pressure, it renounced its rights.

Toro, Ankole, Bunyoro, and Busoga (which was not a kingdom but consisted of independent chieftaincies) were incorporated in the Uganda Protectorate in July, 1896.

²⁹Generally A.R. Dunbar, A History of Bunyoro-Kitara (Nairobi, OUP, 1965), at pp. 31-43.

There was no prior treaty with any of them accepting Britain's protection. However, in 1900 and 1901, identical agreements were entered into with Toro and Ankole, respectively, which laid out the distribution of power between the Protectorate Government and the rulers of the two nations.

The rest of the territory in the north and east, stretching between the Nile and Lake Rudolf, was officially declared incorporated in the Uganda Protectorate in 1902, under the Uganda Order in Council of that year. Prior to that, between 1894 and 1898, the British Government had despatched military expeditions, especially in the north, to forestall attempts by the Belgians and the French to acquire territory in or near the Nile valley which Britain claimed was part of her sphere under the 1890 Anglo-German Agreement. Several treaties were made with local rulers whereby they undertook not to cede their territory to other Europeans or to enter into agreements with them except with the consent of the British Government. Ultimately the region was secured to Britain when France, under the 1899 Anglo-French Agreement, acknowledged Britain's claim over the Nile basin.³⁰

1.3.5 Anglo-German Rivalry for East Africa

The coastal territory stretching from Aden in the north and as far south as Cape Delgado formed part of the empire of the Sultan of Oman whose headquarters were at the time on Zanzibar Island. The hinterland of this empire was not deep, but, according to legend, the Sultan was so influential that "when they pipe[d] in Zanzibar people danced[d] on the shores of the Great Lakes".³¹ Zanzibar was the commercial centre of the region. As the seat of the Sultan it was also its political nucleus.

³⁰Generally James Barber, Imperial Frontier: A Study of Relations Between the British and Pastoral Tribes of North-East Uganda (Nairobi, EAPH, 1968), at pp. 5-14.

³¹Godfrey Uzoigwe, Britain and the Conquest of Africa: The Age of Salisbury (Ann Arbor, University of Michigan, 1974), at p. 145, and generally pp. 145-171.

Although Zanzibar was an independent state³² with diplomatic relations with a number of European countries and the United States of America, the British enjoyed a special status at the Sultan's court. They were allies of the Sultan from as far back as the first decade of the nineteenth century. Moreover, since their victory over Napoleon in 1815, the British had undisputedly the most powerful force in the Indian Ocean. The combination of power and friendship allowed them to dominate the Sultan and the region. By supporting the Sultan's sovereignty over the east coast and the hinterland the British were able for decades to protect their political and commercial interests in the region without any direct engagement in its administration.

Anglo-German rivalry for the east Africa interior sprang from Zanzibar. Until 1884 Britain's monopoly of the coast had never been challenged by any other European state. In November of that year a group of German adventurers (members of the German Colonisation Society) led by Carl Peters, without sanction of their Government, entered into twelve treaties with chiefs in Zanzibar mainland wherein the latter purported to surrender their sovereignty to the Society. In spite of strong protests from the Sultan that the chiefs were his subjects and had no independent sovereignty, the German Government on 2 March 1885 (a few weeks after the notification of the General Act of the Conference of Berlin of 1884-85) declared the territories covered by the treaties as German protectorates; and Peters' Society was granted a charter to administer them on its behalf.³³ "The Scramble" had reached the east coast of Africa. Because of the complexity in European politics at the material time Britain valued German's friendship more than Zanzibar's. Thus Salisbury, in his capacity as Foreign Secretary, fearful to do

³²Its independence was guaranteed by the Anglo-French Agreement of 1862, Hertslet, Map of Africa by Treaty, 3 volumes (London, Frank Case, 1967), 1: 300.

³³R. Coupland, The Exploitation of East Africa 1856-1890 (London, Faber and Faber, 1939), at pp. 400-405. For discussion of Bismark's motive for entering the race for colonies, W.C. Henderson, "Germany East Africa 1884-1918," in Vincent Harlow *et al*, ed., History of East Africa (Oxford, 1965), pp.125-126.

anything that might alienate the Germans, did not wish to intervene to protect the Sultan's dominions.³⁴ Eventually, as between Britain and Germany, the matter was resolved by a Treaty which was signed towards the end of 1886.³⁵

The gist of the 1886 Anglo-German Agreement was that both countries undertook to recognise the sovereignty of the Sultan over the islands of Zanzibar, Pemba and other smaller islands. On the mainland they limited it to a narrow coastal strip between five and ten miles deep, stretching from Kipini in the north to Rovuma in the south. To avoid any future conflicts between the two powers in their quest for territories, the rest of the east coast was divided into British and German spheres of influence. The agreed demarcation was a line running westwards from the north of the River Wanga or Umba "direct to the point on the eastern side of Lake Victoria Nyanza which is intersected by the first degree of south latitude". All the territory north of the line was a British sphere and that to the south was German.³⁶

The Sultan of Zanzibar, who was neither a party nor consulted during the negotiations of the agreement, was forced to accept its terms. His position was so weakened by the events that, on 24 May 1887, he granted a concession (which he had earlier refused) to the newly formed British East Africa Association, led by Mackinnon, a British businessman. The concession authorised the Association to administer on behalf of the Sultan, for a period of fifty years, what was left of the Zanzibar mainland.³⁷

Since the 1886 Agreement did not fix the western limits of the sphere, the

³⁴Ronald Robinson, John Gallagher, with Alice Denny, Africa and the Victorians: The Official Mind of Imperialism (London, Macmillan, 1961), at p.192.

³⁵Hertslet, Map of Africa by Treaty, 1: 304.

³⁶Article 1 and 3. See illustration Map 1.

³⁷Generally John Galbraith, Mackinnon and East Africa 1878-1895 (Cambridge, 1972), at pp. 127-136.

hinterland immediately became the focus of Anglo-German rivalry. It was believed that the interior, especially Buganda, was a rich commercial region. In the words of McDermott, an official of the British East Africa Association:

[The] peculiarity of the territory of East Africa acquired by Great Britain and Germany, which explains the movement towards the interior adopted by both nations, ... lay in the fact that the value of the coast depended, ... in large measure on the commerce of the distant interior. Without control of the latter, the former could be little more than a barren acquisition; and it was a strong conviction of this fact which suggested and gave force to the "hinterland doctrine"....³⁸

Peters' German Colonisation Society and Mackinnon's Association, organised rival expeditions to explore the interior. Each accused the other of plotting to annex the hinterland with a view to cutting off the other from a lucrative trade.³⁹

Salisbury initially resisted calls by British merchants and some of his official advisers to take positive steps to protect Britain's interests in the hinterland. Whether he did not believe that the Germans posed any serious threat; or whether he still treasured their friendship more than the allegedly lucrative hinterland trade; or whether he simply wanted to avoid committing the Government to ventures without commensurate returns, is a matter for debate. In any case, by the end of 1887, he had started to change his attitude. Early in 1888 a Charter was granted to Mackinnon's Association (thereafter known as the Imperial British East Africa Company or "IBEAC") authorising it to operate in the British East Africa sphere.

According to Percy Anderson, Head of the Africa desk in the Foreign Office, the main reason for granting the Charter was that the company would push towards

³⁸British East Africa or IBEA: A History of the Formation and Work of the Imperial British East Africa Company (London, 1893), at p.103.

³⁹Uzoigwe, Britain and the Conquest of Africa, at p.153; and Robinson and Gallagher, Africa and the Victorians, at p.193.

Buganda. On the other hand, historians Robinson and Gallagher doubt whether that was indeed Salisbury's objective. In their opinion Salisbury was not then concerned about Buganda and the rest of the interior; rather his interest was to use the Company to strengthen the Sultan's position at the coast against any further German intrusion. However, they admit that soon thereafter Salisbury, for strategic reasons, was committed to bring Buganda under Britain's control. Having decided that Britain would stay in Egypt to guard Suez, his Government was determined to block other European countries from controlling Buganda, the source of the Nile, and the rest of the territory in the Upper Nile.⁴⁰

It was Peters who reached Buganda first. At the time of his arrival there was a brief lull in the political turmoil. In a tense situation Peters quickly entered into a provisional treaty with Mwanga. The essence of this treaty was that Buganda would remain neutral and open to trade and settlement for all Europeans. No sooner had he left than Jackson, an agent of the Imperial British East Africa Company, arrived at Mwanga's court. Jackson failed in his endeavour to persuade Mwanga (then in alliance with the Catholic faction) to abandon his treaty with Peters, or to enter into one with his Company. However, on his departure from Buganda he left behind a European employee of the Company, and he took with him two of Mwanga's envoys to confirm at Zanzibar whether Buganda was in the British, German, or French sphere of influence.

With the agents of the British and German companies locked in a stiff competition for the interior, their Governments decided to resolve diplomatically the two countries' rivalry for territory in Africa. The discussions started in Berlin on 5 May 1890 and lasted for almost two months. The outcome was the 1890 Anglo-German Agreement, whereby

⁴⁰J.V. Wild, The History of the Uganda Agreement (London, Macmillan, 1955), at pp.24-25, and 33.

the British and German spheres of influence in Africa were determined.⁴¹ By virtue of this Agreement the future Uganda Protectorate was secured in the British east Africa sphere of influence.

In this thesis I examine the development of Britain's legal power in Buganda from the signing of the 1890 Anglo-German Agreement. What was the legal significance of a sphere of influence? What rights accrued to the British Government in the sphere? What powers did IBEAC have in Buganda? These are some of the questions which I investigate in the following chapter.

⁴¹For discussion of the negotiations, W.M. Roger Louis, "The Anglo-German Hinterland Settlement of 1890," Uganda Journal 27 (1963), at pp. 71-83.

CHAPTER 2

THE BRITISH SPHERE OF INFLUENCE

The Anglo-German Agreement relating to Africa and Heligoland was signed on 1 July 1890. Its object was to acknowledge and demarcate certain territories in Africa as falling within the British and German spheres of interest respectively. The sphere reserved for Britain was defined as bounded to the south by the “line running from the mouth of the River Umba to the point where the 1st parallel of south latitude reaches the Congo Free State” To the north it was bounded by the Italian sphere and Egypt, and to the west by the Congo Free State and the watershed of the basin of the Upper Nile.¹ Within this territory was the Kingdom of Buganda and other communities which were subsequently amalgamated to form the Uganda Protectorate.

Under Article (vii) of the Agreement, Britain and Germany undertook not to “interfere with the sphere of influence assigned to the other ... or make acquisitions, conclude treaties, accept sovereign rights or protectorates, nor hinder the extension of influence of the other.” Moreover, they agreed to preclude their respective subjects, or companies subject to their authority, from exercising any sovereignty within each other’s sphere except with the consent of the Power concerned.

Agreements of this nature had precedents at least as early as the fifteenth century, when in 1479 and 1494 Papal Bulls were issued to divide the new world into zones or

¹Hertslet, Map of Africa by Treaty, 3: 399. See illustration, Map 1.

spheres of exploration between Spain and Portugal.² But the concept of sphere of influence gained its prominence in the late nineteenth century, during the European scramble for Africa and the Pacific islands. According to Westlake, it was invented during this period to hasten the colonisation process, as annexation and establishment of protectorates were not fast enough in the acquisition of territory. The main reason for resorting to sphere agreements was to avoid conflicts amongst European nations in their rivalry for territories.³ The first such agreement was the Anglo-German Treaty of 1885 relating to certain territory in Africa.⁴

In this chapter I examine the legal significance which was attached to these arrangements during the period under investigation in both international and English municipal law, especially with regard to the rights and obligations which accrued to the British Government *vis-a-vis* third states and within the sphere. I shall also study the power and the authority of the Imperial British East Africa Company, and the foundation the company laid in the development of Britain's legal authority in Buganda.

2.1 Sphere and Third States

Agreements recognising spheres of influence, like all treaties, were binding upon all those party to them. On that score Britain's east Africa sphere was safe against possible challenge from Germany. With reference to third states the position was less certain. This was partly due to the fact that the concept of a sphere of influence was relatively new and was invented at a time of bitter rivalry for territory among European nations. Legal principles were still in their early stages of development. It is noteworthy that up to 1894 none of the leading English authors on international law had written anything on

²Clair Palley, The Constitutional History and Law of Southern Rhodesia, 1888-1965 (Oxford, 1966), at p.8. Also Lindley, The Acquisition and Government of Backward Territory, at p.208.

³Collected Papers of John Westlake on Public International Law (Cambridge, 1914), at p.130.

⁴Lindley, The Acquisition and Government of Backward Territory, at p.210.

the subject.⁵ Even then Hall, in his 1894 edition of The Foreign Powers and Jurisdiction of the British Crown, observed that the term sphere of influence “is one to which no very definite meaning is as yet attached.”⁶ No wonder that when a British parliamentarian in 1889 asked the Under Secretary of State whether he could give the House any authority from which information might be gathered as to what a British sphere of influence meant the latter insisted that the member had to give notice of the question.⁷

Various official statements during the period also point to either a lack of clear comprehension of the concept or an attempt to manipulate it for national designs. An interesting example is the Anglo-Portuguese dispute over territory in central Africa. Portugal based her claim on centuries-long occupation and agreements with France and Germany by which she was entitled to extend her sovereignty. While admitting that the recognition of her rights by France and Germany was not binding upon third states, Portugal nonetheless maintained that:

... their political importance, the very great interest which both these powers are already taking at the present day in the ... African continent, give to these deliberations so important a meaning and establish our title in such a manner that, in the opinion of the Portuguese Government... the title in question can, on grounds of the greatest justice, even were others lacking, be invoked before other nations as legalising our dominions and sovereignty over the regions in question.⁸

How could agreements which Portugal admitted were not binding upon third states at the same time be pleaded against them as “legalising” her title? Britain in any case rejected the claim on the grounds of Portugal’s failure to establish effective occupation in the region. In a parliamentary debate, in late 1888, Salisbury explained Britain’s position:

... Her Majesty’s Government distinctly do not recognise unlimited claims on the part of Portugal in the interior of Africa. The conditions by which the spheres of influence of European Powers in South Africa are bounded are

⁵Palley, The Constitutional History and Law of Southern Rhodesia, at p.9n.

⁶(Oxford, 1894), at p.228.

⁷2 April 1889, House of Commons Debates, 3rd Series, vol. 334, col.1386.

⁸Quoted Herbert A.Smith, ed., Great Britain and the Law of Nations (London, P.S.King and Son, 1932) at p.10.

perfectly well known. Those influences are not recognised, except where settlements take place, and where a Power possesses the means of maintaining order, protecting foreigners, and controlling the natives.⁹

The dispute was eventually resolved by a treaty between the two countries thereby avoiding a possible military confrontation.¹⁰

Ironically almost ten years later, Salisbury was apparently not ashamed to adopt an argument similar to one advanced by Portugal to justify Britain's claim over territory in the Upper Nile which France was threatening. In a note to the French Ambassador, he protested that:

France had received warnings that a seizure of land in that locality could not be accepted by Great Britain. The first warning was the Anglo-German Agreement, and the provisions of which as regards the Nile were never formally contested. The next warning was given by the Agreement with the King of the Belgians, the Sovereign of the Congo Free State¹¹

Were the "warnings" supposed to convey any legal significance? On the surface that seems to be the Foreign Secretary's argument. Perhaps it was a political ploy to put pressure on France to acknowledge the position. Salisbury must have been aware of the weakness of Britain's legal claim to the territory. Apart from the fact that Britain had no any form of settlement in the region in question, in 1895 Salisbury's predecessor, Rosebery, had received a confidential legal opinion from the Lord Chancellor, Herschell, that:

Our sphere in that part of Africa [Nile Valley] rests on an agreement which amounts to no more than this that the Powers *who are parties to it* [his emphasis] will not interfere with the recognised sphere of influence of the other. But it is difficult to see what effect such agreement can have as regards a Power not a party to it and who has not recognised it or what right it can give against such a Power.¹²

On the other hand, Salisbury's theory might have been that since third states failed

⁹Ibid., at p.16.

¹⁰Treaty of 3 July 1891, Hertslet, Map of Africa by Treaty, 3:1061.

¹¹Quoted Westlake, International Law Part I: Peace (Cambridge, 1910), at p.133.

¹²Lord Chancellor to Rosebery, 28 April 1895, Confidential Rosebery MSS 71.

to object after a considerable period of time they were legally estopped from challenging Britain's sphere. Such an argument, according to Westlake, could not be sustained because silence only damaged if there was a duty to speak. Westlake submits that there was no obligation upon third states to object against agreements, such as the Anglo-German Agreement, since they did not interfere with their rights. Besides, he says that a sphere of influence was unknown in international law.¹³

Whatever the case it is evident that a claim of sphere of influence by itself was not legally sufficient to preclude other states which had not expressly or tacitly recognised it. Besides, it appears that third states were not bound by a claim of a sphere except where the country asserting it had established some form of control over the region.¹⁴ Since, mainly for financial reasons, the British Government was unwilling to assume any administrative responsibility in the east Africa sphere, it granted a Charter to the Imperial British East Africa Company to operate within the sphere. The object was for the company to set up a government, at its own expense, to control the region in return for the expected economic gains. Its presence would strengthen Britain's claim over the sphere against all potential claimants, at no cost to the Crown.¹⁵ We revert to this below.

¹³International Law, at p.131. See also Baty, "Protectorates and Mandate", 1921-22 B.Y.B.I.L 109, at p.115. But see Taylor, International Public Law (Chicago, Callingham, 1910), at p.271, predicted that the sphere of influence would develop into a positive canon of international.

¹⁴Perhaps not so surprisingly (in view of the intense rivalry and mutual suspicion at the time) there was fear in some British official circles that the Anglo-German Agreement might not be legally sufficient to exclude the Germans from the British sphere unless Britain established an effective administration, even though settlement was never mentioned in the Agreement as a prerequisite, see Memo by Major Wingate on the effect on Egypt of the withdrawal from Uganda, 21 August 1892, FOCP/6341.

¹⁵For a general discussion of the reasons for the Charter companies, see Lugard, The Dual Mandate in British Tropical Africa (London, Frank Cass, 1965), at pp. 18-31.

2.2 Authority and Obligation in the Sphere

The nature and extent of authority and obligation of a nation claiming a sphere were never very clear. In the House of Commons debate in 1891, a member inquired from the Under Secretary of State for Foreign Affairs whether a British sphere of influence entailed any authority or sovereignty over the native people. The Minister responded that Her Majesty's Government had "repeatedly" stated that within a sphere no sovereignty was assumed except with the consent of the local rulers.¹⁶ When a similar question was put to him a month later he replied, with apparent irritation, that he had answered it "a good many times".¹⁷ The persistence of the parliamentary questions is not surprising. There was no writing on the subject; and the Government's position in the sphere was sometimes inexplicable: it granted a Charter to the IBEAC; there were talks of constructing a railway from the coast right across the British East Africa sphere to the shores of Lake Victoria; Britain undertook to stamp out slave trade in the sphere; she purported to lease to the Congo Free State part of her sphere in the Upper Nile, and so on.¹⁸ What could the Crown not do in the sphere?

Probably the clearest exposition of the legal position by a contemporary statesman was that made during the House of Commons debate on the east Africa sphere in 1892, by Sir William Harcourt, formerly Professor of International law at Cambridge University then a Liberal Party member of parliament.:

A sphere of influence confers no rights, no authority over the people, ... or authority over the land of any kind Every act of force you commit against a native within a sphere is an unlawful assault; every acre of land you take is robbery; every native you kill is murder, because you have no right and authority over these men, ... except such as in any particular spot may have been given you by Treaty with any particular Chief.¹⁹

¹⁶15 June 1891, Hansards Parliamentary Debates 1890-91, 3rd Series, vol.354, col.404-405.

¹⁷Ibid., 20 July 1891, col. 1761.

¹⁸The French Government questioned the legal basis of the lease since the British had no sovereignty over the region, Lindley, The Acquisition of Government, at p.215.

¹⁹1 March 1892, House of Commons Debate, 4th Series 55 Victoria, 1892, vol. 2, col.71.

Harcourt's views were similar to those expressed by Hall in the 1894 edition of his Foreign Jurisdiction of the British Crown. He wrote that in a sphere of influence "No jurisdiction is assumed, no internal or external sovereign power is taken out of the hands of the tribal chiefs; no definite responsibility consequently is incurred."²⁰ This interpretation was convenient to the British Government. There was no need for parliament or the British public to worry about the endless expansion of the British empire -- the Crown had no responsibility over the sphere except where it chose to by express agreement with the local ruler. Nevertheless, it was believed to be the true legal position. Indeed this is reflected in the Africa Order in Council, 1889.

The Order was the basic law for the exercise of the Crown's jurisdiction in any part of Africa where it was applied. For purposes of this Order the whole east Africa sphere was declared a local jurisdiction.²¹ We discuss this Order in subsequent chapters. Presently it is enough to point out that it was primarily intended for administering justice (by consular courts established thereunder) to British subjects. Under English municipal law, subjects of the Crown, wherever they might be, retain their allegiance to it, and therefore for certain purposes are liable if they act contrary to that allegiance or the municipal law.²² With reference to non-British subjects, the Order made provision for the exercise of consular jurisdiction over foreigners (who included the local inhabitants) who either submitted to British jurisdiction or whose sovereigns by treaty or otherwise manifested their consent. In the case of Imperatrix v Juma bin Fakir and Urzee bin Sulleman, the High Court of Bombay was emphatic that the British consular courts had no jurisdiction over the natives of the sphere for offences committed within the sphere. The fact that the British Government had undertaken an international obligation

²⁰(Stevens), at p.228.

²¹Article 5. For text see Hertslet, Commercial Treaties, 18:1. Also at p.63, the Secretary of State's instructions of 22 February 1890, applying the Order to the sphere.

²²Henry Jenkyns, British Rule and Jurisdiction Beyond the Seas (Oxford, 1902), pp. 136-137.

to eliminate slavery and arms trafficking in all territories under its control, including spheres of influence, was held to be irrelevant to the jurisdictional issue.²³ It is submitted that this ruling was consistent with the then prevailing interpretation that the Crown could not exercise any power or authority within the sphere, except with the consent of the local rulers.

2.3 IBEAC's Authority in the Sphere

If the Crown had no power in Britain's sphere of influence, on what legal basis did it authorise the Imperial British East Africa Company to exercise sovereignty therein? This issue was not raised when the Company petitioned for the Charter, but two years earlier it had caused some concern over the National Africa Company's (later the Royal Niger Company) application for a Charter to operate in the Niger region. Both the Colonial and Foreign Offices had expressed serious doubt about the competency of the Crown under international law to grant a Charter in territories over which it exercised no jurisdiction or protectorate.²⁴ However, by the time the IBEAC made its petition the legal difficulty had been explained away. The argument then was that, by granting the Charter, the Crown was not purporting to give the petitioners any sovereign powers in the territory, rather it was merely authorising them to exercise such powers as were delegated to them by the local sovereign.²⁵ From the English municipal law point of view the Charter was the formal consent to the petitioners to accept and exercise those sovereign powers. Otherwise it was illegal, according to the Law Officers, for a British subject to accept or assume sovereignty over a foreign country.²⁶

²³(1898) I.L.R (Bombay) 54, 75-76. At page 82, Justice Renade summed up the position that, for purposes of internal jurisdiction, a sphere was an "independent territory where the Consular Court has no direct authority and cannot control the actions of its native rulers"

²⁴Robinson *et al*, Africa and the Victorians, at pp.181-182.

²⁵C.O. and Dr Dean to Salisbury, 8 August 1885, FOCP/2275.

²⁶Opinion of 9 January, 1854, Arnold Macnair, International Law Opinions, Selected and Annotated (Cambridge, 1956) 1:5. See also memo by Wright and Davidson, August, 1885, F0412/28.

The IBEAC Charter, Article 2, clearly indicates that the authority which was granted to the Company was to acquire any power by treaty or agreement with the local rulers "and to hold, use, enjoy, and exercise the same, for the purposes of the Company ... subject to the charter." It is thus not strictly correct to say, as some writers have done, that the Crown gave the Company sovereign powers in the sphere.²⁷ The prevailing view was that the Crown had no sovereign power in the sphere and could not give what it did not have.²⁸ As we shall see presently, the Company, prior to establishing its administration in the sphere, entered into treaties with the Kabaka and other rulers. One reason for this was that legally, and under its Charter, it could not exercise any authority in the territory except with the consent of the local chief.

It is instructive that whatever rights or authority the Company acquired were for its own purposes. This no doubt was intended to make it clear that it was acting on its own and not on behalf of the Government. However, the Crown reserved in the Charter substantial powers which it could use to manipulate and steer the Company in a desired direction. For example, the Company was precluded from exercising any treaty rights or grants until the Secretary of State had signified his approval of the treaty. Moreover, the Company could not assign or lease any rights without the consent of the Government. And if all else failed the Charter could be revoked.²⁹

Thus as far as the British were concerned, the Company was not only a private financial venture in the sphere but legally it was independent of the Government though subject to its control. The measure of its legal authority in the sphere was a matter for negotiation with the local sovereigns. It is within that legal and political framework that the Company proceeded to Buganda.

²⁷For example, Karugire, A Political History of Uganda, at p.73.

²⁸Lord Chancellor Herschell (confidential) opinion to F.O., memorandum of 5 November 1892, FOCP/6535.

²⁹Articles 2, 3, 5, 6 and 7.

2.4 IBEAC in Buganda

Captain Lugard was the first Company official specifically accredited to Buganda. He received his orders to proceed to Buganda two months after the signing of the 1890 Anglo-German Agreement. His instructions, in his own words, were brief and somewhat vague. He summarised them as follows: firstly, to offer Mwanga a “guarantee of peace in his kingdom and to impress him with a sense of the power of the Company”; secondly, to exercise “a steady pressure upon him” with the object of securing control of all affairs concerning Europeans in his country; finally to show impartiality in dealing with the religious/political factions, except that, if the others proved “intractable”, he was to join hands with the Protestants. Although Lugard was not expressly told to make a treaty with Mwanga, he gathered from previous Company instructions that it was a priority which should give him “an acknowledged and legal status in the country to deal with its troubles.” Without a treaty, Lugard wrote, “any action I took would be mere filibustering. It would be open to Mwanga, when I had rendered him any assistance in my power, to profit by my work and repudiate ... any obligation.”³⁰

Treaty making with the Baganda proved to be much more difficult than Lugard anticipated. It took a week of tense and close to violent negotiations before the Kabaka and his chiefs reluctantly agreed to sign the treaty. This was partly due to the prevailing factional animosity among the chiefly oligarchy. While the Protestants led by the Katikiro (Prime Minister) Apolo Kagwa welcomed the British Company and, according to Lugard, were anxious to discuss the terms of the treaty, the Catholics and Mwanga (then a Catholic) were not. They were adamant that no treaty would be signed until the Kabaka’s envoys sent to Zanzibar with Jackson returned with a confirmation that Buganda was indeed in the British sphere. Moreover, the negotiations were lengthy because the Baganda were bargaining with Lugard about the terms of the treaty. Lugard

³⁰The Rise, vol.2, at pp.16, and 19-20.

was surprised by the number of questions ("all most intelligent for these people are very clever") which the Baganda asked him during the negotiations. He noted that:

Every clause is discussed in all its bearing sometimes for days, words are altered, and the foresight and determination which the natives show of forecasting the bearing on the future of every regulation is as keen almost as would be that of Europeans³¹

Lugard's observation is significant. It contradicts the common generalisation that the African signatories to treaties with Europeans did not comprehend the transactions. In the circumstances described by Lugard, there must have been reasonable comprehension by the Baganda -- hence the tension and the vigorous bargain.

In spite of the clamour, on Boxing Day of 1890, a treaty was signed by the Kabaka, and Lugard signed on behalf of the Company.³² The pith of the treaty was that the Company offered to protect Buganda and to introduce an administrative system to secure peace, prosperity and commerce, and to promote civilisation. The Kabaka, accepted the Company's protection and undertook not to enter into any agreement with any European of whatever nationality, or allow Europeans to settle in his country except through and with the consent of the Company's resident officer.³³ Under Article 3(a) all matters and questions regarding Europeans were to be the sole responsibility of the Company's resident officer who would act as an "arbitrator" and whose decision, subject to appeal to senior officers of the Company, was to be final. No mention was made of jurisdiction over the Baganda and other non-Europeans. However, the Company's resident officer was given wide general powers to intervene in the Kabaka's administration. For example, Article 2(ff) provided that the Kabaka had to seek his consent before declaring war and "in all serious affairs and matters connected with the state." Under the guise of this

³¹Ibid., at pp.33-34; also Lugard, "Treaty Making in Africa," 1893 J.R.G.S., at pp.54-55.

³²For the text see Mergary Perham, ed., Lugard's Dairies (London, Faber, 1957), 2:42-45.

³³Article 1.

provision a lot of powers could be assumed.³⁴ Finally, the treaty was expressly limited to a period of two years subject to renewal and revision as circumstances might require.

It has been mentioned above that under the Company's Charter, no treaty made by it was effective till a copy thereof had been sent to the Secretary of State and his approval signified. In this case Lugard enforced the treaty immediately without waiting for confirmation, which was only given more than a year later.³⁵ Ironically by that time Lugard and Mwanga had already entered into a fresh treaty which supposedly superceded all earlier ones "whatsoever with whomsoever concluded."³⁶ The latter treaty was submitted to the Foreign Office in October, 1892, but, for reasons stated below, it was not ratified. Consequently, on the basis of the Charter, neither under the former nor the latter treaty did the IBEAC acquire the necessary legal authority to administer Buganda. Arguably, as between Buganda and the Company the treaty was valid since it was not made subject to the approval of the Foreign Secretary. It was up to the Crown to penalise or condone the Company for violation of the Charter. In the event the issue does not appear to have attracted the Government's attention. Presumably it was not, in the circumstances, regarded as a serious breach of the Charter.

The Company had scarcely established itself when a war broke out between the Protestants and the Catholics (with Mwanga on the side of the latter). Eventually, with the assistance of Lugard, the Protestants won. Following the war Lugard, as a condition for restoring Mwanga (by then a Protestant) to his throne, forced him to sign the 1892 treaty which gave the Company wider powers. By that time, however, the Company had intimated to the British Government its intention to pull out of Buganda and the whole of the Lake region. Heavy transport costs and the Company's involvement in wars in

³⁴See also Articles 5-7.

³⁵On 29 April 1892, Hertslet, Map of Africa by Treaty, 1:378.

³⁶For the text see Hertslet, Commercial Treaties, 38:5-7.

Buganda and in neighbouring territories had drained all its resources. Because of the political turmoil there was no revenue to balance the books.³⁷ Nor would the British Government agree to give financial assistance.

At the end of March, 1893, the Imperial British East Africa Company officially completed its withdrawal from Buganda and all the territories beyond. Indeed the only region in the sphere where it remained was Ukamba and Kikuyu (Kenya).

2.5 Legacy of the IBEAC Treaties

As we shall see in the following chapter the decision of the Company to abandon the sphere, especially Buganda, prompted a widespread outcry in Britain urging the Government to take over the administration of Buganda. For the moment, however, our interest is with another, albeit related, debate, namely the fate of the Company's treaty rights and obligations in the sphere. Was the British Government bound by the treaties or entitled to the rights acquired under them? This issue was raised as soon as the Company indicated to the Foreign Office its plans to withdraw. Because of the uncertainty of the situation, especially as the British Government was not anxious to assume the Company's responsibility in the sphere, the Secretary of State declined to approve the second treaty between Lugard and Mwanga and those made with the rulers of Ankole, Toro, and other chiefs in the region.³⁸

The issue of the legacy of the Company's treaties was raised with the Lord Chancellor, Herschell, who, as we have seen, had on a number of occasions expressed views on the Crown's legal authority and obligation in the sphere. Herschell advised the Foreign Office that, if the Company ceased to administer and afford protection to any

³⁷McDermott, British East Africa, pp. 195-203; also Galbraith, Mackinnon and East Africa, at p.192.

³⁸Rosebery's memo of October, 1892. IBEAC's other treaties are enclosed in Portal to Rosebery, 29 August 1892, FOCP/6341.

territory as promised under its treaties "that would of itself absolve the native chiefs from all obligations under the treaty, and the treaty would be practically at an end." The Lord Chancellor stressed that neither rights nor obligations under the treaties would be incurred by the British Government. Whether the Crown had a moral duty with respect to the treaties which were approved by the Secretary of State, in his view, was a different proposition.³⁹

The Lord Chancellor's opinion was consistent with his previous legal advice to the Foreign Office. But Rosebery most likely would have preferred a different opinion. He was strongly behind the move for the Crown to take over the administration of Buganda. Indeed he threatened to resign from his Cabinet post if his colleagues decided against it.⁴⁰ If the Government were held legally responsible for the Company's treaties, it would have added ammunition to his campaign. Interestingly, in his instructions to Gerald Portal, Commissioner in Zanzibar and the British east Africa sphere,⁴¹ he somewhat down played the Lord Chancellor's opinion. While emphasising the "considerable difficulty" concerning the Company's treaties, he remarked that "Whether an approval [of the Secretary of State] can be held in any way, directly or indirectly, to bind Her Majesty's Government is a moot point." He told Portal to investigate and report on the practical effect to Britain's reputation in these regions were she not to adopt the treaties.⁴²

Predictably Portal, who also strongly favoured retaining Buganda, reported that, whatever the legal distinctions were between the Company and the Crown:

... the impression conveyed to the different native chiefs and peoples in this

³⁹Memo of 23 November 1892, FOCP/6362. In 1897, the Law Officers expressed doubt as to whether legally the Royal Niger Company could cede to the Crown its rights under treaties made with chiefs, L.O. to F.O., 28 December 1897, FO881/7058.

⁴⁰Robinson *et al*, Africa and the Victorians, at p.318.

⁴¹Portal was instructed by the Cabinet to make a fact finding mission to Uganda and write a report which was to be used as a basis for its decision over the territory.

⁴²Rosebery to Portal, 10 December 1892, FOCP/6362.

region [British east Africa sphere] when they signed treaties and received in return the Company's flag and promise of protection was that they were thereby placing themselves under the protection of the Government of Great Britain. Even among the more intelligent people of [B]Uganda the same belief obtained

Portal urged a practical solution to the problem of the treaties. He cautioned the Government that failure to assume the Company's treaty obligations was bound to tarnish the English reputation (which he claimed was held in higher esteem than that of other Europeans), and ruin Britain's commercial prospects in the region.⁴³

Eventually the Government decided to make fresh treaties with the chiefs throughout the British sphere. Most likely the legal uncertainties indicated by the Lord Chancellor contributed to the decision. Besides, the Company had assumed substantial powers and duties under its treaties which the Crown was not, as yet, prepared to accept. With the exception of the treaty between Mwanga and Portal, to be discussed in the following chapter, in none of the Government treaties with the chiefs was protection promised or any obligation assumed. Essentially the treaties were of "friendship" and trade, with a provision that the chiefs would not cede their territory or enter into any treaty or agreement with any European except with the consent of the British Government. The content of these treaties was compatible with Britain's policy of retaining control over the sphere, by excluding other Powers, but without taking over the administration of the territory.

2.6 Summary and Conclusion

The main political objective for demarcating spheres of influence was to eliminate relentless rivalry for territories. But, as the evidence in this chapter indicates, there was a general confusion and uncertainty as to the nature and scope of a sphere. Since spheres

⁴³Portal to Rosebery, 1 November 1893, FOCP/6497. But see Lugard (report of 11 April 1894, encl. IBEAC to F.O., 11 April 1894, FOCP/6557), he claimed that the Baganda were aware of the difference between the Company and the Crown.

were based on bi-lateral treaties, legally they were only significant as against those states which were parties or which had recognised them, though this did not prevent countries claiming spheres from asserting vague legal rights even against those which had not expressly done so. Secondly, to secure a territory against rival states there had to be some form of administrative control over it. It would seem that international law did not reach the stage where a sphere, like a protectorate, was recognised as giving an exclusive claim which was good as against all other countries.

The popular interpretation was that a sphere gave neither rights nor obligations except that acquired from the local sovereign. This interpretation was convenient to the British Government. It could afford to make claims of sphere of influence without undertaking any responsibility over the territory, though at the risk of losing to rival countries. However, it would be wrong to conclude that this construction was maintained simply because it was advantageous to Britain. The law was uncertain, and this construction, according to the prevailing legal theory, was presumed to be the legal position. This is reflected in the IBEAC Charter, the Africa Order in Council, the opinions (some of which were confidential) expressed by contemporary lawyers, and the treaties with the chiefs.

During the period investigated the only power and authority acquired in Buganda was by the Imperial British East Africa Company under the 1890 and 1892 treaties with Mwanga. These powers were extensive but they were its own. Consequently the Company did not lay any legal foundation for the Crown's authority in Buganda, or, for that matter, anywhere else in the sphere. In political terms, of course, the role of the company in opening up the country and retaining it for the eventual administration of the British Government cannot be overemphasised. Indeed, as Portal reported, the chiefs in the sphere assumed that the company's treaties were those of the Crown.

In the following chapter I examine the transition from a sphere to the Uganda Protectorate.

CHAPTER 3

FROM A SPHERE TO A BRITISH PROTECTORATE

Once the Company decided to quit Buganda, the British Government had to make up its mind whether to step in and, if so, in which way. The Government was still unwilling to assume responsibility for Buganda and the rest of the sphere. However, there was a public outcry urging it to take over the administration of Buganda. Pressure groups mounted campaigns using all available mass media. They reminded the Government of Britain's duty to stamp out slavery and to spread Christianity and European civilization. Businessmen pointed to the loss of potential markets and a source of raw materials. Others felt that for strategic reasons Britain had to stay in Buganda and protect the Nile for the sake of Egypt and the Suez Canal.¹ The Cabinet itself was divided. Some members were against Britain's involvement in Buganda while others, particularly Rosebery, were in favour. Eventually, by way of compromise, the Cabinet agreed to commission Gerald Portal to go to Buganda to investigate and write a report which it would use in making its final decision.² As part of the arrangement the IBEAC was requested to maintain its position in Buganda for a period of three months (ending on 31 March 1893) under Government sponsorship.³

In this chapter I investigate the development of Britain's legal authority from the date of the Company's departure up to the declaration of the protectorate.

¹Generally Low, *Buganda in Modern History*, at pp.55-83.

²Rosebery to Portal, 10 December 1892, FOCP/6341.

³F.O. to IBEAC, 30 September 1892, FOCP/6341.

3.1 Portal's Mission

Portal was instructed by Rosebery to cultivate friendly relations with Mwanga (by giving him presents and, if necessary, a small subsidy) and to impress upon him Britain's interest in his country. However, he was precluded from making any arrangements of a permanent nature without further consulting the Secretary of State. Otherwise within those limits he was given lee-way to exercise his discretion according to the circumstances. No specific instruction was given about the rest of the territories in the sphere.⁴

Portal arrived in Buganda barely a fortnight before the Company's final departure. Reportedly his arrival was greeted by the Baganda with glamour and splendour; he was the visible symbol of the British Government. Indeed one of his first major ceremonies was to lower the Company's flag, at mid-day on 1 April 1892, and to hoist in its place the Union Jack. According to an eyewitness account, Anglican Bishop Tucker, for those present "the administration of Her Britannic Majesty's Government became an accomplished fact The British Government had come to stay."⁵ As a prediction this proved to have been right, but at the time Portal had no power to declare Buganda a British protectorate, nor for that matter did he have any legal basis for asserting any authority in the country.

The lowering of the Company's flag was the final sign of its evacuation from Buganda. Technically, it meant that Buganda was once again an independent state. However, Buganda's freedom was short-lived because barely two months later a fresh treaty was entered into between Mwanga and Portal, acting on behalf of the British Crown. This treaty, according to Portal's despatch to the Secretary of State, was made:

⁴Rosebery issued (behind the back of his colleagues) secret instructions to Portal to take all necessary steps, including negotiating treaties with the local rulers, to protect Britain's interests in the Upper Nile Valley, Robinson *et al*, Africa and the Victorians, at p.326.

⁵A.R.Turker, Eighteen Years in Uganda and East Africa (London, Edward Arnold, 1911), at p.326.

[W]ith the object of insuring and defining the position and authority of Her Majesty's Representative in the country until the final decision and further instructions of Her Majesty's Government on the whole question can be conveyed to him.⁶

In other words, it was intended as a provisional arrangement which immediately provided the British representative with a legal basis for asserting authority in Buganda. Portal claimed that the treaty was entered into by Mwanga "of his own free will and at his request", and that all possible care was taken to ensure that he and his principal chiefs comprehended its terms and willingly gave their consent. The provisions of the treaty were explained to them "sentence by sentence" by Bishop Tucker, and before it was signed it was left with Mwanga for a fortnight for his consideration.⁷ Evidently the circumstances were much more relaxed than three years earlier when Lugard made his first treaty with Mwanga. Part of the credit for this must be given to Lugard, whose activities had a softening influence upon the Buganda oligarchy. Mwanga himself, having had serious political problems since he took over the throne, assumed that with the British presence he had a better chance of safeguarding his position. He lived to regret this assumption.

3.2 Outline of the Treaty⁸

Portal's treaty was very carefully drafted. Its terms were described as "conditions" which Mwanga promised to fulfill with the object of securing British "protection, assistance and guidance" in governing his country.⁹ The treaty was immediately binding upon both parties except that, whereas Mwanga was bound to renew it or to enter into another with similar terms if so requested by the British Government, the latter's obligations were only to remain until such time as the Secretary of State instructed otherwise. Mwanga could not escape the treaty, but the Crown had a discretion to

⁶Portal to Rosebery, 29 May 1893, FOCP/6490.

⁷Ibid. See also Tucker, *Eighteen Years*, at p.265.

⁸Appendix 1.

⁹Article 3.

continue with it or to cancel. From Portal's point of view, this provision was explicable on two main grounds. In the first place, he had no authority to make any arrangements of a permanent nature without reference to the Secretary of State. When the opportunity for a treaty with Mwanga presented itself he felt obliged to accept it without transgressing his orders. Secondly, Portal had made adverse comments on the Company's breach of its treaties and the legal obligations it had assumed. He carefully drafted his provisional treaty with this in mind, ensuring that if the Government did not ratify the responsibilities he undertook on its behalf it would be free to pull out in accordance with the terms of the agreement. Portal had also to ensure that Mwanga exactly understood the position. In this regard the treaty differed from most of the others made by the agents of European countries with African rulers in that it showed purpose and genuineness which the others generally lacked.

Under the treaty the British Government acquired extensive powers and authority in Buganda. One of the powers was the administration of justice. Article 5 of the treaty provided that all cases and matters concerning Europeans and persons not born within Buganda or in which such persons were involved "so far as ... [the Kabaka] was concerned" were to be dealt with solely by the British Government's representative. From this Article it is clear that Mwanga had deprived himself of whatever jurisdiction he had over foreigners or cases in which they were involved. Could the British representative, on the basis of this treaty, exercise jurisdiction over non-British subjects in Buganda? This issue was raised with Portal by Macdonald, the acting British representative he appointed on his departure from Buganda. Macdonald at the time was anticipating that Mwanga might institute legal proceedings in the British representative's court against a French Catholic priest for "fraud" and "breach of contract". The case related to Mwanga's children whom the priest had refused to return to their father. Although Macdonald was confident that it was within his jurisdiction to deal with the

case, he feared that the French might make a "fuss" if he tried their subject.¹⁰

Apparently Portal did not respond and in the event the case did not materialise as the priest returned the children. Nonetheless, the issue raised by Macdonald is interesting. As we have seen, the English law which was applicable in the east Africa sphere was the Africa Order in Council, 1889.¹¹ Article 16 thereof provided that any treaty or agreement made by the Crown with any chief, king, or state, with respect to any particular territory, was to be enforced as part of the law under the Order. The Article continued that, in the event of conflict between the provision of the treaty and any law applicable in England or anything stated in the Order itself, the former should prevail. Therefore, on the basis of this Article, it is submitted that the provisional treaty was law in Buganda under which the British representative could exercise jurisdiction over non-British subjects. On the other hand, as may be recalled, the Order was interpreted to mean that it only applied to British subjects and to foreigners who either submitted to British jurisdiction or whose sovereigns consented to its exercise.¹² Since the foreigners in Buganda were not the Kabaka's subjects nor under his protection, he could not authorise the British representative to administer justice over them.¹³ It is submitted that the treaty with Mwanga, in so far as its legal effect was founded on the Africa Order in Council, did not apply to non-British subjects.

¹⁰Macdonald to Portal, 13 July 1893, FOCP/6538.

¹¹The Order was amended twice in 1892 and 1893, see below.

¹²Above at p.28.

¹³Probably Portal did not make this distinction because in his instructions to Macdonald (*vide* 29 May 1891, FOCP/6490), he told him that his (Macdonald's) powers were spelled out in the Africa Order in Council. Portal himself, in his capacity as British Commissioner of the East Africa Sphere, was instructed by the Foreign Office that "the administration of justice, as regards Europeans and others, not natives of the country, will be exercised under the Africa Order in Council," quoted in IBEAC to F.O., 12 October 1894, FO2/75. However, other F.O. correspondence indicate that, according to the interpretation of the Foreign Office, application of the Order was limited to British subjects, see e.g., F.O. to IBEAC, 24 September 1894; and the Foreign Office Committee on the administration of east Africa, 17 April 1894, FOCP/6489.

Besides, in 1891, the Law Officers reported that it was necessary "in order to give validity to [an] Order in Council so far as it ... [might] affect the subjects of other Powers, that the territories comprised therein should be declared to be under the protection of Her Majesty the Queen." The Law Officers were commenting upon a draft Order in Council which purported to confer upon the High Commissioner of British Bechuanaland jurisdiction over foreigners in southern Matabeleland on the basis of a treaty with its ruler, Lobengula. They argued that, in international law, jurisdiction was either territorial or based on consent. Where a protectorate had been declared, consent of the signatory Powers to the Berlin and Brussels Acts was inferred.¹⁴ Since Buganda had not been declared a British protectorate, it followed from the Law Officers' report that the Crown could not exercise the jurisdiction which was acquired under the treaty over non-British subjects.

Could the jurisdiction ceded by the Kabaka be exercised without the Africa Order in Council? There is some evidence which indicates that such a view was entertained in some official British circles.¹⁵ Apparently the argument was that since under international law there was nothing to prevent an independent chief from exercising "full civil and criminal jurisdiction over any person, European or otherwise, within his territory ...," he could by treaty delegate his powers to the Crown which would exercise them in his name.¹⁶ A problem which was rarely, if ever, discussed was: whose law was applicable in the circumstances? Was it that of the local ruler or of the delegate?

¹⁴L.O. to C.O., 30 April 1894, FO881/6207. Their opinion was probably based on Doctor Lushington's Privy Council judgment in Papayani and others v The Russian Steam Navigation and Trading Company (The Laconia), 15 E.R. 862, at p.870. Lushington expressed the view that the Ottoman Porte could not give to one Christian Power jurisdiction over subjects of another Christian state. But see F.T.Piggott, Exterritoriality, at p.19. He claims that the Crown was competent, under English law, to accept and exercise jurisdiction ceded by local sovereigns without need of consent of the European state concerned.

¹⁵For example, the report of the Foreign Office Committee on the administration of east Africa, see below.

¹⁶L.O. to C.O., 21 April 1886, FO84/2275. See also the report of the Foreign Office Committee on the administration of east Africa.

Logically, subject to the agreement, it should be the former. However, there were some conflicting views about this. In some documents there is a vague reference to application of the local law; while in others it is the English law.¹⁷ Whatever it was, in practice the British Government, for political reasons, was loath to exercise delegated powers over subjects of other European states without their consent. Most likely that was the "fuss" which Macdonald feared were he to exercise his powers over the French priest.

The legal position for the administration of justice in cases where only the Baganda were involved was more straight forward. Article 6 of the treaty empowered the British Government's representative "at his absolute discretion" to act as "a Supreme Court of Appeal" in all civil cases. In criminal cases he was given the power to intervene "in public interest and for the sake of justice" as he saw fit. Portal instructed Macdonald to exercise these powers sparingly and to intervene in criminal cases only in instances of cruelty or injustice brought to his notice. The main reason for this was probably to conserve manpower, and to avoid straining relations with the chiefs by frequently interfering in their administration of justice.

Although both the Foreign Office and the local administration were under the impression that the Africa Order in Council was not applicable to the Baganda, it will be argued below that in fact, by virtue of the treaty, the Baganda were justiciable under its provisions. The authority of the Crown to exercise jurisdiction in Buganda was based on both the Order and the treaty.

¹⁷For example: Wright, in a memorandum on foreign jurisdiction written for the Attorney-General (dated August 1885, FO412/28), argued that, "A sovereign may arrange with the Queen that the courts in his territory shall be held by British judges administering either the native, or the British, or any other law (as he may direct) in the case of all persons within his territory, whether native, or the subject of any other foreign power. Such courts would not be British courts at all, but courts of the sovereign of the territory." Wright was emphatic that Orders in Council would not be applicable to these courts. See also the Law Officers' report to the C.O., 15 November 1884, no.28 L.O.R., vol.4, at p.1. Also Piggott, *Exterritoriality*, at pp.95-96, asserts that if a treaty ceded open powers the inference was that the grantee had the right to introduce a whole body of procedural and substantive laws. For opposing views, see IBEAC to F.O., 26 June 1894, and the minutes of 27 and 28 June 1894, FO2/74 and FOCP/6557.

Apart from judicial powers, Portal's treaty with Mwanga allowed the British Government wide powers to intervene in Buganda's affairs. Under Article 10, the British representative had to concur in all serious matters affecting Buganda, such as declaration of war, appointment of chiefs, revenue collection and expenditure, and any division of territory based on religion and politics. In addition Buganda's foreign affairs were unreservedly surrendered to the Crown. Moreover, the Kabaka acknowledged that all international agreements to which Britain was a party (then or in future) were to bind Buganda and all its dependences to the extent determined by the British Government. As part of the bargain, Portal undertook to appoint and leave behind a British Government representative in Buganda with sufficient staff to implement the terms of the treaty until such time as the Secretary of State ordered otherwise.¹⁸

The overall effect of the treaty was to make Buganda a "provisional" British Protectorate until the Government confirmed or renounced its status. In a strict legal sense, since Portal had no mandate to declare Buganda a British Protectorate (and in fact he did not), Buganda was still a mere sphere of influence in which, by virtue of the treaty, the Crown had acquired extensive powers.¹⁹ However, the arrangement was convenient to the British Government. If it were in its interest it could deny that Buganda was a British Protectorate as it had not been declared; on the other hand the Crown could assert the powers conferred upon it under the provisional treaty.²⁰ Perhaps it was for this reason that Portal took special steps to ensure that the treaty was properly made with the Buganda ruler.

In practice Britain's ambiguous status in Buganda does not appear to have raised

¹⁸Articles 9, 14, and 16.

¹⁹In *Imperatrix v Juma and others*, supra, at pp.81-82, it was held that a British protectorate had to be expressly declared and not just inferred from the Crown's activities in the territory.

²⁰Ratification of a treaty, unless otherwise provided, has a retrospective effect, Hannis Taylor, *A Treatise on International Public Law* (Chicago, Callingham, 1901), at pp.387-389.

many legal issues. Ironically the only serious legal problem was pointed out by the Imperial British East Africa Company. In December, 1893, the Company, whose official administration was then restricted to the coast and a few inland posts, reminded the Government that Buganda did not qualify for the advantage relating to importation of arms under Article 9 of the General Act of Brussels, 1890, because it was neither a protectorate of a signatory Power nor, as an independent territory, had it adhered to the provisions of the Act. Since, however, the country was "occupied" by Britain the Company promised not to raise any technical issues, at any rate for the time being.²¹

The period between the making of Portal's treaty with Mwanga and the declaration of Britain's protection over Buganda, was marked by the continuity of the religious/political struggle among the rulers of Buganda. No wonder that one of the treaty powers which the British representative commonly used was that of settling disputes relating to the division of chieftainships and territory among the warring factions. Interestingly, in dealing with these matters Macdonald represents himself as merely advising the Kabaka in accordance with the treaty; while in others he makes it clear that he was the one giving orders.²² In reality, apart from the treaty powers, the British representative's position was reinforced by these factional fights which had weakened the status of the Kabaka. Moreover, he had at his command a large contingent of soldiers in Buganda and the surrounding countries. All these factors helped to make the British administration, during this transitional period, the focus of political authority in the country.

²¹IBEAC to F.O., 6 December 1893, FOCP/6477.

²²For example, Macdonald to Portal, 13 July 1893; and Macdonald to Portal, 18 July 1893, FOCP/6538. Also some of the proclamations which were issued by Colvile (Macdonald's successor) were jointly signed with Mwanga while the others were signed by him alone, Colvile to Cracknall, 13 December 1893, FOCP/6557.

3.3 Declaration of the Uganda Protectorate

Meanwhile, Portal, predictably, reported in favour of declaring Buganda as a British protectorate.²³ Portal's arguments were basically a summary of the different views expressed in the public campaign mentioned above. The main problem he felt was to determine the best way of administering Buganda. For this purpose he came up with a number of possibilities which the Government could adopt. For instance Britain could let the Sultan of Zanzibar administer it with the rest of the east Africa sphere under the guidance of the British Consul-General at Zanzibar. The advantage of such a scheme was that Britain would retain an indirect control over the whole region without shouldering any financial or other burdens -- more or less the arrangement which obtained previously with the IBEAC. However, it had many disadvantages which, Portal thought, rendered it less attractive. First, since Zanzibar was a Moslem country it could mean introducing an Islamic government in Buganda which was bound to inflame the Christians and lead to more religious wars. Second, Portal pointed out that in Zanzibar there were already many international legal issues arising from the special treaty rights which were accorded to other Powers in the Sultan's dominion. He feared that, if the authority of the Sultan were extended to the rest of the British sphere, there was a chance that these countries would claim that their rights extended to these territories as well. In any case Portal felt that the Zanzibar Government was not strong enough to be trusted with the administration of such an extensive territory. Portal also considered annexation of Buganda. This he quickly dismissed as likely to be too costly, entailing many British officers to administer, and without, at least for the time being, commensurate returns. Besides, Portal noted that the Baganda had their own administration (however defective) which could be utilised under European supervision.

Between these propositions (which Portal called "extremes") Portal thought that a

²³Portal to Rosebery, 24 May 1893, and 1 November 1893, FOCP/6490 and 6497.

compromise could be struck by appointing Commissioners for the whole sphere with sufficient staff and force to protect Europeans and generally to control the region. Whether Britain declared the whole region as under her protection or left it as a British sphere was, in his opinion, no longer important since the sphere had already been recognised by all the Powers interested in the region. As for Buganda, Portal asserted that Mwanga would settle for nothing less than a treaty of protection; indeed Portal reported that Mwanga had already asked for one under the provisional arrangement. In the circumstances he recommended that Britain ought to declare Buganda her protectorate. Such a step, he reasoned, could have a further advantage of resolving the issue raised by the Company of import taxation on goods to Buganda.

The proposal immediately to declare Buganda a British Protectorate was endorsed by Rosebery. He argued that since the Company's withdrawal from Buganda the Government had spent on the average 40,000 pounds per annum "in an anomalous and undefined manner". This figure he said was much more than Portal estimated it would cost the Government to administer Buganda as a Protectorate. Moreover, Rosebery claimed that, according to some authorities, Britain's liability in a sphere was not any less than in a protectorate. "Under these circumstances," he concluded, "it would appear that our position is that of carrying on the Government with the same liability and responsibility as a Protectorate, only at a greater cost."²⁴

At that stage the Cabinet decision was a foregone conclusion. On 18 June 1894, it was announced in the London Gazette that:

Under and by virtue of the agreement concluded on the 29 May, 1893, between the late Sir G. Portal and Mwanga, King of [B]Uganda, the country of that ruler is placed under the Protectorate of Her Majesty the Queen.²⁵

²⁴Memorandum Rosebery, 24 February 1894, FOCP/6538. Rosebery was referring to the French Government claim against Britain, mentioned above.

²⁵Gazette dated 19 June 1894.

The notification specifically limited the Protectorate to Buganda "proper" which was described as the territory "bounded by Busoga, Bunyoro, Ankole, and Koki". The announcement was followed by instructions to British officials to inform Mwanga accordingly and to advise that the provisional treaty made with Portal had been ratified. Two months later Colvile, Acting Commissioner, entered into a fresh treaty with Mwanga, dated 27 August 1894, which was merely a replica of the one it replaced.²⁶

It is noteworthy that the Protectorate over Buganda was expressly established "under and by virtue of the treaty made with Mwanga". In other words the treaty was the basis of the Protectorate. This factor, as this study will show, gave legitimacy to the treaty which dominated the relationship between Buganda and the British Government.

3.4 Neighbouring Countries

With the issue of Buganda's status finally resolved, what was to be done with the rest of Britain's east Africa sphere? A Foreign Office committee, chaired by Percy Anderson, was given the task of reporting on this matter.²⁷ On a number of grounds the committee recommended that the Protectorate's immediate neighbours (or "the neighbouring countries"): Toro, Ankole, Busoga, Kavirondo, Koki, Bunyoro, and the tribes around Lake Albert, because of their political and geographical connection to Buganda, should be placed under close supervision of the British Government. Busoga and Kavirondo, for instance, were caravan routes to and from the coast. The committee felt that, if these territories were not controlled, the communication between the Protectorate and the coast might be jeopardised. Ankole, Toro, and Bunyoro were within the Nile strategic zone hence the need for a close watch over them. Control of these countries was also justified on the ground that Britain had a duty to help stamp out slave and arms trade in the sphere.

²⁶Hertslet, *The Map of Africa by Treaty*, 1: 396. Below, Appendix 2.

²⁷Report of 17 April 1894, *supra*.

Anderson's committee proposed that the neighbouring countries should be placed under the control of the Uganda Protectorate Commissioner who would, "after obtaining, if necessary, further treaties", exercise a general superintendence as Her Majesty's Commissioner, administering justice over British subjects under the Africa Order in Council. However, the committee anticipated a legal problem with regard to the exercise of jurisdiction over foreigners within the region. It assumed that jurisdiction could be exercised under delegation of the local sovereign although it realised that it might put the Commissioner in an "anomalous position" since:

In [B]Uganda, an African Protectorate, he could exercise judicial powers over foreigners under the Order; outside it he could not do so. Thus, a recalcitrant French missionary or German trader, with whom he could cope in [B]Uganda, could only be dealt with in Ankol[e] or [B]Usoga under authority delegated by the native Chiefs. This might place the Commissioner in a position of no inconsiderable difficulty.

The legal and political problems contemplated by the committee have already been touched upon in this study. In the event it would seem that no specific decision was made on the proposals.

In the meantime a large scale military campaign was waged by British troops in alliance with the Baganda, against Kabarega, the King of Bunyoro. Kabarega resisted all foreign intrusion in his country. The main object of the war was strategic: to force a "safe-corridor" through Bunyoro for purposes of watching the Nile. By the end of 1894, reports from the Uganda officials to the Foreign Office were that the whole of southern Bunyoro was under British military occupation and that a line of forts had been constructed stretching from the Protectorate border to the shores of Lake Albert.²⁸ The speed the local officials were expanding the British empire was a cause for concern in London. Kimberley, then Foreign Secretary, cautioned the administration to limit Britain's activities in Bunyoro to purely defensive measures.

²⁸Low, "Uganda, the Establishment of the Protectorate," at pp.68-69. Also Ingham, The Making of Modern Uganda, at p.58.

Likewise the Protectorate officials were instructed not to assume any responsibilities in the surrounding territories. For this purpose fresh treaty forms were despatched which as many rulers as possible in the sphere were made to sign. Unlike the IBEAC treaties they had no provisions offering protection nor Britain undertaking any obligations in the territory.²⁹ The treaties secured for British subjects freedom to trade and to acquire property in the region. However, their immediate objective was to commit the rulers so that they would not cede their countries to other Europeans or enter into any agreements with them except with the consent of the Crown.

The British Government was so particular about limiting its obligations in the surrounding countries that it disallowed an addendum to a treaty made on its behalf with Kasagama, the Mukama (King) of Toro, which suggested that a protectorate had been declared over his Kingdom. While approving the treaty, the Foreign Office made it clear that it had to be understood that "the mention of protection ... [in the addendum] in no way implies a protectorate"³⁰ The agent who made the treaty no doubt assumed that by signing the treaty form which excluded Kasagama from all external contact, Toro had automatically become part of the British Protectorate. Certainly that was not the view of the Foreign Office; Toro was still a mere sphere of influence. In another instance, a proposal by Thruston, a British official in Uganda, to offer Kabarega a peace treaty on condition that he had to become "an obedient British subject", received a similar rebuff:

[B]Unyoro is outside the limits of the British Protectorate and neither the Chief himself nor any of his subjects can be considered as under the protection, still less as the subjects of Her Majesty.³¹

²⁹The only jurisdiction which the Crown acquired was to settle disputes between the local ruler and British subjects with respect to matters relating to trade, for example, custom payable to the chief (Article 2). The treaty forms were signed by the rulers of Toro (3 March 1894); Ankole (29 August 1894); Kavallis (18 April 1894); and so on, Hertslet, Commercial Treaties, 20: 33-39.

³⁰F.O. to Jackson, 10 April 1895, FOCP/6717.

³¹*Ibid.*

Ross Johnston,³² claims that administrators in London neither knew the theoretical distinction between a sphere and a protectorate nor considered it essential. The foregoing evidence contradicts his assessment. It also negates assertions by both Portal and Rosebery that it did not make a difference whether the whole British east Africa sphere was declared a protectorate or administered as a sphere; otherwise the Foreign Office would not have been so particular. Of course, as we have seen, there were advantages for Britain in persisting with the legal distinction between a sphere and a protectorate. Most important of these was that, provided she precluded other Powers from the sphere, the Government did not have to do anything about its administration. At the material time there was also a strong political motive not to declare the neighbouring territories under British protection. The Foreign Office was locked in delicate negotiations with the French over territory in West Africa and the Nile region. It was feared that extension of the Uganda Protectorate might thwart the discussions and provoke a race for the Nile Valley which the British preferred to avoid, if possible.³³ Leaving the neighbouring countries as mere spheres at least gave the appearance of maintaining the status quo -- of course, to Britain's advantage.

In practice, however, British officers in the field were much more active than was warranted by Britain's legal status. Bunyoro had a garrison of British troops scattered all over the southern part of the Kingdom. In Busoga Portal left a standing army of a hundred men under the command of a British officer with the title "officer in charge of the district". A British official was stationed in Toro, and also in Kavirondo. These men carried on administrative duties in the respective territories. They appointed and dismissed chiefs; exercised jurisdiction; punished slave and arms traders; collected

³²Sovereignty and Protectorates, at page 319.

³³Robinson *et al*, Africa and the Victorians, at pp. 333-334.

customs duty from merchants going through the territory, and so on.³⁴ None of these powers had been formally acquired from the local rulers under the treaties. Consequently, according to the prevailing interpretation of the concept of sphere of influence, and on the authority of *Imperatrix v Juma* (supra), strictly, there was no legal basis for the exercise of these powers.

3.5 Extension of the Protectorate

3.5.1 Busoga

It has been seen that British officials in Uganda were anxious to expand their authority outside Buganda. Formal extension of the Protectorate administration was first made with regard to Busoga. The main reason for this was that Busoga was an important communication link with the coast; secondly, the Baganda claimed some "sovereign" rights over it which they were not prepared to forego.³⁵ Prior to Portal's departure an agreement was reached between the Baganda and the Basoga chiefs which allowed the Protectorate Government to participate in the administration of justice of Busoga. Under this agreement all minor cases were to be dealt with by the chiefs of Busoga in conjunction with the British officer in charge of Busoga, while important cases were to be decided by the Kabaka and the Commissioner jointly. In addition it was agreed that a regular payment of tribute would be payable to Buganda by Busoga, half of which was to go to the Protectorate Government as some form of taxation from Busoga.

However, the arrangement proved to be impracticable. By the end of 1895, the British officer in charge of Busoga was complaining bitterly of the "inconvenience" caused by Mwanga and his chiefs coming up with decisions which contradicted his own thereby making the maintenance of law and order very difficult. To resolve the problem Berkeley,

³⁴Memorandum by Colvile, 25 July 1894, FOCP/6661; Berkeley to Salisbury, 18 December 1895 and 23 March 1896, FOCP/6827; 19 January 1895, FOCP/6693.

³⁵Portal's report, supra.

the Commissioner, persuaded Mwanga to surrender his share of the jurisdiction to the British Government which would then become solely responsible for the administration of the territory. A provisional agreement, subject to the approval of the Secretary of State, was entered into between Mwanga and Berkeley, acting on behalf of the Crown. Unlike the previous agreement the Basoga chiefs were not a party. Presumably this was because Berkeley was convinced that Busoga was Buganda's dependent state, and he did not consider it necessary to seek the chiefs' consent.³⁶ Under the new agreement Mwanga and his chiefs were to surrender henceforth to the Protectorate Government all claims to any voice in the administration of Busoga or to any jurisdiction in Busoga. Second, in return the British Government was to give up its share of the Busoga tribute which was to be paid to the Kabaka. Finally, it was expressly declared that Busoga would remain a tributary state of Buganda.³⁷

Interestingly, unknown to Berkeley, by the time the agreement was made the British Government had, almost five months earlier, declared the territories in that part of the British sphere lying between Uganda Protectorate and the coast (which embraced Busoga), and between the River Juba in the north and the southern frontier of the German sphere, were under the protection of the Crown.³⁸ The notification was prompted by a Cabinet decision to construct a railway (the so-called Uganda Railway) from the coast to the shores of Lake Victoria.³⁹ The announcement of the Protectorate was made without any reference to treaties or agreements with the local rulers. Quite clearly Whitehall, at this point in time, did not regard the consent of the local rulers as necessary prior to declaring their territory a British protectorate. Thus Busoga, unlike

³⁶Berkeley to F.O., 8 December 1895, FOCP/6827.

³⁷Ibid.

³⁸London Gazette, 18 June 1895.

³⁹Roberts, "Evolution of the Uganda Protectorate", at p.99. Karugire, A Political History of Uganda, at p.99, says that, apart from Buganda, the process of acquiring Uganda did not proceed according to a logically worked out plan.

Buganda, came under British protection by a unilateral action. Throughout the colonial period this factor was frequently emphasised by British officials, and the Baganda.

Low⁴⁰ comments that Berkeley's arrangement for the administration of Busoga shows that the extension of the Protectorate did not always await legal enactments. While that might have been so, it is questionable whether in fact that was how Berkeley himself construed the effect of the agreement. Most likely Berkeley thought that the agreement gave the Protectorate Government the necessary authority to exercise jurisdiction and other administrative powers in the territory which hitherto belonged to the Kabaka and the chiefs of Busoga. Technically, as we have suggested above, that did not mean that the British Protectorate had been extended to Busoga. As we have seen, it was considered legally feasible to administer a territory as a sphere without it necessarily being a protectorate. Buganda itself was under British administration for over a year before the Protectorate was declared over it.

3.5.2 Ankole, Toro and Koki

Next Berkeley (still unaware of the abovementioned announcement) sought to formalise Britain's relationships with the kingdoms of Ankole, Toro, and Koki by incorporating them within Buganda. Berkeley told the Foreign Office that one of the main advantages of this was that it would regularise Britain's authority in these territories. He confessed that although for some time British officials had been engaged in maintaining law and order in these kingdoms and the inhabitants usually referred their problems to them, he did not know upon what technical legal basis such interference was justified. He instanced a case submitted to him by Captain Ashburnham (British officer commanding Toro) of a prominent chief of Toro accused of slave trading:

Although I at once took up the case I was not, nor am, very clear as to my technical jurisdiction over a Tor[o] Chief, and by what precise authority I should have punished him had he been found guilty. Our Treaty with Tor[o], for instance, does not refer in any way to slave-dealing.

⁴⁰"Uganda: the establishment of the Protectorate", at p.68.

Berkeley was happy to report that in the particular case the Chief proved his innocence, though he detained him "as a kind of political prisoner."⁴¹

Berkeley claimed that the Kabaka and his chiefs enjoyed considerable influence in the three kingdoms which he could in other circumstances take advantage of, but he thought that in this case it was inept for him to do so at an official level. He submitted that all administrative problems would disappear once these territories were absorbed into Buganda: "[O]ur Treaty with [B]uganda would at once give us all desirable powers, and the central Native government which is under our immediate superintendence and guidance could work with us in a common aim." All that he wanted was permission to bring about agreements between the Kabaka and chiefs of Buganda, and those of Ankole, Toro, and Koki, to become part of Buganda. He promised to ensure that the agreements were made voluntarily by all concerned.

Quite clearly Berkeley's immediate concern was to establish a legal basis for exercising authority in these territories. Being aware of the reluctance of the Foreign Office directly to extend the Protectorate, presumably he thought that his proposal to expand Buganda had a better chance of acceptance than if he asked for the three kingdoms to be declared British protectorates. However, it is arguable that, even if the three kingdoms were incorporated within Buganda, they would still have been outside the Uganda Protectorate since the proclamation which declared the Protectorate expressly limited it to Buganda "proper".

Whatever the legal implications might have been, Berkeley was instructed to

⁴¹Curiously three months earlier Berkeley had despatched to the F.O. a copy of his judgement, *Imperatrix v Juma*, in which he had convicted slave and arms traders in the sphere, Berkeley to F.O., 1 September 1895, FOCP/6913. His decision was subsequently overturned by the High Court of Bombay, *supra*.

proceed with the negotiations and conclusion of the necessary agreements, as he had proposed, in order to bring Ankole, Toro, and Koki "within the scope of the Treaty now existing between [B]Uganda and ... [Britain], by incorporation with [B]Uganda or otherwise."⁴² Curiously, without waiting for the outcome, on 3 July 1896, a proclamation was published in the London Gazette that:

[B]Unyoro, together with that part of the British sphere of influence lying to the west of [B]Uganda and [B]Unyoro which has hitherto not been included in Uganda Protectorate, is placed within the limits of that Protectorate, which includes, also, [B]Usoga and the other territories to the east under the administration of Her Majesty's Commissioner and Consul-General for the Protectorate.⁴³

Again there was no reference to any agreements or treaties with the local rulers. Indeed, on the basis of the minutes of the Foreign Office after the notification, it would seem that the only issue which appeared to bother the Department was whether in the covering letter to Berkeley informing him of the decision it should be noted that the Protectorate had been extended as he had requested.⁴⁴ The despatch which was sent about a fortnight later simply stated that a decision had been made by the Secretary of State to incorporate within the Uganda Protectorate the territories mentioned in the proclamation:

[After] consideration to the questions which have been raised on the subject of the difficulties as regards jurisdiction, arising from the fact that [B]Unyoro, Tor[o] and Ankol[e], though within the British sphere were not included in the Protectorate... [and]... [i]n order to regularise the situation, and to give Her Majesty's Commissioner the powers which are requisite for administration....⁴⁵

The letter continued that, by virtue of the notification, the countries in question were brought within the jurisdiction conferred by the Africa Order in Council. Nothing was said of the earlier instructions to conclude agreements with the three kingdoms.

⁴²F.O. to Berkeley, 13 April 1896, FOCP/6849.

⁴³F.O. to Berkeley, 17 July 1896, FOCP/6861.

⁴⁴Minute Anderson and Hill, 3 July 1896, FO2/111.

⁴⁵F.O. to Berkeley, 17 July 1896, *supra*.

At that stage the situation could be summarised as follows. In the first place, it is evident that the main object for the formal extension of the Protectorate to incorporate the neighbouring countries was to resolve the jurisdictional problems mentioned by the Commissioner. The assumption was that the change of status of the territory from a sphere to a Protectorate would automatically enable the Commissioner to exercise in the region the powers conferred upon him under the Africa Order in Council. Secondly, it appears that the consent of the local rulers was not considered necessary before their territories were incorporated within the Protectorate, or the African Order in Council applied to them. However, with reference to the Africa Order in Council, it must be remembered that these countries, as part of the British sphere of influence, were subject to this Order well before the Protectorate was declared over them except that its application was limited, as we have already indicated.⁴⁶ Moreover, as we shall see below, doubt remained even after the declaration of the Protectorate as to the scope of the Order with regard to the inhabitants of the Protectorate and foreigners who were not subjects of signatory Powers to the Berlin and the Brussels Acts.

Kenneth Ingham,⁴⁷ comments that with the notification of the Protectorate over Ankole, Toro, and the others, the treaties their rulers made with Britain in 1894 were "legalised". It is submitted here, however, that the declaration did not add anything to the legal status of these treaties which, in fact, were approved by the Secretary of State more than a year before the Protectorate was announced. The notification of the Protectorate over these territories, unlike that over Buganda, was not based upon any agreement with the rulers concerned. Besides, the 1894 treaties, as indicated, did not confer any administrative powers or jurisdiction upon the British Government.

⁴⁶ A statement by Morris and Read, Uganda the Development of its Laws, at p.13, that Uganda became subject to the Africa Order in Council on the establishment of the Protectorate, is questionable.

⁴⁷ The Making of Modern Uganda, at page 64.

Consequently, whatever powers Britain had in these territories was by virtue of her status as the protecting country.

3.5.3 Further Extension of the Protectorate

There still remained territories in the north and north-east corner of the Uganda Protectorate which Britain claimed lay within her sphere. Some of these were within the Nile Valley and therefore were critical to Britain's Nile strategy but, as we have seen, the situation was politically delicate. A number of British spying missions had been despatched there to check on the activities of the Belgians and the French. Although the Belgians had by the 1894 Treaty recognised Britain's claims to the sphere, Britain remained suspicious of their movements in the area. However, it was the French who posed the most serious threat to Britain's interest in the region. In 1896 Britain's military intelligence reported a plan by France to acquire a strip of territory connecting her west Africa possessions to the Nile at Fashoda, separating Uganda and the East Africa Protectorate from Egypt.⁴⁸ To forestall the French manoeuvre Salisbury, once again in charge of the Foreign Office, secretly instructed Major Macdonald to survey the territory lying on the northern and north-eastern frontiers of Uganda and the East Africa Protectorates. His orders were "to endeavour and make Treaties with Chiefs in the ... [form provided]" and to explain to them Britain's position in the two Protectorates. The treaty forms were identical with those signed by Toro and Ankole rulers. A second set of treaty forms was also given to Macdonald which provided for a limited protection of the region; but his instructions were that he was only to use the latter if compelled by circumstances.⁴⁹

Because of political turmoil and war in Uganda, Macdonald did not start on his mission until April, 1898. A year later he reported the success of his assignment. He had

⁴⁸Macdonald to Salisbury, 31 July 1899, FOCP/7402. Also Barber, The Imperial Frontier, at p.13

⁴⁹Salisbury to Macdonald, 31 July 1897, FOCP/6964.

twenty eight treaty-forms signed by the chiefs in the region. Macdonald obviously trusted the legal efficacy of the treaties, proudly informing the Secretary of State that:

A total of 50,000 square miles ... [have] been secured to the Empire by treaties, and ... this continuous block of treaty country has been carried northward conterminous with the southern frontier of Abyssinia.

Macdonald claimed that, with these treaties, he had thwarted French plans to establish a continuous belt of territory from the Atlantic to the Red Sea.⁵⁰

Whatever Macdonald's achievements, they had earlier been overshadowed by an Anglo-Franco Agreement of 21 March 1899, partly inspired by Britain's military success in Egypt and Sudan. Under the Agreement France recognised the remainder of Britain's east Africa sphere as demarcated under the Anglo-German Agreement of 1890.⁵¹ With the sphere secured from all conceivable threat by other European states, Britain took her time in formally incorporating the rest of the territory within the existing Protectorate. A scheme devised by Macdonald for the Government to assume immediate control of the so-called "treaty countries" was rebuffed by Salisbury. So were Berkeley's proposals to convert the military posts in the "Nile District" into administrative centres as initial steps towards establishing Britain's authority over the whole Nile region. Salisbury was emphatic that the only expenditure he would authorise was for maintaining the forts for military purposes and not for civil administration.⁵² Quite clearly, as far as the Secretary of State was concerned, the mission had been accomplished. There was no justification for incurring further responsibilities and financial burdens in these regions. Moreover, administering the Uganda Protectorate was proving to be very expensive, especially in military expenditure to suppress both internal conflicts and resistance against British imperialism. The cost of construction of the Uganda Railway had also raised the Protectorate administration bill beyond all original estimates.

⁵⁰Macdonald to Salisbury, 31 July 1899, *supra*.

⁵¹Hertslet, *Map of Africa by Treaty*, 2: 796.

⁵²Barber, *Imperial Frontier*, at pp.17-18.

During the period there were a few jurisdictional problems. These were partly a consequence of the ambiguity of the border between the Uganda and the East Africa Protectorate; and partly due to the lack of clarity concerning the extent of the territories which were actually under British protection. For instance, the Commissioner of the East Africa Protectorate at one time reported a European hunter who challenged Protectorate legislation restricting the number of elephants which could be killed in the Lake Rudolf area. The hunter claimed that since the area in question was neither within the East Africa Protectorate nor that of Uganda, none of the Protectorates had the authority to impose any restriction over the territory. Salisbury, in response, admitted the ambiguity in the description of the Protectorate's boundary. He authorised the Commissioner to assume that the areas in question was within his jurisdiction, though he cautioned him against entering into unnecessary details.⁵³

Similar jurisdictional problems were reported by Harry Johnston, Britain's Special Commissioner, during his mission to Uganda. He complained that a number of foreigners were violating Uganda Protectorate regulations in the Baringo and Rudolf districts on the pretext that they were not aware of the extent of the Protectorate. Johnston submitted to the Foreign Secretary a draft proclamation which he proposed to issue, subject to his approval, declaring all territories covered by Macdonald's and other British agents' treaties (effectively the remainder of the British east Africa sphere) to be incorporated within the Uganda Protectorate. The proclamation decreed that, whether a British administration was established in these regions or not, the laws and regulations promulgated for the Uganda Protectorate would be enforceable, unless otherwise provided. Johnston justified his endeavour in the interest of protecting the natives.

Unfortunately for Johnston the Foreign Office was not impressed by his ambitious

⁵³Salisbury to Hardinge, 31 May 1898, FOCP/7077.

proposal. Time was not ripe to extend the Protectorate. There were other more pressing issues than the jurisdictional problems incurred by the Uganda authorities. Britain was then engaged in a war in south Africa; there were still unsettled boundary problems regarding Bahr-Ghazal district and the southern frontiers of Abyssinia, part of which would probably fall within Johnston's proposed proclamation, thus creating potential problems; and of course there was also the financial cost of administering the Protectorate. Johnston was told to consult with the Commissioner of the East Africa Protectorate, Hardinge, to work out a solution to the jurisdictional problem.⁵⁴

Meanwhile a new Order in Council for Uganda was in preparation by the Foreign Office. The Order was finally promulgated on 11 August 1902.⁵⁵ For the present purposes the most important provision is Article 1 which had the effect of extending the Uganda Protectorate to cover all territories which Johnston had earlier proposed to include therein. The regions which constituted the Uganda Protectorate, and to which the Order was made applicable, were divided into five Provinces: Central, comprising the districts of Bukedi, Elgon, Karamoja, Busoga, and Labar; Rudolf, made up of the districts of Turkwel, Turkana, and Dabassa; Nile, made up of Dodinga, Beri, and Acholi; Western, comprising the kingdoms of Bunyoro, Toro, and Ankole; and finally, the Kingdom of Buganda. Power was reserved to the Secretary of State to remove from or add any territory to the Protectorate. Working out the exact boundaries of the Protectorate took several years to complete. In some cases it involved negotiating with Germany and the Congo Free State where their respective territories shared a common border with Uganda. As between Uganda and the East Africa Protectorate, adjustments were made by local British officials guided by administrative convenience and political considerations. In the end, the Uganda Protectorate of 1902, was by 1927 reduced to about half of its original

⁵⁴ Johnston to Salisbury, 1 February 1900 and Salisbury to Johnston, 19 April 1900, FOCP/7404.

⁵⁵ London Gazette 15 August 1902, see below for details.

size, the beneficiary being the East Africa Protectorate, or Kenya Colony as it was later known.⁵⁶

Assumption of the actual British administration did not automatically follow the legal extension of the Protectorate. It proceeded very slowly, mainly guided by the availability of resources, administrative convenience, and the commercial viability of the particular region. In some cases it took almost twenty years before British authority was effectively established.

3.6 Summary and Conclusion

Portal's provisional treaty conferred upon the British Government legal power to administer Buganda without a formal declaration of a protectorate over the territory. Without cession of power by the local ruler Britain could not exercise any sovereign authority in the country. The decision to regularise Buganda's relationship with Britain was made partly because Britain was already so involved in Buganda that it did not make much difference whether to continue administering it under the interim arrangement or as a protectorate. Moreover, in spite of the substantial powers which the Crown enjoyed under the treaty, there was still some doubt in official circles as to whether it was proper, on political or legal grounds, or both, to exercise those powers, in particular jurisdiction over subjects of other countries within the sphere. It has been submitted that, on a careful reading of the Africa Order in Council, the Commissioner could not administer justice over foreigners in Buganda on the basis of the treaty.

With reference to the rest of the territories, Britain chose not to acquire any administrative authority under the treaties made with the local rulers. In practice zealous British officers assumed administrative powers in the sphere even though they had

⁵⁶Generally A.C.McEwen, International Boundary of East Africa (Oxford, 1971), chapters 17-20; also Kabwegere, The Politics of State Formation, at pp. 56-67.

no legal basis for doing so. It was mainly to rectify this situation that the Uganda Protectorate was gradually extended over these other territories. For the immediate purposes the assumption was that the extension of the Protectorate to the rest of the sphere would thereby give the Commissioner the jurisdiction over foreigners and the inhabitants of the region.

An important point to note about the transitional period -- from a sphere to a Protectorate -- is the different way the Protectorate was established over Buganda as compared with the rest of the country. Whereas the British expressly based their protection of Buganda on the treaty made with the Kabaka, they had no agreement with the rulers of the other regions accepting Britain's protection. The fact that the Foreign Office did not await for the results of its instructions to the Uganda officials to enter into protectorate agreements with the rulers of the neighbouring territories, is indicative that it did not consider their consent necessary. Andrew Roberts observes that with the notification of the Protectorate over the other regions the Uganda Protectorate thus ceased to be based on a treaty with the native state.⁵⁷ His comment, it is submitted, is right provided it does not include Buganda.

In the following chapter I examine the legal consequences of declaring the Uganda Protectorate. In particular I will investigate the authority which Britain claimed accrued by virtue of the Protectorate. Did the status entitle the Crown to exercise all the powers it needed to administer the country? What legal difference did it make that the Protectorate was declared over Buganda on the basis of a treaty while over the other territories the decision was unilateral? These are some of the issues to be examined below.

⁵⁷"The Evolution of the Uganda Protectorate", at p.100

CHAPTER 4

THE BASIS AND EXTENT OF BRITISH JURISDICTION

As indicated in the previous chapter, the main official reason for formally extending the British Protectorate to the rest of the territories was to enable the Commissioner to exercise jurisdiction and other powers conferred upon him under the Africa Order in Council. The Order, from the viewpoint of British municipal law, was the fundamental law for the exercise of British jurisdiction in the territories to which it applied. It has been suggested above, and will be touched upon below, that the application of the Order was limited to British subjects; other persons were only justiciable under its provisions where they voluntarily submitted to British jurisdiction or where their sovereign had agreed to “the exercise of power and authority by Her Majesty.”¹ In Buganda the Kabaka had consented to the Protectorate. Rulers of the other territories had not -- indeed many were not even aware that they were under British protection. In this chapter I examine the legal basis for and the extent of the jurisdiction the British asserted in Uganda in the period from the time the Protectorate was announced up to 1902 when a new Order in Council was made for Uganda.

4.1 General Background to the Jurisdiction Issue

Uganda Protectorate was one of the last British protectorates to be established in Africa. For more than a decade prior to the declaration of the Protectorate there was a lively debate among British officials in London as to the nature and extent of a protecting

¹Article 10 (4), emphasis added.

Power's jurisdiction over persons other than its subjects, in territories under its protection. Although by the time Uganda became a Protectorate much of the steam had evaporated, except in those aspects stated below, an outline of this debate is necessary in order to put the picture of what followed in Uganda in perspective.

For the present purposes we need not trace the issue back before 1886. In August of that year, Britain's Foreign Secretary inquired from his German counterpart as to the legal status of Germany's protectorates in south-west Africa and the South Seas and elsewhere. The question was prompted by an Imperial German decree promulgated earlier in the same year which provided for legislation and administration of justice over all persons in German protectorates, irrespective of nationality. The British Minister wanted to know whether the territories to which the legislation applied had been annexed by Germany or were still regarded as protectorates. If they were still protectorates he wanted to know the basis upon which the German Government asserted its jurisdiction over subjects of other Powers. The German Minister in response explained that the territories in question had not been annexed but were foreign territories under his Government's control. He added that, according to the German Government, if a country submitted to German protection, or was uncivilised and a protectorate was declared over it, such a situation entitled the Government to assume jurisdiction over all persons residing or sojourning therein irrespective of the consent of their governments. Jurisdiction in that case, he said, was not regarded as dependent on annexation nor derived from the native chiefs, but existed by virtue of the protectorate. The German Minister emphasised that jurisdiction over the natives was by treaty left with their chiefs; but only as a matter of expediency rather than law.²

If the British Parliament could enact similar laws for Britain's protectorates, it

²L.O. (Webster and Clerk) to Salisbury, 29 June 1887, FO84/2275.

would solve complex legal problems. However, the question was whether it was within parliamentary competency to enact such laws. A reference to the Law Officers of the Crown returned a negative response. Although the Law Officers sounded somewhat uncertain, since the form of protectorates in question was new in international law and had never been discussed in any of the leading writings, nonetheless they confidently asserted that the relevant general principles were well settled:

... the right of jurisdiction over the persons found in any territory belongs only to a power which is entitled to rights of territorial sovereignty. Those rights may be acquired by conquest, by cession, or by settlement, and where they exist, the Power which possesses them is clearly entitled to exercise jurisdiction over all persons coming within the limits of the territory, whether they be natives of the territory or the subjects of a ... foreign Power.³

Since a protectorate was a foreign territory, the Law Officers opined that no Power had a right to exercise jurisdiction over subjects of other countries within that protectorate without first obtaining the consent of the governments concerned. Alternatively they suggested, as did their predecessors, that jurisdiction could be acquired by treaty from the local rulers; though on diplomatic grounds they cautioned against its exercise without the consent of the Power concerned. In the opinion of these Law Officers, the German law mentioned above was misconceived since no country had the power to alter international law merely by enacting its own laws. They advised that the Germans ought to be reminded accordingly.⁴

The Law Officers' report, which the Foreign Office accepted, was severely criticised by Jenkyns, Parliamentary Counsel, who indeed thought that the German Government

³Ibid.

⁴Ilbert, Assistant to Parliamentary Counsel, attributed the Germans' action to lack of "practical colonial experience". He claimed that their statesmen and jurists were still in an experimenting stage unable to distinguish between a "dominion" and a "protectorate", consequently they referred to all their overseas territories as *Schutzgebiet* (protected territories), memorandum on Indian and African Protectorates, 24 January 1889, FO84/2275.

had taken a step in the right direction.⁵ Jenkyns urged the British Government to follow suit by enacting a law conferring upon the Crown legislative and judicial powers over all persons in any "uncivilised" territories under Britain's protection. He argued that, according to English municipal law, the legislation could not be challenged in British courts. Though internationally it could be subject to diplomatic protest, he thought that if the exercise of the jurisdiction did not entail gross violation of international legal principles or was fairly enforced, objection was unlikely.

Moreover, Jenkyns argued that, if there were no international law principles directly applicable to the subject, as the Law Officers reported, it was an opportune time for Britain to lead the way by making them.

[I]nternational law like other law [he asserted], has altered and grown, and must alter and grow with changing circumstances, and the writers on it have invented principles of international law to suit accomplished facts We may therefore consider in which direction we can direct the growth of international law by municipal law

Besides, Jenkyns stated that, according to a general belief, international law only applied to civilised states of Europe and America, and, if it applied at all to uncivilised territories, it did so only with considerable modification to suit the special circumstances of these territories. One of the factors he mentioned was that, since by virtue of the protectorate a territory was legally cut off from all contact with other European states except through or with the consent of the protecting Power, the latter had a double duty: to safeguard foreigners against native attacks and to provide them with a redress which they could not get from the local rulers. At the same time it was incumbent upon it to ensure that the natives were not injured by the Europeans. As a corollary of this duty,

⁵Memorandum on the application of principles of international law to foreign subjects in British Protectorates, 26 July 1888, FO84/2275. A draft response to the German Government was prepared on the lines suggested by the Law Officers, Salisbury to Count Hatzfeldt, August, 1887, FOCP/5736. It is not clear whether the letter was actually despatched.

Jenkyns submitted that the Protecting state had to assume authority over all persons in the protectorate irrespective of their nationality.

Jenkyns reinforced his argument by referring to Article 34 of the General Act of Berlin, 1885,⁶ which provided that any Power which acquired a protectorate on the coast of Africa had to notify other Signatories to the Act to give them a chance to object if they so wished. This Article (which Jenkyns said constituted international law for the uncivilised states on the coast of Africa) in his interpretation meant that, by notifying the others, all their activities in the territory were immediately excluded or limited and any Power which did not object was deemed to have acquiesced. Furthermore, he suggested that the Article had to be interpreted as enabling the protecting country to assume power in order to discharge obligations imposed upon it under Articles 30 and 35 of the Act: to protect foreign subjects and to maintain sufficient authority to safeguard existing rights and trade.⁷

Strictly, Jenkyns' interpretation of the Berlin Act went beyond what was agreed upon at the conference. First, the Act was only intended to apply to protectorates and new occupations on the coast of Africa; although Jenkyns mentioned this point, he argued as if it were applicable to the whole continent of Africa.⁸ Second, the obligations under Article 35 were imposed only in the case of "new occupations" (annexations) and not simply where a protectorate had been declared. In fact this distinction was maintained at Britain's insistence.⁹

⁶Hertslet, Map of Africa by Treaty, 2: 468.

⁷Jenkyns claimed that that was how the Germans interpreted the provision as evidenced by their response to the British Government in the despatch referred to above.

⁸France rejected Britain's suggestion to apply the Act to the whole continent. The Russian representative also emphasised that his understanding was that the Act's limits was the Africa coast. See Lindley, Backward Territory in International Law, pp.144-148.

⁹*Ibid.*, at p.445. See also Twiss to Paucefote, January 1885; and notes by Lord Chancellor Selbourne dated 3 January 1885, and 11 January 1885; FO84/2275.

Jenkyns also attacked the maxim of "territorial sovereignty" upon which the Law Officers based their challenge to the Germans' legislation. He claimed that the maxim was a product of Austinian jurisprudence -- that sovereignty was indivisible -- which had since been proved false in international law by Henry Maine.¹⁰ If sovereignty was divisible, Jenkyns theorised that the solution to the territorial sovereignty maxim was to conceive of "territory" as the defined area within which any portions of the external and internal sovereignty were exercisable. By declaring a territory its protectorate the protecting Power acquired external sovereignty to the exclusion of others over that area. Jurisdiction, he submitted:

... will depend on the existence in fact of the assumption of the Protectorate, and not on the question whether some naked chief living in the country is or is not sufficiently civilised to cede jurisdiction, or has or has not by some informal agreement in fact ceded it. It really seems absurd that the question of the jurisdiction of one of the Queen's courts should depend upon such points.

Jenkyns conceded that his proposals could in practice cause some inconvenience to the Crown. For example, other Powers could also decide to assert their jurisdiction over British subjects which might well be to their detriment. It could also entail the Government assuming more responsibilities than it was prepared to take on at the time. However, in his opinion, these were all matters of policy for the Cabinet and not for the lawyers to consider. From a legal point of view Jenkyns was convinced that there were no limitations upon the power and jurisdiction which the Crown could claim and exercise in its protectorates. Consequently he strongly felt that it was impolitic for the British Government to make a protest to the German Government, as suggested by the Law Officers, which would not only impede the development of international law, but would expressly commit the Government to a position from which it would find difficult to withdraw in the future.

¹⁰Henry Maine, International Law (London, 1888), at p. 58.

4.2 The Foreign Jurisdiction Bill

In the meantime Jenkyns and Ilbert on one side and Wright on the other, were locked in another (but related) debate over the drafting of the Foreign Jurisdiction Bill. The Bill had been commissioned by the Foreign Secretary to remove doubts regarding foreign jurisdiction which had cropped up since the last consolidation of the Foreign Jurisdiction Act in 1878. Jenkyns and Ilbert could not agree with Wright on the extent to which Parliament could go in legislating over natives and foreigners in British protectorates irrespective of their governments' consent or that of the local sovereign. The former, relying mainly on the points raised by Jenkyns in the foregoing memorandum, urged an express provision in the Foreign Jurisdiction Bill conferring upon the Crown power to exercise jurisdiction over all persons in British protectorates irrespective of the consent of their governments or that of the native sovereign.

Wright, on the other hand, staunchly argued that the existence of jurisdiction in protectorates depended on questions of international law as yet unresolved and could not be predetermined by an Act of Parliament. Although Wright admitted that Ilbert's and Jenkyns' proposal was a convenient solution to the jurisdictional problem, especially in uncivilised countries and that he was aware that, if the jurisdiction were asserted as an Act of State its exercise would require legislation under the Foreign Jurisdiction Act, nonetheless he submitted that "it cannot properly be made an universal incident of Protectorate". Wright also envisaged that such assertion of jurisdiction would, for instance, extend Britain's responsibilities in the protectorates. Yet one of the main reasons for not annexing them was precisely to avoid additional duties. Another problem was that of choice of law for the consular courts to apply to foreigners. In his opinion the courts could not administer English law because that law did not apply to persons who did not owe any allegiance to the British Crown. Nor was it, in his view, conceivable that the British consular courts could apply Italian or American law, as the case might be, in a

foreign territory. Wright submitted that the Bill should not go further than to declare that, where the Crown had acquired jurisdiction, by treaty, capitulation, grant, usage, sufferance, and other lawful means, it could be exercised as prescribed under the Act.¹¹

It should be emphasised that the debate was mainly within an international law framework. Both parties treated the issue as one involving international law, with Jenkyns arguing that international law recognised the exercise of the jurisdiction (or at any rate was not against it), while Wright was sceptical whether indeed international law had developed to that extent. Nor did Wright think that the problem could be solved by resorting to the municipal law. He preferred the matter to be left open to let international law take its usual course of development. Another point of difference to be observed is that Jenkyns and Ilbert felt that even on practical grounds it was to Britain's advantage to assume the jurisdiction. Wright thought otherwise.

Salisbury was in a dilemma as to which opinion should be accepted. Assistance was sought from the Lord Chancellor, Halsbury. The latter without hesitation dismissed Jenkyns' argument (which he said was "trying to push the law in a direction which it had not hitherto taken") on two basic principles. Firstly, no state had a right to alter international law. Secondly, the main advantage of the concept of a protectorate was that it enabled the protecting country to control a territory with little obligation therein, unless it chose otherwise. In the Lord Chancellor's opinion this function would be destroyed if a principle was adopted which virtually removed the distinction between a protectorate and complete sovereignty.¹²

The fate of Jenkyns' argument was thereby sealed. Davidson, legal adviser to the

¹¹See exchange of notes relating to the Bill: 15th, 16th and 20th November, 1888. FO84/2275.

¹²F.O. to Lord Chancellor, 15 December 1888, and memorandum by the Lord Chancellor, 28 March 1890, FO97/562.

Foreign Office, commented that he was not surprised by the Lord Chancellor's opinion as it was in accordance with those of successive Law Officers and other eminent lawyers. He suggested that Jenkyns be informed of the Lord Chancellor's "veto" to his proposals, but to avoid further discussion and counter-memoranda, the reasons were not to be disclosed to him.¹³

The Foreign Jurisdiction Bill was eventually presented to Parliament and passed with little discussion. It became law on 4 August 1890. Apart from a few minor verbal changes the new Act retained the substance of the original 1843 Act and the amendments thereof.¹⁴ This in effect meant that, from the point of view of the Foreign Office -- the Department responsible for the Bill -- the Act did not and could not empower the Crown to exercise jurisdiction over non-British subjects in Britain's protectorates as that was a question to be determined by international law. What the Act authorised was for the Crown to exercise any jurisdiction which it already had or it subsequently acquired "by treaty, capitulation, grant, usage, sufferance and other lawful means ... in the same and as ample a manner as if [Her] Majesty had acquired that jurisdiction by the cession and conquest of territory."¹⁵ In other words the Act cleared away the doubt surrounding the exercise of the jurisdiction in foreign territories from a municipal law point of view, but the jurisdiction had to be obtained first by any of the above means which were acceptable in international law.

¹³Minute Davidson (undated), *ibid.* Instructions were given to print the Lord Chancellor's memorandum for the Foreign Office purposes but it was not to be included in the annual collection of the L.O.R.

¹⁴The text of the Act is printed in Hertslet, Commercial Treaties, 18:286. For a detailed discussion of the making of the Foreign Jurisdiction Bill, see: Johnston, Sovereignty and Protection, pp. 218-225; Colin Newbury "Treaty, Grant, Usage and Sufferance: The Origins of Britain's Colonial Protectorates" in Wood and O'Connor, ed., W.P. Morrell: A Tribute Essays in Modern and Early History (Dunedin University of Otago, 1973) pp.69-80; Palley, The Constitutional History and Law of Southern Rhodesia, pp. 57-60.

¹⁵Preamble and Article 1

4.3 Development of International Law

Barely a year after the enactment of the Foreign Jurisdiction Bill, Bramston, legal adviser to the Colonial Office, raised with the Law Officers the issue of jurisdiction over non-British Europeans in territories under Britain's control. The reference was prompted by reports of British officials in southern Africa that they were encountering difficulties in maintaining law and order among Europeans of diverse nationality, over whom they had no control, who were arriving in large numbers into Bechuanaland and Matabeleland Protectorates. Bramston urged the Law Officers to accept that, according to the prevailing principles of international law, the Crown had the power to legislate and to administer justice over all foreigners in the Protectorates. Interestingly Bramston supported his case with an argument which was identical to that of Jenkyns, reinforced by reference to the recently signed Brussels Act, and the fact that both German and French practices assumed jurisdiction by virtue of the protectorate -- thus proving that the principle already had international recognition. He also drew the Law Officers' attention to the latest edition of Hall's International Law (1890) where a similar point was made.¹⁶

Unlike Jenkyns, Bramston had some success. The Law Officers partially accepted his argument to the effect that consent for the exercise of jurisdiction could be inferred from the Berlin and the Brussels Acts. This, they claimed, was consistent with the view they had always entertained that jurisdiction was either territorial or consensual. However, they were only prepared to accept the rule as regards subjects of the Signatories to the two Acts when in protectorates declared by the other over territories within the contemplation of the said Acts. The Law Officers denied the existence of a general principle of international law which entitled the Crown to assert coercive jurisdiction

¹⁶Memorandum Bramston, 12 March 1891, encl. C.O. to L.O., 23 April 1891, FO881/6207.

merely by declaring a protectorate.¹⁷

By restricting the principle to Signatories to the two Acts it meant that some Europeans and persons of other nationalities (including Africans) whose governments were not parties thereto, were still not justiciable in British courts. Moreover, even for the former, no inference of consent could be made regarding their subjects within protectorates outside the coast of Africa, for example the Pacific where similar jurisdictional issues were being encountered.¹⁸ However, the partial breakthrough enabled the Colonial Office to promulgate the South Africa Order in Council whereby the High Commissioner was authorised to make regulations for the administration of justice and generally for government of all persons in Bechuanaland and Matabeleland protected territories.¹⁹ The Foreign Office also capitalised on the Law Officers' report by amending the Africa Order in Council to apply to all subjects of Signatories to the Berlin Act within British protectorates to which the Order applied.²⁰

Encouraged by his success, in August 1892, Bramston yet again made another proposition to the Law Officers. This time he requested them to consider as a "special case" a draft Order in Council for the Western Pacific which provided for the exercise of jurisdiction over natives and foreigners in the protected Islands "inhabited by native tribes under no civilised government." Bramston claimed that, to make the Protectorate effective in these Islands, the protecting state had to assume extensive powers including

¹⁷L.O. to C.O., 17 April 1891, no. 209, vol.4, L.O.R; also no. 210, 30 April 1891.

¹⁸For example the case of the Protectorate of British New Guinea. In 1884 the Law Officers reported that, if there were no chiefs in the Protectorate to cede to the Crown jurisdiction over non-British subjects, it could not assume it as long as the territory was not annexed, L.O. to Derby, 11 December 1884, FO881/512. New Guinea was annexed in 1888.

¹⁹Article 4. Note that "all persons" is qualified by the fact that the Commissioner could only exercise powers acquired by the Crown in the territory (see Article 2). For the text of the Order, see Hertslet, 19:30.

²⁰For the text of the Order see Hertslet, *Commercial Treaties*, 19:2. The order recited that subjects of the Signatories had been included in accordance with the obligations undertaken under the Berlin Act.

the administration of justice and punishment of all persons of whatever nationality who were oppressive towards the natives as well as natives who attacked foreigners.

A similar argument had been presented to the Law Officers almost ten years earlier, regarding New Guinea. Then it found no favour with the Law Officers (Henry James and Herschell) who suggested annexation as the only solution.²¹ This time the Law Officers (Russell and Rigby), by extending the principle of implied consent under the Berlin Act enunciated by their predecessors, were at pains to give a partial acceptance of Bramston's proposal:

[T]he precedent set by that Act, and the general arguments in support of the jurisdiction of a Protecting Power in similar cases, make it right ... to assume that the Signatories of the Berlin Act will not object to the exercise of jurisdiction over their respective nationals and we think that such jurisdiction may be assumed by the Order, if it be thought advisable as a matter of policy.²²

The scope of the Crown's jurisdiction was thereby extended within a space of only two years since the consolidation of the Foreign Jurisdiction Act. It should be emphasised that the basis of the jurisdiction was still regarded as consensual, however flimsy the line of its inference had become. In fact the two Law Officers in the same month criticised the French for assuming that an international rule had been developed which entitled the protecting state to exercise jurisdiction over all persons, including subjects of countries which were not parties to the Berlin Act.²³ Therefore, according to the prevailing British legal opinion, there were still persons who were not justiciable in the protectorate courts.

²¹L.O. to C.O., 11 December 1884, *supra*.

²²L.O. to C.O., 17 November 1892. The draft Order had been queried by the Foreign Office, see minutes Davidson, 23 August 1892, on Rosebery to Ripon, 26 August 1892, FO58/273.

²³Johnston, *Sovereignty and Protectorates*, at pp. 245- 246.

4.4 Issue of Jurisdiction Over Natives of the Protectorate

What about the natives of the protectorate? Were they subject to the British jurisdiction by virtue of the protectorate? The Law Officers' report of 1892, on the draft Western Pacific Order in Council, advised that jurisdiction over the local inhabitants of the protectorate depended in each case on the treaty with the local sovereign, where there was such a ruler.²⁴ In contrast, the South Africa Order in Council, 1891, which the Law Officers approved, empowered the High Commissioner to legislate for government of all persons within its limits. Nonetheless the Colonial Office instructed him not to include the natives of the protectorate in his proclamations since the law affecting them was still unsettled.²⁵

It was not till 1895, that the Colonial Office was specifically asked to give a ruling as to whether the Crown had jurisdiction over the natives of the protectorate. The request came from Hudson, the Governor of the Gold Coast Colony and Protectorate. Apparently there had been an ongoing debate over this matter between him and the Chief Justice of the Colony, Griffith. According to the Governor, the natives of the Protectorate of the Gold Coast were by "sufferance" subject to the jurisdiction of the courts of the Colony. The Chief Justice on the other hand denied that sufferance could be deemed to be established by the fact that "one ignorant native" had appeared before one of the British courts. Griffith was convinced that, where jurisdiction had not been acquired under the treaty with the local sovereign, the subjects of that sovereign were not justiciable in the British courts.²⁶ In other words the Crown had no jurisdiction over the inhabitants by virtue of the protectorate.

²⁴L.O. to C.O., 17 November 1892, *supra*. The Law Officers had previously been informed that there were no chiefs in British New Guinea, L.O. to Derby, 11 November 1884, *supra*.

²⁵Johnston, *Sovereignty and Protectorates*, at p.245.

²⁶Hudson to C.O., 14 February 1894, CO96/243.

Bramston with his usual flamboyance drafted a response in which he claimed that a principle had been established that existence of a protectorate in an uncivilised country entailed a right on the part of the protecting Power "to exercise within that country such authority and jurisdiction, in short such of the attributes of sovereignty as are required for the due discharge of the duties of the Protector." These duties, he contended, involved protecting foreigners and natives from hurting each other as well as natives from the excesses of their own sovereign. In the circumstances, Bramston submitted that the question of the extent of powers assumed in this type of protectorate was a matter of policy irrespective of express grant in the treaties.²⁷

Had the principle in fact been established? That apparently was the question which the Colonial Secretary asked because, before the letter was despatched to the Governor of the Gold Coast, it was referred to the Law Officers for their comment. The latter (Reid and Lockwood) pointed out that the doctrine propounded by Bramston contradicted the position hitherto assumed by the British Government (which they admitted was contrary to that of France and Germany) that jurisdiction over the natives of the protectorate was dependent on express consent of their sovereign. Nevertheless, the Law Officers reported that over the previous ten years Britain had gradually assimilated her position with that of France and Germany; and in their opinion the principle had been established in accordance with international law.²⁸

The report was hailed by the Colonial Office as an important breakthrough. Wingfield, Assistant Secretary, proposed that, since the principle laid down was generally applicable to all protectorates, a copy of the report and Bramston's draft to the Governor should be sent to the Foreign Office, although it was not the usual practice for the two

²⁷C.O. to Ag. Governor Griffith, draft of January 1895, FO83/1375.

²⁸L.O. to C.O., 14 February 1895, no.78, L.O.R., vol.5.

Departments to keep each other informed of instructions despatched to the protectorates under their control. To counteract possible opposition of the Foreign Office, Wingfield suggested that the report had to be sent "for their information" only, so that no impression was given that the Colonial Office was seeking concurrence over the issue. Irrespective of the Foreign Office, the Colonial Office was prepared to accept the report as it stood.²⁹

Subsequently a copy of the draft and the report were sent to the Foreign Office with an intimation that, if no response was received from that Department within a fortnight, the draft as it was would be despatched to the Governor of the Gold Coast. From the tone of the letter and the fact that the Colonial Office sent the draft after seeking the Law Officers' opinion -- and not before, Davidson was able to guess that the Colonial Office was not concerned about the views of the Foreign Office on the matter. Although Davidson thought that it was probably a good policy for the British Government to modify its earlier views and to bring them into line with French and German jurisprudence, nevertheless he felt that, since the principle reversed the views of the previous Law Officers, who included the current Lord Chancellor (Halsbury), and the Chief Justice (Henry James), the report ought to be submitted to Halsbury before a final decision was taken.³⁰ But his proposal was rejected by the Foreign Secretary, Kimberley, who saw no reason for involving the Lord Chancellor. In the Minister's view there was no justification for not accepting the Law Officers' report "which seems to be in accordance with common sense."³¹

²⁹Minute of 22 February 1895, on L.O. to C.O, *ibid.*, CO96/243. Most likely Wingfield's rider was prompted by the Foreign Office's earlier objection to the provisions of the draft Western Pacific Order relating to the exercise of jurisdiction over the natives of the protectorate, Rosebery to Ripon, 26 August 1892. The objection was raised by Davidson, minute 23 August 1892.

³⁰Minute Davidson 27 February 1895, on C.O. to F.O., 26 February 1895, *ibid.*

³¹Minute of 27 February 1895, *ibid.*

Kimberley's veto on Davidson's suggestion contrasts remarkably with that of Salisbury over the Foreign Jurisdiction Bill. It is quite evident in this case that Kimberley was in favour of the Law Officers' report and perhaps feared that the Lord Chancellor might reject it as he had Jenkyns' argument. On the other hand, Davidson was not excited and probably hoped that Halsbury would intervene.³² One wonders what might have happened had the papers been sent to Halsbury. Three years later he expressed his bitterness over the report and accused the Law Officers who wrote it of ignorance of international law.³³ By then it was too late to change the decision.

The foregoing account indicates how the British reasoned from a denial of a right to exercise jurisdiction over persons who were not subjects of the protecting Power, to its acceptance. Throughout the period the argument was within the framework of international law. The conclusion to be drawn at this stage is that it was not the Foreign Jurisdiction Act which was regarded at the time as the basis for assuming this jurisdiction. Rather it was international law which, as developed, allowed the assumption of coercive jurisdiction over all persons in the protectorate; the Foreign Jurisdiction Act merely provided for the exercise of the jurisdiction by the Crown. One could easily contend that the British statesmen and lawyers conveniently manipulated the legal argument to suit their desired policy. However, it is evident that the matter was much more complicated than such a conclusion warrants. It is obvious that the law was not clear but at the same time expediency for its own sake was not allowed to prevail over what were conceived to be the relevant principles of international law, otherwise all the legal memoranda and arguments would have been unnecessary. Perhaps it hardly needs emphasis that these were confidential documents and yet there was no direct suggestion of the law being flouted in favour of expediency. The manipulation involved was, so to

³²As we shall see, Davidson maintained the argument that the Crown had no jurisdiction over natives of the protectorate.

³³Johnston, Sovereignty and Protectorates, at p. 260.

speaking, calculation within the law and it involved developing the legal principles (usually) to catch up with practical developments. To a legal mind that is not necessarily unusual, indeed that is how the law is developed: reasoning by analogy and distinguishing situations. The question of whether the official legal framework was adhered to in practice, is a different story.

4.5 The Jurisdictional Issue in the Uganda Protectorate

The Africa Order in Council was the fundamental law of the Uganda Protectorate. With regard to the administration of justice, the Order provided for the setting up of consular courts in the Protectorate exercising civil and criminal jurisdiction, so far as circumstances admitted, "upon the principles of and in conformity with the substance of the law for the time being in force in ... England".³⁴ The Order created certain specific offences which were unique to the African continent, and in addition the Commissioner was given power, subject to the approval of the Secretary of State, to make legislation (designated Queen's Regulations) for the maintenance of "peace, order and good government" of British subjects in relation to any matter which was not expressly provided for by the Order.³⁵

Jurisdiction under the Africa Order in Council of 1889 was limited to British subjects (and their property) who were defined for the purpose as including all persons enjoying Her Majesty's protection, and subjects of the British Protected States of India.³⁶ "Foreigners", that is all other persons not falling in the above category (whether Africans or not) could be justiciable under the Order provided that they either voluntarily submitted to British jurisdiction or their local sovereign consented to the exercise of

³⁴Article 13. Colvile was the first Protectorate officer to obtain a judicial warrant to hold a Consular Court in Uganda. Thereafter several other officers received similar powers. The first Consular Judge, Collinson, was appointed in 1896. He was the first person with legal qualifications to be recruited. H.B. Thomas and Robert Scott, *Uganda* (London, OUP, 1935) p.247.

³⁵Articles 48-56, and 99.

³⁶Articles 3 and 10.

British power or authority. This provision was consistent with the prevailing legal opinion that jurisdiction in protectorates was based on consent. As may be recalled, the Order was amended in 1892 to render subjects of Signatories to the General Acts of Berlin and Brussels justiciable in a similar manner as British subjects. A year later inhabitants of any British protectorate when outside their local jurisdiction were also included in the Order.³⁷ The extension of the British jurisdiction over the latter was justified on the ground that, since the Crown was responsible for the foreign relations of their territory the duty of protecting and controlling the natives while abroad devolved on it. As a corollary it had the right to assume jurisdiction over them when in territories subject to Britain's control. It is significant that, even though the Foreign Office did not object to the Colonial Office's instructions to the Governor of the Gold Coast, *supra*, it did not, as on the other occasions, follow-up the legal breakthrough by amending the Africa Order in Council accordingly. Probably this was partly due to the fact that the Departmental legal advisers were not fully convinced by the legal argument for assuming the jurisdiction; and partly that the Foreign Office was not anxious to exercise it.

Since under the 1894 treaty the Kabaka had consented to the declaration of the Protectorate and to the exercise of jurisdiction over his subjects, it is submitted that the Baganda were "foreigners" to whom the Order was applicable. As already explained, the application of the Order to them was subject to the provisions of the treaty.³⁸ On the other hand, the rest of the inhabitants of Uganda Protectorate, and the foreigners not falling into any of the above groups, were not justiciable under the Order except with their consent or that of their rulers.

³⁷For the texts of the Orders see Hertslet, Commercial Treaties, 18:2-4.

³⁸Above at p.43.

4.6 Official Interpretation of the Jurisdictional Position

Predictably there was confusion as to where British authority lay and on what legal basis jurisdiction was exercised. Although the official reason given by the Foreign Office for extending the Protectorate was to enable the administration to exercise jurisdiction under the Africa Order in Council, no one seemed to be sure whether the Order applied to the natives of Uganda. This is illustrated by two judgments delivered by Colvile "in the Court for the district of Port Alice, Entebbe ... under the Africa Order in Council, 1889." In one of the judgments he convicted and sentenced to death one "Badzangeri" (possibly a Muganda "Bazongere") for murdering his wife; and in the second judgment he sentenced a Sudanese soldier to life imprisonment for manslaughter. Colvile reported to the Foreign Office that, in accordance with Articles 74 and 75 of the Africa Order in Council, he had despatched copies of the judgments to the High Court of Bombay.³⁹

Apparently the procedure which he followed bemused the Foreign Office. Immediately Colvile was instructed to explain the legal basis upon which he exercised jurisdiction over the two men. If it was under the Africa Order in Council, the Foreign Office wanted to know why he had not sent the men to be tried in the courts in one of Britain's possessions as required under Article 61 of the Order. Colvile in response cited the 1894 treaty whereby "Her Majesty's representative was authorised to try such criminal cases as he considered desirable." He justified his decision of not sending the accused to Natal, which was the nearest British possession, on the ground that he was merely following the practice of the Zanzibar Court.

The Foreign Office was not any wiser after the second explanation. One official dismissed it as "displaying strange confusion". The contradiction, it would seem from the

³⁹The Articles prescribed that where a sentence in excess of twelve months was given, the judgment had to be sent to the High Court of Bombay (which was the appellate court for Uganda) for review. See Colvile to F.O, 3 April 1895, FO2/72.

point of view of the Foreign Office, was that if the men were tried pursuant to the powers granted by the Kabaka their cases were supposed to be dealt with under the treaty presumably according to Buganda's laws; but not under the Africa Order in Council.⁴⁰ The Foreign Office allowed the matter to drop since (regrettably) the judgments had already been sent to Bombay.⁴¹

Colvile most likely assumed that the treaty enabled him to apply the provisions of the Africa Order in Council over the Baganda -- which, as we have suggested above, was not necessarily wrong. Nor was Colvile's interpretation, in this regard, unique. Harry Johnston, then Commissioner of the British Central Africa Protectorate, had earlier given a similar interpretation to the treaties made with the chiefs in that Protectorate. On several occasions Johnston was reminded by the Foreign Office that the natives were not justiciable under the Africa Order in Council or any regulations made thereunder. The Foreign Office maintained that jurisdiction over the natives of the Protectorate was based on delegation of authority to the Commissioner who exercised it in the name of the Chief concerned.⁴² A parallel view was expressed by Nunan, Consular Judge of the British Central Africa Protectorate, in the case of Cox v The Africa Lakes Corporation: "To try a native case, this Consular Court would have to change its character, and resolve itself into a Native Court exercising jurisdiction, not in pursuance of the King's commission, nor of a judicial warrant signed by His Majesty's Secretary of State for Foreign Affairs, but, by the authority of his Majesty's Commissioner, in the name of the Chief."⁴³

⁴⁰Minute 4 April 1895, *ibid.*, (initials blurred). He also suggested that Colvile probably meant that he did not mean to try them under the Africa Order in Council but under the "[B]uganda law in the fashion of the High Court".

⁴¹*Ibid.* No further correspondence relating to these cases could be traced.

⁴²F.O. to Johnston, no. 135, 22 November 1895, FO2/97. Also discussions at the Foreign Office of a letter from the Acting Commissioner (Sharpe), British Central Africa Protectorate, dated 17 March 1897, minutes Bertie and Davidson. See also Harry Johnston, British Central Africa, (London, Methuen, 1897) at p.114.

⁴³For copy of the judgment enclosure Sharpe to Lansdowne, 29 July 1901, FO2/471. See also Johnston, *ibid.*

In contrast to Colvile, his successor, Berkeley, thought that the Africa Order in Council was not applicable to the natives of the Protectorate.⁴⁴ In his 1897 report which informed the Foreign Secretary of the establishment in Buganda of regular consular courts under the Africa Order in Council, Berkeley emphasised that the "provisions [of the Order], of course, do not apply to the Natives of the jurisdiction". Berkeley explained that justice in cases where only the Baganda were involved was administered in a two tier court system -- "lower" and "higher" courts -- which had been established with the assistance of George Wilson, officer in charge of Buganda. These courts were presided over by the chiefs under the "guidance" of Wilson.⁴⁵ Appeals were sometimes allowed to go to the Commissioner and as a rule no executions ordered by the Buganda courts were carried out without his consent. Berkeley justified the Commissioner's role by reminding the Foreign Secretary that "your Lordship is, of course, aware that by our Treaty with [B]Uganda Her Majesty's Government exercises final jurisdiction over all matters of local jurisdiction". However, he also admitted that in practice the position was to some extent different:

Cases (among natives) would be heard somewhat indiscriminately either in the Courts of the Administration or of local authorities, and in some cases settlements in the nature of judgements would be arrived at a mission. It is clear from all this that among the masses there existed a good deal of doubt as to where real authority lay, and on what lines it was exercised.⁴⁶

Nor did Berkeley think that the rest of the natives of the Protectorate were justiciable under the Order. Indeed in his opinion "... the officers in charge of the ... districts outside [B]Uganda [had] no jurisdiction over disputes and claims to which natives of these districts [were] exclusively concerned." These he said were matters for their local authorities or tribunals as were competent to deal with them. In Berkeley's

⁴⁴This was partly based on his experience in Witu Protectorate, Berkeley to Salisbury, 27 July 1898, FO2/157.

⁴⁵Wilson claimed that he participated at the request of the chiefs, see Wilson to Her Majesty's Commissioner, re: Mr Collinson's despatch 24 July 1898, enclosure, *ibid*.

⁴⁶Berkeley to Salisbury, 26 January 1897, FOCP/6694.

view, the duty of the officers in charge of these districts was "only to see that nothing barbarous [was] done, and that the judgement and punishment ... [were] in accordance with public requirements and with justice according to the officer's own knowledge of the case."⁴⁷

If the Africa Order in Council was not applicable to the natives of the Protectorate, on what legal basis did these district officers intervene in the administration of justice in their districts? What was the legal justification for applying the Order to the indigenes in cases involving both natives and non-natives? Probably these were some of the questions which provoked Collinson, the Protectorate Consular Judge, to offer his own theory of the jurisdictional position in contradistinction to that of the Commissioner. His proposition was that the Africa Order in Council was applicable to the natives of the Protectorate.⁴⁸

Collinson supported his views on two grounds. In the first place, he referred to the definition (under the Order) of "British subjects" which included persons "enjoying Her Majesty's protection". Since the natives of Uganda "no doubt" enjoyed this protection, he held that they were British subjects for the purposes of the Order and therefore justiciable thereunder.⁴⁹ Second, in the alternative, Collinson suggested that the Crown by "usage and sufferance" could apply the Order to the natives and that in fact she had done so with regard to the natives of Uganda, except the Baganda because of the treaty. From his standpoint, the basis of the Crown's jurisdiction over the natives was the Order. For this reason he maintained that the officers responsible for the districts outside

⁴⁷Berkeley to Salisbury, 10 December 1898, *supra*.

⁴⁸Collinson's arguments are paraphrased by Berkeley in his letter to Salisbury, 10 December 1898, *supra*; and in Collinson's memoranda to Berkeley of 24 June 1898 and 27 July 1898, enclosure, *idem*.

⁴⁹Collinson's memorandum of 27 July 1898, enclosure Berkeley to Salisbury, 10 December 1898, FO2/157. With reference to this particular point Berkeley retorted by noting that while Article 3 defined "Native" "Foreigner" and "British Subject", Article 10 (which prescribed persons who were justiciable under the Order) only mentioned the last two.

Buganda, who administered justice among the natives, were under the obligation to comply with the provisions of the Order; for example, they had to transmit to the Bombay High Court all their judgments in which sentences of twelve months or over were imposed.

Collinson did not elaborate the latter argument, however, it is submitted that it was quite tenable at least with regard to some of the districts. It will be recalled that persons who were subject to the Order included "Foreigners ... with respect to whom any ... King, Chief ... whose subjects, or under whose protection, they are, has, by any Treaty, ... or otherwise agreed with Her Majesty or consented to, the exercise of power or authority by Her Majesty." The provision, in other words, contemplated manifestation of consent by any means. According to Lushington's oft quoted judgment in the case of Papayanni v The Russian Steam Navigation Company (The Laconia), usage and sufferance could constitute consent where the usage is "permitted and acquiesced in" by the local ruler; or where there was active or silent "acquiescence" with "full knowledge" without any protest from his part.⁵⁰ Whether or not any particular local ruler fell within this category was obviously a question of fact.⁵¹

Because of the 1894 treaty with the Baganda, Collinson was prepared to draw a distinction between them and the rest of the Protectorate. Jurisdiction over the Baganda -- in Buganda -- he felt was regulated by this treaty. Collinson argued that cases where only the Baganda were involved were justiciable in their own courts, but that the

⁵⁰ 15 E.R. (P.C) 862, at p.870. F.T. Piggott, The Law Relating to Consular Jurisdiction and to Residence in Oriental countries (London, William Clowes and Sons, 1892) at page 53 emphasises that the crucial phrase is "full knowledge"; without it he submits that there could not be sufferance or usage.

⁵¹ Ankole and Toro chiefs were taking their cases to the Protectorate administration even before the Protectorate was formally extended to their territory, see Berkeley to Salisbury, 18 December 1895, *supra*. In the circumstances it was arguable that the Crown had acquired jurisdiction over the Banyankole and Batoro by usage and sufferance; therefore the Order should have applied to them.

Commissioner, either acting personally or through the officer in charge of Buganda, was empowered to intervene and to control any decisions made by them (Article 7). The Commissioner's jurisdiction in that case was not dependent on his judicial warrant but was by virtue of the treaty, and he exercised it in his administrative capacity. On the other hand, Collinson added that, where a Muganda was involved in a dispute with "persons enjoying Her Majesty's Protection", because of Article 5 of the treaty, he was amenable to the jurisdiction of the Consular Court. The distinction which Collinson was apparently trying to draw was that in the former the Africa Order in Council did not apply, while in the latter it did.

It is submitted that the foregoing argument was also conceivable within the scope of the Order. Because of the treaty the Baganda were "foreigners" to whom the Order applied. However, a point which most likely Collinson had in mind, application of the Order in any country which had a treaty with Britain was qualified by Article 16 thereof which provided that, in the event of conflict between the provisions of the treaty and any of the applied laws, including the Order itself, the former would prevail. The treaty with Buganda did not expressly prescribe the law which was to be administered. But since the Kabaka retained the jurisdiction over cases where only the Baganda were involved (subject to appeal and intervention by the Commissioner) it was implicit that the intention was that Buganda's laws and procedure were to apply; whereas in mixed cases, and those involving non-Baganda, where jurisdiction had been surrendered to the Crown, it was the Order.

Collinson was evidently attempting to justify the Crown's jurisdiction over the natives of Uganda within the context of the Protectorate municipal law. If his argument were accepted, it meant that all the provisions of the Africa Order in Council had to be complied with in administering justice over the natives, except the Baganda as explained.

For example, only officers with judicial warrants could hold courts; sentences in excess of twelve months had to be confirmed by the Secretary of State, and the minutes of the judgment had to be sent to the High Court in Bombay for review -- which entailed delay and a possibility of the judgment being overturned on technical grounds. Most likely these considerations influenced Berkeley to take strong exception of the Consular Judge's views. Not that Collinson himself favoured the full fledged application of the Order; quite the contrary. However, he thought that the position as he interpreted it was the law unless regulations were made (as he indeed proposed) providing a simpler system for the administration of justice in the districts outside Buganda.⁵² A point which should be noted is that nowhere in Collinson's argument did he express any reservations that the Crown had jurisdiction, by virtue of the Protectorate, over the natives of Uganda. His endeavour was to explain this jurisdiction within the context of the Order. On the other hand, Berkeley was perhaps confused by the wider issue as to whether the Crown had jurisdiction over non-British subjects within a British protectorate.

4.7 Issue Referred to the Foreign Office

In view of the disagreement between the Commissioner and the Consular Judge, the former requested the Foreign Office to intervene. He wanted an authoritative opinion as to whether the Africa Order in Council was or was not applicable to the natives of the Uganda Protectorate. Berkeley added that, until the position was clarified, it was pointless to make any proposals regarding the administration of justice in the Protectorate especially in the districts outside Buganda.⁵³

At the Foreign Office the matter was referred to the legal adviser, Davidson, to untangle. Characteristically Davidson began by expressing his sympathies for the difficulties Collinson had (which he said were experienced by other lawyers) in construing

⁵²Collinson to Commissioner, 27 July 1898, *supra*.

⁵³Berkeley to Salisbury, 10 December 1898, *supra*.

Articles 3 and 10 of the Africa Order in Council to determine the jurisdictional position of the natives of the Protectorate. Davidson attributed the problem to the ambiguous definitions of a "British subject" and a "Native" in the Order. Nonetheless, he had no doubt that, according to the rules of statutory interpretation, Collinson's construction of the Order was misconceived. Since in Article 3 the definition of "Native" came after that of "British subject", Davidson argued that it overrode the latter "qua its special subject matter of 'British subject' in so far as it purports to include Natives".⁵⁴ In any case, Davidson minuted that, even if Collinson's interpretation were right that the definition of British subject included natives of the Protectorate, it did not, in his opinion, necessarily render them justiciable in Her Majesty's courts if she did not otherwise possess jurisdiction over them:

The Order in Council merely provides for the exercise of Her Majesty's jurisdiction which has (in theory at any rate) been obtained by Treaty or Agreement with the Sultan, King, Chief or other ruler of the Protected place. Such Sultan or other ruler did not grant to Her Majesty jurisdiction over his own subjects and Her Majesty cannot assume a jurisdiction which does not otherwise exist by making phylacteries of a definition clause in the Order in Council.⁵⁵

From the foregoing it is evident that, according to Davidson, the declaration of a protectorate did not by itself entitle the Crown to assume jurisdiction over the natives of the territory. Moreover, it would seem that, in his opinion, jurisdiction could not be created merely by legislating: it had first to be acquired from the local sovereign. If this is a fair interpretation of Davidson's minutes, they contradict the Colonial Office's instructions to the Governor of the Gold Coast, mentioned above. Surprisingly, nowhere in his minutes were these instructions mentioned; on the other hand, it may be recalled that Davidson did not show much enthusiasm about the legal position taken by the

⁵⁴Minute Davidson, 6 April 1898.

⁵⁵Ibid. W.E. Hall, Foreign Powers and Jurisdiction of the British Crown (Oxford, 1894) at page 213, interpreted Article 10(4) of the Order as amounting to the assumption of jurisdiction over the natives of the country and all subjects of European states in the territories where the Order applied.

Colonial Office. Perhaps he did not wish the Foreign Office to follow the latter's precedent which he felt was not consistent with English and international law. It is also noteworthy that in his argument Davidson only dealt with situations where there were no express authorisation by the territorial sovereign to exercise jurisdiction over his subjects. He did not discuss or comment on a situation like that of Buganda which had a treaty with the Crown. Was the Africa Order in Council applicable in that case? Davidson did not say.

Davidson passed on Berkeley's letter to Albert Gray, the draftsman, for his comment and possible action. Significantly, Davidson forewarned him against amending the Africa Order in Council (unless unavoidable) solely to correct the apparent overlapping definitions, as he feared that "doubt [might] thereby be thrown on the proceedings of the last ten years."⁵⁶ This indicates that Davidson was not only opposed, on technical grounds, to the exercise of jurisdiction over the natives of the Protectorate, but he was probably also against it as a matter of policy.

In the event Gray expressed his full agreement with Davidson's interpretation of the jurisdictional position. Gray attacked Collinson for holding that "since a Native of a Protectorate enjoyed Her Majesty's protection ergo, he was a British subject under the Africa Order in Council." In his opinion the premise was unsound in law because the Crown did not protect natives individually in their own country, but only their government. He claimed that it was only when the natives were abroad that they became British protected persons. This was because their government had no independent foreign relations which, by virtue of the protectorate, were Britain's responsibility.⁵⁷ Gray illustrated his argument by reference to the protected states of India which he said

⁵⁶Minute Davidson to Gray, 11 April 1898.

⁵⁷Memo Gray, 11 April 1899, FO2/259. Compare Gray's views with those of Bramston, above pp.77-78.

provided an excellent example of the concept of a protectorate. Although the native governments in east and central Africa were not exactly analogous to those of India (for example they were not as organised and some could hardly be described as governments), nevertheless Gray submitted that there were native laws and custom which the British Government upheld, provided they did not offend against morality and justice. These laws, he argued, could be administered, where possible, through a native agency, otherwise by British Officers.

Addressing himself specifically to Uganda, Gray confessed that he was neither acquainted with the Buganda treaty nor with the distinction which Collinson said should be "observed between Buganda and the rest of the Protectorate." He casually remarked that "it appears from ... [Collinson's] statement that the Baganda are by some treaty provision justiciable to a certain extent to the Consular Courts. Is this so?" He did not comment any further.⁵⁸

Collinson, by basing part of his argument upon the definition of "British subject" in the Order, exposed himself to this criticism. However, that was only part of his argument for holding that the Order was applicable to the natives of the Protectorate. Neither Gray nor Davidson commented upon his suggestion that the Order applied by "usage and sufferance". Gray's ignorance of the treaty provisions, and Davidson's silence about it, are indicative that the two legal advisers were discussing the issues raised from a theoretical standpoint without seriously attempting to relate to the actual facts of the Uganda Protectorate. As suggested earlier, Collinson was trying to justify the Crown's jurisdiction over the natives of Uganda within the framework of the municipal law of the

⁵⁸Subsequently Hill, Head of the Africa desk, sent him a note explaining the treaty. Davidson expressed his gratitude to him for taking a strong view of the "erroneous nature of Collinson's construction of the Africa Order in Council", minutes: Hill to Gray, 15 April 1899; and Davidson to Gray, 26 April 1899.

Protectorate which was founded upon the Africa Order in Council. Both Gray and Davidson denied that the Order was applicable, yet neither of them indicated the legal basis for the Protectorate Government's intervention in the administration of justice within this framework.⁵⁹

There are no records of the Foreign Office's response to Berkeley emanating from the above discussion. Probably it did not write back. This was partly because Berkeley resigned (on health grounds) while the matter was still under discussion, and Harry Johnston was appointed as a Special Commissioner to replace him. Johnston left Britain for Buganda at the beginning of September 1899. Johnston most likely was instructed to resolve the jurisdictional problem in the Protectorate.

4.8 Proposal for a new Order in Council

Meanwhile Gray conferred with Hill, Head of the Africa desk, about the need to promulgate a new Order in Council for Uganda. Gray advised Hill that the Africa Order in Council was "outdated in a Protectorate where the general administration is largely assumed by Her Majesty and we have as you know had great difficulty in doing what is required under it." He predicted that with time these difficulties were bound to increase rather than decrease. In any case, in his opinion, a fresh Order in Council was required "unless we are to go on administering justice to the natives without any written constitution."⁶⁰ Later Gray submitted to the Foreign Office a detailed memorandum in which he reiterated these views. He urged the Department to promulgate a broad based law for the Uganda Protectorate which authorised legislation on general matters of administration, for example, customs, police, post office, land, and so on.⁶¹

⁵⁹See in particular Gray's suggestion that the British officers could administer justice to the natives either through "a native agency" or directly. Query: Was the consent of the local ruler necessary?

⁶⁰Minute Gray to Hill, 9 May 1899, FO2/259.

⁶¹Memorandum respecting law in Uganda, no.97, 2 September 1899, FOCP/7402.

Thus from Gray's analysis the Africa Order in Council was actually the cause of the Protectorate's jurisdictional problems. His advice was simply to repeal and replace it with an appropriately worded Order which conferred extensive power and authority over a wide spectrum of topics. Jurisdiction, contrary to Davidson's views, could after all be acquired by legislation even where it did not exist before!

Gray's solution was of course not new. As we have seen, there were already precedents of such Orders in Council as he proposed in some of the protectorates administered by the Colonial Office.⁶² Why did the Foreign Office adopt a legal position which its lawyers had previously rejected? It seems that the Foreign Office by that time was anxious to extend the powers and administration of the Crown in the protectorates under its control. The Colonial Office was far ahead in this regard and it provided convenient precedents. Moreover, up to that time no legal problems had apparently been experienced with the Colonial Office Orders in Council which authorised the exercise of extensive powers. This might have encouraged the Foreign Office to follow suit. Indeed prior to Gray's submission of his memorandum for a new Order in Council for Uganda, he had referred to the Law Officers a proposed amendment to the East Africa Protectorate Order in Council, 1897. This empowered the Commissioner to issue proclamations for the natives of the protectorate.⁶³ Significantly, Gray, in the accompanying letter to the Law Officers, enclosed the 1895 Colonial Office instructions to the Governor of the Gold Coast, mentioned earlier. Since the Law Officers approved the amendment without demur, it confirmed that, by virtue of the protectorate, the Crown could assume judicial

⁶²For example, South Africa Order in Council, 1891; West Pacific Order in Council, 1892; *supra*.

⁶³See Articles 51 and 52. Although Queen's Regulations dealing with these Courts were enacted there was serious doubt about their legality, Y.P. Ghai and J.P.W. McAuslan, Public Law and Political Change in Kenya: A Study of the Legal Framework of Government From Colonial Times to the Present (Nairobi, OUP, 1970) pp. 19-20. The Order is printed in Hertslet, Commercial Treaties, 20:50.

and legislative powers over the indigenous people.⁶⁴

Hence when Gray recommended that a new Order in Council should be promulgated for Uganda, a decision had already been taken by the Foreign Office as to the general legal question; at any rate, as regards the East Africa Protectorate. In fact Gray suggested that the East Africa Protectorate Order, as amended, should be adopted for Uganda with a rider that certain matters might need special consideration for Uganda's purposes. As an example he singled out the treatment of Buganda the circumstances of which he again confessed, he was not too familiar with.

Instructions to prepare the Order were issued to Gray in March, 1900. Two years later the Uganda Order in Council, 1902, was enacted. This Order is discussed below. One point which should be emphasised here is that, while the above discussions were taking place in London, Johnston, unaware of the London talks, was negotiating a fresh Agreement with the Baganda. Johnston regarded the Agreement he made as the legal breakthrough which authorised the Crown to legislate and administer justice over the Baganda.⁶⁵

4.9 Queen's Regulations

Before drawing a conclusion from the foregoing account, we shall briefly digress to deal with the issue of legislative powers which is closely linked with jurisdiction. If the argument was maintained that the Africa Order in Council was not applicable to the natives of the Protectorate, then it followed that Queen's Regulations could not affect them either. That indeed was the official interpretation in the British Central Africa

⁶⁴F.O. to L.O, 24 July 1899; L.O to F.O, 8 August 1899, FOCP/7402. The amendment fell short of making all persons justiciable under the Order, see Article 2, Hertslet, Commercial Treaties, 21: 118.

⁶⁵See chapter six.

Protectorate, which was also approved by the Foreign Office.⁶⁶

Under the 1894 British/Buganda treaty, there is no provision which empowered the Commissioner to legislate for the Baganda (though, as suggested above, he had the power under the Order). Either because of this or for political expediency, or both, George Wilson reformed the Lukiiko and converted it into a legislative body somewhat modelled on the British Parliament. Thus "Bills" were introduced in the Lukiiko, read and debated at three separate sittings before finally being voted upon to become "statutes". One of the first laws to be made by the Lukiiko was that which required the chiefs to attend to Lukiiko matters for at least a period of four months annually. Another law provided that no legislation made by the Lukiiko was to be valid until it had received the Commissioner's confirmation.⁶⁷ These two laws were obviously part of the reform to convert the Lukiiko into a legislative body under the control of the Commissioner.

Berkeley in his report of the Lukiiko's law making powers, claimed that the Protectorate administration's role was indirect: "It may be that the administration suggests the need for legislation in a particular question, and indicates the line on which it might most advantageously be provided, or the local native authorities themselves take the initiative."⁶⁸ By contrast, Katikiro Apolo Kagwa's account gives the impression that the British officials played a more dominating role. Kagwa bluntly wrote that, "By the 9th of July 1895 Mr Jackson [had] enacted eighteen laws."⁶⁹ Interestingly, these laws, as recorded in Kagwa's book, bear the signatures of Mwanga, Kagwa and two other chiefs. Jackson signed: "Approved by Frederick Jackson, representative of the King of England

⁶⁶ Johnston's Circular to all judicial and other officials of the Protectorate, 17 January 1896, cited in Piggott to H.M.S. Commissioner, 7 April 1898; FO2/147. See also memo by Farnall on the administration of Northern Rhodesia, 8 October 1898, FOCP/7143.

⁶⁷ Kagwa's book, cited below.

⁶⁸ Berkeley to Salisbury, 26 January 1897, *supra*.

⁶⁹ Apolo Kagwa, *Basekabaka be Buganda* (translated, microfilm copy, University of Chicago Library, 1927) p.167. Since the original was not available, I was unable to check whether the term "enact" is an accurate translation of the expression used by Kagwa. However, I have no reason to doubt that this is indeed the case.

in witness thereof." Was Jackson a witness or the one who made the laws? There are at least two possible explanations: either the laws were made by Jackson and the chiefs just signed as a formality; or the system of legislation being new, Kagwa did not appreciate that the laws were made by the Lukiiko since the Commissioner had the final word.

Whatever the practical explanation, using the Lukiiko politically to make laws for Buganda had the advantage in that the chiefs and their subjects were more likely to cooperate if they participated in the legislative process than if the laws were just imposed by the British administration. Secondly, Wilson probably saw the exercise as part of Britain's "civilising" mission of the Baganda. Whether in addition the Lukiiko was consciously developed as a legislative body because the administration believed that it was the only legal mechanism for making law for the Baganda, cannot be said for certain. However, there are a few pointers which suggest that this might well have been the case. The most obvious example is Berkeley's insistence that neither the Order nor Queen's Regulations were applicable to the natives of the Protectorate. One might deduce from this that the Lukiiko was perhaps developed with the intention of being used to enact laws which the Government considered desirable for the administration of Buganda. Secondly, Berkeley's explanation, in his 1897 report earlier referred to, of the administration's role in the Lukiiko's law making process might partly have been intended to portray the view that the Protectorate Government had no direct legislative powers over the Baganda. Another example which supports this line of argument is found in the Protectorate administration's discussion of the proposal to apply in Uganda the Land and Mining Regulations. Both Wilson and Collinson were emphatic that the Regulations had to be adopted by the Buganda Lukiiko before they could apply in Buganda. This indicates that, in their opinion, the Lukiiko was the only body which had the power to legislate for Buganda.⁷⁰

⁷⁰Collinson to Wilson, 11 August 1899, enclosure Wilson to Salisbury, no.83, FOCP/7077, see chapter six.

Nevertheless, there were a few Queen's Regulations which were made applicable to all persons within the Protectorate. Most of these were made after 1900, during Johnston's administration.⁷¹ Ironically, Johnston, while Commissioner of the British Central Africa Protectorate, in 1896 issued a circular to his subordinate staff reminding them that neither the Africa Order in Council nor Queen's Regulations were applicable to the natives of the Protectorate.⁷² Why did he in this case make them applicable to the people of Uganda Protectorate? Why did the Foreign Office approve them when a few months previously its legal advisers had ridiculed Collinson's argument that the Order applied to the natives of the Protectorate? Was the application of the Order regarded as different from Queen's Regulations? Perhaps none of these questions can be answered satisfactorily, though there are a number of possible reasons to account for the contradiction.

Firstly, and perhaps most importantly from a legal point of view, towards the end of 1899 a reference was made to the Law Officers by the Foreign Office with regard to the Crown's powers over land in the Uganda and the East Africa Protectorates. In its letter the Foreign Office confessed that Queen's Regulations had in some cases been made and applied to the natives of the two Protectorates even though strictly there was no power under the Order to do so. In their response the Law Officers agreed that the Regulations were *ultra vires*, but, since they had been authorised by the Crown they were Acts of State and therefore not questionable in the courts.⁷³ Effectively this meant that any legislation could be made and applied to anybody provided it was approved by the Secretary of State. Secondly, as the Foreign Office had accepted the principle that the Crown had the power to exercise judicial and legislative jurisdiction, it might well be that

⁷¹For example Hut Tax Regulations, 20 September 1900; Native Gun Tax Regulations, 30 September 1900; Regulations number 29 and 30' Laws of the Uganda Protectorate 1895-1900.

⁷²Above at p.96n.

⁷³The report is discussed in the following chapter.

it decided not to intervene with Queen's Regulations made under the Africa Order in Council even though they were believed to be irregular. Thirdly, a related point, it might have been decided as a matter of policy not to stifle the local administration with technical issues which after all were meaningless to the persons concerned and probably would never be raised by them.⁷⁴ Finally, with regard to Buganda, Toro (and later) Ankole), the agreements which they entered into with Johnston, expressly accepted the application to them of the laws made by the Protectorate Government provided they were not inconsistent with the provisions of the Agreement.

4.10 Summary and Conclusion

The official reason for formally declaring the Uganda Protectorate was to regularise the Crown's jurisdiction and power therein under the Africa Order in Council. In this chapter we have seen that the establishment of the Protectorate did not automatically resolve the jurisdictional problem. On the contrary controversy persisted amongst British officials, both in Uganda and London, as to whether the Crown had jurisdiction over the local inhabitants and if so whether they were justiciable under the Africa Order in Council which was the fundamental law of the Protectorate. The arguments and the confusion were predictable. In the first place, the law was still very unclear. Even though by the end of 1895 the Law Officers had reported that, according to international law, the Crown was entitled to assume jurisdiction over the natives of the protectorate, the Foreign Office legal advisers were still in doubt. Secondly, the *ad hoc* approach to the problem made consistency difficult. Thirdly, the Africa Order in Council -- itself a product of that *ad hoc* approach -- was ambiguous: it was almost impossible to say which persons were supposed to be subject to its provisions. Fourthly, the Order was not popular with the administrators because it entailed a cumbersome procedure which was

⁷⁴For example, in the East Africa Protectorate, Judge Cator reported the illegal application to the natives of the 1897 Order and the Regulations. His only comment was that if it were in civilised countries it would have led to many jurisdictional issues. See Cator to Hardinge, 11 April 1898, enclosure Hardinge to Salisbury, 18 April 1898, FOCP/7077.

neither comprehensible to them nor to the local people. This factor encouraged arguments that the natives were not justiciable under the Order, thereby leading to other jurisdictional problems.

The argument that the Order was not applicable apparently broke down when it came to the administration of justice in cases involving natives and other persons subject to the Order. Nobody seemed to object that the natives were not justiciable in that situation, even though there was nothing in the Order which justified it. Similarly Queen's Regulations applying to the natives of the Protectorate were approved without demur. Yet the argument and concern of the officials cannot be dismissed as wanting in all genuineness. The fact that the jurisdictional issue was raised and for years discussed at great length in confidential memoranda, not only in relation to Uganda but also to other territories, is indicative of the importance attached to it.

It has been submitted within that the Baganda, because of the treaty, were subject to the Order except that its application was limited by the provisions of the same treaty. As for the rest since their sovereigns had not consented to British protection they were not justiciable under the Order, though it was open to the Crown to bring them within the Order by either acquiring the jurisdiction over them from their rulers or by "usage and sufferance". During the period investigated this interpretation was never officially adopted.

By the end of the period examined the Foreign Office had accepted that the Crown was entitled to assume jurisdiction over persons in the Protectorate. Instructions had been given to make a new Order for Uganda which was to be comprehensive in line with the new legal theory. In the meantime, the new Commissioner for Uganda, Johnston, unaware of the discussions in London, was trying to resolve the jurisdictional and other

problems relating to British administration of Buganda in the conventional manner: by entering into an Agreement with the rulers of Buganda. The Agreement was accepted by the British Government before the new Order was promulgated. As we shall see, it later played a crucial role in the legal and political relation between the British Government and the Kingdom of Buganda. Before I deal with the Agreement I will discuss another contentious issue: whether by virtue of the protectorate the Crown had the power to convey titles or lease unowned or unoccupied land in the protectorate.

CHAPTER 5

DOES ACQUISITION OF THE RIGHTS OF PROTECTING POWER CARRY ANY TITLE TO THE SOIL?

Whether it was the commercial enthusiasm which primarily motivated the British to declare their Protectorate over Uganda is a subject of much controversy. Be that as it may, by the close of the century there was a drive in London and locally to encourage expatriates to exploit Uganda's reputedly fertile land which was lying "waste" and apparently unowned. For the immediate purposes there was a desperate desire to make the Protectorate self-sustaining rather than relying on the British Government for funds for its administration. It was hoped that the sale and lease of land would raise revenue which would go a long way towards meeting this objective. Secondly, and even more importantly; it was anticipated that with the expatriates' capital investment and advanced farming methods the Protectorate would provide in the long run raw materials which could be used for production in the British economy.¹ The construction of the railway from the coast to Uganda increased the anxiety about land in Uganda and the East Africa Protectorate. The railway project involved an expensive capital out-lay and had to be made commercially viable.

The plan to make conveyances and leases out of the "waste" land ran into a legal problem: whether the acquisition of the protecting power carried with it any title to the

¹Wadada Nabudere, Imperialism and Revolution in Uganda (London, Onyx Press, 1980), pp. 37-39.

soil? In other words did the Crown, by virtue of the protectorate, have the power to dispose of land to expatriates? This issue, like the one of jurisdiction, was debated in London as well as in most British protectorates. In this chapter I examine its development and the attempts which were made to resolve it. A brief background of the legal controversy will be given before focusing on Uganda.

5.1 General background

The involvement of the Foreign Office in the issue of Crown authority over the disposal of land can be traced back to March 1893. In that month, the Foreign Office requested the Colonial Office's advice regarding its policy for land sales in Mashonaland and Bechuanaland. This request was prompted by a land settlement scheme for the British Central Africa Protectorate submitted by Commissioner Johnston. Under this scheme, Johnston claimed to have acquired from the native chiefs (through "purchase" "grant" and "cession") approximately one and a half million acres of "Crown land", which he was proposing that the Crown lease to expatriate farmers. The Foreign Office, being inexperienced in dealing with land, sought assistance from the Colonial Office on how best to dispose of this land. If possible, it wanted the two departments to pursue a uniform land policy in all British territories in southern Africa.²

In response, the Colonial Office advised that it made a distinction between land in Mashonaland and the Bechuanaland Protectorate on one hand, and land in the Bechuanaland Colony on the other. With reference to the former, the Crown did not claim ownership. The land was regarded as still vested in the chiefs and the relevant tribes "except such lands as had been duly alienated by them". The only claim made by the Crown, as the protecting Power, was the authority to investigate and confirm or disallow any grants made by the native owners. As for the Bechuanaland Colony,

²Memorandum by Hill, "Land claims in British Central Africa", 11 August 1893, FO881/6383.

because it was an annexed territory, the Crown, according to the Colonial Office, was “regarded as having become the supreme owner of the soil and the duty of allotting land was entrusted by law to the Governor”.³ British Central Africa being a protectorate, its land was in the former category. Consequently the Colonial Office advised that, unless the land was granted to the Crown by the local ruler, it could not be sold or leased by the Crown. With respect to Johnston’s claims of having acquired “Crown Lands”, the Colonial Office suggested that the Foreign Office legal advisers verify the documents upon which he based his claim and ensure they amounted to such transfer of native rights as would enable the Crown to re-grant the land in fee simple or lesser rights. Otherwise, it warned, grantees’ rights could in future be jeopardized by native claims.

The legal distinction which the Colonial Office purported to make was based on the English common law feudal doctrine that all land in England was owned by the Crown from which all other titles ensued.⁴ By virtue of annexation of a territory, whether as a result of cession, conquest, discovery or whatever, this principle was applied to the territory, and the Crown, if it so chose, assumed the radical title to the soil.⁵ Then at its discretion it could convey or grant lesser titles out of this land though, according to international legal principles, it was under an obligation not to dispose of land which was in private ownership prior to annexation. Where however it did violate these obligations, the municipal courts could not interpose to enforce them.⁶ In contrast, a protectorate being a foreign territory, the Crown had no radical title to the soil which was regarded as still vested in (whoever was) the territorial sovereign. Without it the legal advisers could

³C.O. to F.O., 29 April 1894, annex 1, *ibid*.

⁴Also known as “*nulle terre sans seigneur*” (no land without a Lord or no land is allodial). See R.E. Meggery and H.W.R. Wade, The Law of Real Property (London, Stevens, 1966), p.13.

⁵Amodu Tijani v Secretary Southern Nigeria, 1921 (2) A.C. 399, 404.

⁶Cook v Sprigg, (1899) A.C. 572, 578. See also: Vajesingji Joravasingji v Secretary of State, (1924) L.R. 51 Indian Appeal Cases 357, 361; Amodu Tijani, *ibid*. For a general review of cases on the subject from diverse jurisdictions, see the Australian case of Milirroum and others v Nabalco Pty Ltd and Another, 17 F.L.R. 141.

not envisage how, as a matter of law, the Crown could issue titles out of the land unless the land was first expressly granted to the Crown and it sub-granted.⁷ Even then the radical title still remained vested with the territorial grantor.⁸

One of the main reasons for insisting that there had to be a proper conveyance was that investors' titles to the land might in future be at the risk of challenge by the native owners.⁹ Secondly, the legal advisers were concerned about the effect on the constitutional status of a protected territory if the Crown announced the land as Crown lands or granted titles therefrom. There was a theory that a declaration of Crown lands in a territory could be interpreted as tantamount to annexation of that territory. Since the British Government was at the time loath to annex territories in Africa, legal advisers warned against such declarations. Amongst the lawyers who subscribed to this line of argument, perhaps surprisingly, was Bramston. Commenting on the Gold Coast Land Bill, Bramston wrote:

I doubt ... whether the Crown can become the owner, *jure coronae*, of large tracts of foreign territory: to assert such ownership would I think amount to annexation, which if the assertion in any way affects private owners this would be going beyond the exercise of partial sovereignty which H.M. has acquired by

⁷Minute Davidson, 9 June 1897, on Johnston's memorandum, "Government rights over waste land and unoccupied land in British Central Africa Protectorate", 4 June 1897, FO2/128. Davidson, apparently frustrated, commented that "The difficulty in practically dealing with these real property questions in a savage protectorate is that we don't know what the *lex loci rei sitae* is by which they should be governed and we are obliged to try the doctrine of English law as well as we can."

⁸Davidson, *ibid.* But see the case of Crown Prosecutor v The British Central Africa Company, reported in the British Central Africa Protectorate Gazette, 30 October 1905, where it was held that the radical title to the soil in the Protectorate was with the Crown "by virtue of a more or less informal process of surrender and re-grant and that sovereignty of the country is identified [in B.C.A.] with the ownership of the soil." In Salmond's Jurisprudence (London, 10th ed.), App. iv, it is argued that since under the common law the Crown was the owner of all land it followed that application of the common law to a colonial protectorate meant that the Crown automatically became the owner of the land. This theory is opposed by Roberts-Wray, Commonwealth and Colonial Law (London, Stevens and Sons, 1966), pp. 626-627.

⁹The fear was not necessarily far fetched considering the fact, for example, that in 1966 in the Papua New Guinea High Court a tribe challenged the Government's title to land in the national capital claiming that the alleged transfer of the land to the Crown in 1886, was fraudulent. The plaintiffs won the case in the lower Court but lost on appeal, see The Administration of the Territory of P.N.G. and another v Daera Guba, 130 Commonwealth Law Reports 353. See also below at pp.233-236.

virtue of her being the protecting power.¹⁰

Bramston's views apparently were based on the Privy Council case of Attorney-General v Bristowe, where it was held that the making of a Crown grant in a territory previously outside the territorial dominion of the Crown constituted annexation.¹¹ It transpired subsequently that these fears were misconceived since no one can force the Crown to annex a territory against its will.¹² As it happened, Crown lands were later declared in protectorates and titles conveyed by the Crown. And all this had no effect at all on the constitutional status of the protectorates.¹³ This, however, is rationalisation with hindsight. During the period under investigation, as evidenced by the views of such prominent Government legal advisers as Bramston, the law was believed to be otherwise. Indeed, as regards the British Central Africa Protectorate, the Foreign Office, following the advice of the Colonial Office, appointed a departmental committee to verify Johnston's claims. Pending its findings all leases of the "Crown Land" already granted by Johnston were suspended and Johnston was forbidden to make further grants.¹⁴

¹⁰Minute of 12 June 1895 on Maxwell to Ripon, 9 May 1895, CO96/257.

¹¹1880 (6) A.C. 143, at p.148. According to Clark, Colonial Law (London, 1834), at p.330, it was not even necessary that the grants were freeholds.

¹²Per Kennedy, L.J., in R v Crewe ex. p. Sekgome, 1910 K.B. 576, at p.625, citing with approval Stapple v The Queen (unreported).

¹³Roberts-Wray, Commonwealth and Colonial Law, at p. 626 *et seq.*

¹⁴Memorandum Hill, 11 August 1893, *supra*. Eventually the committee confirmed Johnston's claims. Davidson, who saw the report for the first time three year after it was made, expressed strong reservations whether in fact the documents constituted grants. He thought that they were actually "cessions" of territory as opposed to transfer of title to land. Davidson accused Johnston of confusing "cession" with purchase as if they were convertible terms. He proposed that the matter should be referred to the Law Officers, minute of 9 June 1897, on Johnston's memorandum, *supra*.

5.2 The position in the East Africa Protectorate and Uganda

In the East Africa Protectorate and Uganda, the Foreign Office, some two years later, attempted to invoke an exception to the Colonial Office's interpretation of the Crown's rights to the land. It alleged that in the regions beyond the Sultan of Zanzibar's coastline dominion, the Protectorate Administration claimed the right to deal with uncultivated and unoccupied lands without the consent of the natives. Therefore, the Crown could grant titles and mineral concessions out of them.¹⁵ On this assumption, Hill drafted land regulations to be issued in Uganda and the East Africa Protectorate, authorising the Commissioners to grant land titles.¹⁶ Before despatching them to Africa a copy was sent to the Colonial Office for its comment but without specifically mentioning the issue as to whether the Commissioner was legally competent to lease land in the two protectorates.

The legal issue, nonetheless, was raised and it provoked diverse opinions within the Colonial Office. It was Lucas (Assistant Under-Secretary) who, probably unintentionally, exposed it. He stated in his minutes that East Africa (outside the Coast and "possibly" Buganda) was behind South Africa as regards tribal ownership and occupation of land. He theorised that these territories were no man's land and therefore belonged to the strongest man. Since Britain as the protecting Power was the strongest, Lucas saw no reason why it could not make grants of this land which belonged to no one.¹⁷ Bramston disagreed with this argument. He reiterated the concept that legally it was impossible for the Crown to make grants or leases of land in a mere protectorate:

¹⁵F.O. to C.O., 30 June 1896, FOCP/6849. The Foreign Office's information was based on a report given to it by Hardinge, Commissioner of the East Africa Protectorate, Hardinge to Salisbury, 15 May 1896, FOCP/6849. See also generally, M.P.K. Sorrenson, *Origin of European Settlement in Kenya* (Nairobi, Oxford University Press, 1968), pp.46-47.

¹⁶Minute Hill, 20 June 1896, on the draft Land Regulations, FO2/176. The Regulations were modelled on the 1894 IBEAC Land Regulations, Sorrenson, *ibid.*, at p.47.

¹⁷Minute of 30 July 1896, on F.O. to C.O., 30 June 1896, CO417/202. Lucas suspected that the Foreign Office did not wish to raise the legal issue and he saw no reason for doing so.

The acquisition of partial sovereignty in a protectorate does not carry with it any title to the soil. The land is foreign soil and does not become vested in H.M. as in a territory which is actually annexed to the British Dominion.

Consequently, in Bramston's opinion, it was inadvisable for British authorities to purport making grants or leases out of this land which did not belong to the Crown.

In anticipation of further requests for advice from the Foreign Office, Bramston suggested that the desired objectives could be achieved by issuing "permits". He claimed that administrative officials, acting on behalf of the Crown, had the power to issue permits authorising any person to occupy a specified piece of land subject to any conditions as they deemed fit. This, Bramston submitted, was an administrative act and was not in any way in conflict with the legal concept since a permit did not constitute a transfer of title. In effect, he elaborated:

The Crown ... cannot say to an individual this land is mine [and] I give it to you; but it can say, this land is vacant [and] if you like to occupy it on certain conditions, I will take care that nobody interferes with you¹⁸

Bramston emphasised that the distinction he was making was, in law, a real one though in practice the results were bound to be the same. Already there were land regulations for the Gambia Protectorate based on the same principle. He thought the same could be adopted, *mutatis mutandis*, for the East Africa Protectorate.

Bramston's views were in turn questioned by Fairfield, Assistant Under-Secretary, who was also a lawyer by training. Fairfield accused Bramston of perpetuating the concept that distinguished land in a protectorate from that in a colony: "Of all places on earth British East Africa is the last place where we should insist on that distinction."¹⁹

¹⁸Minute of 9 August 1896, and 29 August 1896, *ibid*.

¹⁹Minute of 28 August 1896, *ibid*. Fairfield cited Chief Justice Russel's summing up to the jury in the case of *R v Jameson and others* (1896) T.L.R. 551, at p.594, which he claimed that it effectively brought down the distinction between a protectorate and a dominion. To the latter comment Bramston retorted that the passage cited had nothing to do with the concept that land in a protectorate was foreign soil, minute of 29 August, *supra*.

On practical grounds he reminded Bramston that the British Government was investing over three million pounds in the railway project which had to be recovered. Fairfield was prepared to assume, on the basis of the Foreign Office information, that the Crown had a right to make grants of land in East Africa and Uganda.

Which of these conflicting views were to be recommended to the Foreign Office? That, most likely, was the question which Chamberlain, then Secretary of State for the Colonies, asked himself. Vaguely he scribbled on Bramston's minutes: "Proceed as proposed, but without too much insistence on our old doctrines -- apart from legal interpretation it looks like the protectorate as our administrative garment is wearing out at once."²⁰ On the basis of the letter which was finally sent to the Foreign Office, Chamberlain's note was interpreted to mean approval of all Bramston's views. The letter was a verbatim copy of his minutes. No attempt was made to scale down the legal concept; nor was there any hint given to the Foreign Office of the sharp controversy over this issue within the department. In effect, as far as the Colonial Office was concerned, the circumstances which prevailed in Uganda and the East Africa Protectorates did not constitute an exception to the legal maxim.

There was no immediate reaction to the Colonial Office's letter within the Foreign Office. Davidson had been on leave and conveniently excused himself from commenting on the letter.²¹ But the response provoked an angry reaction from Hardinge, the Commissioner of the East Africa Protectorate -- the man who was mainly pushing the idea. Hardinge sarcastically dismissed as "pedantic" Bramston's distinction between the Crown granting title over waste lands and the Crown authorising occupation of this land as an administrative act. If there were no practical differences, he wondered, "why not

²⁰Minute of 31 August 1896.

²¹Minute (undated) on C.O. to F.O., 14 September 1896, *supra*.

say boldly that all unowned land, and all rights whatever in it, is the property, not necessarily of the Crown, but of the Protectorate Administration?"²²

In spite of Hardinge's sharp reaction, the Foreign Office decided to proceed cautiously. Instructions were given to Gray to draft "simple" land regulations for the East Africa Protectorate, possibly modelled on the Gambia Land Regulations.²³ Gray prepared a draft which essentially was a replica of these Regulations. He based the Regulations on the authority invested with the Commissioner by Article 99 of the Africa Order in Council, to make regulations for "peace, order and good government".²⁴ Under the Regulations the Commissioner was empowered to issue a certificate of occupancy to any person to hold and occupy a specified portion of land for a maximum period of twenty one years. There was no fixed limit on the size of the territory on which he could authorise occupation. However, in exercising his powers he was enjoined from granting certificates of occupancy over areas which, at the date of the promulgation of the Regulations, were cultivated or regularly used by natives. Nor could he permit occupation of land which was already held by any person, native or non-native, under a document of title granted prior to the Regulations.²⁵

Supposedly, these Regulations were based on the common law concept of a license. At common law, a license by itself does not create any estate or a legal or equitable interest in the property to which it relates. In the words of Chief Justice Vaughan,²⁶ "[it]

²²Memorandum of 9 October 1896, FOCP/6913. See also Sorrenson, Origin of European Settlement in Kenya, pp. 46, 47 *et seq.*

²³F.O. to Gray, 10 November 1896, FOCP/6913. Enclosed therewith were the Colonial Office letter of 4 September, referred to above, and Hardinge's comments thereon; and a number of other memoranda on the land matters in the East Africa Protectorate written by Hardinge. Davidson was skeptical about the legality of the Crown's claim to the waste lands, but Hill pressed for the papers to be passed on to Gray to see what he could work out, minute on F.O. to Gray, 10 November 1896, FO107/70.

²⁴See the preamble to the Regulations. For the text, see Hertslet, Commercial Treaties, 21:82.

²⁵Regulations 1, and 5-7.

²⁶Thomas v Sorrell, 1673 Vaugh 330, at page 351.

only makes an action lawful which without it had been unlawful.” Since it creates no title to the land it is not necessary that the licensor is the owner of the land. It was because of these attributes that Bramston believed its issue would not violate the legal concept. On the other hand there is authority to the effect that an instrument which purports to give the holder an exclusive right of occupation of land, though subject to certain reservations for which the land may be used, is in law a demise of the land itself.²⁷ Therefore, if the certificates of occupancy granted under the Land Regulations went beyond the scope of a mere license, they were illegal, since (assuming of course Bramston’s principle was sound law) the land did not belong to the Crown.

5.3 The Land question in Uganda

Although the Uganda Protectorate was occasionally mentioned in these discussions, it was mainly after the drafting of the East Africa Protectorate Land Regulations that it featured more prominently. Until then, none of the Uganda officials had contributed to the discussion, nor it would seem, supplied information to the Foreign Office on the land system in Uganda.²⁸ All the information came from British officials in the East Africa Protectorate. From this it was assumed that similar circumstances prevailed in Uganda. In fact, within Buganda, British officials made no presumptions about the land. All the land was regarded as belonging to the Kabaka. Until 1896 it was he alone who had the power to grant land.²⁹ In that year a land “statute” was passed by the Lukiiko which provided that this power was to be exercised by the Kabaka and the Lukiiko. Moreover, the exercise of this power was subject to the “approval or consent or direction” of the Commissioner. The “statute” also provided for registration of all private grants whether

²⁷ *Glenwood Lumber Company v Phillips* (1904) A.C. 405, at p.408. The Law Officers’ report of 1899 (below p.127), described the licence granted under the Land Regulations as constituting a conveyance.

²⁸ Berkeley to Salisbury, 26 January 1897, FOCP/6964.

²⁹ For example, he granted a small tract of land to Lugard, and later to Colvile on behalf of the Crown, for official use. H.B. Thomas and A.E. Spencer, *Uganda Land and Survey* (Government Printer, Entebbe, 1937), p.45.

to foreigners or to the natives.³⁰ These reforms were part and parcel of an ongoing political struggle between the Kabaka and the chiefs. It was a struggle which the former was gradually losing -- a development encouraged by British administrators.

Meanwhile, in London, following the promulgation of the East Africa Protectorate Land Regulations, Hill inquired from Gray whether similar laws could be enacted for Uganda. The latter was uncertain. He thought they could "provided as I assume that treaties have been made with Mwanga and the other chiefs (if any) in the protectorate giving the Commissioner some power to deal with the land."³¹ Curiously Gray did not impose a similar qualification over the enactment of the Regulations for East Africa Protectorate. The possible explanation is that, according to the information supplied to the Foreign Office, the land in East Africa Protectorate was either unowned, or consent of the chiefs was not regarded as necessary.³² Up to that date there was no specific information on Uganda. Gray probably assumed that the circumstances in the East Africa Protectorate were unique. He had obviously heard about Mwanga and possibly other chiefs whom he thought were responsible for the land and whose consent had to be given before the Regulations applied.

However, subsequently Gray changed his mind. He advised that treaties were not necessary prior to the enactment of the Land Regulations for Uganda. Even then it seems he retained some reservations about the application of the Regulations to Buganda. For having said this he immediately called Hill's attention to Article 10 of the 1894 treaty which, he emphasised, contained the only reference to land: "... and there it is only political or religious distribution of territory -- that expression means distribution as between tribes on the one hand and missionary societies on the other." Gray proposed

³⁰Berkeley to Salisbury, 26 January 1897, FOCP/6694.

³¹Gray to Hill, 3 February 1897, FO2/176.

³²F.O. to Gray, 10 November 1896, *supra*.

that there should be a better and definite land settlement with Mwanga when the treaty was next revised.³³

The Land Regulations finally became law in Uganda on 10 July 1897.³⁴ Their promulgation in Uganda did not raise as much excitement amongst local officials, as did their counterparts in the East Africa Protectorate. This was probably partly due to the absence, as yet, of foreign investors showing interest in land in Uganda as compared to the East Africa Protectorate.³⁵ Secondly, it was assumed that the Regulations were not supposed to apply to Buganda, which at the time was the most important part of the Protectorate. Wilson thought that since all land in Buganda was regarded as the property of the Kabaka the Colonial Office maxim "that the acquisition of the right of a protecting power does not carry with it any title to the soil ..." applied to Buganda. He told the Foreign Office that:

Such being the case, it would perhaps be expedient in disposing of unoccupied lands therein situated to arrange that the regulations should be adopted, in principle at least, by the local authorities in the interests of their Government.

In his opinion the results would practically be the same "as all grants and other transactions affecting public lands are subject to the approval of Her Majesty's Commissioner."³⁶ Similar views were expressed by Collinson. He stressed that the Crown could not dispose of the land in Buganda except where the land was granted to it by the native authority.³⁷

³³Gray to Hill, 5 February 1897, FO2/176.

³⁴For the text see Hertslet, Commercial Treaties, 21: 160.

³⁵For example, by the end of February, 1898, the Land Regulations had only been used once, Wilson to Salisbury, 22 February 1898, FOCP/7077. For an account of the position in the East Africa Protectorate, see Sorrenson, Origins of European Settlement in Kenya, pp.47-51; and Mwangi wa-Githumo, Land and Nationalism (Washington, University Press of America, 1981, > pp.169-73.

³⁶Wilson to Salisbury, *ibid.* Presumably he was referring to the powers given to the Commissioner under the Lukiiko land "statutes", mentioned above.

³⁷Collinson to Wilson, 11 August 1897, enclosure Wilson to Salisbury, *ibid.*

As for the rest of the Protectorate, both Wilson (then Acting-Commissioner) and Collinson assumed that the Land Regulations were automatically applicable to it. Wilson, indeed, complained that the Regulations were unnecessarily restrictive of the Commissioner's powers since "... unoccupied lands have been held, so far without contention, to be entirely at the disposal of the Crown in like manner with those of the interior districts of the British East Africa Protectorate."³⁸ He asserted that the Crown had the power to alienate absolute titles, as opposed to mere certificates of occupancy, over all unoccupied land in the rest of the Protectorate outside Buganda. The two men felt that the Colonial Office maxim was not applicable to these districts because the land was not supposed to be owned by anybody.

The Colonial Office, which received from the Foreign Office copies of the foregoing despatches, cautiously conceded Wilson's argument as far as Buganda was concerned: "If it has already been settled, as Mr Chamberlain is inclined to suppose from Mr Wilson's despatch, to regard all the land in the Kingdom as the property of the natives the disposal of it would rest with the native authorities and not with the administration." It maintained nonetheless that the Crown had the power to control land transactions in Buganda.³⁹ Actually, the Foreign Office had never expressly resolved the issue of land ownership in Buganda; it was the view of the local officials that land in Buganda was the property of the Kabaka.

With reference to the rest of the Protectorate, the Colonial Office categorically denied that the Crown had the power to convey land titles, as opposed to licences of occupancy. It reiterated that, as far as it was concerned, the principle that the acquisition of the rights of protecting Power did not carry any title to the soil, was

³⁸Wilson to Salisbury, *ibid.* Wilson borrowed the phrase quoted from Hardinge's memorandum of 4 September 1896, *supra*, which he in fact cited.

³⁹C.O. to F.O., 21 June 1899, FOCP/7401.

applicable even to unoccupied lands in districts where the land was not regarded as owned by anybody. This was also Gray's view.⁴⁰

There is no record of the Foreign Office communication with Uganda officials over the issues raised by Wilson. Nor is there any evidence to indicate whether Wilson made any overtures to the Buganda authorities to persuade them to adopt the Land Regulations. It is, however, certain that there was no change in the belief that these Regulations were not applicable in Buganda. The only change which seems to have occurred in this regard concerned the reasoning for their non-application. For example, in a District circular which Wilson issued over a year later it was stated that the Land Regulations were not applicable because of the treaty.⁴¹ Yet in the same circular it was claimed that the Protectorate Government "in the exercise of its powers and responsibilities as protector and in accordance with the terms of the treaty" had control over all transactions relating to public land. The circular warned that as a result no transfer or lease of land in Buganda was effective unless approved by the administration. How the treaty exactly fulfilled these roles the circular did not say.

Strictly, it was arguable that the Regulations were not applicable in Buganda in so far as they were inconsistent with the treaty, since, as we have seen, the treaty prevailed over any other law in the Protectorate. The only power relating to land expressed in the treaty, as Gray pointed out to Hill, was under Article 10. This provided that the Commissioner's consent had to be given in all "religious or political transfer of territory". Beside the question whether "transfers of territory" was intended to embrace all land grants as used in this context, two other important points emerge from this provision. First, the Commissioner's consent was required only in cases where the motive for the

⁴⁰Gray to F.O., 21 June 1899, FOCP/7401.

⁴¹Buganda Resident Archives, 15 May 1899. The circular was aimed at the Missions which were receiving gifts of land from the chiefs.

transfer was religious or political. It was not, for instance, required where it was made for purely economic reasons. Secondly, it was implied by this provision that the power to "transfer" was with the Buganda authorities and not with the Commissioner. Thus, the statement in the circular that the Regulations were not enforceable in Buganda because of the treaty, was right. But the claim that the treaty entitled the administration to exert control over all land transactions, was excessive (though it may be recalled this power was given to the Commissioner under the Lukiiko land law "statute").

5.4 The Exception to the Rule -- the Uganda Railway

The adage that all rules are subject to exceptions eventually proved to be true in this case when land was appropriated for the Uganda Railway. The Uganda Railway project was one of the most expensive projects yet undertaken by the British Government in black Africa. Initially its cost was estimated at about two and a half million pounds, but eventually it proved to be almost three times that.⁴² It was anticipated that all land wherever the railway was constructed inevitably would rise in value. As one of the means of recouping the enormous expense incurred in the construction, the Treasury Department suggested that a one mile zone on both sides of the railway, wherever constructed, (including all the minerals therein) be acquired, absolutely, as an asset for the Uganda Railway with power to sell or lease at its discretion.⁴³

As to the merits of this proposal there was probably no one in doubt, but the question was how to reconcile it with the legal maxim. The Treasury's original idea was to include a provision in the Uganda Railway Bill appropriating the land and minerals in the zone. But the Foreign Office objected on the grounds that dealing with land in a protectorate by an Act of Parliament could lead to constitutional issues. Instead, it

⁴²M.F. Hill, Permanent Way: The Story of the Kenya and Uganda railway (London, Hazel Watson, 1949), pp. 83, 134, 243 *et seq.*

⁴³Treasury to F.O., 2 March 1896, cited in Treasury to Salisbury, 24 March 1897, FO2/135.

suggested that the appropriation provision be incorporated in a subsequent Order in Council.⁴⁴ This viewpoint, according to Gray, was not satisfactory either:

The constitutional difficulties involved in dealing with the fee simple of land in a protectorate appear ... to be present equally whether the legislation is by Act of Parliament or by Order in Council.⁴⁵

As a partial solution, he suggested that the Commissioner promulgate Queen's Regulations providing that all rents and rates paid by occupants or holders of land under the Land Regulations in the territory within the Uganda Railway zone be paid to the Railway fund.

Gray's proposal would at least have ensured that the Uganda Railway project received the revenue from the zone. However, this was not considered secure enough for such an expensive out-lay. In the event the Uganda Railway Committee resolved to disregard the legal technicalities and simply proclaim the zone appropriated to the Railway -- a suggestion with which Gray reportedly agreed in a private conversation with Bertie, Chairman of the Railway Committee. Certainly, he thought it was better than appropriating the land by an Order in Council "as it would be difficult to do an illegal thing in that way." Bertie himself, in support of the Committee minuted: "If we appropriate the zone who can turn us out? There is no one with a better title to the waste and unappropriated land."⁴⁶

With the approval of Salisbury, identical instructions were sent to the Uganda and the East Africa Protectorate Commissioners to issue proclamations appropriating for the Uganda Railway, subject to any proven right of ownership, all land within a one mile zone of either side of the railway line wherever finally constructed.⁴⁷ A notification to

⁴⁴Treasury to Salisbury, 24 March 1897, FO2/135.

⁴⁵Gray to F.O., 7 April 1897, FOCP/6964.

⁴⁶Minute Bertie, 15 April 1897, on Gray to F.O., *ibid*.

⁴⁷F.O. to Ternan, and F.O. to Hardinge, both dated 31 May 1897, FOCP/6964.

that effect was published by the Uganda Commissioner on 17 November 1897.⁴⁸ The notice omitted any reference to legal authority upon which the land had been acquired. This most likely was deliberate since the legal advisers were not too sure as to the legal basis of the acquisition of the land.⁴⁹ Subsequently this land, by virtue of the Africa (Acquisition of Lands) Order in Council, 1898, was vested "absolutely" in trustees for the Uganda Railway.⁵⁰ Thereafter, it was presumed ready for sale or lease by the railway authorities.⁵¹

For immediate purposes, especially as regards Uganda, the acquisition of land for the railway was more theoretical than real. The zone could not be identified until after the railway lines were laid, or at any rate after when the survey had been completed -- a very slow process which took years to accomplish. But as a practical result, it proved the Colonial Office maxim was not an impregnable fortress; at least where the land was required for certain public purposes. Later this success was used as a precedent to support the argument that the Crown could, after all, assume title over land in its protectorate. Nevertheless it was some years before that position was generally accepted.

5.5 Ternan's Reform Proposals

In the meantime Ternan, then Acting-Commissioner following Berkeley's resignation, convinced himself of an urgent need to reform the land in system the Uganda Protectorate. Ternan was obsessed with the idea that expatriate farmers would soon flock into the country. He was anxious that when they came there should be sufficient good land as well as land tenure laws which were conducive to investment in the country. The gist of the problem from Ternan's point of view were the Land Regulations. Ternan

⁴⁸Hertslet, Commercial Treaties, 21:93.

⁴⁹See below at p.125.

⁵⁰*Ibid.*, 20: 231. See also the East Africa (Acquisition of Lands) Order, 1898, *idem*, 21: 93.

⁵¹Gray to F.O., 18 November 1897, FOCP/7032.

grumbled that since the Regulations were not applicable in Buganda, the whole question of land disposal was with the chiefs, with hardly any government control.⁵² Outside Buganda, Ternan thought their application was not uniform because "the various customs as to land tenure throughout the Protectorate differ immensely in each district."⁵³ Even where the Regulations were applicable, Ternan suggested they were unsatisfactory. For example, it was difficult to ascertain what was "occupied" and "unoccupied" land (the latter being available for the government's disposal) because of shifting cultivation. In any case, Ternan thought the Regulations were too restrictive and not conducive to potential planters. In particular, they did not contemplate land sales or leases.

Ternan presented to the Foreign Office reform proposals which he called "Proposed Basis of New Land Regulation". They involved a declaration that all land in the Protectorate belonged to both the Government and the inhabiting tribe or sub-tribe, if any. Disposal of this land to any non-member of a tribe was subject to the consent of the Commissioner whose decision as regards the terms and the price was to be final. Proceeds from the sale or lease of this land were to be shared equally between the Government and the tribe concerned. In the absence of an inhabiting tribe, the land and the proceeds were to belong to the Government. The scheme also provided for setting aside, subject to mutual agreement with the tribe, land for Government purposes free of rent or any other payments.

Ternan was so confident about the suitability of his project for all the districts outside Buganda that he did not consider it necessary to discuss it with the officers in charge of the districts, or with the chiefs. However, as for Buganda, "owing to the Treaty" he felt compelled to know the views of the chiefs before he submitted the scheme

⁵²Ternan to Hill, 27 June 1899, FO2/202. Unlike Wilson and Collinson, Ternan believed that the application of the Land Regulations was subject to the local system of land holding.

⁵³Ternan to Salisbury, 22 July 1899, encl. 1, FOCP/7402.

to the Foreign Office. He instructed Wilson to discuss the proposal with them and in particular to find out their feelings as to the proposed sharing of the land with the Protectorate Government. Within three days, Wilson reported the outcome of his discussion with the regent katikiros (Kagwa and Mugwanya). Wilson observed that the two during the conversation were very thoughtful and asked several pertinent questions on how the proposed regulations would affect Buganda. Nevertheless, in the end they gladly accepted the plan. In Wilson's opinion, their decision was mainly influenced by the assurance that under this scheme their income would be secure.⁵⁴

With this backing, the self-assured Ternan submitted his proposal to the Foreign Office. He credited it with several merits over the Land Regulations. Firstly, it was simple. Secondly, it would give the Government control over all land transactions. Thirdly, it would raise substantial revenue for the Government and native authorities through the sale or lease of land (Ternan predicted that this would be the only steady source of revenue for the foreseeable future). Fourthly, it would be very easy for the Government to acquire land for its purposes, moreover, for free. Finally, Ternan claimed it would lead to a uniform land law system throughout the Protectorate.

No doubt Ternan's scheme had some merits. But basically, as a resolution of the legal problem, it just begged the question. A declaration per se, according to the prevailing legal opinion, could not make the Crown a joint owner of the land with the native tribes. Nor could it make the Crown the absolute sole owner of the uninhabited regions. Indeed, that was the core of the problem. For his scheme to be "legal", it had to be assented to by all the local authorities and not just the Buganda chiefs. Some of the disadvantages he mentions were also exaggerated. For example, as Hill observed, defining

⁵⁴Ternan to Wilson, 19 July 1899; and Wilson to Ternan, 22 July 1899, encl. 2 and 3 in Ternan to Salisbury, *supra*.

“inhabited” and “uninhabited” land was not necessarily simpler than “occupied” and “unoccupied” land.⁵⁵

In the event the proposal did not cause any excitement in the Foreign Office. Hill conceded that the Land Regulations had their problems but he did not think this scheme necessarily resolved them. Moreover, Johnston, the Commissioner designate, was already on his way to Uganda. Although land settlement was not expressly included in his mandate, he had specifically requested the Colonial Office to defer any definite decision on the land question pending his report. Furthermore, the Foreign Office was at the time preparing a reference to the Law Officers on the land question in Britain’s protectorates which was bound to affect its land policy.⁵⁶ For these reasons, Ternan was told that a decision over his proposal had been deferred. In the meantime “for the immediate necessities of the case as regards restrictions in the transfer of the native lands” he was authorised to make a regulation similar to the one issued in the East Africa Protectorate on 8 July 1897. The regulation provided that no document purporting to transfer land from a native to a non-native would be recognised unless approved by the officer in charge of the district.⁵⁷

As a matter of fact, Ternan had already published a circular to that effect -- in addition to one communicated earlier by Wilson.⁵⁸ The only issue which was still open concerned the Crown’s power to dispose of this land under the Land Regulations or otherwise. This is the issue which was the subject of a reference to the Law Officers.

⁵⁵Minute Hill, 29 September 1899, on Ternan to Salisbury, FO2/203.

⁵⁶Hill, *ibid.*, proposed that Ternan’s letter should be enclosed with the papers to be sent to the Law Officers. The letter does not appear in the list of documents finally sent to the Law Officers.

⁵⁷F.O. to Ternan, 29 September 1899, FO2/203.

⁵⁸Ternan to Salisbury, telegram of 5 August 1899, FO2/205.

5.6 Reference to the Law Officers

It was Gray's idea that the Law Officers ought to be consulted. The Foreign Office itself had decided to give in to the pressure, especially from Hardinge and some potential settlers in the East Africa Protectorate, to disregard the colonial Office maxim. They maintained that nothing short of freehold or indefinite leases could induce investors to come to East Africa.⁵⁹ As the railway construction progressed inland, the Foreign Office became more concerned about the effect of this maxim on investment. Overtures to the Colonial Office for a compromise were of no avail.⁶⁰ Eventually the Foreign Office decided unilaterally to disregard the legal maxim. Instructions were issued to Gray to draft as far as possible, uniform land regulations for Uganda and the East Africa Protectorate. Gray was authorised if he thought it necessary or expedient, to declare expressly in the Regulations that: "the Administration has the right to deal with waste and unoccupied lands as Crown lands, and to create freehold tenure instead of mere leaseholds."⁶¹ Gray, however, doubted the legality of what the Foreign Office wanted to do. Before proceeding any further, he thought the Foreign Office ought to seek the opinion of the Law Officers over the whole question of land administration in East Africa. Otherwise, he cautioned, "if not put on legal lines [it] may give rise to much future trouble".⁶² This advice could not be disregarded, especially as it was given by Gray who had so far played a very important role in this matter.

Three questions were framed for the Law Officers' opinion.⁶³ First, whether, in

⁵⁹Sorrenson, *Origin of European Settlement in Kenya*, at pp. 50-51.

⁶⁰Salisbury to Hardinge, 6 August 1898, FOCP/7018; F.O. to C.O., 3 September 1897, FOCP/7018; F.O. to C.O., 20 September 1897, FOCP/7018; C.O. to F.O., 10 November 1898 (cited in C.O. to F.O., 7 April 1899, FOCP/7401); C.O. to F.O., 25 January 1899, FO2/259.

⁶¹F.O. to Gray, 9 March 1899, FOCP/7401. It is significant that the instructions were sent before the Colonial Office responded to the despatch of 10 November 1898, *supra*. This indicates that whatever the views of the Colonial Office, the Foreign Office was prepared to proceed with its own arrangements. In the event the former refused to compromise over the issue, C.O. to F.O., 7 April 1899, *ibid*.

⁶²Gray to F.O., 12 June 1899, FOCP/7401.

⁶³F.O. to L.O., 18 November 1899, FOCP/7403.

regions where Her Majesty exercised rights of protectorates under treaties which did not specifically grant to Her Majesty the right of dealing with waste or unoccupied land, such a right accrued by virtue of the protectorate. As a supplement to this question, whether it made any difference if the natives with whom the treaty were concluded, were practically savages without any proper conception of land ownership. Second, if in their opinion the answer to the first question were in the negative, how would the difficulties of Land Certificates be overcome or what other alternatives were available to Her Majesty to deal with land in these regions. Finally, whether the Crown could by operation of the Indian Land Acquisition Act and the East Africa (Acquisition of Lands) Order in Council, 1898, grant a title amounting to a freehold in the regions referred to in the first question.

Though this reference specifically related to Uganda and the East Africa Protectorate, the Law Officers were requested to consider these issues according to general legal principles since the problem was not unique to these two. They were informed that for purposes of the reference, protectorates were divisible into two groups. Group one had an organised system of government and possessed land laws which, inter alia, provided for the tenure and transfer of titles to land. Above all, the concept of private and public ownership of land was well known. Zanzibar and Tunis were identified as typical examples in this group. In contrast, the Foreign Office asserted that protectorates in the second group had not, as yet, developed an organised system of government: "[Territorial] sovereignty, if it can be said to exist at all ... is held by mainly small chiefs or elders, who are practically savages, and who exercise a precarious rule over tribes which have not as yet developed either an administrative or a legislative system". The statement went on to deny that in these communities any idea of tribal ownership of land, let alone private ownership, existed. The nearest to ownership, it was claimed, occurred when crops were grown or where the land was used for grazing. Even

then, the interest was more in the crops and the animals than the land "temporarily occupied by them". All territories in the East Africa Protectorate beyond the Sultan of Zanzibar's coastal dominion, were identified as belonging to this group. In the Uganda Protectorate, the whole Protectorate was included, except the Kingdom of Buganda, which "might perhaps in some respects be placed in the first class". But it was emphasised that this reference was mainly concerned with protectorates in the latter group.

The Foreign Office outlined legislative measures which had been taken so far in respect of land in both protectorates. Some of these measures involved compulsory acquisition of land: for example, under the Indian Land Acquisition Act, land acquired for construction of the railway and other public purposes; the proclamations under which the Uganda Railway zone was appropriated; the proclamation in the East Africa Protectorate which provided for compulsory purchase of native houses and land, and so on. Reference was also made to the Land Regulations and the Commissioner's powers therein. Some of these measures the Foreign Office confessed were somewhat irregular. For instance, land beyond the coastal region was purportedly acquired under the Indian Land Acquisition Act, before the Act was even applied to the region. Another example was that of the proclamations under which land in the East Africa Protectorate and Uganda was acquired for the Uganda Railway. The proclamations did not state on what legal authority they were issued. Moreover, at the time when they and the Land Regulations were promulgated, the Commissioner had no legislative powers over the natives of the Protectorate or their property since the Africa Order in Council and the East Africa Order in Council, 1897, applied only to persons and property of British subjects and some foreigners. Doubt, therefore, still lingered in the Department as to whether these measures were strictly applicable to the natives and their property.

In spite of the irregularities, the Foreign Office was happy to point out that they had not resulted in any ill feelings on the part of the natives, nor had the inhabitants who might have been affected under the Indian Land Acquisition Act, ever instituted any action for appropriating their land under the Act. The latter, in the Foreign Office's opinion, supported the argument that the concept of land ownership was unknown in these regions. Moreover, the Foreign Office argued that if land could be acquired (with compensation) from natives under the Indian Land Acquisition Act, which it believed could thereafter be granted in freehold; it seemed proper by a similar Act for the Crown to acquire waste and unclaimed land.

Reinforcements of the argument were also found in recent precedents regarding the concept of protectorates. The Law Officers were reminded of their predecessors' approval of the Colonial Office's instructions to the Governor of the Gold Coast Colony for the Supreme Court to assume whatever jurisdiction, over all persons in the Protectorate, that might be needed for the effective administration of the Protectorate. Similar precedents were also found in some Orders in Council, which included the Foreign Office's own East Africa Order in Council, 1899, recently approved by them. If the Crown could assume jurisdiction over natives of the Protectorate, why, the Foreign Office wondered, for the good and the development of these regions the Crown could not: "... assume jurisdiction over waste and uncultivated land in places where the native ruler is incompetent, whether from ignorance or otherwise to exercise that jurisdiction."

In a brief response which contained no arguments, the Law Officers (Webster and Finley) reported that in protectorates such as these, the Crown by virtue of the protectorate had the power to assume control over all "lands unappropriated". The Crown was free to declare them Crown lands and to grant freeholds or lesser terms from them. They emphasised that the naming of this land Crown land or public land had no

legal significance. As regards the legislative measures already taken, the Law Officers admitted that there were some irregularities. For instance, they doubted whether the Indian Land Acquisition Act, could have been used as a basis for acquiring unowned lands. They also cast doubt on whether the proclamations declaring the appropriation of the Uganda Railway zone were within the scope of the Commissioner's powers under the Africa Order in Council. On the other hand they exposed the so-called licenses of occupancy issued under the Land Regulations as amounting to actual conveyances. Notwithstanding, in their opinion, the irregularities were not of any legal consequence. The legislation was authorised by the Crown's Secretary of State, therefore they were Acts of the Crown and could not be questioned in any British courts. Nonetheless the Law Officers recommended promulgation of a fresh Order in Council for Uganda which would enable the making of Land Regulations and any other proposed regulations for control of unoccupied land.⁶⁴

Perhaps any other response from the Law Officers was in the circumstances unlikely. In the first place, the reference was not designed as an objective statement requiring an objective opinion. It was a campaign for a favourable response. The Foreign Office had made up its mind to take the land. Already, by some "irregular" legislative measures -- which produced no harm -- it had acquired some land for government purposes. Either the Law Officers had to accept the position or suggest an equally viable alternative. Secondly, the recent developments in the concept of protectorates strongly favoured the Foreign Office's argument. If the Crown could assume jurisdiction over natives of the protectorate, what excuse could be used to deny assumption of jurisdiction over unoccupied land? Added to this, the information given to the Law Officers about these regions (their lack of government and absence of any concept of land ownership) made the situation look extremely hopeless. It meant there was no one to authorise

⁶⁴L.O. to Salisbury, 13 December 1899, FOCP/7403.

occupation of the land: the natives neither understood nor cared about its ownership. Could such a situation be allowed to continue especially in view of the British economic investment in East Africa?

A number of writers have since proved that even at that time the idea of land ownership was not as alien to some of the tribes as the Foreign Office asserted.⁶⁵ Some go on to claim, possibly with some element of political motivation, that indeed there was no land at all which was not owned at the material time.⁶⁶ Similarly allegation of lack of proper governments throughout these regions is, rightly, strongly contested. It is ironical that whereas ten years earlier the Law Officers had been told that there were native sovereigns to cede jurisdiction, when it came to land it was a different story. The fact that sovereignty was spread over many people, as alleged by the Foreign Office, was of course legally irrelevant. Yet it would be perhaps going a bit too far to suggest that the information was fabricated to secure a favourable response from the Law Officers.⁶⁷ According to the prevailing standards of investigation it was probably believed to be true. Though at the same time it must be emphasised that the Law Officers' opinion was based on facts as given by the Foreign Office. It is a matter of speculation as to whether their report would have differed with different information.

Finally, the concept of Act of State, which the Law Officers invoked to uphold the irregular legislative measures, strictly meant that nothing could be questioned in the British courts provided that the Secretary of State approved or ratified the action. But

⁶⁵See for example: Sorrenson, Origin of European Settlement in Kenya, at p.51; W.S. Routledge and K. Routledge, With a Pre-Historical People: The Akikuyu of the British East Africa (London, Edward Arnold, 1910), at p. 12; K.Maini, Land Law in East Africa (Nairobi, Oxford University Press, 1967), at p.3.

⁶⁶See for example, Mwangi, Land and Nationalism, at pp. 173-176. See also Kimble, A Political History of Ghana, chapter 9.

⁶⁷Sorrenson, Origin of European Settlement in Kenya, at pp. 177-79, argues that the misinterpretation of the Kikuyuland system: that land ownership was unknown, was originally deliberate to discourage foreigners from attempting to buy land.

as will be shown below, it was only gradually that this concept came to be critically relied upon.

5.7 The Outcome

Naturally the report was a welcome relief to the Foreign Office. Davidson described it as the most valuable opinion.⁶⁸ Gray recommended that Orders in Council be promulgated for both Uganda and the East Africa Protectorate to put the land system in the two Protectorates on a basis consistent with the Law Officers' opinion. He suggested that it ought to be declared expressly in the Order that all unappropriated and waste land were vested in the Crown and could be disposed of either in fee or for a term of years at the Crown's discretion. As for Buganda, Gray thought that its "special circumstances" would require consideration both in the Order and in any subsequent regulations. If the Protectorate Government admitted the rights of the chiefs to alienate the land, he proposed the promulgation of regulations empowering the Commissioner to control the transaction.⁶⁹

Gray's proposals were approved by the Foreign Office. Instructions were duly given to him to draft the necessary Orders in Council for both Uganda and the East Africa Protectorate vesting all land belonging to Her Majesty either by virtue of the Protectorate or otherwise in the Commissioner for the time being as trustee for the Crown.⁷⁰ In the first draft (East Africa Lands Order in Council) Gray defined Crown lands as:

All lands belonging to Her Majesty by virtue of any Treaty or Convention, or of Her Majesty's Protectorate, or assigned or transferred to His Highness the Sultan of Zanzibar or the British East Africa Company, all waste and unoccupied lands ... and all lands which have been or may be otherwise howsoever purchased or acquired by Her Majesty within the Protectorate

⁶⁸Minute of 6 February 1900, on L.O. to Salisbury, *supra*, FO881/7675.

⁶⁹Gray to F.O., 16 February 1900, FOCP/7404.

⁷⁰F.O. to Gray, 12 March 1900, FO881/7404.

These lands were to vest "absolutely" in the Commissioner for the time being in trust for the Queen. Gray intended to incorporate a similar provision in the Uganda Order in Council which he was drafting. He emphasised to the Foreign Office that the important point was to ensure that the definition comprised all the different sources of Her Majesty's rights to land in the Protectorate.⁷¹

However, in the end Gray's definition of Crown land was amended by the Law Officers to read as follows:

... all public lands in the East Africa Protectorate [or Uganda as the case may be] which are subject to the control by virtue of His Majesty's Protectorate, and all lands which shall have been acquired by His Majesty for public services or otherwise.⁷²

A comparison of the two definitions shows that the latter was much more concise than the former proposed by Gray. Moreover, Gray's definition purported to embrace not only lands which belonged to the Crown "by virtue of the protectorate" but also "all waste and unoccupied lands" which, strictly, would have included more land than was justified by the Law Officers' opinion. It is quite possible that the Law Officers amended the definition to limit Crown lands within the scope of their report. Finally, it is also noted that the word "control" (which is the actual word used in their report) was substituted for "belong". The two words are not of course synonymous. Indeed control without claiming ownership was always claimed as the only power which the Crown had over the land by virtue of the Protectorate. Control as used by the Law Officers in this particular case must have been intended to encompass much more than the control as hitherto used since it included the power to convey all the lands that were under the "control" of the Crown -- which made the land more akin to being owned than merely supervised. Why then did they shy away from an outright declaration of ownership as in Gray's draft?

⁷¹Gray to F.O., 3 September 1900.

⁷²This is the version which was adopted in the Uganda Order in Council, 1902, Article 2. See also the East Africa (Lands Order in Council), Article 1. For the texts of the Orders see Hertslet, 23: 63 and 227.

Was it because the idea that land in a protectorate did not belong to the Crown still haunted them? Claire Palley⁷³ suggests that this might well have been the case.

5.8 Summary and Conclusion

Within Buganda the local Officials' views were consistent. Land throughout the Kingdom was the property of the Kabaka and it was he with his Lukiiko who had the power to dispose of this land. Even the Protectorate Government had to acquire land for its purposes in Buganda from the Kabaka. Some of the Officials assumed this was due to the treaty (which was quite true though there is no evidence of any reasoned argument on this basis). The Colonial Office maxim, if anything, merely confirmed what was in any case already taken for granted. The only power claimed by the local officials was that of control over land transactions by the Kabaka and the Lukiiko. Even here confusion reigned as to the basis of this power. The treaty, the "statutes" made by the Lukiiko and the power of the Crown "by virtue of the protectorate", were all at one time or other cited as the basis of this authority. A literal interpretation of the treaty was incapable of sustaining this claim. The Lukiiko "statute" was probably the basis of the Commissioner's power over land in Buganda.

As for the rest of the Protectorate, similar confusion was displayed. Some of the local officials assumed that the Crown had unlimited powers over all unoccupied lands in these districts, whilst others were not too sure. Ternan's scheme in particular highlighted this confusion.

The Foreign Office was in the midst of the imbroglio. It was caught between the Colonial Office legal maxim and the information and pressure from its field officers. With reference to Buganda, it never made up its mind whether to accept the views of the local

⁷³The Constitutional History and Law of Southern Rhodesia, at page 82-83 .

officials or not; the Buganda land question was throughout the period referred to in hypothetical terms. In contrast with the rest of the Protectorate, at least judging by the memorandum accompanying the reference to the Law Officers, the Foreign Office accepted the generalised view that the land was not owned.

Finally, the opinion of the Law Officers that the Crown could after all by virtue of its protectorate convey titles out of unappropriated lands helped to clear a decade-long confusion. In the process it narrowed down the distinction between the type of protectorates described in the reference and annexed territories. But there was still a problem of interpretation. The Law Officers' report was based on certain facts as given by the Foreign Office: the territories were ruled by "savage" chiefs and had no conception of tribal or private ownership of land. What if the facts in practice or in certain areas were found to be otherwise? Many years later, as will be shown below, the issue of which land the Crown was entitled to convey by virtue of the protectorate was still being raised. In Buganda the question was resolved by the 1900 Buganda Agreement which was entered into shortly after the Law Officers reported.

In the next chapter I examine the 1900 Agreement and its legal significance from its makers' viewpoint. Subsequently I shall revert to the land question in the light of this Agreement and the new Order in Council.

CHAPTER 6

THE BUGANDA AGREEMENT

On 10 March 1900, an Agreement was made between the chiefs of Buganda acting on behalf of the Kabaka (then a minor) and the people of Buganda on one side and Harry Johnston acting on behalf of the Queen, on the other. This Agreement was called the Uganda Agreement, hereafter the Buganda Agreement.¹ It has been variously described as “Buganda’s charter of rights” “the Magna Carta” “Buganda’s constitution” and so on.² The Agreement was a landmark in Britain’s relationship with Buganda. It survived for fifty odd years. Anthony Low, Buganda and British Overrule,³ aptly observes that of all treaties between Britain and native authorities during the colonial era “few ... have been of such consequence as ... [this] Agreement, few have been so detailed, few have attained such importance in the relationship with the colonial people; few too have so enjoyed their approbation or become so embedded in their folklore.” Apart from the Buganda Agreement there was the Toro Agreement which Johnston made some three months later with the rulers of that Kingdom; and the Ankole Agreement which was entered into the following year.⁴ Although these two Agreements were important in their own ways they did not achieve the prominence of the Buganda Agreement.

¹Appendix 3. The Agreement was ratified on 15 June 1900, Hertslet, Map of Africa by Treaty, 1: 397.

²For example, Kabaka of Buganda, Desecration of My Kingdom (London, Constable, 1967), p. 63; Low and Pratt, Buganda and British Overrule, p.56.

³At page 3.

⁴26 June 1900, and 7 August 1901, respectively. See Appendix 4. The Ankole and Toro Agreements are discussed in F.Uzoigwe, ed., Uganda: The Dilemma of Nationhood (New York, Nok Publishers International, 1982), chapter 4.

The Buganda Agreement was negotiated and made by Johnston unaware of the Law Officers' report on the Crown's judicial powers and right to dispose of land in the protectorate. This chapter assesses the Agreement and the reasons leading to its making. Was the Agreement meant to be simply a political settlement? Was it regarded as legally necessary in order to confer upon the Crown sovereign powers in Buganda? It is not intended at this stage to discuss whether the Agreement was actually a treaty in the legal sense: my concern is with the understanding of its makers at the material time.

6.1 Origins of the Agreement

The political background to the Agreement is well documented. Since the establishment of the Protectorate there was never any real peace in the country. Britain found herself engaged in one war after another: war against Mwanga; Kabarega; and a number of other tribes in their quest to fend off imperialism. In addition she had to quash a mutiny by her hitherto trusted Sudanese mercenaries. All these wars were calculated in monetary terms. It was all expenditure with very little revenue. Even Buganda, where much of the original hope for prosperity had been placed, hardly produced anything for revenue purposes. The construction of the Uganda Railway, which was regarded as part of the overall bill for the administration of Uganda, aggravated the financial situation.⁵ By the end of the century, after the capture of Mwanga and Kabarega and the suppression of the Sudanese mutiny, there was some relative tranquility, which at least in Buganda, had not been enjoyed for more than a decade.

Following Berkeley's resignation, Salisbury instructed that he had to be replaced by a first class officer who would put the Protectorate on a more satisfactory footing. The person who was found to possess the necessary qualities was Harry Johnston. He had served in various posts in Africa including that of Commissioner in British Central Africa

⁵Ingham, The Making of Modern Uganda, chapter 4.

Protectorate. His experience in the latter Protectorate had influence on his activities in Uganda.

Johnston was given a special commission with two main objectives. First, he was to:

Organise the administration of the Uganda Protectorate on lines which, with due regard to economy and any minor alteration which experience might suggest, will meet the requirements of the Protectorate on completion of the railway from Mombasa and a creation of a more rapid communication with Europe⁶

Second, Johnston was instructed to "pay special attention to the possibilities of raising the present revenue, without risk of arousing the susceptibilities of the natives or pressing unduly upon their resources." Because of Johnston's "experience in the public service in west and central Africa" and his "general acquaintance with the state of affairs in the Uganda Protectorate" it was not considered necessary to set out in detail how he was to achieve these objectives. The assumption was that he already knew what he was supposed to do and how to do it. Johnston however had discussions with the Foreign Office before leaving for Uganda.

To appreciate fully Johnston's activities and the making of the Buganda Agreement one needs to look at them in the light of prior events as well as the surrounding circumstances. Many writers have, rightly, stressed the political and the economic aspects of these events.⁷ Nevertheless there are also legal issues which it is felt have been relegated to the background if not totally ignored by some historians.⁸ As we have seen in the previous chapters, there was confusion as to the extent of the Crown's power and authority in Uganda Protectorate, and in other British protectorates. The critical legal

⁶Salisbury to Johnston, 1 July 1899, FOCP/7402.

⁷For details see Low and Pratt, Buganda and British Overrule, chapter 1.

⁸For example, Low and Pratt, *ibid.*, at p.193.

issues at the time of Johnston's commission were those of land and jurisdiction. As earlier indicated Johnston left London for Uganda before the legal position had been cleared and he did not become aware of it until after the Agreement had been negotiated and signed. Land, jurisdiction, and taxation, were some of the main items dealt with in the Agreement. Since there were outstanding legal problems in relation to these matters, it has to be assumed (even though his formal instructions did not expressly say so), that Johnston was required to solve them by entering into a new treaty or securing an amendment to the current one. The statements made by Johnston and the surrounding circumstances support this argument.⁹

6.2 Negotiations of the Agreement

Whatever the exact instructions might have been, as soon as Johnston arrived in Buganda he initiated negotiations with the chiefs for a new Agreement. Johnston, like Lugard ten years earlier, thought that the negotiations would be a very simple process taking only a few days. He was mistaken; probably he had not read Lugard's account of his experience of treating with the Baganda. The negotiations were carried on for more than two months. Meeting after meeting was held, many of which were stormy and tempers flared. The chiefs asked Johnston questions about all aspects of his proposals. As we commented with regard to the other Buganda treaties, the anxiety which was exhibited by the Baganda over Johnston's plans is indicative of the fact that they were aware of the nature of the transaction.

Johnston used threats and persuasion in his endeavour to force the Baganda to come to terms with him. He told the chiefs that if they refused to grant to the Crown the power to dispose of waste and uncultivated land he would, as the representative of the protecting State, forbid any transfers of land made by the chiefs:

⁹For example, Johnston to Salisbury, 13 October 1899, FOCP/7403. Jorgensen, Uganda a Modern History, at p.49, claims that Johnston arrived in Uganda with instructions to negotiate an agreement.

This will greatly hinder the establishment of traders and planters and will delay indefinitely the prosperity of the country; but I can see no alternative.¹⁰

Buganda, Johnston stressed, had to pay a price for being part of the British Empire and part of that price was the surrender to the Crown of the power to dispose of waste and uncultivated land. On the basis of his statement it is clear that Johnston believed that only the chiefs had the legal power to make land grants in Buganda. His task was to persuade them to confer their rights upon the Protectorate Government.

Johnston also tried to rationalise the position to the chiefs. He told them that the British tax-payers could not go on indefinitely sponsoring Buganda's administration. Buganda, Johnston maintained, had to contribute towards the colonial bill by paying taxes and revenue from forests and uncultivated land. If Buganda refused to accept Britain's protection, he predicted that other European Powers which it was too weak to resist would overrun it.

According to some historians Johnston was bargaining from a position of strength vis-a-vis the Baganda. The chiefs over the years had witnessed Britain's military prowess which had destroyed Mwanga, Kabarega, and more recently the Sudanese mercenaries. What could the British not do? Moreover, it is pointed out that the chiefs with whom he negotiated partly owed their ascendancy to the British and did not feel secure without them.¹¹ Other historians however contend that it was in fact the chiefs who had an edge over Johnston. This is supported by the argument that Britain at the time had many problems in her colonies in Africa, a war was the last thing she could afford. Johnston in fact sounded a warning to his Government that for the survival of the Protectorate it was imperative to come to terms with the Baganda:

¹⁰ Johnston to Jackson, 15 January 1900, cited in Low and Pratt, Buganda and British Overrule, at p. 44.

¹¹ Low and Pratt, *ibid.*, pp. 31-32, and 182.

If there is any part of the Uganda Protectorate which could do us any real harm it is ... the Kingdom of [B]Uganda. Here we have something like a million fairly intelligent, slightly civilized negroes of warlike tendencies, and possessing about 10,000 to 12,000 guns. These are the only people for a long time to come who can deal a serious blow to British rule in this direction¹²

Perhaps the truth is that each side had weaknesses and strength. However, for the present the issue of relative bargaining strength is not very important. The point is it was a bargain. Johnston was trying to acquire from the chiefs more powers for the Protectorate Government to administer Buganda and to raise revenue.

Eventually, when the chiefs accepted his proposals Johnston, evidently nervous, wrote to a friend:

I am just about to conclude a most important Treaty with the King and Chiefs of [B]Uganda which give us power to tax the natives, the control of land, and all branches of government. There is many a slip betwixt the cup and the lip, and although the Chiefs have appointed next Saturday the 10th March for signing the Treaty I shall not chuckle until it is signed and posted. When this is done I shall consider I have achieved a most striking success the results of nearly three months' negotiations.¹³

The chiefs kept their word. At a special public ceremony, after the Agreement was read in both English and Luganda, the Regent chiefs and five Saza chiefs signed it on behalf of the Kabaka and people of Buganda, and Johnston signed on behalf of the British Queen. Twenty other chiefs and a number of Europeans and local British officials witnessed the signatures. Later Johnston justified the long list of signatories to the Foreign Secretary that it was on the suggestion of Apolo Kagwa so that "in future they did not plead ignorance of its terms and its binding nature."¹⁴

¹² Johnston to Salisbury, 17 March 1900, quoted Low and Pratt, *ibid.*

¹³ Johnston to Selater, 6 March 1900, A7/6.

¹⁴ Johnston to Salisbury, 6 April 1900.

6.3 Terms of the Agreement

The Agreement was so comprehensive that it virtually covered all aspects of government and Buganda's relationship with the Protectorate Government. For convenience the Agreement is divisible into three main parts: land; taxation; and administration.

6.3.1 Land

Not surprisingly the land question was the most controversial aspect of the Agreement. Johnston was forced to abandon his original demand for the Crown to take all waste and uncultivated land. Instead he settled for the Kabaka, chiefs and notables to be granted as private estates large pieces of land running in square miles according to sizes prescribed in Article 15 of the Agreement. The remainder of the land, apart from private estates already granted to Europeans and missions, and all forests waste became Crown land. Johnston estimated the Crown's share to be approximately 10,550 square miles -- which was about half of his estimated total area of Buganda.¹⁵ Johnston boasted that before the Agreement the Crown had only fifty square miles of land in Buganda. He was confident that the land acquired would be a very important source of revenue to the Crown.

Shortly after the Agreement was signed Johnston sent a cable to the Foreign Office informing it of his success in concluding a land settlement. He requested postponement of any further steps in the land matters until the Foreign Office had received his report. By that time the Law Officers' report on land was already out and Gray was preparing the necessary legislation to give legal effect to their opinion. Hill felt that it would be a pity to stop Gray; nonetheless he sent him privately a copy of Johnston's telegram.¹⁶

¹⁵ Johnston to Salisbury, 12 March 1900, *supra*.

¹⁶ Telegrams dated 17 March and 17 April, 1900. See also minutes Hill, 30 March 1900, and an undated one, FO2/301.

Meanwhile, in Uganda Johnston, booming with confidence, issued a circular to warn Europeans who persisted to acquire land from natives. The circular read:

... in virtue of the Treaties and Agreements concluded with the Kings and Chiefs of ... [Uganda] Protectorate and its adjoining territories, Her Majesty's Government has acquired the sole right of disposal over the waste and uncultivated lands of the ... Protectorate and its adjoining districts

The circular went on to prohibit any acquisition of land from the natives by non-natives whether by purchase or gift, without the consent of the Commissioner. Johnston explained to the Foreign Secretary that the notice was "drawn up, of course, on the assumption that your Lordship will ratify the recent Agreement into which I have entered into with the Kingdom of [B]Uganda."¹⁷

The Foreign Office approved the circular, for whatever it was worth, as "a timely and useful warning" which brought "certain facts to the knowledge of the East Africa public" Johnston was however reminded of the instructions given to his predecessor to promulgate a Regulation prohibiting transfer of land from native to non-natives.¹⁸ The rather cold response is indicative that the Foreign Office was not sharing in Johnston's enthusiasm. No doubt, at least for the immediate purposes, the Law Officers' report had overshadowed most of the credit which should have been given to Johnston for his success.

6.3.2 Taxation

As indicated above, Johnston hailed the power to tax the Baganda as one of the most important achievements of his Agreement. One of the main reasons for this was that the taxation provisions of the 1894 treaty were not very clear. Under Article 11 thereof the Protectorate Government was empowered to control the assessment, collection and the expenditure of tax revenue; while under Article 13 it had the authority to impose

¹⁷ Johnston to Salisbury, 10 April 1900, FO881/7405. There is no record of any other agreements allegedly entered into by Johnston with the "Kings and Chiefs" of the Protectorate. The Toro Agreement was made a month after the circular.

¹⁸ F.O. to Johnston, 15 June 1900, FO881/7405.

custom duty on all goods leaving or entering Buganda. Whereas the custom revenue was expressly stated to be for the sole use and benefit of the Protectorate Government, the treaty was not so explicit about the revenue from the internal taxation. According to Berkeley's interpretation of the treaty, the Government was entitled to all revenue from taxation.¹⁹ The Foreign Office on the other hand doubted whether that was indeed the correct construction. In its letter to the Treasury relating to the Estimates of Receipts and Expenditure of the Uganda Protectorate, it explained that:

According to the Treaty with the King of [B]Uganda, of which a copy is enclosed, only the import and export duties accrue the exchequer of the Protecting Power²⁰

Johnston's instructions were that in Buganda, because of the treaty, all revenue had in the first place to be collected in the name and on the account of the Kabaka. And it was on his account that it was to be expended. However, for administrative convenience, he was told to secure the collection of all revenue in the Protectorate and its expenditure in the name of the Crown. Under the Agreement, Article 12, it was stipulated that the Baganda would pay a hut and gun tax the proceeds of which were to be handed over intact to the Protectorate Government as contribution towards its maintenance. Furthermore, the Baganda would be subject to the same "exterior taxation" as was imposed on other parts of the Protectorate. The Article however declared that except as was provided in the Agreement no further "interior taxation" would be imposed on Baganda without the consent of their government. In other words the power to tax the Baganda was limited. As we shall see below, controversy developed over the interpretation of this provision.

As security for the payment and receipt of the taxation revenue by the Protectorate

¹⁹Berkeley to Salisbury, 31 October 1896, *supra*.

²⁰F.O. to Treasury, 26 January 1895, FOCP/6697.

Government the validity and continuation of the Agreement was partly based on the payment of this tax. By Article 20 the Government had the right to terminate it if the Buganda authorities failed to raise within the first two years of the Agreement, at least, half of the estimated taxation revenue, or if thereafter without a reasonable excuse that minimum was not collected. By linking the Agreement with the payment of tax Johnston thereby ensured that the chiefs would become tax collecting agents for the colonial state.

6.3.3 Administration

For administrative purposes it was agreed that Buganda was to be a province equal in rank with any other province into which the Protectorate might be divided into (Article 3). This provision was quite significant since Buganda had always been treated differently from the rest of the Protectorate. For example in the discussion of the land and jurisdiction issues Buganda was always mentioned as a possible exception to the general rule. This had partly to do with the 1894 treaty, a fact itself which is noteworthy. Johnston's objective in incorporating this provision in the Agreement was to try and prevent the administration of Buganda from being different from that of the other parts of the Protectorate or the future combined Uganda and East Africa Protectorate which was then under contemplation.

However, the equality under the Agreement itself was more theoretical than real. Article 5 stipulated that all laws and regulations made for the Protectorate were to be applicable to Buganda "except in so far as they may in any particular conflict with the terms of this Agreement, in which case the terms of the Agreement will constitute a special exception to the Kingdom of [B]Uganda."²¹ Since Buganda was guaranteed certain rights which were not available to the others, and which could not be overridden by the Protectorate legislation, it could not be equal in rank with them.

²¹It may be recalled that that was indeed the position under the Africa Order in Council, which was still current. Above at p 43.

As for the administration of justice, the Agreement provided for a Buganda court system (designated Kabaka's courts) with the Kabaka acting through the Lukiiko as the highest court. Jurisdiction of the Lukiiko over the Baganda was unlimited. A right of appeal to the Protectorate courts was granted in all cases of capital sentence or imprisonment in excess of five years or a fine of over one hundred pounds.²² In addition the Commissioner was given power of "remonstrance" with the Kabaka where an inhuman punishment was imposed by any of the Kabaka's courts (Article 8). The latter courts however had no jurisdiction to deal with cases where any of the persons involved was not a Muganda. All such cases were only justiciable in the British courts. Thus in purely Baganda cases the Protectorate courts had only appellate jurisdiction; while in mixed cases they had full jurisdiction.

Generally there was nothing new in the foregoing arrangement. The Crown under the 1894 treaty had unlimited jurisdiction over the Baganda. And the Kabaka had surrendered to the Crown his jurisdiction over the non-Baganda. Moreover, the Buganda court system was already established under the Lukiiko "statutes". However, as it may be recalled, there was serious doubt whether the Baganda were subject to the jurisdiction of the consular courts. The Agreement made it clear that on appeal and in mixed cases they were justiciable in these courts. Even though the Commissioneer was given the power to remonstrate with the Kabaka, it would seem that that was not intended to confer judicial jurisdiction to him. Rather it was an administrative -- at best quasi-judicial -- power to supervise the exercise of jurisdiction by the Kabaka's courts. This was considerably different from the power the Commissioner held under the 1894 treaty.

The position of the Kabaka in the administrative structure was also expressly

²²See Article 6. There was no mention of civil cases in the Article, most likely the omission was inadvertent since in Article 8 reference is made to civil cases.

provided for under the Agreement. The British Government would continue to recognise him as the native ruler of Buganda (Article 6):

So long as the Kabaka, chiefs, and people of [B]Uganda shall conform to the laws and regulations instituted for their governance by Her Majesty's Government, and shall cooperate loyally with [it] in the organisation and administration of [Buganda].

The Kabaka was to carry the honorific title of "His Highness the Kabaka of Buganda", a title which Johnston strongly urged the Secretary of State to approve because, in his view, the Kabaka of Buganda was of no lesser importance than the Sultan of Zanzibar (he carried a similar title) who ruled over a much smaller territory and had fewer people.

Subject to this Agreement, the Kabaka was to exercise a "direct rule" over the Baganda with the assistance of three Ministers appointed by him with the approval of the Commissioner. In addition the Lukiiko (constituted of these Ministers, the saza chiefs, and persons nominated by the Kabaka with the approval of the Commissioner) was to function as his advisory body. Any administrative measures desired by the Lukiiko were to be passed in form of "resolutions" and presented to the Kabaka for his consent. However, the Kabaka had to consult with the Commissioner before giving his consent and was explicitly bound, whether to approve or not, by the latter's advice.²³

It has been suggested that the Kabaka ended up the worst loser in the Agreement.²⁴ He no longer ruled as of right but had to be recognised by the British Government. Most of all the powers reserved for him were either to be exercised subject to the approval of the Commissioner or with the advice of the Lukiiko. In the circumstances this is not surprising. The political events in Buganda especially in the last decade of the century saw the ascendancy of the chiefs over the Kabaka -- a trend encouraged by the British.

²³This was not entirely new; the Lukiiko was already making "statutes" subject to the approval of the Commissioner.

²⁴Luyimbazi-Zake, Reform in Uganda (Kampala, Sapoba Bookshop, undated), at pp. 10-17.

Moreover, the Kabaka was a minor at the time of the negotiations. Nevertheless this loss of power ought not to be judged solely in terms of this Agreement; regard must also be had to the 1894 treaty. Under its provisions Mwanga surrendered a substantial part of his sovereign powers. The new Agreement, apart from land matters and possibly taxation, mainly clarified the position and consolidated the powers since granted under the Lukiiko "statutes".

6.4 Ratification of the Agreement

Unlike the 1893 Portal/Mwanga treaty, it was not expressed that the Agreement was provisional and subject to ratification by the Crown. Nor is there any evidence to indicate that Johnston advised the signatories of this point. In spite of this, according to Halleck's International Law,²⁵ ratification is required "even where this requisite is not reserved by the express terms of the treaty itself". The treaty though, except where it is otherwise provided, takes effect from the time of its signature and not the date of ratification.

Johnston was aware that the treaty had to be confirmed by the Government before it became effective. In his despatch forwarding it, he pleaded to the Foreign Secretary that:

I sincerely hope your Lordship will ratify this Agreement, the value of which, I believe I do not over-estimate by saying that it solves the questions of taxation of the natives and the control of the land in Uganda Protectorate, and as regards the Kingdom of [B]Uganda ..., determines once and for all its exact boundaries, rights, privileges and obligations.

Johnston pointed out that in accordance with its terms, if the chiefs "displayed the slightest disobedience or disloyalty" then it would be open to the Crown to declare the Agreement null and void. Thereafter, he claimed, the Crown could institute whatever

²⁵Volume 1, at page 276.

government it deemed proper for Buganda.²⁶

As noted earlier, since Johnston was given his commission there had been important changes in the legal thinking at the Foreign Office. The Law Officers had reported favourably on the land issue; and they had confirmed to the Foreign Office that the Crown could assume jurisdiction over the natives of the protectorate even where such powers were not expressly granted under the treaty with the local ruler. It was then generally accepted that the Crown's powers could be extended by legislation. Indeed by the time the Foreign Office heard of the Agreement, Gray was under instruction to draft a new Order in Council for Uganda which, in terms of the Crown's powers, was expected to be more comprehensive than the Africa Order in Council. Hence the position was much more relaxed.

Nonetheless there was some excitement about the Agreement. Hill commented that it was "very ably conceived and of which the first reading impress[ed him] favourably." Brodrick, Parliamentary Under-Secretary, cautioned that it would sooner or later be scrutinised in Parliament. By the time the Agreement reached Davidson it was dubbed the "[B]uganda Constitution". Davidson had no qualms with its provisions.²⁷ Subsequently a Departmental committee, composed of Brodrick (Chairman), Davidson, Hill, and Ternan, was assigned the task of examining the Agreement. Generally the committee was in favour of ratifying it though it raised some queries about the land settlement. In its opinion this settlement was bound to lead to the introduction of the complicated English law of real property for which Buganda was ill-prepared. Salisbury

²⁶ Johnston to Salisbury, 12 March 1900, *supra*, and Johnston to Salisbury, 28 August 1900, FO2/299.

²⁷ Minutes on Johnston to Salisbury, 12 March 1900, *supra*,. Minute Hill, 4 May 1900; Brodrick and Davidson's minutes are undated. In the file there is an undated and uninitialed note "send to Cabinet". Low and Pratt, Buganda and British Overrule, at p. 91n, say that it was written by Salisbury.

on the other hand did not share the committee's fears. If English law were not introduced, he asked, which law was suitable? "They are all complicated -- even the code Napoleon." His only reservation was the duration of the Agreement. Salisbury thought that it ought to be given a trial period of four years before its final confirmation.²⁸

Eventually the Foreign Office decided not to carry out any amendments to the Agreement since it was felt that it would thereby invalidate it unless all the signatories thereto endorsed the changes. The Agreement, nevertheless, was ratified on condition that the British Government reserved to itself a right to alter its terms if circumstances rendered it necessary. Johnston was specifically instructed formally to inform the signatory chiefs accordingly.²⁹ Strictly, of course, the British Government's rider was an addition to the Agreement which ought to have invalidated it unless the other party accepted them. The indication, according to a report ten years later by Governor Girouard of the East Africa Protectorate, is that most likely Johnston did not inform the Buganda signatories about the Government's qualification to the Agreement. Girouard who was trying to find a way around the Agreement lamented that as a result the reservation could not be relied upon to amend its terms.³⁰

A copy of the Agreement was in the meantime sent to Gray who was already under instruction to draft a new Order in Council for Uganda. There is no evidence available to the present writer, of what exactly his instruction were regarding the Agreement. However, when Gray submitted the first draft of the new Order he reported that "it comprises one at least of the principal provisions of ... Johnston's recent convention, namely, that which places natives of [B]Uganda under the jurisdiction of native courts

²⁸Minutes on Johnston to Salisbury, *ibid.* See also Salisbury's minutes of 13 June 1900, on the Committee's report, FO2/380.

²⁹Salisbury to Johnston, 15 June 1900, FO881/7505.

³⁰Report on the Uganda Protectorate by Girouard, 15 November 1909, CO533/63. Most likely Johnston did not want to risk another round of negotiations with the chiefs.

with an ultimate appeal to the Protectorate court.”³¹ The impact of the Agreement on the new Uganda Order in Council is examined in the following chapter.

6.5 Summary and Conclusion

Johnston was aware that the colonial state could not succeed without collaborators. By granting extensive estates to the Bakungu oligarchy and strengthening the institution of the Lukiiko as a judicial and administrative body, he ensured its support of the Protectorate Government and the Agreement. Moreover, he realised that Buganda -- because of its population, military strength and social organisation -- posed the most serious threat to the colonial Government. In his pragmatism he came to terms with its rulers. Hence the political goal of the Agreement was to enlist support and to find a secure base from which the rest of the Protectorate was to be ruled.

Apart from the political aims, it was at the time deemed necessary to enter into this Agreement in order for the Government to expand its legal powers in Buganda. If one takes into account the legal issues and the level of thinking at the time of Johnston's commission; and the statements made by Johnston and his predecessors, before and after the Agreement, all indicate that that must have been the assumption in Uganda. The Buganda/British relations were based on a treaty of protection whose validity or efficacy as a legally binding document had never been questioned. Indeed under the Africa Order in Council, which was the current municipal law of the Protectorate, it prevailed over any other law. It was therefore natural for Johnston to enter into a new Agreement as the British Government wanted to extend its legal powers beyond those already possessed. Whether or not the Foreign Office construed the Agreement in a similar manner, is more difficult to answer because of the changes in the legal thinking which occurred just when it was being negotiated. This issue is dealt with in the following chapter. It suffices to note

³¹Gray to F.O., 21 July 1900, FO881/7675.

here that the fact that the Agreement was scrutinised by the senior officials of the Department, and actually sent to the draftsman while the Order was still under preparation, is significant.

In the next chapter I examine the 1902 Uganda Order in Council and how it related to the Buganda Agreement. In subsequent chapters the issue of conflict between the Order and the Agreement will be tackled.

CHAPTER 7

ASSUMPTION OF COMPREHENSIVE LEGAL POWER: THE UGANDA ORDER IN COUNCIL

We have seen that at the close of the last century, Gray urged the Foreign Office to have the Africa Order in Council repealed for Uganda and replaced by a more broadly based Order. The legal draftsman was by then convinced that by legislation the Crown's authority could be extended to cover almost all aspects of government in the Protectorate. This idea had been confirmed by the Law Officers' opinion following their approval of the East Africa Order in Council, 1899, and, equally important, their report on the land question. While these events were taking place in London Johnston, unaware of them, was busy negotiating the Buganda Agreement. In fact he submitted the Agreement to the Foreign Office shortly after formal instructions had been given to Gray to proceed to draft a new Order in Council for Uganda.

In this chapter I examine the main provisions of the Uganda Order in Council in contrast with the Africa Order in Council, and the basis the power thereunder was assumed. I will also investigate the impact, if any, the Buganda Agreement had on the drafting of the new Order in Council. The crucial question is whether the Agreement was regarded as the source of the Crown's legal powers in Buganda.

Originally the Foreign Office intended the new Uganda Order to follow as closely as possible the precedent of the East Africa Orders in Council of 1897 and 1899. The object was for both protectorates to have uniform laws as at the time it was contemplated that

they might be combined into one Protectorate. In any event with the improvement in communication, mainly as a result of the construction of the railway which was steadily proceeding inland, there was bound to be a great deal of movement of people and goods between the two protectorates. Since their borders were ill-defined it was convenient administratively for the two British protectorates to have similar laws.¹

When Gray submitted his first draft in July 1900, he informed the Foreign Office that although it followed the precedent of the East Africa Orders "in so far as it applies the law of India in substitution for that of England" he proposed "not to confine the Order to judicial matters, but following the precedents of ... some of the South African Orders to give legal expression to the fact that the general administration of the Protectorate is in the hands of His Majesty." With this object in mind he added in the draft, provisions giving the Commissioner extensive powers for the purposes of administration, raising of revenue and for granting of land titles.² These, it may be recalled, were the main topics in Johnston's negotiations with the Baganda.

Gray's proposition was agreeable to the Foreign Office. Indeed Gray was given further instructions to prepare new Orders for the East Africa Protectorate and British Central Africa Protectorate, incorporating similar provisions. Several consultations were held with a number of officers with local expertise in the three protectorates. These included: Cator, judge of the East Africa Protectorate; Nunan, judge of the British Central Africa Protectorate; Sadler, Commissioner designate for Uganda; Hardinge and Hayes.³ After a number of drafts, a final Order was eventually produced which received the Royal assent on 11 August 1902. This Order laid out the extent of the power and

¹Minute Gray of 9 May 1899, on Hill to Gray, 15 April 1899, FO2/259. See also Gray's memorandum on Uganda, 2 September 1899, *supra*.

²Gray to F.O., 21 July 1900, FO881/7675.

³Hill: A note to the Law Officers, 4 March 1902 FO2/663.

authority of the Crown in Uganda Protectorate.⁴

7.1 Administrative and Legislative Powers

The new Order provided for the establishment of a complete system of government with executive, legislative, and judicial powers. Administration of the Protectorate was entrusted to a person holding the title of Commissioner (or such other title as designated by the Crown) in the name and on behalf of the King of England. Subject to the instructions of the Secretary of State which might be given from time to time, and to the laws applicable in Uganda, the Commissioner was to exercise such powers as were granted him by virtue of this order and his commission. These powers included: appointing public officers and prescribing their duties in the Protectorate; exercising the Crown's rights in relation to land and minerals; and making legislation.⁵

Undoubtedly the provision empowering the Commissioner to legislate was the most important. Article 12 stipulated that he could make Ordinances "for the administration of justice, the raising of revenue, and generally for the peace, order, and good government of all persons in Uganda." A comparison between this provision and the corresponding Article 99 of the Africa Order in Council, reveals two significant differences. First, and foremost, in the new Order the authority given was to legislate for all persons in Uganda irrespective of consent of their sovereign. The notion that the Crown could not legislate for the natives of the protectorate, and foreigners within the protectorate, was thereby disregarded. In practice, as we have seen, there were already a number of Queen's Regulations which were made applicable to foreigners and to the local inhabitants. We have submitted above that these regulations were *ultra vires* the legislative powers given to the Commissioner under the Africa Order in Council. In contrast in many protectorates administered by the Colonial Office similar powers had long been authorised

⁴For the text see Hertslet, Commercial Treaties, 23: 227.

⁵Articles 4, 10, and 11.

under the relevant Orders in Council.⁶

Second, the wording of Article 12 of the new Order was different from that of Article 99 of the Africa Order in Council. Whereas the latter specified a long list of subjects over which legislation could be made (including the general object of attaining “peace, order, and good government”) in the former it was not found necessary to do so. The draftsman was content to name only administration of justice, the raising of revenue, and generally for “peace, order, and good government”. Probably the difference between the two Articles is explicable on the grounds that by the time the Uganda Order was made the draftsmen were quite confident that the latter phrase was wide enough to cover all matters for which legislation might be required which in fact was the intention.⁷ Even then Gray probably considered it safer to mention specifically administration of justice and the raising of revenue, to put beyond any shadow of doubt that the Commissioner had that power.⁸

7.2 Limitation of the Commissioner's Legislative Powers

The Order stipulated that the Commissioner in exercising his legislative power had to observe any general and specific instructions given by the Secretary of State in respect to any matter. In any case the Secretary of State reserved the power of disallowance of any Ordinance made by the Commissioner. Secondly, he was enjoined to respect native

⁶For example: Article 8 of the Barotziland-Northern- Western Rhodesia Order in Council, 1899; Article 8 of the Northern Nigeria Order in Council, 1899; Hertslet, *Commercial Treaties*, 21:210 and 250. Compare the East Africa Order 1899, *supra*, Articles 2 and 9. The Commissioner was empowered to legislate for the natives of the Protectorate but not for foreigners except with the consent of their sovereign.

⁷In the course of the discussions of the draft, Judge Cator expressed the hope that the words “peace, order, and good government” were extensive enough to cover all objects of legislation, minute of 18 January 1902, on the draft, January 1902, F02/663. In Gray's earlier proposal he had suggested that, to make the point clear, all topics over which legislation might be made should be expressed in the Order, memorandum on the law in Uganda, *supra*. There were already judicial precedents to the effect that the phrase authorised unlimited legislative powers, for example, *Reg. v. Burah* (1878) 3 A.C. 889; and *Riel v Reg* (1885) 10 A.C. 675.

⁸According to Morris and Read, *Indirect Rule*, at p.46n, as late as January, 1901, the Foreign Office was still in doubt whether the words “peace order and good government” included the power to legislate for foreign marriages.

law and custom in so far as it was not opposed to morality or justice.⁹

The issue is whether the Commissioner's powers were limited by the provisions of the Agreement? We have seen that the Buganda Agreement expressly provided that any laws made for the Uganda Protectorate were to apply equally to Buganda except to the extent that they were inconsistent with the Agreement. In that event the provisions of the Agreement would constitute a special exception to Buganda. That in fact had been the position under the Africa Order in Council, Article 16. Whether or not this situation was to continue under the new Order was not expressly stated. However, the issue was touched upon during the discussions of the draft. In the first draft Gray had included the following provision: :

In making Ordinances the Commissioner shall observe any Treaties or conventions made with the King of [B]Uganda or any native Chiefs¹⁰

As a result of Judge Cator's criticism the provision was deleted from the general draft. "I think," Gray minuted, "Mr Cator's criticisms are well founded ... I do not think it necessary to provide that the Commissioner is to observe treaties as that goes without saying."¹¹

Why was compliance with treaties so obvious? Was it because the Commissioner was in any case legally bound to exercise legislative powers subject to treaties? Or could it have been that the Commissioner, as a matter of British policy, was expected to respect the treaties? In the circumstances arguments are available either way. At the time of the enactment of the Africa Order in Council, in 1889, the assumption was that jurisdiction of the Crown, outside British dominions, was dependent on consent of the local sovereign. Hence the Commissioner could not legally exercise powers which were beyond those

⁹Article 12(3).

¹⁰Draft enclosed in Gray to Hill, 11 January 1902, FO2/663.

¹¹Gray to Hill, 8 February 1902, *ibid*.

granted under the treaty. On the other hand, by the close of the century, when the instructions were given to draft a new Order for Uganda, the legal advisers had abandoned this position. Observance of treaties was by then largely regarded as a matter of policy. Perhaps the latter is what Gray thought was obvious and needed not be expressed.

A comparison with Orders in other African Protectorates, prior to the Uganda Order indicates a similar pattern.¹² Others, like the Northern Nigeria Order in Council, 1899, had a slightly different formula though the effect was more or less the same. It stipulated (Article 12) that subject to its provisions or any proclamations made thereunder any power granted by treaties, prior to the Order, was to continue in full force as before the Order. In contrast the Lagos Protectorate Order in Council, 1901, had a saving clause of the treaties which was identical to that Gray wanted to incorporate in the Uganda Order. Under Article 2 of this Order the Lagos Legislative Council was empowered by Ordinance to exercise and provide for giving effect to all such jurisdiction as the Crown at any time before or after the passing of the Order had acquired, within the protected territories:

provided that nothing in such Ordinance ... contained shall take away or affect any rights secured to any natives ... by any treaties or agreements made on behalf or with the sanction of His Majesty and all such treaties shall be and remain operative and in force¹³

The Uganda Order in Council provided, Article 28(1), that in absence of Ordinance "any practice or procedure" established by or under the Africa Order in Council should

¹²For example, Barotziland-North-Western Rhodesia Order, 1899, *supra*, Article 12. Stokes, "Barotseland: the Survival of an African State" (in Stokes and Brown ed., The Zambian Past (Manchester University Press, 1966), at p.272, argues that this Order took precedent over the 1890 Agreement with the Barotse King.

¹³Article 2, see Hertslet, Commercial Treaties, 23:245. The Order was replaced by the Southern Nigeria Order in Council, 1906, which retained the saving clause, Hertslet, Commercial Treaties, 24:145.

remain in force until superseded by other law. Morris and Read,¹⁴ suggest that since under the Africa Order in Council the provisions of the treaty with the Crown prevailed over it and any other law, there was scope for the argument that, as a result of this saving clause, the Buganda Agreement continued to override the 1902 Order and the Ordinances made thereunder. This might well be true. However, it is submitted here that, at least in theory, the clause gave much less protection to the treaties as compared to Article 16 of the Africa Order in Council. Whereas under the Africa Order in Council the Commissioner could not legislate contrary to the treaties, in the new Order there was nothing which precluded him from enacting laws which were inconsistent with the "practice and procedure" established under the previous Order. In other words the practice only remained as long as it had not been overridden by legislative provisions.

The issue of conflict between the Agreement and the Uganda Order, and ordinances made thereunder, subsequently came to the fore in the High Court of Uganda. Ironically the absence of any express mention of the Agreement in the Order was used to prove that it was never incorporated into the laws of the Protectorate. We revert to this matter below.

7.3 Judicial Powers

In addition to legislative powers, full jurisdiction was assumed under the Uganda Order. While under the consular courts system jurisdiction was limited to British subjects and other persons specified in the Africa Order in Council, the new Order provided, Article 18, for the establishment of "His Majesty's High Court of Uganda" which was granted full jurisdiction, civil and criminal, over all persons and matters in Uganda. Thus the concept of jurisdiction by consent, over non-British subjects within the Protectorate and natives of the Protectorate, was legislated away.

¹⁴Indirect Rule, at p.51. See also below p. 226.

The new Order also made provision for setting up courts subordinate to the High Court and special courts. The final Article in this regard differed somewhat from the corresponding one in the draft. Originally it had been prescribed that courts subordinate to the High Court could be established to administer justice among "natives" or "to natives". It had also been provided for the creation of any courts having special jurisdiction and own appellate rules. Apparently one of Gray's reasons for inclusion of this provision was an endeavour to accommodate that part of the Buganda Agreement relating to the administration of justice over the Baganda. Again on Cator's advice the specific reference to the natives was deleted as redundant since the High Court had been given jurisdiction without any distinction between natives and others.¹⁵ However, what was taken for granted was later a matter of serious concern. For instance, doubt was expressed whether the native courts and the special courts were subordinate to the High Court. What of the Kabaka's courts? Were they such special courts as were referred to in the Order? These questions are dealt with in the following chapters, but it would seem that, at the time of drafting, Gray and the others who were involved in preparing the Order were convinced that the Crown's jurisdiction was complete over all persons within the Protectorate. Having resolved the broad jurisdictional issue they left the details of organisation of the court system to be worked out subsequently.

7.4 Legal Basis of the Uganda Order

Looking at the provisions of the 1902 Uganda Order in Council, it is clear that the Crown had at that stage assumed plenary powers in the Protectorate. The Commissioner had been given unlimited legislative powers, and the High Court had full jurisdiction over all persons and matters in Uganda. Although the Buganda Agreement (and the Ankole and Toro Agreements respectively) imposed certain restrictions on the Crown's powers in Buganda, the Order did not expressly incorporate them.

¹⁵Gray to Hill, 8 February 1902, and Cator's minute of 4 February 1902, on draft of 21 January 1902, FO2/663.

On what legal grounds was the power assumed? The Order, like all the others, recites that the Crown had "by Treaty, grant, usage, sufferance, and other lawful means" power and jurisdiction in Uganda Protectorate. Then it goes on to declare that it was made by virtue of the Crown's power under the Foreign Jurisdiction Act, 1890.¹⁶ Allott suggests that, with reference to Buganda, the power which the Crown sought to exercise under the Uganda Order was founded on the 1894 treaty and the 1900 Agreement.¹⁷ It is submitted that, though this argument is conceivable, and in fact, as is discussed below, was adopted by the Uganda High Court, evidently it was not the construction of the Foreign Office at the time the Order was made.

It has been seen that instructions to draft a new Order in council for Uganda were issued before the Foreign Office heard of the Agreement. Although an attempt was made to accommodate it in the Order it was not regarded by those involved in the drafting as the source of the Crown's powers in Buganda. The truth is that the making and ratification of the Buganda Agreement coincided with the acceptance by the Foreign Office of the view, much earlier adopted by the Colonial Office, that under international law a Protectorate over "uncivilised" regions entitled enjoyment of as ample power and jurisdiction as was necessary for purposes of establishing an effective government and to discharge international obligations.¹⁸ The policy of the Foreign Office could not be better represented than by the views of Cranborne, then Foreign Secretary (*vide* minutes of 10 April, 1902), that:

the legal difficulties attending the status of protectorates are in the process of being explained away. It seems the gradual broadening of view in the Law Officers' Department neither has produced nor is likely to produce any serious objection, and we shall soon reach the stage when an Order in Council -

¹⁶Preamble and Section 1.

¹⁷A.N. Allott, "The Development of the East Africa Legal System During the Colonial Period", in D.A. Low and Alison Smith, ed., History of East Africa, 3:348, 355.

¹⁸This was the view of most of the leading publicists. For example: John Westlake, The Collected Papers, pp.185-186; Jenkyns, Jurisdiction beyond the Seas, pp.177 and 193-194; W.E. Hall, Foreign Powers and Jurisdiction of the British Crown, p.220.

authorised, if necessary, by a short enabling Act - will make it possible to sweep all cobwebs away without any resistance from foreign powers.¹⁹

Under the British municipal law the assumption of this power was probably justified as acquired by "other lawful means" referred to in the Foreign Jurisdiction Act, since, as Westlake wrote, acquisition of ample jurisdiction in these type of protectorate had become internationally lawful.²⁰ If that were true, it followed that it was not legally necessary for the Crown to enter into the Buganda Agreement in order to extend its power and authority in Buganda.

Nevertheless, a rider may be added to this conclusion. Up to that time there was scarcely any judicial authority to confirm or lend support to these developments in legal thinking. And in absence of strong judicial precedents it could not confidently be stated that the matter had been put to rest. Indeed Cranborne's minute cited above indicates that there was still some doubt as to the extent the Crown could go in assuming power, by Order in Council, in its protectorates. In Southern Nigeria, for instance, as late as 1904 it was considered necessary, at least as a precautionary measure, to enter into "judicial agreements" with the local rulers to confer jurisdiction to the Protectorate Government in those territories where "usage and sufferance" could not be relied upon to assert it.²¹ It is also important to remember that the views of the publicists and the legal advisers referred to protectorates over "uncivilised" regions. What was the test for civilisation? It is of course easier to use nebulous terms, such as this one, in general

¹⁹Minute on Oakes, and Hill memorandum, 4 March 1902 and 7 April 1902, respecting the advantage or otherwise of annexation of the Foreign Office controlled protectorates, F0881/7716.

²⁰The Collected Papers, at page 186. Roberts-Wray, Colonial Law, at page 187; suggests that jurisdiction might have had its origin in an Act of State which he says is one of the "lawful means" recited in the Act.

²¹Secretary of State to Governor, 14 October 1913, C0879/113. O. Adewoye, "The Judicial Agreements in Yorubaland," Journal of Africa History, 12, 4 (1971): 607-627, claims that there is no doubt that the judicial agreements were regarded by the administration as the basis of British jurisdiction. Also T.N. Tamuno, The Evolution of the Nigeria State: The Southern Phase 1888-1914 (Lagos, Longmans 1972), generally pp.64-80.

theorisation than to apply them. For example, was Buganda which was reputed to have a social organisation which was unique in the region, supposed to be civilised or uncivilised? As we have seen in previous chapters, there was always doubt whether Buganda ought to be treated in a similar manner as the others.

Finally, whether or not at the time of drafting the Uganda Order it was considered legally necessary to enter into the Agreement, what legal significance was attached to it? It is noteworthy that in the discussion at the Foreign Office, in 1902, whether the three protectorates under the Department's control (Uganda, East Africa, and British Central Africa) should be annexed, Hill expressed a view that the newly ratified treaty which recognised the Kabaka as the ruler of Buganda was one of the "inconveniences" which might be met in a decision to annex Uganda Protectorate.

In the following three chapters I investigate the interpretation of the legal position with reference to those areas where the provisions of the Agreement conflicted with those of the Uganda Order in Council. The critical issue is whether after 1902 the Crown's power in Buganda was, as a matter of law, regarded as plenary or subject to the Agreement.

CHAPTER 8

JUDICIAL AND LEGISLATIVE POWERS: CONFLICT BETWEEN THE ORDER AND THE AGREEMENTS

We saw in the previous chapter that, by virtue of the Uganda Order in Council, 1902, the High Court was granted full jurisdiction over all persons and matters in Uganda. Moreover, the Commissioner was invested with virtually unlimited legislative powers. On the surface there was nothing which could not legally be done in the Protectorate if necessary by the Commissioner issuing appropriate legislation. In contrast, the Buganda, Ankole, and Toro agreements allowed less than full judicial and legislative powers to the Crown in the respective territories. In this and the following chapters I investigate how this conflict was resolved.

8.1 Jurisdiction

From the beginning it would seem that the Protectorate officials, possibly under the influence of the newly appointed High Court judges, Ennis and Carter,¹ interpreted the High Court's jurisdiction as subject to the agreements. Evidence of this is found in the fact that barely two years after the Uganda Order in Council was promulgated, Sadler, then Commissioner, proposed the amendment of the Buganda Agreement in order to arm himself with power to extend jurisdiction of the British courts over the Baganda. As we

¹Ennis previously was an assistant judge at Zanzibar. He went to Uganda as Chief Judicial Officer, and Vice-Consul in 1902, before he became a judge of the High Court of Uganda, and later of the Court of Appeal for Eastern Africa. Carter was formerly Registrar in the East Africa Protectorate, and Magistrate at Zanzibar. He went to Uganda in 1903 as High Court judge and a member of the Court of Appeal for Eastern Africa. Subsequently he became Chief Justice of Uganda (1912-1920). Both judges, especially Carter, played a very influential role in shaping Uganda's land policy during the first two decades of the century. See Morris and Read, *Indirect Rule*, at p. 334.

have seen, under the Agreement the British courts had exclusive jurisdiction in all cases where the Baganda were involved with other persons (mixed case) but no jurisdiction in purely Baganda cases which were reserved to their courts.² Sadler wanted the Commissioner to be empowered to transfer some of the latter cases for trial in the British courts wherever circumstances rendered it desirable. In a despatch to the Foreign Secretary justifying the need for the amendment, he claimed that the provisions in Article 6 of the Buganda Agreement ("the Kabaka of [B]Uganda shall exercise direct rule over the natives of [B]Uganda") were held to be "a bar for jurisdiction by our Courts in native cases even when the Kabaka would be willing that they should be tried by us." At the time he in particular had in mind divorce cases among the Baganda which he thought "for obvious [but unspecified] reasons should not be left for trial by the native courts."³

In addition Sadler wanted to amend the Agreement in order to clarify the position relating to appeals from the Buganda courts to the British courts. Under Article 6 of the Agreement there was a right of appeal "to the principal Court established by Her Majesty in Uganda" in all cases where a sentence of more than five years imprisonment was imposed or a fine of over a hundred pounds. The use of the words "fine" and "sentence" which pertain to criminal law led to some doubt within the administration whether the right to appeal in civil cases was intended to be included or was restricted to criminal cases alone; yet in Article 11 reference was made to both civil and criminal cases. Sadler argued that, since in the recently promulgated Appeals Ordinance,⁴ appeals from Native courts to the British courts were anticipated in both criminal and civil cases, it was prudent for the matter to be made clear in the Buganda Agreement by expressly providing that appeals could lay to British courts in both civil and criminal cases.

²Articles 6 and 8.

³Sadler to F.O., 6 July 1904, FO2/858. The Divorce Ordinance No.5 of 1904, Uganda Protectorate Ordinances, 1904-1905, was translated into Luganda presumably because it was to be administered by the Kabaka's courts since at the time the High Court had no jurisdiction over cases involving only the Buganda.

⁴No. 16 of 1904, Ordinances of Uganda Protectorate, 1904-1905.

Sadler presented his proposals together with a draft Agreement which reportedly the chiefs were ready and willing to sign subject to the Secretary of State's approval.⁵

The preamble to this draft recited in part:

Whereas by the Principal Agreement certain provisions were made for the establishment of native Courts and the administration of justice in ... [B]Uganda and whereas it is expedient to supplement, vary or modify such provisions, the Acting Commissioner and Regents do hereby agree....

The draft then went on to set out the proposed terms of Agreement. Under Article 3 the Commissioner was to be empowered, with the consent of the Kabaka:

by order under his hand, in any case or class of cases in which it may be deemed just and expedient [to] transfer any case or class of cases for trial or decision from any Court established by virtue of this or the [1900] Agreement to any Court established by or under the Uganda Order in Council, 1902.

Similarly under Article 4 of the draft, a right to appeal to the British courts in certain criminal and civil cases was expressly granted.

For quite some time the Foreign Office deferred the decision over this matter. No reasons for the delay are recorded in either the correspondence or the minutes. It might well be that it wanted to weigh the financial cost of the proposal. In the end approval was signaled without any amendment and, it is noted, without any comment on the Commissioner's reasons for the amendment.⁶ No sooner was the amendment (entitled the [B]Uganda (Judicial) Agreement, 1905)⁷ signed by the chiefs, than an order was signed by the Commissioner and the Buganda regents issued under authority of this Agreement directing that with immediate effect the High Court of Uganda was to hear and decide all causes between natives of Buganda "of a like nature to the causes that would come before the said Court in the exercise of its jurisdiction under the Divorce Ordinance 1904 and according to the practice and procedure laid down by or under that Ordinance."⁸

⁵The draft also contained taxation proposals, see chapter 9.

⁶F.O. to Commissioner, 24 March 1905, FO2/865.

⁷Laws of Uganda, 1951, 6: 28.

⁸Order of 23 January 1905, enclosure Ag. Commissioner to F.O., 16 February 1905, FO2/926.

There is no doubt that part of the reason for amending the Agreement formally was political. However, on the basis of the correspondence between Uganda and London, it is evident that the local officials believed that the exercise of the power and jurisdiction of the High Court under the Uganda Order in Council, was subject to the Agreement. They were convinced that the procedure which was followed to amend the Agreement was legally a condition precedent. The fact that the Foreign Office did not challenge or comment upon Sadler's reasons justifying the amendment probably confirmed to the Uganda officials that this was indeed the legal position.

8.2 Galt Murder Case

Further evidence of similar interpretation is found in the so-called Galt murder case.⁹ Galt, an administrative Official in charge of the district of Ankole, was murdered, allegedly by a Munyankole (man of Ankole tribe). His alleged murderer was himself murdered suspectedly by other Banyankole presumably to suppress evidence of a conspiracy surrounding the case. Two men were arrested and charged with the second murder.

Article 6 of the Ankole Agreement provided that justice between natives of Ankole was to be administered directly by the recognised chiefs of Ankole. Appeals could then go to the European officer in charge of the district. But there was no mention of further appeal to the British courts nor did the Agreement state anywhere that the British courts had jurisdiction over the people of Ankole except in cases in where other persons or their property were involved. In the latter situation the British courts had exclusive jurisdiction. Since the accused men were charged with murdering one of their own tribesman, the Uganda authorities classified the case as one between natives of Ankole, and therefore only justiciable to the Ankole chiefs' tribunals.

⁹For a detail account of Galt's murder, see Henry Morris, "The Murder of St. G. Galt," Uganda Journal 24 (1960): 1-15.

Because of the political implications of this case the Commissioner decided that it was so grave it had to be tried in the High Court of Uganda. To give the High Court jurisdiction over the case, the Commissioner issued a Proclamation suspending the Ankole Agreement as, he said, he had been "advised that the suspension of the Agreement is necessary in order to enable [him] to assume jurisdiction to try the murderers of the murderer in [British] Courts...."¹⁰ He purportedly justified the suspension of the Agreement on the grounds of proof of "sufficient cause" having been shown.

By this time Uganda affairs had been transferred to the Colonial Office department.¹¹ Apparently this was the first time this Department had had to deal with the Uganda agreements. The immediate impression, even of its lay officers, was that the suspension of the Agreement was legally uncalled for. Ellis, then Clerk, minuted:

... I cannot see anything in the Agreement which would oust (in such a case at least) the jurisdiction of the H[igh] C[ourt] of Uganda which under S[ection] 15 of the U[ganda] Order in Council has full jurisdiction, civil and criminal, over all persons and over all matters in Uganda.

In his opinion the annulment of the Agreement was just a political decision which was probably necessary, as the Commissioner said, to mark the gravity of the offence.¹²

Risley, Legal Assistant, endorsed the argument that the suspension of the Agreement was not required. Moreover, he even doubted whether the circumstances constituted an infringement within the meaning of Article 3 thereof which entitled the Crown to annul the Agreement. Whether it was justified or not within the terms of the Agreement, it was, in his opinion, of no legal consequence since it could be defended as

¹⁰Commissioner to F.O., CO879/88.

¹¹The transfer was effective from the end of April, 1905, Thomas and Scott, *Uganda*, at p.241.

¹²Minute of 3 October 1905, CO879/88. Read, Principal Clerk, concurred but passed the papers on to the lawyers, "as we do not want to have another Max Wehner incident", minute of 4 October 1905. For a note on this incident see Morris and Read, *Indirect Rule*, at p.52n.

“simply an act of force justified by the political expediency.”¹³

Following these minutes the Commissioner was told that his action in suspending the Agreement was approved although it was not legally necessary as the High Court already had full jurisdiction over all persons and matters in Uganda. Moreover, he was advised that the suspension was not strictly justified under the terms of the Agreement but was nonetheless an act of force justified by the gravity of the case.¹⁴

At that stage one would have assumed an end to this matter, but it was not to be the case. Most likely the Uganda Government was taken aback by the Colonial Office's reaction to what they had all along believed to be the legal position. The Commissioner responded:

... it has always been held here that under Article 6 of the Ankole Agreement ... cases between natives of Ankole were only triable by the Ankole Native Courts, and as the reported murderer of the late Mr Galt was a native of Ankole, as are the persons tried in the second cases for murdering this native, it was thought that some special steps were necessary to take this case (not that of the ... [conspirators to murder Galt] who would naturally be tried by our Courts) out of the jurisdiction of the Ankole Courts.¹⁵

This was probably intended partly as a polite challenge to the Colonial Office's interpretation and partly as a solicitation to reconsider the matter. The issue was then even more academic since the Court of Appeal for Eastern Africa had dismissed the case against the accused men for want of evidence connecting them with the murder. The Colonial Office did not bother to respond and the matter was dropped.

Up to this time none of these conflicting assumptions had been tested in the Uganda

¹³Minute of 13 October 1905. Risley in any case queried the classification of the murder of a native by his tribesman as a “native-to-native” case, although “it is possible the natives of Ankole might look upon it in the light. I presume that murder and other crimes are prosecuted in the name of the Crown in Uganda as in other protectorates.”

¹⁴C.O. to Commissioner, 10 November 1905, CO879/88.

¹⁵Commissioner to C.O., 5 December 1905, CO879/88.

courts, though behind the scene the judges were probably playing an influential advisory role.¹⁶ Shortly thereafter, however, the High Court found itself face to face with this issue of conflict between the Order in Council and the Ankole Agreement. This occurred in the case of Katosi v Kahizi¹⁷ which again involved two Banyankole.

8.3 Katosi v Kahizi

The case originated from the Court of the Mugabe of Ankole against whose decision Katosi wanted to appeal to the High Court. A preliminary issue was raised by the two presiding judges, Ennis and Carter, as to whether the High Court had jurisdiction to entertain the appeal. As already seen, under the Ankole Agreement courts established by the Protectorate Government had no jurisdiction in cases where only the natives of Ankole were involved nor was a right of appeal granted to these courts.¹⁸ Although the jurisdiction of the High Court under the Order in Council (Article 15) was stated to be complete over all matters and persons in Uganda, the learned judges were not satisfied that the provisions of the Order could override the Agreement. Indeed they expressed a very strong view that the High Court's jurisdiction had to be read subject to the Crown's jurisdiction under the Ankole Agreement. Being aware that their interpretation was in conflict with that expressed by the Colonial Secretary in the despatch referred to above they thought it was advisable for the matter to be clarified before they could proceed with the appeal.

At the judges' request a formal reference was made by the Governor to the

¹⁶The two judges had written several formal memoranda expressing their opinions on diverse legal issues and policy matters. See for example: memorandum by Ennis and Carter on Succession law in Uganda (especially on land), enclosure Ag. Commissioner to F.O., 10 February 1905, FO2/984; memorandum by Ennis on meaning of "exterior" and "interior" taxation under the Buganda Agreement, 6 October 1903, (see next chapter); reports on land tenure in Uganda, especially by Carter (below chapter ten). In addition, there was bound to have been many informal discussions in which the judges were involved; it has to be remembered that the official community was very small.

¹⁷(1907), 1 U.L.R. 22.

¹⁸Article 6. A right of appeal was granted in certain cases, but only to the principal European officer in charge of the district.

Secretary of State to determine whether the High Court had jurisdiction to hear the appeal.¹⁹ This reference was purportedly made under section 4 of the Foreign Jurisdiction Act, 1890 which provided that:

If in any proceeding, civil or criminal, in a court ... under the authority of Her Majesty any question arises as to the existence or extent of any jurisdiction of Her Majesty in a foreign Country, a Secretary of State shall, on the application of the court, send to the court within a reasonable time his decision on the question, and his decision shall for the purposes of the proceedings be final.

Strictly this reference was misconceived. In the first place, the above section only applied where a question arose as to whether the Crown had jurisdiction at all in a territory and as to the territorial limits of that jurisdiction. It did not entitle the court to ask the Secretary of State to tell it whether it had jurisdiction under an Order in Council in matters before it. That was for the court to determine by interpretation of the Order or any other relevant law.²⁰ Secondly, ironically, the Ankole Agreement was at the material time still under suspension,²¹ hence it ought not to have been an obstacle to the High Court's assumption of jurisdiction in this case. Had the judges and the Uganda officials forgotten what took place only a couple of years previously? If they had, they were not alone in this matter because nowhere in the minutes of the Colonial Office was this point mentioned.

Be that as it may, Risley, to whom the matter was handed, had no doubt in his mind that the learned judges' interpretation and fears were unfounded. He reiterated the view that the High Court's jurisdiction under the Order was full over all matters and persons in Uganda and was not limited in any way by the agreements with the local

¹⁹Governor to C.O., 8 April 1907, CO536/13.

²⁰See Minute Roberts-Wray, 23 September 1937, on Governor to C.O., 12 July 1937, CO36/40199, also below at p.252-253. See also the argument by counsel, Diplock, in the case of Mukwaba v Mukubira (1953) High Court Transcript of the Proceedings, below at p.177

²¹The Agreement was not restored until 12 September 1912, Proclamation, Laws of Uganda, 1923, 3:520.

rulers. In his opinion where the Crown had entered into these types of agreements which, for example, allowed chiefs to administer justice in native and native cases, it meant that the jurisdiction was concurrent and not exclusive of the High Court. Naturally, he thought, in practice the High Court ought to use its jurisdiction sparingly except in grave cases.

On the other hand, Cox, the Legal Adviser Under-Secretary, was sceptical of his assistant's argument. He premised that the Crown acquired its jurisdiction in Ankole by cession from the chiefs, and, in ceding this jurisdiction they reserved their rights to try native cases: "If that be so," he minuted, "I doubt whether the Order in Council is valid so far as it takes away this right ... [and] I think that it ought to be construed so as not to impair it". Cox emphasised that he was not denying the fact that the Crown could by force compel the Ankole chiefs to forgo the reserved jurisdiction to His Majesty:

... but I think that some cession of this right by the chiefs or some further Order in C[ouncil] w[oul]d probably be necessary in order to put the jurisdiction of the Supreme C[our]t [in] Ankole beyond q[uestio]n. The constitutional position seems to me to be that H.M. cannot be supposed to override by Order in C[ouncil] for a jurisdiction which has not been acquired by treaty grant usage or sufferance ... [and] that we cannot point to any one of these things in Ankole as regards the trial of purely native cases.²²

Cox's suggestion that there should be cession of jurisdiction by the Ankole chiefs, was probably based upon Henry Jenkyns' British Rule and Jurisdiction Beyond the Seas. Although Jenkyns strongly argued that, according to international law, the protecting Power had a right to assume the entire internal government of the protected territory, he said that until that was done by following the appropriate methods, the jurisdiction belonged properly to the local sovereign. Jenkyns was convinced that this rule of international law was part of English municipal law and had to be observed by the courts:

In considering the Orders in Council issued under the Acts [i.e. The Foreign

²²Minutes of 18 and 19 May 1907, on Governor to C.O., 8 April 1907, CO536/13.

Jurisdiction Acts] it must be recollected that in any legal proceedings, civil or criminal, the validity of any Order can be challenged on the ground that it is *ultra vires*, as, for instance, that it dealt with jurisdiction which the Crown did not possess or purported to confer powers in excess of the jurisdiction

Jenkyns claimed that, though under the Foreign Jurisdiction Act a court might refer to the Secretary of State a question respecting jurisdiction (in the international law sense) acquired by the Crown in a foreign territory, "it would be for the court to draw the inference from the facts stated by the Secretary of State, and that inference might be adverse to the Order in Council."²³

As we shall presently see, Jenkyns was castigated by subsequent writers and the judiciary for misrepresenting the English legal position.

With reference to the rest of Cox's argument, a number of queries may be raised. If the Crown could acquire the reserved jurisdiction from the Ankole chiefs by "act of force" (or Act of State) why did Cox not consider Article 15 of the Uganda Order in Council which conferred full jurisdiction upon the High Court (moreover subsequent to the Ankole Agreement) as constituting such an act of force? Why did he think it was necessary for either a cession (which of course would have been consistent with the Agreement) or a new Order in Council to put the matter of the High Court jurisdiction beyond question? How would the Order in Council which he had in mind have succeeded where the Uganda Order in Council failed? With due respect one cannot easily glean answers to these questions from Cox's minutes. Presumably his hypothesis was based on the assumption that, since the Crown had entered into a treaty with the King of Ankole whereby it acquired some jurisdiction in Ankole, the Order in Council of 1902 which was subsequent to this Agreement was intended to provide for the exercise of that jurisdiction alone. Consequently it had to be construed accordingly. This probably accounts for his rather

²³At p.153. Also W.E.Hall, Foreign Jurisdiction of the British Crown, at pp. 220-225.

obscure suggestion for a fresh Order in Council to clarify the position.²⁴

Whatever the explanation Antrobus, the Assistant Under Secretary, was satisfied by the argument of the Legal Adviser. He did not, however, think that it was necessary to state in the response to the Commissioner anything about taking steps to get the jurisdiction of the High Court extended since the Commissioner had expressed a desire to leave the administration of justice in native-to-native cases with the Ankole chiefs.²⁵ A draft on those lines was subsequently prepared. Interestingly, Cox noted in the margin of the draft that "... if the British Gov[ernmen]t by force superseded the Ankole Agreement it might be argued -- if the Court had actually tried cases between native and native -- that by sufferance of the chiefs the necessary jurisdiction had been acquired." Presumably this was intended to emphasise the point that, even without taking the steps he mentioned, there was still room for future argument that the jurisdiction had been acquired by sufferance provided there were precedents of its exercise. Cox nevertheless agreed with the view expressed in the draft as the safest, and was reportedly assured by the Law Officers in a private conversation that it was the one they would have adopted.²⁶

In the final despatch sent to Uganda the Secretary of State confirmed the judges' view that in ceding jurisdiction the chiefs reserved jurisdiction in native to native cases "the validity of the Uganda Order in Council in so far as it nullifies this reservation, is consequently open to question notwithstanding the view ... [earlier] expressed."²⁷

Without more ado, Kotosi's appeal was dismissed by the High Court for want of jurisdiction. The precedent was reinforced the following year in the case of Nasanairi

²⁴But see our conclusion in the previous chapter.

²⁵Minute 22 July, 1909.

²⁶Cox to Hopwood, Minute of 26 July, 1907.

²⁷C.O. to Commissioner, 31 July 1907, CO536/13.

Kibuka v Bertie Smith to be discussed below, which went up to the Court of Appeal for Eastern Africa.²⁸

8.4 Native Courts of Buganda

Meanwhile Bell, then Governor, on 29 January 1909, issued a Proclamation entitled "Native Courts in Buganda Proclamation"²⁹ which, according to its preamble, had three objectives: firstly, to organise, recognise and define the jurisdiction and powers of the Buganda courts; secondly, to define the supervisory powers of the Government over these courts; and finally to provide that certain offences committed by the Baganda be tried in British courts.

Three levels of Buganda courts were recognised in the Proclamation. At the top was the Court of the Lukiiko whose jurisdiction (both original and appellate) over the Baganda was declared to be full except as was provided in the Proclamation. Appeals lay in some cases from this Court to the High Court in accordance with the terms of the 1900 Agreement and the judicial Agreement of 1905. Below the Lukiiko Court were the courts of the county chiefs and sub-county chiefs respectively. These courts were subordinate to the Lukiiko and had limited jurisdiction. Appeals from the latter courts lay to the Lukiiko Court.

The second objective of the Proclamation was satisfied by setting out in detail the powers of the District Commissioner over the Buganda courts. These included: power to call records of proceedings; power to stay proceedings which appeared to be illegal or in excess of jurisdiction of a particular court; power to annul judgments which appeared to be illegal and to refer them to the next highest court and so on. But in exercising his

²⁸(1908-09), 1 U.L.R. 41. Also Adamu Kikonyogo v The Kivuvu (Uganda) Rubber Company Ltd., (1915), 2 U.L.R. 36; Crown v Kiimba, (1908-09), 1 U.L.R. 79; Stanislas Mugwanya v Lui Sensuwa, (1915), 2 U.L.R. 207.

²⁹1909, Uganda Gazette, 2: 23.

powers the district Commissioner was enjoined not to “unduly interfere” with the proceedings of these courts.

The final objective was in effect to extend the jurisdiction of the British courts over the Baganda in certain cases. Except where a right of appeal was granted,³⁰ British courts, as we have seen, had no jurisdiction over cases where only the Baganda were involved. In clause 2(a) of the Proclamation it was provided that certain offences committed by the Baganda were to be tried in British courts. These included: offences committed in the Township of Entebbe and certain parts of Kampala; offences (and civil cases) in which Baganda employed by the Government were involved; violations of any special laws such as the laws relating to arms, forests, game and so forth; lastly, any other cases where the presiding chief so requested. All the cases falling in this category were removed from the jurisdiction of the Baganda courts and transferred to that of the British courts established under the Native Courts Ordinance, 1905.

8.5 Legal Basis of the Proclamation

On what legal authority was the above Proclamation made? This question is important because in 1905 judges Ennis and Carter expressed a view that, as the High Court of Uganda had under the 1902 Order jurisdiction over all persons and matters, no court could be established under the same Order that was not subordinate to the High Court.³¹ The judges were reacting to the Commissioner’s attempt to establish Native courts in Bunyoro that were outside the control of the High Court. In doing so the Commissioner purported to rely on Article 18(1) of the Uganda Order in Council which authorised establishment by ordinance or under an ordinance of “Courts subordinate to the High Court and Courts of special jurisdiction.” The Commissioner thought “Courts of special jurisdiction” included Native courts which were not subordinate to the High

³⁰Article 6 of the 1900 Agreement, and 4 of the 1905 Judicial Agreement.

³¹Ennis’s memorandum, 3 January 1905, *supra*.

Court. This interpretation, it would seem, had been endorsed by the Foreign Office before the Uganda affairs were transferred to the Colonial Office.³² But the judges interpreted the phrase "Courts of special jurisdiction" to refer to courts which exercised jurisdiction that could neither be classified as criminal nor civil; for example, bankruptcy, divorce, probate, admiralty and so on. They asserted that it did not include Native courts exercising ordinary criminal and civil jurisdiction. On the advice of Risley, the Colonial Office agreed with the judges' interpretation.³³

Reverting to the 1909 Proclamation, we find in the preamble a statement to the effect that the Kabaka, chiefs and the people of Buganda had agreed to its making, and the Governor "by virtue of the Agreement and of exercise of powers conferred" had promulgated it. Significantly the Proclamation did not purport to be made under any particular Ordinance. Most likely the omission was deliberate since the view was that there was no ordinance which authorised its enactment.³⁴

Recitals in subsequent proclamations relating to these courts, however, mentioned without specifying, in addition to the consent of the Kabaka (and the 1900 and 1905

³²Acting Commissioner to F.O., 10 February 1905, and minute Risley of 17 May 1905, FO2/984. See also minute Hirst of 15 October 1904, on C.O. to F.O., 1 September 1904, FO2/865.

³³Minute of 17 May 1905, *ibid.*, and C.O. to Commissioner, 26 May 1905, FO2/984. In the same year the [B]Unyoro Native Courts Ordinance, No.5 of 1905, and the Native Courts Ordinance, No.10 of 1905, were enacted (see Ordinances of the Uganda Protectorate, 1904-05). The courts established under these Ordinances were subordinate to the High Court.

³⁴In *Alipo Kabazi v Jemusi Kibuka*, *supra*, at p.11, judges Ennis and Carter held that "The Native Courts in Buganda were formally organised and their powers and jurisdiction defined by Agreement evidenced (emphasis added) by the Proclamation of 29th January 1909" E.S. Haydon, *Law and Justice in Buganda* (London, Butterworths, 1960) at p.32, says that the Proclamation was made under the Native Courts Ordinance, 1905, *ibid.* The Proclamation does not recite that it was made thereunder. Besides it is doubtful whether that ordinance authorised the issuance of proclamations to constitute or establish Native courts. In a supplementary Native Courts Ordinance, No.15 of 1909 (Uganda Gazette, 1909, 2:300) which was enacted after the Proclamation, the power to establish and constitute Native courts was expressly granted to the Governor (see Article 2). Most likely this provision was added after it was realised that in the principal Ordinance there were no such powers.

agreements), the powers of the Governor under the Courts Ordinance, 1911.³⁵ The nearest relevant provision in this Ordinance was Section 41 which authorised the Governor to establish and constitute by Proclamation Native courts in any district with such jurisdiction as the Governor, subject to the same Ordinance or any other prevailing law, cared to allow.³⁶ Were the Buganda courts supposed to be “established and constituted” under this provision? If they were, did that not make them subordinate to the High Court in accordance with the principle professed by the judges?³⁷ Furthermore, how could they be subordinate to the High Court if, as it was then believed, they exercised jurisdiction outside that of the High Court?

There is no evidence to indicate whether these issues were ever discussed or indeed considered by the Uganda authorities. Nevertheless, it is noted that in none of the proclamations relating to the Buganda courts was it ever mentioned that they were *established* by the Governor under the Courts Ordinance or any other law; the proclamations just *recognised* and *declared* these courts and their jurisdiction. As a matter of fact when it was desired to establish Buganda courts in the counties of Kabula and Mawogola, the courts were established by the Buganda authorities after which the Governor issued a Proclamation “to declare and proclaim” that the said courts had been established with his consent.³⁸ This point is emphasised if one, for example, compares this Proclamation with the Proclamation which established Native courts in Busoga. The latter expressly cited that the courts had been established by the Governor exercising

³⁵The Native Courts Ordinances of 1905 and 1909 were repealed by the Courts Ordinance, No. 12 of 1911 (Uganda Gazette, 1911, 7:461), which in turn was repealed by the Courts Ordinance, No. 24 of 1919, (Uganda Gazette, 1919, 12:346). The substance of the provision dealing with Native Courts was retained. For a full list of Proclamations relating to Buganda courts, see Haydon, *Law and Justice in Buganda*, p.454.

³⁶This provision was substantially the same as sections 2 of the 1909 Ordinance, and 34 of the 1919 Ordinance.

³⁷The High Court exercised extensive powers over the courts established under the Ordinance, see sections 46 and 48 of the 1911 Ordinance.

³⁸Proclamation of 11 August 1909, Uganda Gazette, 1917, at p.99.

powers given to him under the Courts Ordinance, 1909.³⁹

Apart from the problem of subordination to the High Court, jurisdiction of the courts under the Courts Ordinance was substantially limited. For instance, they could not try cases involving capital sentence or carrying a life sentence (Section 50), whilst, as we have seen, the Lukiiko had jurisdiction to try such cases. If the Buganda Courts were established under this Ordinance it meant the Lukiiko jurisdiction was thus limited. But there is no evidence to indicate that it was regarded as such when it came to these cases. This suggests that probably from the point of view of the Government the Buganda courts were not considered to be established by the Governor under the Courts Ordinance.

But the issue remains unresolved. Proclamations of a legislative nature could only be made on basis of some law. If the Buganda courts were not established or their jurisdiction recognised under the Courts Ordinance or for that matter under any other law made pursuant to the Uganda Order in Council (since that would make them subordinate to the High Court), on what authority then did the Governor purport to issue the proclamations relating to them? Presumably if this question had been posed at the time, the answer would have been "on the basis of the Agreement and consent given from time to time by the Kabaka and the Lukiiko prior to each Proclamation." It was probably for this reason that these proclamations always cited the Agreement and declared that consent of the Kabaka and the Lukiiko had been signalled. As a matter of legal theory, it may be asked whether the proclamations could have been made without the Uganda Order in Council but on the basis of the Crown's common law prerogative rights?

³⁹Proclamation of 11 August 1909, Uganda Gazette, 1909, 2:303. Also proclamations in chapter 4, Laws of Uganda, 1923.

The foregoing issue was actually indirectly raised some forty years later at a time when the matter was almost academic, during argument in the High Court of Uganda in the case of Mukwaba v Mukubira.⁴⁰ The facts of the case are not important, it suffices to say that they related to the Buganda Agreement. During the course of argument, Dreschfield, Q.C., Attorney-General of Uganda, asserted that it was axiomatic that treaties among sovereign nations did not become part of the municipal law except by legislation of the territory. Consequently the Buganda Agreement was not by itself law in Uganda. In response to a suggestion that it could have been recognised as law without any specific legislative measures, the Attorney-General submitted that:

... since 1890 the Crown had no power to legislate in any way ... [other than by Order in Council]. It is not entitled under the Foreign Jurisdiction Act to legislate by means of agreeing to an agreement; there is nothing in the Foreign Jurisdiction Act that allows it so to do.⁴¹

His opposing Counsel, Diplock Q.C., conceded to the extent that treaties had to be incorporated in municipal law before they could be enforced; but he submitted that the decision as to whether a particular treaty had been incorporated or not was an Act of State. To determine whether the Crown had recognised treaty rights the courts had to examine the instrument itself and subsequent conduct of the Crown expressed or implied through its proper officers.⁴² Diplock denied that the Crown could not legislate for the protectorates by means other than by Order in Council:

My Lord [he submitted] it has been the practice of the Crown in many cases of recent years to legislate by Order in Council but in [the case of] Secretary of State for India against Sirdar Rusto v Khan⁴³ ... no Orders in Council were made.... The Crown exercises its ... prerogative rights by prerogative acts or Proclamations without any Order in Council at all.

⁴⁰Also known as the "Kabaka Deportation Case", (1953), 7 U.L.R. 74. The arguments are quoted from the High Court transcript of the proceedings (unpublished). The author had access to Professor Anthony Low's personal copy.

⁴¹*Ibid.*, at p.261.

⁴²*Ibid.*, at pp.565 and 570. Counsel cited as his authority the case of Secretary of State For India v Kamachee Bhoy Sahaba (1859) 18 Moore's Appeal Cases 22.

⁴³1941 A.C. 365.

Chief Justice Griffin, who was presiding, agreed that the Agreement, so far as it was incorporated in statutes, did constitute enforceable legal rights. However, he did not answer the question as to whether it was only by legislative measures that these rights were incorporated in the municipal law.⁴⁴

Whether Diplock's argument is accepted or not it was no doubt a subsequent rationalisation. Apparently at the critical period there was no serious consideration of the theoretical legal basis of the Buganda courts proclamations. Irrespective of any legal theory it is clear that the view was firmly held that the jurisdiction of the Crown in Buganda was subject to the Agreement with the Buganda Government. Indeed as late as 1928, John Gray, then Acting Solicitor-General in Uganda, drew attention to the fact that the Courts Ordinance, 1919, and the Civil Procedure Ordinance, had in the case of Buganda to be read subject to the Agreement.⁴⁵

A statement by Carter (Chief Justice of Uganda sitting as one of the three appellate judges of the Court of Appeal for East Africa), in Ol le Njogo and others v The Attorney General and others⁴⁶ is significant in this regard. He and his brethren were unanimous in holding that an agreement entered into between the Crown and the Masai tribe of Kenya, was not cognisable in the East Africa Protectorate courts. This is because they found that the agreement was a treaty between the Crown and a foreign sovereign state: the Masai. From their holding one would have assumed that logically the Buganda Agreement and those of Toro and Ankole, fell in the same category, and consequently the decisions of the Uganda High Court ought to have been overruled or at least questioned. Yet the Chief Justice of Uganda, in his long judgment, merely observed that:

⁴⁴(1954), 7 U.L.R.74. Roberts-Wray, Colonial Law, at p.186, suggests that the Crown could exercise its powers in a protectorate by means other than Order in Council. See also Lord Denning in Nyali Ltd v Attorney-General, [1956] 1 Q.B. 1, at p.14.

⁴⁵Cited by Morris and Read, Indirect Rule, at p.55.

⁴⁶(1913-24) K.L.R. 70 at page 93.

During the course of the argument with regard to treaties or agreements I took occasion to refer to the agreements with native chiefs in Uganda, another protectorate under the appellate jurisdiction of this Court (in which there is an Order in Council similar to the East African Order of 1902 ...), and to state that the jurisdiction of the High Court in Uganda is regarded as subject to these agreements or treaties.

For reasons which are not expressed in Carter's judgment, it is evident that he still believed that the Uganda Order in Council was subject to the "agreements with native chiefs." The other members of the panel, Justices Bonham Carter and King Farlow, did not say anything about the Uganda cases. Of course, for purposes of disposing of the appeal before them, they did not have to comment upon the Uganda decisions, nonetheless their silence is surprising especially so as these cases were cited and moreover the same Court constituted the Appellate Court for Uganda. As we shall see below, the Uganda cases were not challenged until more than two decades later.

8.6 Legislative Powers

On the question of legislation, as we have already seen, under Article 12 (1) of the Uganda Order in Council, 1902, the Commissioner had power to make ordinances for the administration of justice, raising of revenue, and generally for the peace order and good government of the Protectorate -- power which was normally interpreted as plenary. In the Buganda Agreement, on the other hand, Article 5 stipulated that the laws made for the Protectorate were to apply equally to Buganda except in so far as they were inconsistent with the provisions of the Agreement in which case the latter would prevail. Were the legislative powers of the Commissioner subject to the provisions of the Agreement? This issue was raised (a year after Katosi v Kahizi) in the High Court of Uganda in the case of Nasanairi Kibuka v Bertie Smith.⁴⁷

In this case Kibuka, a Muganda, entered into an agreement to sell his land to

⁴⁷ *supra*.

Smith, an Englishman. A law, the Land Transfer Law, 1904, made by the Kabaka on the advice of the Lukiiko and with the consent of the Commissioner, prohibited natives of Buganda to sell land to any person without the consent of the Lukiiko.⁴⁸ Apparently both parties were willing to complete the transaction but the Land Officer informed them that the transfer would not be registered without the Lukiiko's consent. Smith sought to challenge this requirement in the High Court. It was contended on his behalf that the Kabaka and his Lukiiko had no legislative powers and therefore the so called Land Transfer Law had no legal effect. In support of his argument Counsel cited Article 12(1) of the Uganda Order in Council, which empowered the Commissioner to make legislation for the Uganda Protectorate.

To put the case in perspective, reference may be made to the provisions of the Agreement relating to legislation. Article 11 vaguely provided that:

The functions of the Council will be to discuss all matters concerning the native administration of [B]Uganda, and to forward to the Kabaka Resolutions which may be voted by a majority regarding measures to be adopted by the said administration. The Kabaka shall further consult with ... [the Commissioner] before giving effect to any such Resolutions ... and shall in this matter explicitly follow the advice of ... [the Commissioner].

This provision was construed by the Protectorate Government to mean that the Kabaka aided by the Lukiiko and in consultation with the Governor, could enact laws concerning the Buganda administration and in respect of any other matter in Buganda which under the Agreement were outside the Crown's jurisdiction.⁴⁹ But up to the time of the case there was no legislation which authorised or recognised this legislative power.

Judge Carter, after theorising that a right to legislate was an attribute of every Sovereign State (which Buganda was prior to the Agreement), held that this Agreement was "not to be regarded as taking away any right or power of the Kabaka except by its

⁴⁸Section 2.

⁴⁹Memorandum Russell, 26 June 1909, enclosure Ag. Governor to C.O., 5 July 1909, C0536/27.

express provisions, therefore whatever powers were his before remain with him, except so far as they are expressly taken away or limited.”⁵⁰ In his opinion there was nothing in the Agreement which could be interpreted as taking away the Kabaka’s powers. He dismissed Counsel’s argument regarding Article 12 of the Order in Council, holding that the Order could not take away these powers as it had to be read subject to the Agreement.

Carter also dismissed Counsel’s alternative argument that, even if the Kabaka and the Lukiiko had legislative powers, the Land Transfer Law, 1904, was itself invalid since it had not been published in the official Gazette as was required under Article 11 of the Uganda Order in Council. He held that the Order did not deal with native law and there was no other law he was aware of which required laws promulgated by the Buganda authorities (including those made prior to the Agreement which were still valid) to be published or promulgated in any particular manner.⁵¹ As long as the Governor gave his consent to a law passed by them it was valid; the manner of publication, in the judge’s opinion, was immaterial. Judge Carter found that the Land Transfer Law, 1904, was a valid law; consequently, the consent of the Lukiiko before any land transfer by a Muganda could be completed was a legal condition.

Smith appealed to the Court of Appeal for Eastern Africa where a similar argument was presented; but was of no avail. The Court (constituted by Lindsey Smith, J.W. Murrison and Peter Grain, J.J.) held:

We think that by the Agreement of 1900 the Kabaka of Buganda parted with his rights of legislation to this extent that the approval of H.M.’s Commissioner was thereafter necessary to complete the validity of his laws.

It upheld the findings of the lower Court that the Land Transfer Law, 1904, complied

⁵⁰(1908) 1 U.L.R. 41, at p.42.

⁵¹*Ibid.*, at pp.43-44.

with the procedural requirements and was a valid law.⁵²

This case not only affirmed that the Commissioner's legislative powers were limited in Buganda by the Agreement, but also upheld the Government's interpretation that the Kabaka and his Council had legislative powers which were seen as being part of the remaining -- original -- sovereignty of the Kabaka. With advantage of hindsight, it would seem that both Courts missed a crucial point which Counsel for the plaintiff/appellant was apparently trying to establish. As stated above, there was no statutory law at the time which sanctioned or recognised the right of the Kabaka and the Lukiiko to legislate. The plaintiff's counsel's point was probably that the Agreement, until incorporated in the municipal law of the Protectorate, could not be regarded as authority for the rights it purported to confer or to preserve. Hence his submission that the Land Transfer Law, 1904, had no legislative effect. But both the lower and appellate courts, judging by their holdings, assumed that he was attacking the power of the Kabaka and the Lukiiko to legislate per se. Consequently they did not address their mind to this particular issue.

Following this case the irregularity of the Kabaka's legislative powers under the laws of the Uganda Protectorate was realised by the Colonial Office's legal advisers. On the basis of their recommendation the Secretary of State, without actually questioning the Court's decision, reminded the Governor:

... that the rights of the chiefs to make regulations binding upon natives appears solely to rest on interpretation of the [B]Uganda Agreement, 1900 Article 11, as approved in the High Court ... and the Court of Appeal ... in a recent case.

I consider it advisable that this report should be duly regularised and I should be glad if you would have an Ordinance drafted providing explicitly for the right of the Kabaka aided by his ... [Lukiiko] and in consultation with H.E the

⁵²*ibid.*, at p.45.

Governor to enact laws binding upon the native administration of [B]Uganda]. The same procedure to be followed in the case of both native laws and Ordinances, as regards submission in the first instance together with a legal report to the Secretary of State.⁵³

Interestingly, however, Russell, the legal adviser to the Uganda Protectorate Government, demurred at the proposal to clarify the position of the Kabaka's legislative powers by an Ordinance. He submitted that the proper course to take was by a short amendment to the Buganda Agreement because:

The [B]Uganda Agreement 1900, is an Agreement outside and not governed by the Uganda Order in Council, 1902. If, therefore, an Ordinance is made under that Order purporting to make clear a doubtful point in the [B]Uganda Agreement, it might be held that such an Ordinance was *ultra vires* on the ground that it was made in variation of the Agreement.

With deep regret he suggested that another amendment was, unfortunately, inevitable. He put forward to the Colonial Office a draft amendment Agreement (the [B]Uganda Agreement (Native Laws) 1910) which it was proposed to offer to the Buganda authorities. In this draft the right of the Kabaka and the Lukiiko to make laws binding on the Baganda was expressly recognised and the procedure to be followed in making these laws was stipulated following the lines as suggested by the Secretary of State in the above despatch. Since the amendment was mainly in favour of the Baganda, the Uganda officials assured the Colonial Office that no problems in securing their consent were anticipated.⁵⁴

Within the context of the prevailing legal thinking, no doubt Russell was right, but it would seem he was at cross-purposes with the Colonial Office's intention. He assumed that the problem was merely the vagueness of the provisions of the 1900 Agreement, whereas actually the Colonial Office, as suggested above, was thinking of those legal

⁵³C.O. to Governor, 13 August 1909, CO536/27.

⁵⁴Legal report on the draft Agreement Native Laws, 1901, enclosure Ag. Governor to C.O., 17 June 1910, CO536/27.

irregularities which it wanted to be corrected. Nevertheless Russell's interpretation and proposed Agreement were accepted by the Colonial Office without any further comment.⁵⁵ This promoted and cemented the view, especially, one would imagine, among the Uganda Government officials, that the Agreement by itself was a legal document with enforceable rights and obligations⁵⁶ superior to any other law in the Protectorate. Thus for instance, when in 1919 an Ordinance (the Native Law Ordinance) was enacted to empower the Governor to authorise Native councils constituted or recognised under the Ordinance to exercise some limited legislative powers, it was expressly stated that nothing in the Ordinance was to be construed as affecting the power of the Kabaka and the Lukiiko to legislate for the Baganda in accordance with the terms of the Agreement.⁵⁷ As we shall see in subsequent chapters, it was not until 1938 that legislation was promulgated which recognised these powers. In that year the Buganda Native Laws (Declaratory) Ordinance, was hastily enacted by the Legislative Council to confirm that the Kabaka and the Lukiiko had and always had those legislative powers mentioned in the 1900 Agreement and the Buganda Agreement (Native Laws) 1910. All laws purportedly made since the date of the execution of the 1900 Agreement which were still operative were retrospectively validated.⁵⁸

8.7 Summary and Conclusion

The conclusion to be drawn is that, the Uganda Protectorate officials from a very early stage were convinced that the Buganda Agreement (and for that matter the Toro and Ankole agreements) was legally binding upon the Crown and prevailed over the Uganda Order in Council. This in effect meant that, notwithstanding the apparently plenary provisions of the Uganda Order in Council, the Crown's judicial and legislative

⁵⁵C.O. to Ag. Governor, 29 July 1910, CO536/27.

⁵⁶For example, in the case of *Crown v Kiimba*, supra, the accused, a Chief, was convicted under Article 9 for failing to furnish to the Protectorate officials information relating to the collection of poll tax.

⁵⁷Sections 3 and 4, Laws of Uganda, 1923, 1: chapter 62.

⁵⁸See chapter 11.

powers were limited in Buganda. Any extension of these powers had to be by agreement with the Buganda authorities. The evidence indicates that the legal advisers played a very influential role in implanting this idea. Indeed it was so firm that when the Colonial Office which had just taken over Uganda's affairs confidently asserted otherwise, the Uganda officials did not readily accept its view. The reference in the Katosi v Kahizi case is clear proof of this. In the end the Colonial Office itself under the influence of its most senior legal adviser, Cox, was converted. The judicial precedents thereby legitimated the legal position assumed by the administrators.

In the following chapter I examine the conflict between the provisions of the Agreement and the Order with reference to the Crown's power to raise revenue in Buganda.

CHAPTER 9

LEGISLATION FOR THE RAISING OF REVENUE

The power to make legislation for the raising of revenue was another area of conflict between the provision of the Buganda Agreement and of the Uganda Order in Council. Article 12 of the Agreement provided that a hut tax and gun tax of four shillings respectively, were to be levied on every hut and gun in Buganda. The Article prescribed further that:

The Kingdom of [B]Uganda shall be subject to the same customs Regulations, Porter Regulations, and so forth, which may, with the approval of Her Majesty, be instituted for the Uganda Protectorate generally, which may be described in a sense as exterior taxation; but no further interior taxation, other than the hut and gun tax shall be imposed on the natives of the Province of [B]Uganda without the agreement of the Kabaka, who in this matter shall be guided by a majority of votes in his native Council.

On the other hand under the Order in Council, Article 12(1), the Commissioner was invested with power to make legislation for the raising of revenue in the Protectorate. As with his other legislative powers, there was nothing in the Order to indicate that his powers were limited except, of course, where the Secretary of State disallowed the legislation.

In this chapter, I investigate the interpretation of the foregoing provisions of the Agreement by the Protectorate administration and its effect upon the Commissioner's powers to make legislation for the raising of revenue.

9.1 Interior and Exterior Taxation

As we shall see below, there was seldom any doubt within the administration that the consent of the Kabaka and the Lukiiko were necessary before the imposition of any direct tax (such as the poll tax, land tax and gun tax) or its increase where it had already been imposed. The problem was with indirect tax, for example licensing fees and charges for various administrative duties. The question was: were these licensing duties and charges classified as taxes? Was the consent of the Buganda authority necessary before they were imposed?

Apparently the Protectorate Government as early as 1903 felt uneasy about the legality of imposing any licensing fees and charges in Buganda. Judge Ennis in that year advised the administration that the issue of taxation in Buganda had to be resolved by interpretation of the words "exterior taxation" and "interior taxation" in Article 12 of the Agreement. Ennis held that the former referred to revenue and charges collected under laws which applied generally to the whole Protectorate, whereas the latter referred to revenue resulting from laws of local application to Buganda. Thus, according to the Judge, if any tax were imposed by the Government throughout the Protectorate, it would be "exterior taxation" within the meaning of the Agreement and therefore would not require the consent of the Baganda; but if any tax were to be imposed only on the Baganda the consent of the Kabaka and Lukiiko were necessary.¹

After the holding in the case of Katosi v Kahizi, that the provisions of the agreements prevailed over the Order, Russell, the Protectorate legal adviser (then officially known as the "Crown Advocate") told the Governor that since ordinances imposing charges and fees had already been made and more were likely to be made in the future, it was of "immediate importance ... to consider whether the agreement of the

¹Memorandum Ennis, 6 October 1903, quoted in Governor to C.O., 16 July 1908, CO536/20.

Kabaka was and will be necessary for the validity of such charges or fees.”² Russell cast doubt on judge Ennis’ interpretation of Article 12 of the Agreement. He argued that if such interpretation were admitted, it meant the Government had almost unlimited powers of taxation; yet under Article 12 of the Agreement it was expressly provided that “no further interior taxation other than hut and gun tax was to be imposed without the consent of the Kabaka.” According to his own interpretation “exterior taxation” referred to revenue collected under laws of a general application to the Protectorate which had an exterior element in them, for instance, customs involved import and export, and porter regulations applied to engagement of porters for work involving a journey outside Buganda. “Interior taxation” on the other hand referred to revenue collected under laws of a general application without any such “exterior” element, as well as laws of a local application.

The Governor, Hesketh Bell, who had only recently assumed office, immediately echoed Russell’s fears to the Colonial Secretary. He warned that legal questions might be raised if any legislation were enacted in the Protectorate involving “duties and fees or taxation of any other kind.” Moreover, “the validity of the existing sources of revenue may at any moment be called in question; in either civil or criminal proceedings, ... [on the grounds] ... that they are *ultra vires* as being imposed in a manner not in accord with the provisions of the [B]Uganda Agreement, 1900.” Bell said that, although the issue had not actually been raised in practice, he nevertheless felt that it was prudent to refer it to the Secretary of State well in advance so that in the event that legal difficulties arose (as he was advised they were bound to) they might be dealt with accordingly.³

The legal adviser to the Colonial Office, Cox, admitted that it was very difficult to

²Memorandum Upon Taxation under the Uganda Agreement, 1900, dated August 1907. See enclosure Governor to C.O., 16 July 1908, *ibid*.

³Governor to C.O., *ibid*.

determine what was meant by "exterior" and "interior" taxation. Although Cox was inclined to agree with Russell's interpretation in preference to that of Judge Ennis, nevertheless, in his opinion, the safest solution to the problem was to enter into a new Agreement with the Baganda.⁴ This view was accepted by the Secretary of State. The Governor was told that Russell's construction of the Agreement was the correct one. Consequently, he was instructed to negotiate with the Buganda administration to amend Article 12 so as to read that, "no tax, beyond those already in force shall be imposed without the consent of the Kabaka, unless it applies to all inhabitants of the Province, whether natives or others." It was hoped that this amendment would not only have the effect of legalising *ex post facto* the existing taxation but that it would give the Government all the powers for the future which were necessary.⁵

In effect the position was that, legally, no licensing fees or charges could be imposed upon the Baganda in Buganda without the consent of the Kabaka and the Lukiiko or at any rate until the Agreement was amended as suggested by the Colonial Office. The local officials, however, were not too anxious to propose to the Baganda to amend the Agreement. For almost a year they kept quiet about the matter until Boyle, who was then the Acting Governor, officially requested the Colonial Office to postpone the implementation of its decision. Boyle expressed a fear that since the Agreement had in the previous nine years been amended seven times, any attempt made to push in another amendment was bound to lead to suspicion and probably rejection. Regretfully, desirable as it was to settle the issue once and for all, Boyle felt that the timing was not

⁴Minute of 19 August, 1908. Hopwood expressed a similar view, alternatively he suggested to go for an authoritative judicial interpretation of Article 12, minute of 1 September, 1908. Johnston, who was by coincidence in London, at the request of the Colonial Office interpreted "interior" and "exterior" taxation to refer to "direct" and "indirect" taxation respectively, Johnston to C.O., 6 September 1908, CO356/20. His interpretation was summarily dismissed as based on afterthought and therefore unhelpful.

⁵C.O. to Governor, 2 October 1908, CO526/160/20525.

opportune.⁶

Ironically, even Russell strongly supported the postponement. The issue was still theoretical in so far as the Baganda had not challenged any of the existing legislation nor had it been as yet raised in the courts. Russell warned of serious consequences if the proposal was made and the Buganda authorities refused to accept it (as he was sure they would) since there was no way the Government could legally force them to comply.⁷ In the circumstances the Colonial Office acceded to the Government's request and the problem was shelved indefinitely.⁸ We shall revert to this matter below.

9.2 Direct Taxes

As to direct taxation, consent of the Buganda authorities was always sought before its imposition. The first such tax the Baganda were called upon to pay (in addition to the hut and gun taxation which were expressly prescribed in the Agreement) was a poll tax. This was a three shillings tax imposed on every "marriageable" male Muganda who was not liable to pay the hut tax. The tax was actually proposed by the Buganda authorities with the object of catching males in this age group who were evading the hut tax by abstaining from owning a hut preferring instead to cram into one hut with friends or relatives.⁹ An Agreement was entered into, the [B]uganda Agreement (Poll Tax), 1904, authorising the tax.¹⁰ A year later the Commissioner promulgated the Poll Tax Ordinance, 1905, which imposed a three shillings tax on every male over eighteen years of

⁶Ag. Governor to C.O., 9 September 1909, CO536/28.

⁷Ag. Governor to C.O., 9 September 1909; and Russell's memorandum of 7 July 1909, enclosure, CO536/28. Russell cited the Colonial Office's letter to the Governor, *supra*, which approved the interpretation of Article 12.

⁸C.O. to Governor, 28 October 1909. Cited by Governor to C.O., 29 January 1930, *supra*.

⁹Commissioner to F.O., 6 July 1904, FO381/858. As it may be recalled collection of sufficient taxation revenue was one of the conditions for the continuation of the Agreement. Hence it was in the chiefs' interest to see to it that it was done. Besides it was claimed that the hut tax was forcing young men not to marry since, according to Baganda custom, they would then have to live in their own houses. It was feared that as a result many young men were tempted to lead "immoral" lives, and there was a possibility of a decline in the population.

¹⁰Enclosure Ag. Commissioner to F.O., 6 October 1904, FO2/860.

age who was not liable to pay a hut tax under the Hut Tax Regulations, 1900, in all those districts to which the Ordinance was applied. The Ordinance was declared applicable to Buganda (Section 6).¹¹

In 1909, the Protectorate Government decided to introduce a new taxation scheme and also to increase the tax. It abolished the separate collection of hut and poll tax which it replaced with a general tax of ten shillings payable by all males over the age of eighteen years unless exempted. To implement this new policy three Poll Tax Ordinances were enacted in the same year.¹² With regard to Buganda before any changes were introduced another Agreement was entered into, the [B]Uganda Agreement (Poll Tax), 1909, consenting to the changes and the increase in the poll tax.¹³ Instead of applying the Poll Tax Ordinances to Buganda, the new scheme was incorporated in a Buganda Lukiiko law (strangely known as "the Law for the People who do not pay their tax before the end of the year in which it is due, 1909") which reproduced the substance of these ordinances. This procedure, according to Russell, was intended for the convenience of the Baganda to avoid confusing them as some of the provisions of the Poll Tax Ordinances were not applicable in Buganda.¹⁴

After the first World War, when the Government wanted yet again to raise the poll tax payable by the Baganda to fifteen shillings another Agreement, the Uganda Agreement (Poll Tax), 1920, was entered into authorising the increase. Unlike the previous Poll Tax Agreement, it specifically provided that the Poll Tax Ordinance, 1914,

¹¹Uganda Protectorate Ordinance, 1904-1905. The Ordinance was also applied to Ankole, Toro, and Bunyoro.

¹²The Poll Tax Ordinances numbers 2, 3 and 5, of 1909, Uganda Gazette, 1909, 2:22, 72 and 320.

¹³5 June 1909, Notice Uganda Gazette, 1909, 2:180.

¹⁴Legal opinion, 5 January 1910, enclosure, Ag. Governor to C.O., 17 January 1910, CO536/32. Russell did not specify the provisions which were not applicable to Buganda.

or any amendment thereof, was to apply to Buganda subject to certain exceptions.¹⁵ One of these exceptions was that the persons who were exempted from payment of the hut tax under the 1900 Agreement for any of their huts or buildings were to receive in lieu in each taxation year a transferable poll tax ticket which would entitle their transferees tax exemption for the particular year.

Curiously, the Agreement provided that there was to be no further increase in interior taxation in Buganda for the next seven years without the consent of the Kabaka and the Lukiiko. In view of the prevailing legal theory it is difficult to see the justification for this, since in any case the assumption had always been that that was indeed the requirement for validity of any legislation imposing direct taxation in Buganda. In the absence of any evidence to indicate a shift from that line of thinking at this stage, it can be presumed that the clause was added as a reassurance to the Kabaka and his Lukiiko against any request for further increase in taxation. Another possible interpretation is that within the succeeding seven years the Government would not increase the taxation without the consent of the Kabaka and his Lukiiko, but that thereafter the tax could be increased without their consent. The latter interpretation, however, is unlikely to have been intended as it would be inconsistent with the 1900 Agreement, whereas in the Poll Tax Agreement it was expressly stated that nothing contained therein was to affect the provisions of the main Agreement.¹⁶

9.3 Land Tax

In the same year as the poll tax was increased, the Government approached the Buganda authorities to persuade them to find additional means of raising revenue in Buganda to contribute towards development projects in the country. After what was described as a "protracted discussion" in the Lukiiko, a resolution was passed authorising

¹⁵ Article 2, Laws of Uganda, 1923, 3:476.

¹⁶ Article 5.

the introduction of a land tax of twenty shillings per annum payable by all land owners, and two shillings levied upon non-land owners. The resolution specifically prescribed that the duration of the taxation be limited to a maximum period of five years after which it would be reviewed by the Lukiiko.¹⁷ Subject to some amendments (accepted by the Lukiiko and the Kabaka)¹⁸ the resolution was given legislative effect by an Ordinance, the Buganda Taxation Ordinance, 1921, enacted by the newly constituted Uganda Legislative Council.

As if to emphasise the point the Ordinance recited the authority of the Lukiiko resolution agreeing to this special taxation over the Baganda. It was also expressly stated that the Ordinance would remain in force till 31 December 1925.¹⁹ Presumably to comply with what was conceived to be the proper procedure, a formal Agreement, the [B]Uganda Agreement (Taxation of Natives), 1921, was signed. This Agreement reproduced the substance of the Ordinance.²⁰

The consistent procedure which proceeded imposition and increase of direct taxation in Buganda, strongly support the view that the Protectorate Government acted on the belief that consent of the Buganda authorities was necessary for the validity of the relevant legislation. It is significant that at no time during the period under consideration was any argument ever raised based on the power of the Commissioner

¹⁷Coryndon to C.O., 8 November 1920, CO536/104. Coryndon personally attended some of the Lukiiko meetings to hear the discussion, and (perhaps) indirectly to assert pressure upon the chiefs. Coryndon was anxious to start development projects after many years of almost total stagnation. Moreover, there were complaints of injustice over the poll tax whereby the rich chiefs paid the same amount as the peasants. See Mahmood Mamdani, Politics and Class Formation in Uganda, at p.122.

¹⁸Attorney-General's report on the Bill. Enclosure Deputy Governor to C.O., 17 October 1922, CO536/121.

¹⁹Section 1, Laws of Uganda, 1923, vol.1, chapter 63. In the Attorney-General's report, *ibid.*, it was stressed that the procedure in making the Ordinance was in accordance with the requirements of Article 12 of the Buganda Agreement.

²⁰The Agreement was signed on 24 August 1922, see Laws of Uganda, 1923, 3:482.

under Article 12 of the 1902 Order in Council to make legislation for raising of revenue. This point is emphasised if one contrasts the procedure which was followed in Buganda with that in the other regions of the Protectorate. Apart from the district of Toro, tax in these regions was imposed, increased or decreased at the discretion of the Government by merely enacting relevant laws or applying the existing taxation legislation to them.²¹

As for Toro, the provisions of its Agreement relating to taxation differed somewhat from the corresponding Articles of the Buganda Agreement. Under Article 5 of the Toro Agreement it was stipulated that "There shall be imposed henceforth on the natives of the Toru [*Sic*] district the same taxation as is in force by Proclamation in the other provinces or districts of the Uganda Protectorate, to wit the hut tax and the gun tax."²² In contrast to the Buganda Agreement, the Toro Agreement did not state that other taxes were not to be imposed in the district without the consent of the King of Toro. When in 1905 the poll tax was introduced under the Poll Tax Ordinance, 1905, the Ordinance was applied to Toro without any prior consent.²³ Presumably the Protectorate Government assumed on interpretation of the Toro Agreement that consent was not necessary. When a further increase of the poll tax was contemplated in 1909, the Secretary of State instructed the Uganda Government that any future increases of tax in Toro or imposition of new tax had to be with the prior consent of the king of Toro.²⁴ Consequently before the Poll Tax Ordinance of 1909 (*supra*) were applied to Toro, a formal Agreement, the Toro Agreement (Poll Tax), 1910, was entered into with the King and chiefs of Toro

²¹For example: Proclamation of 27 January 1909 (Uganda Gazette, 1909, 21:22), applied the Poll Tax Ordinance, 1909, *supra*, to Busoga. Proclamation of 16 March 1911 (Uganda Gazette, 1910, 3:122), applied the same Ordinance to Bunyoro and Lango. The Poll Tax Ordinance, 1914, and 1920, were made applicable to the whole Protectorate, the rates of taxes payable were fixed by the Governor.

²²Appendix 4. The Hut Tax Regulations, 1899; and the Gun Tax Regulations, 1899, *supra*, applied to Toro. As stated above, Johnston claimed that the chiefs had consented to the taxation though there is no written testimony to back his assertion.

²³Notice, 18 April 1905 (Uganda Gazette, 1905). The Ordinance was also applied to Ankole and Bunyoro.

²⁴C.O. to Ag. Governor, 7 January 1910 cited by Ag. Governor to C.O. 536/53.

which expressly authorised the application of the Ordinances to that district (Article 5). Another Agreement was again entered into some five years later, the Toro Agreement (Poll Tax), 1914, before the poll tax was further increased under the Poll Tax Ordinance, 1914.²⁵ In the latter Agreement it was stipulated that the new Ordinance or any other ordinances replacing it might be applied to the district without any further need for consent of the King of Toro.²⁶ This provision was clearly intended to give the Protectorate Government a free hand in making future legislation for raising of revenue in the Kingdom.

As for the district of Ankole whose Agreement with Britain was similar to that of Toro, there is no evidence of any formal consent having been sought and given before the poll tax was imposed or increased. This can be explained on the grounds that the Agreement was still under suspension by the time the Poll Tax Ordinances of 1909 were applied to it. And when the Agreement was restored in 1912, one of the conditions was that its restoration would not invalidate the poll tax introduced during the suspension of the Agreement.²⁷ This however does not account for the subsequent taxation which was imposed in Ankole.

9.4 Further "Interior" Taxation -- the Bicycles Fee Debate

Reverting to the issue of license fees and charges in Buganda, we have seen that by 1909 the Protectorate Government was concerned that it had no power under the Agreement to levy charges and fees without the consent of the Kabaka. However, it postponed proposing the amendment of the Agreement to the Baganda to give the Crown

²⁵Laws of Uganda, 1923, Vol.3, p.515, 519. The preamble of the former Agreement recited that under the Buganda Agreement, 1900, a hut and gun tax of six shillings each had been imposed, and that it was agreed under the Toro Agreement of the same year that a uniform tax was to be imposed in Toro as in the other districts of the Protectorate.

²⁶Articles 1 and 2.

²⁷Proclamations of 12 September 1912. See H.F. Morris, A History of Ankole (Kampala, E.A.L.B., 1962), at pp. 44-45.

the necessary authority for fear of the consequences in the event they declined. For ten years the issue remained in limbo as far as the Protectorate Government was concerned. Meanwhile, a number of Ordinances were made without any objection by the Buganda authorities, nor was the legislation apparently ever challenged in the courts on ground that it was "*ultra vires*" the 1900 Agreement as had been feared by the local legal advisers.²⁸

In 1919, following an increase in the fees for the compulsory registration of bicycles under the Bicycles Ordinance,²⁹ the Buganda authorities for the first time raised an objection pointing out that the increase without first reference to them was contrary to Article 12 of the Agreement. The Protectorate Government managed to overcome the problem by explaining to the irate chiefs the value of the Ordinance and the need of the registration fees to sustain the administration of the scheme. Subsequent increases of the fee in 1921 and 1926 were met with similar objections but on both occasions the Government was able to talk the chiefs into acceptance.³⁰ It is significant that in none of these cases did the Government try to justify the fees on ground of its unlimited power under the Uganda Order in Council to legislate for raising of revenue in the Protectorate. Evidently the assumption was that in Buganda the provisions of the Order were subject to the Agreement.

Officially after 1926 the issue of the bicycle registration fees was never raised again with the Protectorate Government, nor for that matter were the other charges or fees

²⁸Examples of legislation enacted include: Fees for fishing permits (Sleeping Sickness Ordinance, 1913); Fees for motor cars and motor cycles licenses (Motor Traffic Ordinance, 1910; and Highway Ordinance, Laws of Uganda, 1923, 1: chapter 84). See also the Fees and Royalties Ordinance, chapter 85, it empowered the Commissioner to impose fees for a range of purposes. The latter Ordinance was probably justified under Article 12, since it expressly excluded from the definition of "interior taxation" charges for water, market, lighting, and so forth, "which may be treated apart as matters affecting municipalities or townships."

²⁹Laws of Uganda, 1923, 1: chapter 1.

³⁰Governor to C.O., 29 January 1930, *supra*.

imposed in Buganda without the consent of the Kabaka and the Lukiiko ever challenged again. However, in January, 1929, one Yusufu Bamuta (member of the Lukiiko and lately its Secretary before his sacking by the Protectorate Government) purporting to speak on behalf of the people of Buganda, revived the matter. In a petition to the Colonial Secretary Bamuta alleged that the Governor was violating Article 12 of the 1900 Agreement by imposing direct yearly taxes on bicycles, motor cars and fishing licenses without prior consent of the Kabaka and the Lukiiko as was prescribed in this Article. Consequently, Bamuta claimed that these taxes were illegal.³¹

As a matter of policy the Colonial Office was inclined not to do anything in response to the allegations as it did not wish to encourage the habit of direct corresponding with it. On the other hand there was a fear that the petition could culminate in a political attack on the Colonial Office in England of the way it was administering Uganda. In the end the Governor was instructed officially to ignore Bamuta's allegations, since he was not a representative of the Buganda Native Government, unless the Kabaka himself raised the matter with him. However, he was told to write a full confidential report on the substance of the allegations.³²

In a detailed memorandum, Gower, then Governor, reviewed the origin and the arguments of the interpretation of the words "interior" and "exterior" taxation as we have indicated above.³³ He suggested that Russell's interpretation which was accepted by the then Colonial Secretary in preference to that of Judge Ennis, appeared to be misconceived. Since, as he had been advised by his Attorney-General, the opinion then expressed was not necessarily binding, he wondered whether Ennis' interpretation (that

³¹Petition, 7 January 1929, CO536/151. Bamuta was officially marked as the leader of the "Anti-British administration party." Governor to C.O., 28 August 1928, CO536/150/20161.

³²Minute Bottomley of 13 May 1929, on Governor to C.O., 14 March 1929; and C.O. to Governor, 1 June 1929, CO536/151/20255.

³³Governor to C.O., 29 January 1930, *supra*.

"exterior" taxation meant tax imposed upon the Baganda in common with the rest of the Protectorate) ought not to be substituted for the former.

On practical grounds, the Governor pointed out the difficulties which might arise were Russell's opinion to be maintained. For instance, all legislation imposing charges and fees enacted in the previous twenty years would be held illegal unless the Kabaka and the Lukiiko agreed to the fees or to the amendment of the Agreement -- for neither of which he held any prospects. If they refused, in his opinion it would be very unfair to continue with the fees in the rest of the Protectorate and not in Buganda unless a proportionate reduction was made to the Government expenditure in Buganda; which was practically impossible to implement. Gower, however, reiterated that he would not force the issue with the Kabaka unless he (the Kabaka) raised it. But at the same time he undertook for the future to consult the Kabaka before enacting any law involving taxation affecting the Baganda.³⁴

Again it is significant that nowhere in this detailed memorandum did the Governor try to suggest that the Agreement was not legally binding on the British Government. If this idea had ever occurred to the Protectorate administration during this period (when it was anxious to justify the legal basis of the taxation legislation and in a confidential memorandum) one certainly would have expected it to have, at least, raised the point that after all the Commissioner had unlimited powers under the Order to legislate for raising of revenue. Instead the Governor directed all his efforts to the legal interpretation of the Agreement. This strongly suggests that it was believed to be the only legal option (apart from proposing amendment of the Agreement) available to it.

³⁴The Governor pointed out that the administration was not encountering any problems with the Ankole or the Toro Agreement, respectively, because Article 7 thereof prescribed that the district would be subject to the same laws as applied in the rest of the Protectorate. This provision was interpreted to include laws imposing taxes and license fees.

9.5 Re-interpretation of Article 12

Following Gower's report the question of interpretation of Article 12 was re-opened in the Colonial Office. Again the critical issue was whether judge Ennis' interpretation ought to have been preferred to that of the Crown Advocate. While the question was under departmental discussion, the Secretary of State indicated to the Governor that it would take a long time for the matter to be thoroughly considered by his Office:

Meanwhile, [the Secretary of State wrote] until a final decision is reached regarding the way in which this clause should be interpreted, it is open to question whether the practice of consulting the Kabaka of Buganda regarding the application to the Baganda of any further general taxation which it may be proposed to introduce throughout the Protectorate should be put into effect, and I shall be glad if, should the occasion arise to introduce new taxation, you will communicate with me before adopting the course.³⁵

Quite clearly the Minister was concerned that any premature consultation with the Kabaka could establish a political precedent from which the Government could not easily resile if it turned out that, on the strict interpretation of Article 12, the Governor was under no legal obligation to do so.

In the meantime the consensus of the non legal members of the Colonial Office was strongly tilted in favour of Ennis' interpretation. Acheson, Principal Secretary, argued that according to the knowledge and level of development of the Baganda at the time of the Agreement, Ennis' interpretation, on a balance of probabilities, seemed to be nearer to what the parties must have intended than Russell's. But whatever the interpretation he strongly urged that the Protectorate Government be instructed to confront the Kabaka and the Lukiiko with the matter rather than buying time as was done in 1909. Acheson reasoned that:

The issue is bound some day to become one of practical importance. It will then have to be settled either by an appeal to the Courts (which may go as far as the House of Lords [*sic*] or by negotiation). An appeal to the Courts is to be avoided if possible, and it is clearly better to negotiate while there is no immediate urgency and no actual proposals for additional taxation are before the people to complicate the matter.

³⁵C.O. to Governor, 31 March 1930, CO536/160/20525

Parkinson, Assistant Secretary, agreed with this view. In a note to Bushe, Legal Assistant, he literally asked him whether he could think of a sufficient argument to defend Ennis' interpretation: "If so, the Protectorate Government would be free to act without prior reference to the Buganda Native Government in regard to the imposition of taxation applied generally in the Protectorate including Buganda ..." Parkinson conceded that if the Baganda persisted there would be no alternative but an authoritative interpretation presumably secured by way of judicial process or conceivably by submission to an agreed arbitrator.

Bushe obliged. He argued that to sustain Russell's interpretation one had to make three assumptions. Firstly, that it was proper to apply to a document of this sort strict canons of construction and that "exterior" taxation had to be read *ejusdem generis* with Customs Regulations and Porter Regulations. Secondly, that Customs Regulations and Porter Regulations constituted a class. Thirdly, that the class which they constituted was one having the common factor of matters taking place partly within and partly without Buganda. Bushe claimed that none of these assumptions were justified in this case. The interpretation of the Agreement required common sense rather than the technical rules of interpretation. Moreover, he argued that the Porter and the Customs Regulations neither constituted a class nor was there a common factor between them as Russell seemed to have suggested. Consequently, the *ejusdem generis* rule could not in any case apply. Bushe felt that the only sensible meaning to be put to Article 12, was the one suggested by judge Ennis: Buganda was subject to the same taxation regulations as might be applied to the rest of the Protectorate generally, but was not to be subjected to any taxation applying only to it (other than the hut and gun tax) without the consent of the Kabaka. In a footnote, Bushe went even further to assert that if his interpretation of "exterior taxation" was sound, since both the hut and gun taxation had been introduced throughout the Protectorate, it followed that they had also become "exterior taxation"

within the meaning of Article 12.³⁶

On the basis of Bushe's advice Ennis' interpretation was accepted by the Secretary of State as the official interpretation of the problematic Article 12. In communicating it to the Governor of Uganda, he was instructed to treat it as confidential and only to use it for his own guidance unless and until there was a serious objection on the part of the Buganda Government in some concrete case then he was to confront it with this interpretation. If, however, the objection persisted he was to secure an authoritative interpretation through a judicial process or possibly by an agreed submission to arbitration.³⁷

9.6 *Rex v Buganda Cotton Company*³⁸

By a curious coincidence before the Colonial Secretary responded to the Governor, the issue of "interior" and "exterior" taxation was raised in the High Court of Uganda, in the case of *Rex v Uganda Cotton Company*. In this case the Buganda Cotton Company was convicted in the Magistrate's Court for purchasing raw cotton without a license contrary to sections 18 and 25 of the Cotton Ordinance, 1926. It appealed to the High Court against the conviction on the grounds that the fee imposed under the Cotton Ordinance was "interior taxation" therefore it was void since the Kabaka had not consented as was required under Article 12 of the Agreement.³⁹

Chief Justice Griffin, sitting with Acting Judge Hearne, after cautioning himself that the critical words "interior" and "exterior" were not terms of art with a definite

³⁶See minutes of 30 June 1930; 7 July 1930; and 21 August 1930, on Governor to C.O., 29 January 1930, *supra*.

³⁷C.O. to Governor, 24 August 1930, CO536/160/20525.

³⁸(1930), 4 U.L.R. 34.

³⁹For the purpose of the appeal the Court assumed that the appellant Company was a "Muganda".

meaning and consequently had to be construed within their context, held that "exterior" taxation referred to taxation that was common to the whole Protectorate whilst "interior" that which was restricted to Buganda. In other words he upheld Ennis' construction of the Article which, probably, he was aware of prior to the case. The Chief Justice speculated that this "strange" Article was possibly incorporated in the Agreement by the Buganda authorities to guard the Baganda, who at the time of the Agreement were far more advanced than the others in the Protectorate, against a heavier taxation burden than could be imposed throughout the Protectorate.

Since Griffin found that the cotton tax was levied throughout the Protectorate he held that it was "exterior" taxation and therefore consent of the Kabaka was not necessary before it was imposed. On this ground the appeal was dismissed. However, the Chief Justice took the opportunity to comment on what he said took considerable time during argument in the Court: the effect of a treaty on the power to legislate for the Protectorate. Without citing any authorities (though he indicated that several had been referred to) he observed that a treaty except where it was expressly incorporated in a statute was not part of the law of the Protectorate. It could not therefore give rights of action nor afford grounds for defence of private individuals.

This judgement could not have come at a better time for the Protectorate administration. The Governor, naturally, was so excited that he immediately despatched a copy of the decision to the Colonial Office which, judging by the dates, must have crossed with the Secretary of State's letter referred to above enclosing his interpretation of Article 12.⁴⁰ At the Colonial Office a sigh of relief was expressed on hearing of the judgement especially as it coincided with the Department's interpretation.⁴¹ It is

⁴⁰ Ag. Governor to C.O., 29 August 1930, CO536/160/20525.

⁴¹ Minute Inghams of 25 September 1930; and Parkinson's minute of 25 September 1930. Bushe just initialled (12 November, 1930) without comment.

noteworthy that none of the officers (including Bushe) commented on the Chief Justice's *obiter dictum*.

9.7 Summary and Conclusion

Whatever was the true interpretation of the problematic Article 12 is beside the point. What is important is the overall construction of the Agreement within the framework of the Protectorate law. The evidence examined in this chapter indicates that the view of the Protectorate Government was that the Crown's legal power in Buganda was subject to the Agreement. In this particular case this was so notwithstanding that under the Uganda Order in Council the Commissioner had been granted unlimited power to legislate for the raising of revenue in the Protectorate. It has been emphasised above that it was significant that at no time was a reference made, even when the Government was desperately trying to find a way out, to the said powers under the Order. Evidently, the idea was firmly implanted that this power was limited by the Agreement. Both London and Uganda officials concentrated on the interpretation of the Agreement to justify the legislation for the raising of revenue in Buganda. Thus the case of the Buganda Cotton Company was very important not only for giving a construction which assured unlimited legal powers of taxation to the Crown throughout the Protectorate but also for raising the possibility, albeit *obiter dictum*, that the Agreement contrary to prior precedents was not after all legally binding. On the later point, however, as we shall see below, it was just the beginning and not the end of the issue.

Further evidence is examined in the following chapter with regard to the Crown's legal power to deal with land consequent upon the 1900 Agreement and the Uganda Order in Council, 1902.

CHAPTER 10

THE CROWN'S CONTROL AND POWER OVER THE LAND: THE OUTCOME

It will be recalled from chapter five that immediately after the Law Officers had delivered their report on the Crown's power to deal with land, the Foreign Office proceeded to give it legal effect by incorporating in the Uganda Order in Council a definition of Crown land which included, as suggested in the report, land acquired by the Crown through treaties or grants from local chiefs, and any public land under the control of the Crown by virtue of the Protectorate. Article 7(3) of the Order empowered the Commissioner to dispose of Crown lands by grant or lease on such terms, subject to any Ordinance, as he deemed fit; and the Crown Lands Ordinance, enacted the following year, prescribed rules for dealing with this land.¹ In this chapter I investigate the official interpretation of the legal position with regard to the Protectorate Government's powers and authority over the land in Buganda and the rest of the Protectorate following the 1900 Agreement and the 1902 Uganda Order in Council.

10.1 Buganda Land Settlement

In Buganda, as we have seen, the land question was settled under the 1900 Agreement (Article 15). Working on the assumption that the total area of Buganda was 19,600 square miles, the Agreement provided for the division of this land between the Crown, Baganda notables and the Missionary societies as follows: the royal family and leading chiefs were to receive a total of 958 square miles, some in their official and others

¹No.2 of 1903, Uganda Protectorate Ordinances, 1901-1905.

in their private capacity; 8000 square miles were granted to a "1,000 chiefs and private land owners"; Missionary societies received an aggregate of 92 square miles; 50 square miles were set aside for existing Government stations, and 1500 square miles for forest reserves. The rest of the land (including the forest reserves) totaling an estimated 9000 square miles which was described as "waste and uncultivated" was vested in the Crown on the understanding that the revenue therefrom was to be used for the general purposes of the Protectorate. The Agreement provided further that in the event ("after a careful survey") of the area of Buganda being found to be less than the estimated 19,600 square miles, the Crown's share would be reduced to the extent of the deficiency. On the other hand, if the total area were found to be more than this, the excess land was to be shared, with the Crown taking one half and the other half divided among the chiefs.

Once the Agreement was executed, the work of distributing the land to the chiefs and notables commenced. Briefly the procedure was as follows: the Lukiiko (which under the Agreement was invested with the power of determining the allotments among the chiefs with a possible appeal to the Kabaka) would draw up a list of allottees and the sizes of their shares which would then be submitted to the Commissioner for confirmation. After he approved the list, provisional certificates would be granted to the allottees which entitled them to demarcate their chosen estates to the extent of their allotment, or indicate it by description on a map. More often than not grantees chose to demarcate small portions from their total entitlement in different counties rather than satisfy all of it in one area. Final certificates which recognised "absolute ownership" were granted after the land had been surveyed by the Government. Not surprisingly, it took more than three decades before the whole project was accomplished.²

²For a detailed account of the survey and the allocation, see Low and Pratt, Buganda and British Overrule, pp.107-117; Thomas and Spencer, Uganda Land and Survey, pp.66-67, 73-84.

10.2 Crown Land in Buganda

On paper approximately half of the whole territory of Buganda was supposed to be Crown land. Initially, the Government let the Baganda allottees select their estates without any intervention on its part, apparently intending to assert the Crown's claim to its share afterwards. Over four years after the allocation had started, the Lukiiko was still grappling with the allotment list and many allottees were yet to select their estates. Meanwhile, the Government was becoming increasingly impatient with the delay. It was then that Wilson decided to take action by issuing a directive to the effect that any allotments not demarcated by the end of March, 1905, would be forfeited. To add more weight to his order, Wilson urged the Commissioner, Sadler, to issue a similar order, but it would seem that the latter declined to do so.³ Presumably Sadler felt himself lacking the power to issue such an order. This view is supported by the fact that, shortly thereafter, Wilson negotiated with the regent chiefs, and persuaded them to make a written undertaking which effectively confirmed his order. In addition, the regents agreed that if before that date the Government wanted any land in Buganda, provided that they were satisfied that the same had not already been granted to somebody else, they would let the Government have it with a guarantee that no claims over it would ever be made forever.⁴

Later Wilson, by then Acting-Commissioner, explained to the Colonial Secretary that, according to the advice he had received from Judge Ennis, the above arrangement appeared to be contrary to the Agreement. Nevertheless, Wilson reasoned, the judge had justified it on the ground that "the possibility of complication ... [was] so small that the

³Memorandum on Land Settlement by Allen, 23 August 1907, CO536/18.

⁴Undertaking of 20 February 1902, see memo Allen, *ibid.* In a telegram of 1 February 1902 (F02/930), Wilson told the Foreign Office that the Lukiiko passed a resolution to regard all undemarcated land as Crown land. At the time the Government was negotiating to sell ten thousand acres of land to the Uganda Company, minute Ellis of 10 April 1905, on Ag.Commissioner to F.O., 23 February 1905, F02/929.

immense advantage derived from being in a position to deal with Crown lands, pending the final survey of the country ... [was] so obvious as to override the possible legal flaw". Personally, Wilson claimed, he could not see any illegality with it since the undertaking had been endorsed by the Lukiiko which had the power under the Agreement to decide as to the validity of any claims.⁵ The arrangement was approved by the Colonial Secretary without any objection.

Thus at least the Government could deal with the undemarcated lands as Crown land while the survey proceeded. But this was not enough to give the Government a right over the land which was likely to be sought subsequently by expatriate investors. Allottees had demarcated the best lands for their entitlement, leaving what was considered to be the worst land. Moreover, most allottees, partly due to ignorance of proper dimensions had demarcated estates well in excess of their actual entitlement, thereby reducing even further the land available to the Government, and of course, pending the survey, there was no basis for challenging their measurements.

Partly to counteract the problem of excessive demarcations and partly to ensure that the Government had a share of the best lands, a practice was developed by the Government whereby if an estate on survey was found to be bigger than what was indicated as the allottee's entitlement in a particular area, the surplus was immediately declared to be Crown land, and in a number of cases the land was disposed of by the Government. When, on the other hand, there were shortages, owners were told to postpone their claims for making up the difference until after completion of the survey for the whole country. In spite of strong protests by the chiefs the Government persisted with the practice. Subsequently, it was given legal effect by the Land (Survey) Law, 1909, which was drafted by the Government and, surprisingly, enacted by the Lukiiko.

⁵Ag. Commissioner to F.O., 23 February 1905, *ibid.*

This law also prescribed that the claims of those allottees who, by 31 December 1909, had not applied for a provisional certificate, would automatically expire.⁶

10.3 Controversy over the interpretation of Article 15

The circumstances leading to the enactment of the Land (Survey) Law, are not very clear.⁷ However, less than a year later, the regents wrote to the Government vehemently attacking the practice which was legalised by the very law they had enacted. Their main complaint was that the excess lands were being sold to Europeans, whereas "In the [B]Uganda Agreement, it says that the Baganda will be allowed to keep their original estates". They alleged that the lands being sold were "already cultivated and full of people"; consequently, they could not be Crown land. The chiefs suggested that a person with more than one estate, if found to have an excess on one of them, should be given an option to surrender less favoured land. Further if one had a surplus over one estate and a shortage over another, they proposed that he ought to be allowed to balance the two. Whatever the case, the regent chiefs were adamant that the Government had no right to the surplus lands found in the cultivated or occupied areas until the end of the survey, after all the 8000 square miles granted had been fully apportioned.⁸ In their memorandum, the regents made it clear that they were not against Europeans acquiring land in Buganda; on the contrary they were very much in favour of it.

Quite clearly the problem was one of interpretation of Article 15 of the Agreement. According to the chiefs' construction of the provision, the Baganda allottees were entitled to satisfy their shares from the cultivated lands or occupied lands up to the maximum of 8000 square miles, before the Government could assert its claim to whatever remained.

⁶Sections 2 and 3, Uganda Gazette, 1909, 2:279.

⁷Tomkins, Chief Secretary, in a memorandum of 13 May 1911 (enclosure Governor to C.O., 6 July 1911, CO879/107) asserted that the draft was made on Governor Bell's instructions and was left with the Lukiiko for six months before the latter adopted it.

⁸Regent Chiefs to the Provincial Commissioner, 30 March 1910, enclosure Governor to C.O., 6 July 1911, *supra*.

This line of argument was later adopted by a legal practitioner, Burns, who was retained by two of the regent chiefs and ten other senior ranking chiefs to pursue the matter with the Government on their behalf.

Burns contended that under Article 15 one thousand chiefs and private owners were granted estates of which "they were already in possession" to the tune of 8000 square miles. The words "they were already in possession" he interpreted to refer to the lands which the Baganda as a tribe occupied at the time of the Agreement. He submitted that the estates which allottees demarcated were from these lands, and therefore, if there were any surplus on one estate, it was up to the Lukiiko to determine how best to re-allocate it until the 8000 square miles had been surveyed. Burns charged that the Government, by declaring the surplus land Crown lands, was trying to take more than it had contracted for, namely, 9,000 square miles of "waste and uncultivated land". On the basis of his interpretation, Burns went on to suggest that the Land (Survey) Law, 1909, in so far as it purported to declare all surplus lands after survey Crown land, was of doubtful legality as it was inconsistent with the Agreement. Moreover, he claimed that the Lukiiko, when it enacted this law, was ignorant of its overall effect, hence the law ought to be annulled on this ground too.⁹

Russell, then Acting Chief Secretary; Allen, the Land Officer; and Parker, Acting Crown-Advocate, in a joint memorandum, opposed the argument on both practical and legal grounds. They claimed that if the proposals were to be accepted they were bound to lead to endless problems: delays in the survey while awaiting for allottees to make up their minds; the need for re-surveying many of the estates (for instance to balance excesses with shortages); difficulties in keeping records since there was more than one survey group each usually not knowing what the other was doing; and so on. All of these

⁹Burns to Russell, 9 December 1910, enclosure Governor to C.O., 6 July 1911, *supra*.

problems would inevitably cause the already excessive survey expenses to soar even further. They contended that the chiefs had no case either on legal grounds. Since in their opinion the object of the land settlement was to divide the land on a more or less equal basis between the Crown and the Baganda:

... it could not [they submitted] have been the intention ... that the Government should accept as its share of the land, the hill-tops and marshes and such borderland parts of Buganda, as remote as possible from important centres, as should be left in that dim future when the disputes and surveys caused by the allotment, re-allotment and further re-allotment of all land of any value among the native land owners should be composed.

Further, in their interpretation of Article 15, the one thousand chiefs and private owners had to be allocated estates of which each *individual* (emphasis added) was "already in possession" at or prior to the Agreement. If that were true, they concluded that logically shortages from one estate could not be satisfied by surplus from another estate since the two could not have been possessed by the same persons. On the basis of this interpretation they accused the Lukiiko of violating the Agreement when making allocations because it allowed the allottees to select estates at random.¹⁰ For these reasons Russell (and others) urged Burns to advise his clients to drop the matter, especially as it might lead to a wider inquiry and possibly a redistribution of the land to their detriment.¹¹

The chiefs, however, refused to budge. Indeed Burns, on their behalf, proposed to the Government that the matter be referred to the Law Officers of the Crown in London for an official ruling.

Meanwhile the chiefs' claims were boosted by Jackson, the newly appointed Governor of Uganda, who arrived in the midst of this controversy. Jackson had acted as

¹⁰Senior chiefs evicted junior chiefs and their followers from favoured lands; even the traditional sacred clan lands (Butaka) were allocated. The latter subsequently led to a serious political outcry in the early 1920s, Low and Pratt, Buganda and British Overrule, pp.109-110.

¹¹Memorandum of 25 January 1911, enclosure Governor to C.O., 6 July 1911.

a go-between for Johnston and the Baganda during the negotiations of the Agreement. He recalled that, at the time of the Agreement, it was recognised that the whole of Buganda belonged to the people of Buganda "and the main object of the Agreement was to divide the land into, approximately, two equal parts, the Baganda to have the first choice and the remainder including the forests to fall to the Government". Jackson explained that they, Johnston and the other Europeans including himself, were deceived by the little they had seen of Buganda to assume that it was all very fertile and rich:

The Baganda, of course, knew their own country; we did not, and the former, like all other natives, naturally selected the best lands for themselves. We now find that we have, from the point of view of the quality of the waste and uncultivated land, got the worst of the bargain. But the bargain was of our own making.¹²

Jackson disagreed with Russell's (and others') interpretation that the intention was for the grantees to receive the land they individually possessed. In his opinion Burns' construction was the one which was intended. He was also prepared to accept the argument that the Lukiiko enacted the Land (Survey) Law, 1909, unaware that the Baganda were thereby abandoning their rights under the Agreement. Whatever the legality of this legislation, Jackson thought that it would not be in accord with the British tradition for the Protectorate Government to take advantage of a law made in circumstances such as these.

Jackson's intervention prompted a sharp response from Tomkins, the Chief Secretary, who was acting as Governor prior to the former's arrival, and who had himself been working in Uganda for about ten years. Referring to Johnston's despatch to the Foreign Office written just after the Agreement, Tomkins argued that there was nothing therein to support his assertions that the intention was for the Baganda to satisfy their allotments before the Crown. In any case in his opinion what mattered were the contents

¹²Memorandum of 13 April 1911, enclosure Governor to C.O., 6 July 1911.

of the Agreement and not the alleged unwritten intentions of its framers.¹³

Counter memoranda were exchanged but in the end it was resolved to refer the matter to the Colonial Office for an authoritative ruling. In a covering note, Jackson apologised for disagreeing with the rest of the Protectorate staff on this issue, but he said that he felt he had an obligation to state his views openly "even if those views do not tend to assist the Administration in acquiring small acres of land suitable for alienation by sale and lease". Moreover, he claimed that according to his information the attempt by the Government to take advantage of the Land (Survey) Law, was already causing great discontent amongst the Baganda. For all these reasons he thought that it was inadvisable to proceed with the law.¹⁴

Judging by the Agreement alone, especially Article 15, there was really nothing upon which one could conclusively determine whether the intention was that the Baganda grantees were to select their shares before the Crown, or that it was to be a simultaneous process. Burns' argument was probably more convincing on this point than Russell's, though his emphasis that the Government's share of 9,000 square miles was limited to "waste and uncultivated land" was somewhat undermined by reference to the Crown's share in the same Article as the "aforesaid 9,000 square miles of waste or cultivated, or uncultivated land, or land occupied without prior gift of the Kabaka or Chief by ... [peasants] or strangers". This suggested that the Crown's share was not necessarily restricted to waste and uncultivated land.

Extrinsic evidence, however, strongly supported the chiefs' claim. Apart from the fact that Jackson was himself heavily involved in the discussions leading to the

¹³Memorandum of 13 May 1911, enclosure Governor to C.O., 6 July 1911.

¹⁴Governor to C.O., *ibid*.

Agreement, it is really difficult to imagine why, if it was not true, he would have chosen to put his weight right behind the chiefs in contradicting his colleagues. In fact his explanation of the assumption made about the fertility of the land was very plausible. Secondly, the fact that the Government initially let the Baganda allottees select their shares has to be weighed against its case. Indeed it was when expatriates started showing interest in acquiring land in Buganda that the Government became concerned to get them some of the best land. Significantly, when it did, as we have seen, it first secured the undertaking referred to which was purportedly legalised by the controversial Lukiiko Land (Survey) Law. If the Government had been confident of its entitlement to select the Crown's allotment before the final survey, none of this would have been necessary.

In the event, the Colonial Secretary ruled in favour of the chiefs' claim. He agreed with Jackson that the policy adopted under the 1909 Land (Survey) Law contradicted the intention of the 1900 Agreement and thus had to be discarded. He gave Jackson instructions to arrange with the Buganda administration for the situation to be rectified. But as part of the deal, Jackson was told to insist on an undertaking by them that they would not claim any of the "surplus" lands that had since been leased or sold to innocent third parties.¹⁵

A formal Agreement, the Buganda Agreement (Allotment and Survey) 1913, was subsequently concluded between the Government and the Buganda authorities which, among other things, prescribed in detail the procedure which was to be followed in the event of a surplus or a shortage after the survey of demarcated lands. The controversial Land (Survey) Law, 1909, was also deleted and replaced by the 1913 Land (Survey) Law.¹⁶

¹⁵C.O. to Governor, 20 August 1911, CO879/107.

¹⁶Laws of Uganda, 1923, 3:471 and 491.

The ultimate effect of all this was that the Government had to wait until 1936, when the survey was completed, before it knew exactly what was left as Crown land in Buganda. Unfortunately for the Government, it was not much either in quantity or in quality. The area of Buganda proved to be only 17,320 square miles as compared to the 19,600 square miles of the original estimate, and this deficiency, as we have seen, had to be borne from the Crown's share. As regards the quality of this land the best had been taken by the Baganda allottees leaving the Crown some 7,500 to 8000 square miles which included forests, swamps, eroded hill tops and "tracts in the outlying counties of the Kingdom which by lack of water or on account of tsetse fly [were] ... uninhabitable".¹⁷

10.4 Government control over "Mailo" land

Since, for all practical purposes, the land that really mattered in Buganda was granted to the Baganda notables, what powers, if any, did the Government claim to have over this land? Before investigating this question, we should briefly consider the nature of the interest which the notables acquired.

Judge Ennis, in 1902, shortly after his arrival in Uganda, noted that in the provisional certificates which were given to grantees their titles were described as "fee simple". On his recommendation all references to the English real property law concepts were discarded and instead the certificates were confined to a recognition of whatever tenure the grantees were subsequently determined to hold.¹⁸ Presumably, apart from his wish to avoid introducing the complexities of the English real property law into the Baganda held lands, Ennis might have thought that it was a legal misnomer to refer to these lands as held in fee simple, since under the English feudal land system, although a fee simple is the most ample estate from the point of view of the right to deal with the

¹⁷Low and Pratt, *Buganda and British Overrule*, at pp.140-491.

¹⁸Ennis' land report of 7 June 1910, cited by Ennis, Carter, and Russell report (Ennis report), 13 March 1907, CO879/85.

land, it is nonetheless derived from the Crown.¹⁹ The land allotted to the chiefs was not Crown land -- it belonged to the Kabaka -- and hence could not be described as held in fee simple or for that matter under any other English common law concept of real property.²⁰

In 1906, a land Committee constituted by Ennis, Russell and Allen (Ennis Committee) which was set up to probe the land matters in the Protectorate recommended that the Government call upon the Buganda Lukiiko to enact a law which should specify the tenure upon which the Baganda held their land. Subsequently, a draft law prepared by Russell along the lines suggested by the Committee, was presented to the Lukiiko which proceeded to enact it as the Buganda Land Law, 1908.²¹ The name "Mailo land" (derived from the English "mile") which hitherto had been used unofficially to refer to the estates granted under the Agreement, was adopted to describe this system of land holding.

The Land Law did not expressly define the nature of the mailo land, but it was clearly intended to be an absolute tenure akin to the English fee simple.²² Apart from the prohibition to transfer mailo land to non-Ugandans and religious organisations, except with the consent of the Governor and the Lukiiko, mailo owners were free to dispose of their land whether *inter vivos* or by will as they wished. Where a mailo owner

¹⁹Generally G.C. Cheshire, Modern Law of Real Property (London, Butterworths, 1962), at pp. 31-36.

²⁰In the British Central Africa Protectorate case, Augusto Paolucci v The Commissioner of Mines, the Court of Appeal for Eastern Africa overruled the lower Court decision that Europeans who were granted land prior to the Protectorate by native chiefs were not absolute owners but had to be regarded as holding their title from the Crown, and subject to the English law of real property. The Upper Court maintained that the grantees' had a unique title outside the precepts of the English real property law, enclosure Commissioner to C.O., 31 March 1905, CO525/11.

²¹Uganda Gazette, 1923, 2: chapter 102.

²²In the final certificates grantees were described as "absolute owners"; and in official circles the tenure was commonly referred to as a "freehold". See Thomas and Spencer, Uganda Land and Survey, p.68. Krishna Maini, Land Law in East Africa (Nairobi, OUP, 1967) at pp.73-74, argues that the "mailo" was an actual freehold.

died intestate, the land would be inherited by his heirs determinable in accordance with the Buganda rules of inheritance. In the event of the absence of any heirs, section 4 provided that the land would be held by the Lukiiko and the Governor as trustees for the people of Buganda. Practically it was almost impossible for such a situation to happen, but the draftsman was obviously thinking of the common law concept of "escheat" under which the land reverted to the Crown, its original owner, in those circumstances.²³ Since the Crown was not the original owner of this land it had to revert to the people of Buganda. Probably, the Baganda would also have complained if the Crown took such land as it would reduce their aggregate share under the Agreement.

Reverting to the question of the Government's power over mailo land, it is noteworthy that apart from the Registration of Land Titles Ordinance, 1908 (subsequently repealed and replaced by the Registration of Titles Ordinance, 1923)²⁴ the Protectorate Government avoided enacting laws which directly affected mailo land. Wherever the Government wanted to impose any policy decision regarding this land, it exerted pressure on the Lukiiko to enact the relevant law.²⁵ There can be no doubt that there were very strong political reasons for the Government not to intervene in mailo land matters. The land was a delicate issue and the Government was wary of antagonising the beneficiaries of the land settlement who also happened to be the political leaders of Buganda. Nevertheless, it seems that the Government also believed that it had no legal powers to intervene by its legislation. The mailo land, as we have seen, was not Crown land nor was it regarded as granted to the holders by the Crown. Moreover, under the Agreement, apart from the power to acquire land compulsorily for limited public

²³Generally, Martin Leake, The Law of Property in Land (London, Stevens, 1909), pp. 20, 23, and 29.

²⁴Laws of Uganda, 1923, 2: chapter 102.

²⁵See for example the Busuulu and Envujjo Law of 1 January 1928, Native Laws of Buganda, 1957, p.168. The provisions of the Land Transfer Ordinance of 1906 (Uganda Gazette, 1906, p.53) which prohibited land transactions between native and non-natives, were re-enacted by the Lukiiko, see Land Law, 1908 (Uganda Gazette 1:110).

purposes, there was nothing to indicate that the Government could assert any other power over the land allocated to the chiefs. Most likely one of the main reasons the Ennis Committee recommended that the Land Law be enacted by the Lukiiko instead of the Governor was that it felt the latter had no jurisdiction. Presumably this also explains the enactment of the Land (Survey) Laws referred to above. Judges Ennis and Carter were largely responsible for the precedents that the agreements were legally binding and prevailed over any other laws of the Protectorate. Hence they were likely to exercise caution in this very important matter to ensure that it was done in accordance with the Buganda Agreement.

Further evidence of the Government's reluctance to intervene on grounds of want of legal powers, is found in the discussions of the Government policy with reference to outright sales of land to non-natives in Uganda. Till 1915, it was Government policy to sell Crown lands, and the Baganda were also actively encouraged to dispose of part of their huge estates to expatriates. In that year, however, the Secretary of State prohibited all outright sales of Crown lands to non-natives. At the same time he instructed the Governor to refuse, as a matter of policy, to give his consent to any outright transfer of mailo land to a non-native. Thereafter, instructions were issued to the Governor to consider making the ban permanent by legislative measures along the lines of the East Africa Protectorate Crown Lands Ordinance, 1915. The aim was to try to streamline the land policies in the two protectorates so that only leaseholds were granted to non-natives.²⁶

The move to impose a permanent freeze on the grant of freeholds greatly angered the Protectorate Government. Allen, the Land Officer, immediately responded,

²⁶C.O. to Governor, 31 August 1906, quoted in Deputy Governor to C.O., 12 February 1917, CO536/84.

emphasising the advantages of the freehold land tenure system over the leasehold. He claimed that since Uganda was less favourable to Europeans than the East Africa Protectorate, the only way to attract Europeans' investment in its land, was by offering them freehold as an extra incentive. Allen also argued that the ban on the Baganda selling their land to non-natives would be in breach of a policy hitherto followed, and was bound to impede development of the land and the country.²⁷

Protests from the Uganda Government led to suggestions within the Colonial Office that the matter be reconsidered. Coincidentally, judge Carter, who was then regarded as the leading expert on Uganda's land matters, having been a member (in most cases the Chairman) of all land committees set up since 1906, was in London. In a semi-official letter, Butler asked him for his opinion as to the likely reaction of the Baganda to a total ban on selling land to non-natives. Butler made it clear in his letter that he was not seeking his legal opinion on the matter, since it was conceivable that thereafter in his judicial capacity he might "have to give judgement in cases in which the principle of interference with the rights of owners of mailo land was impugned". Rather, he was after his personal assessment based on his knowledge of the Baganda. Carter replied that he was in no doubt at all that the Baganda would consider the ban a breach of faith and that they would resent it. He claimed that the Baganda knew their rights and were aware what a freehold was. Carter also cautioned that, according to his information, if the plans to prohibit absolute transfer of mailo land went through, their validity would immediately be tested in the courts.²⁸

Later in an official memorandum, Carter reiterated his views on this matter. He argued that, according to the final certificate, the mailo land was recognised as vested in

²⁷ Allen to Chief Secretary, 18 January 1917, enclosure, *ibid*.

²⁸ Butler to Carter, 16 July 1917; and Carter to Butler, 2 August 1917, CO536784.

the “absolute ownership” of the respective holders. Consequently, in his opinion, “legislation prohibiting the native from selling a portion of his land to a non-native would be unjust besides being of doubtful legality” Carter tried to explain away the restrictions imposed on transfer under the Land Transfer Ordinance, 1906 (which he stressed was adopted by the Lukiiko in the Land Law, 1908 *supra*) on the ground that it was not the intention for this power to be used for a total ban on transfer of land “Such a prohibition would be a breach of the spirit, if not the letter of the Uganda Agreement” In another memorandum on the same topic, he warned of “the grave legal question which will without doubt some day come for decision before the courts as to the validity” of the instructions prohibiting the Baganda from selling their land to non-natives, a right which he asserted was implied under the Agreement.²⁹

Other Government Officials, including the newly appointed Governor, Coryndon, added their voices in support of the freehold system and the right of the Baganda to dispose of their land to whomsoever they wished.³⁰ Although the Colonial Secretary still refused to change his policy as regards Government freehold, he did agree to lift the ban imposed on the Baganda, citing as the “determining factor” which influenced him, the views expressed by Carter:

As the matter presents itself to me the question to be decided is not the theoretical question whether freehold or leasehold is in the present or future interest of the country generally ... but the practical question whether the right granted to the native land owner under the [B]Uganda Agreement includes the right, subject to proper safeguards in the native interest, to alienate his land to non-natives in freehold. Having regard to the opinion expressed by Sir William Carter, I feel unable to resist the conclusion that the absolute prohibition of the alienation in freehold to non-natives cannot be maintained, so long as the position with regard to native owned land remains as at present.³¹

²⁹Ag. Governor (Carter) to C.O., 21 April 1920, CO536/100. See also Carter’s memorandum of 21 April 1920, cited by Batterbee in minute of 21 November 1920, on Coryndon to C.O., 22 September 1920, CO536/103.

³⁰Coryndon to C.O., *ibid*.

³¹C.O. to Governor, 18 January 1921, CO536/103.

Actually, Carter was not an independent observer in these discussions. On the basis of his land committees' recommendations, he was an ardent supporter of the freehold land tenure system in Uganda.³² His defence of the mailo owner's right to dispose of his land as he wished was probably an indirect attempt to further the campaign for the freehold system of tenure throughout the Protectorate. He possibly thought that, if the right of the mailo owner was sustained, it would be very difficult to refuse the Government the power to dispose of Crown lands in freehold. Nevertheless it must be remembered that Carter by then was very experienced in Uganda's legal matters, having been on the bench for almost two decades during which he was involved in all the important cases dealing with the agreements -- as yet not overruled. His persistent warnings of possible legal action and suggestions that the prohibitions on transfer were in breach of the spirit and possibly the letter of the Buganda Agreement might well have been genuine. The Colonial Secretary evidently considered them serious enough to warrant a change of policy.

Interestingly, the Colonial Secretary's decision did not end the matter. When, towards the end of 1921, the Governor communicated to the Lukiiko an outline of the draft rules for regulating the alienation of mailo land to non-natives, the Lukiiko immediately passed a resolution preventing the Baganda from selling their mailo land to non-natives. This resolution was politically motivated to counteract what the Baganda feared was a scheme to deprive them of their lands. The situation was particularly volatile because of the stories coming through to Uganda of Europeans displacing natives from their land in the newly proclaimed Kenya Colony.³³

However, by then the general attitude of most of the local officials was against the

³²Thomas and Spencer, Uganda Land and Survey, at pp.52-53, 55, and 63.

³³Ag. Governor to C.O., 7 November 1922, CO536/121.

system of freehold in Uganda, preferring instead grants of leasehold or rights of occupancy. Hence the Lukiiko resolution was not only welcome, but (knowing of course that the resolution could be withdrawn at any time) the Government wanted to go one step further and ensure that it remained a permanent policy in Buganda as in the rest of the Protectorate. Several proposals were put forward for effecting this policy. For instance, the conference of provincial commissioners suggested the conclusion of a supplementary Agreement with the Buganda administration prohibiting the alienation of mailo land to non-natives. On the other hand Jarvis, the Acting Governor, thought that the purpose could best be achieved by enacting Protectorate legislation possibly after seeking the consent of the Lukiiko, which, he was confident, would readily be granted.³⁴ The Attorney-General of Uganda, Hogg, on the other hand, opposed both of these proposals. He argued that the right of the Baganda to sell their land in freehold to non-natives with certain safeguards, was "solemnly guaranteed under our law" and therefore could not be removed whether by supplementary Agreement or by Protectorate legislation. Any further attempt to restrict that right would, in his opinion, constitute a violation of "a well known legal maxim that you cannot derogate from your own grant".³⁵

At the Colonial Office, in a joint minute, Batterbee and Bushe came up with yet another proposal: legislation by the Lukiiko. They argued that since the nature of the mailo was established by the Lukiiko Land Law, 1908, which also imposed certain restrictions on its transfer, "There ... [could] be no doubt as to the power under the

³⁴Ibid.

³⁵Memorandum of 24 October 1922, enclosure, *ibid.* The maxim which apparently the Attorney-General was referring to was unsuccessfully invoked in the case of The North Charterland Exploration Company (1910) Limited v The King (1931), 1 Ch. 169. The Court dismissed the argument by the Plaintiff (based on Campbell v Hall 1 Cowp. 204) that if a grant were made by the Crown without reserving the power to revoke, it could not go back on its grant - even by an Order in Council because that would still be its act. Luxmoore, J., held, at p.179, that this doctrine did not apply to land granted by the Crown. Moreover, in his opinion, the Crown could not deprive itself of its paramount right to legislate for the protectorate, pp.186-187.

[B]Uganda Agreement of the Lukiiko to pass such a law [i.e. incorporating the resolution] any more than there was of their power to pass the 1908 law". In the circumstances, they thought that a special Agreement was unnecessary, and they rejected the idea of a Protectorate legislation.³⁶

Batterbee and Bushe's proposal had the advantage that it did not entail direct Government involvement in the mailo land matters; but there were still a few problems to be solved. The Lukiiko in its resolution made it clear that it did not want sale of mailo land to non-natives in any circumstances. Its prohibition thus included sale of mailo land resulting from a court order (either for attachment to satisfy judgment debts or foreclosing mortgaged land) which all along was the only exceptional circumstance wherein the ban to sell to non-natives did not apply. The Conference of the provincial commissioners strongly supported prohibition even in these circumstances, and the Colonial Office was quite sympathetic. But since the Lukiiko under the Agreement, had no jurisdiction to legislate for Europeans, doubt was expressed as to whether it could legally prevent them from participating in a sale ordered by the courts.

Eventually, it was decided that the best course was for the Lukiiko to enact a law prohibiting mailo owners from selling their land to non-natives. But as regards preventing non-natives from buying this land when sold under court order, in view of the uncertainty as to whether the Lukiiko laws were binding on them, the Governor was instructed to enact a law in the Legislative Council which prohibited non-natives from participating in any forced selling of mailo land as long as the Buganda Lukiiko law still remained in force.³⁷

³⁶Minutes of 3 June and 5 June 1923.

³⁷C.O. to Governor, 1 February 1923, CO536/121.

There is no record that the Lukiiko ever enacted the law as proposed. As for the Protectorate legislation, it was not until 1944 that the relevant law was enacted.³⁸ Evidently both the Lukiiko and the Protectorate Government allowed the matter to drop. For purposes of this investigation though, these discussions illustrate the general belief that legally the Government had no power to intervene in matters relating to mailo land.³⁹ Of course, as some of the minutes testify, it was not a question of legal consideration per se. Policy also played a crucial role.

10.5 Rights over Minerals

The issue of rights over minerals in Buganda also demonstrates the assumed legal limits of the Government's claims to land in Buganda. Article 17 of the Agreement provided that "rights to all minerals found on private estates shall be considered to belong only to the owners of those estates, subject to a 10 per cent *ad valorem* duty which will be paid to the Uganda administration when the minerals are working". In contrast, Article 7(4) of the Uganda Order in Council, 1902, prescribed that "All mines and mineral being in, under, or upon any land in occupation of any native tribes or any members thereof, or of any person not possessed of the right to work such mines and minerals, shall vest in the Commissioner ... in the like manner as the mines and the minerals being in, or under any Crown lands".

It was not till around 1918, when expatriate firms started showing real interest in exploring for minerals in Uganda, that the issue of mineral rights in Buganda came to the fore. Since gold and silver were, of course, the most precious minerals and the most likely to attract prospectors, the Government sought to lay claim to them even where found on

³⁸Land Transfer Ordinance, Laws of Uganda, 1951, 3: chapter 114.

³⁹Even though the Indian Land Acquisition Act, 1894, empowered the Crown to acquire compulsorily land for public purposes, as late as 1936 Governor Mitchell was still in doubt whether legally those powers could be invoked in Buganda. Mitchell proposed to resolve the issue by entering into an Agreement with the Baganda. See Mitchell to Bottomley, 3 November 1936, CO536/190/40171.

mailo land. Hogg, the Protectorate Attorney-General, advised Governor Coryndon that the words "all minerals" in Article 17 of the Agreement (cited above), did not include gold and silver. Hogg theorised that, under the English common law, the Crown had a prerogative right over gold and silver, and that a grant of land by the Crown, except where expressly stated, was presumed not to have included these precious minerals. In his opinion the Crown enjoyed all the prerogative rights of the Sovereign in Buganda "except where they have been expressly limited by the [B]Uganda Agreement". Since the Article did not expressly mention gold and silver, he concluded that, if these minerals were ever found, they would be Government property. Hogg, however, conceded that the matter was quite complicated and ought to be referred to the Law Officers of the Crown in London for an authoritative ruling.⁴⁰ The Governor agreed with the suggestion and urged the Colonial Secretary to accept it "in view of the importance the Native Government attach to their rights under the ... Agreement".

Eventually the reference to the Law Officers was made, but not before Bushe and Risley had exposed what they considered to be misconceptions in the Attorney-General's argument. Bushe thought that the latter's theory was based on a presupposition that the Crown had acquired rights over gold and silver in Buganda prior to the Agreement. Such an assumption could only be sustained, in his view, if it were further presumed that a declaration of a protectorate, per se, conferred upon the Crown all prerogative rights in respect of such territory, as existed in England. "This", he said, "appears to me to be an impossible task".⁴¹ Moreover, even if the position were to be considered after the 1900

⁴⁰Opinion of 6 December 1918, enclosure Governor to C.O., 3 January 1919, CO536/93. The Attorney-General had in mind the case of Woolley v Attorney-General of Victoria (1877), L.R. 2 Appeal Case 163. In the British Central Africa Protectorate case, Crown Prosecutor v The British Central Africa Company, Official Gazette, 1904, p.304, the Court of Appeal for Eastern Africa held that the "royal mines" concept did not apply to land granted to Europeans prior to the declaration of the B.C.A. Protectorate because by then the Crown had not claimed the minerals.

⁴¹But see Lord Denning, thirty seven years later, in Nyali Ltd v Attorney-General, [1956] 1 Q.B. 1, at p.16, where he held that the prerogatives of the Crown applied in its protectorates as part of "the substance of the common law".

Agreement, he maintained that it would still be the same, since neither the Agreement nor the 1902 Order in Council purported to give the Crown prerogative rights over gold and silver.⁴²

Risley agreed with him, and he revealed that the question of the right of the Crown over the “royal mines” of gold and silver in protectorates, had in fact been reported upon by the Law Officers in a reference from the Solomon Islands Protectorate.⁴³ The substance of their report, he explained, was that the Crown had no right to the minerals under lands in occupation of the natives either by virtue of the protectorate or on the basis of a provision of an Order in Council which applied the general law of England to the protectorate, such as Article 20 of the Pacific Order in Council, 1893, in case of the Solomon Island; or the 1911 Uganda Order in Council. Nevertheless, Risley said, according to the report, the Crown, if it so wished, could acquire that right by an Order in Council specifically declaring that the right to the minerals lay with the Crown. Risley presumed that Article 7(4) of the Uganda Order in Council was specific enough to satisfy the requirements of the Law Officers’ report. However, he suggested that in the case of Buganda, it was arguable that this provision had to be read subject to Article 17 of the Agreement which was prior to it.

Surprisingly, Risley did not try to support his argument by reference to the Katosi v Kahizi precedent that the agreements prevailed over the Order in Council. Instead he came up with his own theory that under proviso 1 to Article 28 of the 1902 Order in Council, “any law, practice or procedure” which was established by or under the Africa Order in Council, 1889, and had not been superseded by its provisions or by any Ordinances made thereunder, remained in force until other legislative measures were

⁴²Minute of 13 February 1919, on Governor to C.O., 3 January 1919, CO536/93.

⁴³L.O.R., 29 January 1912, no. 152, vol., 7.

made. Since there was no doubt in his view that under Article 16 of the Africa Order in Council, the Buganda Agreement had effect as part of the law to be enforced in Buganda, and that, according to this Article, where the Agreement was inconsistent with the Order or any law in force in England, the provisions of the Agreement prevailed, he suggested that:

It may therefore be argued that Article 17 of the Uganda Agreement was a "law ... established ... under the Africa Order" and, as such, saved by proviso 1 to Article 28 of the 1902 Order.

Risley reinforced his argument by referring to the definition of "Crown lands" in Article 2 of the 1902 Order in Council which he claimed, clearly limited such lands, when situated in Buganda, to lands which were public lands by virtue of the Buganda Agreement, "and the corollary would appear to be that the Order in Council must also be read subject to any provision of the [B]Uganda Agreement as to lands, other than public lands situated in the Kingdom of [B]Uganda".⁴⁴

It must be emphasised that the theory which Risley was advancing was totally different from the Katosi v Kahizi precedent. Risley was in effect saying that the Agreement was a "law" under the Africa Order in Council, which was saved by Article 28(1) of the 1902 Order in Council. Any provisions of the Agreement which had not been superseded by the latter Order or ordinances made thereunder, continued to be law in Buganda.⁴⁵ Thus, in his argument, the mailo owners were not entitled to the mines and minerals on their land because the Agreement prevailed over the Order or any other legislation in the Protectorate; rather, it was the fact that the provisions of the Agreement which guaranteed their rights had not been superseded by subsequent legislation.

⁴⁴Minute of 21 February 1919.

⁴⁵See also above at pp. 156-157.

In the reference to the Law Officers which was accompanied by a background argument (based on the substance of Risley's minutes) their opinion was requested on the following questions:

1. Whether they agreed with the report of their predecessors regarding the right of the Crown to minerals in the Solomon Islands Protectorate.
2. If so, whether Article 7(4) of the Uganda Order in Council constituted a specific requisition by the Crown of all minerals in Uganda.
3. If so, whether Article 17 of the Agreement was superseded by Article 7(4) of the Order in so far as the minerals found on mailo land were concerned and consequently was not saved by proviso (1) to Article 28 of the Order.
4. As the alternative to questions (2) and (3), whether Article 7(4) was to be construed as a specific acquisition by the Crown of the property in all mines and minerals in Uganda excluding those found in Buganda.

In their report the Law Officers expressed total support for the opinion of their predecessors, and with regard to the rest of the questions, they responded that Article 7(4) of the Order had to be construed with reference to Article 17 of the Agreement, that is "minerals found on private estates in the Kingdom of [B]Uganda being excluded as being the property of a person possessed of the right to work such mines and minerals". Moreover, in their view, the words "all minerals" included gold and silver. The Law Officers disagreed with the theory of "mines royal" postulated by the Uganda Attorney-General. It was true, they said, that, according to the English common law, gold and silver presumptively belonged to the Crown and that a grant of land by the Crown would not pass such minerals except where expressly stated:

But it must be doubted whether an agreement with native Chiefs with reference to the Government of a Protectorate is to be construed as a grant from the Crown. The basis of a grant from the Crown is that the property granted is vested in the Crown, whereas none of the mines in Uganda were so vested at the time of the Agreement of 1900.

For these reasons, in their opinion, the property in all mines and minerals in Uganda was by virtue of Article 7(4) of the Order vested in the Crown, with the exception of those found on mailo land.⁴⁶

⁴⁶Report of 16 April 1919, annex C.O. to L.O., 5 March 1919, CO536/98.

Since the background information to the reference was based on Risley's minutes, presumably the Law Officers accepted his general theory for holding that Article 17 was law in Buganda until it was superseded by legislation. But it must be stressed that, from a reading of their report by itself, one could not be absolutely certain that that was indeed their view. This point is important because if Risley's theory were accepted it meant that the Governor could enact legislation to override the mailo holders' mineral rights. There is no evidence to suggest that this possibility was even considered by the Colonial Office. In any case it would most likely have been rejected on policy grounds.

Governor Coryndon, learning of the Law Officers' response to his enquiries, attempted to negotiate with the Buganda authorities for a supplementary Agreement whereby the mailo owners would surrender all their rights to minerals on their land in return for the Government offer of its ten per cent *ad valorem* duty entitlement. The main reason given for wishing to acquire mineral rights was that the Government wanted to enact uniform mining laws applicable to the whole Protectorate, which was then impossible because of the private rights in Buganda. The Baganda, however, had no interest in the Government offer, preferring to stick to their rights under the Agreement.

Subsequent negotiations, in 1928, with even more "generous offers" from the Government, were to no avail. By then the Government was concerned that the mailo owners might refuse to work the minerals on their land or, even more likely, frustrate efforts of prospective investors wishing to mine in Uganda by denying them permission to prospect on their lands.⁴⁷ Negotiations having failed, the Protectorate Government tried to handle this problem by claiming that it was entitled under Article 17 of the Agreement, to call upon mailo owners either to work their minerals or to let others do it. This claim was based on the theory devised by the Attorney-General of Uganda,

⁴⁷Ag. Governor to C.O., 7 September 1929, CO691/29008.

Abrahams, that since under this Article the Government was entitled to a ten per cent *ad valorem* duty, "when the minerals are worked", there was an implied obligation on the mailo owners to work the minerals. On this assumption a provision was incorporated in a draft Mining Ordinance giving the Governor power to grant mining leases on mailo land with the consent of the mailo owner, but, if such consent were withheld, and in the opinion of the Governor it was in the public interest that mining should proceed on the particular estate, he could grant the lease, notwithstanding the refusal of the mailo owner.⁴⁸

The provision was however vetoed by the Colonial Office. Bushe advised that, although the Government's desires were laudable, they were inconsistent with the Agreement. In his opinion, an obligation to work minerals contradicted the "absolute ownership" vested in the mailo land holders, "and", he added, "we must not be swayed by modern notions of the rights of the State in regard to undeveloped land or minerals which 20 years ago had hardly been heard of, much less developed". According to his interpretation, the words referred to in Article 17 meant that if and when the mailo owners worked the minerals the State would be entitled to a ten per cent *ad valorem* duty. But, quite significantly, he pointed out that a further question could be considered as to whether, irrespective of the Agreement the Government could impose the proposed obligations in the interest of the State. Bushe, however, quickly added that such considerations were matters of policy and not of law.

The Governor was told that, in the opinion of the Colonial Office's legal advisers, the provision could not be justified legally. Significantly, it was indicated to him too that the Colonial Secretary considered whether, notwithstanding the Agreement, it was

⁴⁸Memorandum Blair, Commissioner of Mining, "Amendments and additions required to bring mailo land in Buganda under the Mining Ordinance," enclosure *ibid*.

justifiable on grounds of public interest to impose the provision. The letter stated that the Minister had decided against it because the probable political outcry was bound to overshadow the as yet unproved benefits.⁴⁹ This obviously meant that if there were compelling reasons, the Agreement could have been disregarded. It must be said that such express indication that the Agreement could be discarded if it suited the British policy makers, was very rare during the period under consideration. Indeed, as we shall see later, it was only subsequently, after a lengthy discussion, that it was finally decided that the Agreement was not legally binding.

Further attempts to persuade the Buganda administration to surrender the mineral rights received a very demoralising blow from the Kabaka. Politely, but firmly, he indicated to the Governor that it was useless to pursue the matter any more, since, even if his Government was willing to give up these rights, it had no power to do so, the rights having been accorded to the individual mailo owners under the Agreement. This response led the Colonial Office to instruct the Governor to consider any discussion of the mineral rights issue as closed, at least for the time being.⁵⁰ During the period under investigation, the Government did not attempt to exert any further claim over minerals in Buganda.

10.6 Crown land by "virtue of the protectorate"

A brief digression is necessary to contrast the position in Buganda with the rest of the Protectorate, in which, except in Ankole and Toro, the Crown did not acquire any land rights by treaty or grant.⁵¹

⁴⁹C.O. to Governor, 19 July 1929, CO691/29008.

⁵⁰Governor to C.O., 11 June 1931; and C.O. to Governor, 19 August 1931, CO/536/165.

⁵¹Article 4 of the Ankole and Toro agreements, respectively, stated that "All waste and uncultivated land which is waste and uncultivated at the date of the Agreement, ... shall be considered to be the property of the Crown" Under Article 7, the King and a few of the most senior chiefs were granted estates ranging between ten to sixteen square miles (the King had fifty) "out of the waste lands". Logically this meant that their grants were from Crown land. It has been suggested that for this reason the Ankole and Toro grantees, unlike their Baganda counterparts, held their land subject to the Crown Land Ordinance, 1903, Morris and Read, Uganda, the Development of its Laws and Constitution, p.341.

It will be recalled that, following the Law Officers' report of 1899, Crown land was defined to include "all public lands in Uganda which are subject to the control of His Majesty by virtue ... of His Majesty's Protectorate". Whereas in Buganda the problem was one of determining the Crown's share and rights under the Agreement, in the rest of the Protectorate it was one of deciding which lands fell within this definition. In practice the latter was not easier to resolve than the former. According to the Law Officers' report, all waste and uncultivated lands in the territories of "uncivilised" tribes came within the Crown's control "by virtue of the Protectorate". But which lands were to be regarded as "waste" or "uncultivated" or "unoccupied"? Were grazing lands included? What about the lands which were deliberately left to lie fallow? At what point in time was it to be determined whether any land was waste or unoccupied: was it the date of the Order in Council, or of the declaration of the Protectorate, or was it to be done on an *ad hoc* basis? Were the respective customary systems of tenure relevant in determining what was waste or uncultivated lands? Finally, which tribes were to be regarded as "uncivilised" for this purpose? These and many other questions faced the administrators charged with the duty of disposing of Crown lands in both Uganda and the East Africa Protectorate.

The Ennis Committee, earlier referred to, recommended enactment of a law declaring that all land and rights therein (including minerals, water, forests etc) were the property of the Crown until the contrary was proved, or where the Commissioner recognised any individual title in respect thereto. It supported its proposal mainly on three grounds. Firstly, Johnston had already declared in a circular he issued in 1900, *supra*, that by virtue of treaties and agreements the Government had acquired the sole right of disposing of all waste and uncultivated lands. Secondly, it was convenient, especially, the Committee hoped, as it would put an end to the problems of identifying Crown lands by the ill-defined test as to whether it was waste or uncultivated land, and,

moreover, would ensure Government control over all the land. Finally, on legal grounds, the Committee premised that no person could pass a better title than he himself held, and (citing Westlake)⁵² an uncivilised tribe could grant only such rights as it understood and exercised:

If this be so natives could not pass, even with the sanction of the Commissioner, the full property in the soil, and some form of grant from the Crown would have to be made to secure a definite property in the soil.

Probably, by this the Committee meant that it was essential for the Crown to acquire title to the land so as to assure grantees a full title. It is noteworthy that the Committee emphasised the need for saving individual natives' land rights because "it would appear doubtful whether the Government could declare occupied lands as Crown lands simply, a course which might be held to extinguish the rights of the occupiers without their free consent". Precedent for the type of legislation the Committee had in mind was found in Ceylon, where, under its Crown lands Ordinances,⁵³ all lands were declared Crown lands until the contrary was proved. The Committee recommended that similar legislation be enacted in Uganda.

When these proposals were presented to the Colonial Office, Risley immediately expressed his strong doubts about the legality of declaring all land in the Protectorate Crown lands:

In a protectorate where H.M. claims only jurisdiction, I do not think that legally he had any right of dominion in the soil so as to be able to grant any estates; it w[oul]d seem that we can only deal with it ("by sufferance") by way of grants in the nature of licences to occupy and that only as regards waste and uncultivated lands.

Risley expressed a fear that dealing with the land as proposed by the Ennis Committee

⁵²The report did not specify the particular work but the relevant passage is in The Collected Papers, pp.146-147. Westlake's views were partly based on the American case of Johnston v McIntosh 8 Wheaton's Supreme Court Reports (21 U.S.) p.543. But in Paolucci v The Commissioner of Mines, supra, the Court of Appeal for Eastern Africa rejected as a generalisation a submission, based on the foregoing opinion, that the chiefs in the British Central Africa Protectorate were incapable of understanding the concept of land ownership.

⁵³Ceylon Ordinances, no.12 of 1840; no.1 of 1844; no.1 of 1897; and no.5 of 1900.

might lead to future legal problems with the grantees' titles being challenged by the natives claiming ownership of the soil.⁵⁴ In his opinion, the Ceylon situation which the Committee sought to use as a precedent was easily distinguishable from that prevailing in Uganda. In the former, where Roman-Dutch law was the general applicable law, unlike the English Common law feudal system of land tenure, the land was not regarded as held from the Crown as Lord paramount. Secondly, unlike Uganda, Ceylon was a colony: "one does not feel the same difficulty about vesting lands in the Crown by statute until the contrary is proved in the case of a colony ... as in case of a protectorate". On these grounds he thought that at least for the time being, the Uganda Government ought to abstain from dealing with any lands outside the three agreements districts (i.e Ankole, Toro and Buganda) where title was granted to the Crown.

However, Cox thought otherwise. He minuted that he felt "less hesitation than ... [Risley] does in legislating to give the Crown rights over land in a protectorate". In his view "unless the right to legislate as regards ownership of land was expressly reserved" the cession of jurisdiction to the Crown to make laws for peace, order and good government, sufficed to justify legislation in favour of the Crown in respect to the land. Similar views were expressed by Antrobus, Assistant-Under Secretary. He stressed the point that the only restriction on the power of the Crown in Uganda, was where it was imposed under the three respective agreements. A final decision as to whether to accept these proposals was, however, postponed pending comments thereon from the newly appointed Governor, Bell.⁵⁵

It is surprising that neither of the legal advisers recalled the Law Officers' report of

⁵⁴He warned that legal proceedings were already under way in the Gambia Protectorate involving land claims. Minute of 26 October 1907, on Ag. Commissioner to C.O., 26 August 1907, CO536/14. Compare above at p. 106 *et seq.*

⁵⁵Minute Cox, 27 October 1907, and minute Antrobus, undated, on C.O. to Governor, *ibid.* Also C.O. to Governor, 8 November 1907, CO536/14.

1899.⁵⁶ As may be remembered, Risley's argument was identical to Bramston's which dominated the Colonial Office throughout the last decade of the nineteenth century before the Law Officers intervened.⁵⁷

Similar legal problems were being faced in Uganda's neighbouring Protectorate, the East Africa Protectorate. Its Governor, Sadler (formerly Commissioner of Uganda), called the Colonial Secretary's attention to a potentially volatile legal and administrative problem regarding native owned lands which had been disposed of by the Government. He reported that in previous years grants and leases had been made to expatriates without in some cases sufficient investigation to ascertain that the land was not claimed by the natives, while in other cases natives were paid four shillings per acre for their land, which only covered compensation for the crops and buildings but did not include loss of title to the land. As a result a group of natives were reportedly preparing to institute legal proceedings against the Government and the grantees to recover what they claimed was their land. Sadler warned that they had a good chance of winning because the High Court judges had privately expressed a view that tribal lands were not Crown lands and therefore could not be disposed of by the Government.

According to Sadler, the immediate problem was not only in the vagueness of the definition of what were "tribal lands" or "unoccupied" or "waste" lands, and so on but also the growing fear that the assumption all along made that the Crown, by virtue of the Protectorate, was entitled to dispose of the "waste and unoccupied lands" could be contradicted by the judiciary in absence of agreements with the native chiefs making these lands over to the Crown. As a precautionary measure, Sadler proposed that the

⁵⁶Yet barely two months earlier in a reference to the Law Officers regarding the Crown's right to the land in Swaziland, the report was cited, see C.O. to L.O., 3 September 1907; and L.O. to C.O., 25 September 1907, L.O.R. No.86 vol. 7.

⁵⁷See chapter five.

Government should enter into agreements with the various chiefs of the territories where there was demand for land, to surrender to the Crown whatever rights their tribes had to the land.⁵⁸

Ironically, all previous administrators, it will be remembered, in the East Africa Protectorate and in Uganda had denied that there were chiefs in the region with whom to treat to acquire land rights. Indeed in the reference to the Law Officers in 1899, emphasis was laid on this very point. Had the chiefs then been discovered, or was it a mere change in tactics to suit the circumstances? Whatever the reason, it was quite clear that the confidence inspired by the Law Officers' Report was being shattered by doubts.

A conference at the Colonial Office, attended by Coombe, the Crown Advocate for the East Africa Protectorate; Hollis, its Secretary for native affairs; and Ellis, considered the matter raised by the Governor. The three agreed that the question of determining which lands were Crown lands "by virtue of the Protectorate" was obscure, and they endorsed Sadler's proposal to enter into agreements with the relevant local chiefs.⁵⁹ On the other hand, Antrobus and Cox felt that the opinion of the Law Officers ought first to be sought before proceeding with any proposal. It was then that the 1899 Law Officers' report was drawn to Cox's attention.⁶⁰ Interpreting this report to mean that lands acquired "by virtue of the Protectorate" did not include lands which were actually occupied or cultivated by the natives, Cox was convinced that if what the Governor reported were true, there was a strong cause for concern about the possibility of grants made by the Government being nullified. To avert the risk, he also agreed with the Governor's proposition to enter into agreements with the chiefs.

⁵⁸Governor to C.O., 8 May 1908, CO879/99.

⁵⁹Minute Ellis, 10 September 1908, *ibid.*

⁶⁰Minutes Antrobus of 25 September and Cox of 6 and 30 September 1908, *ibid.* In Cox's minute of 9 October 1908, he confessed that he had forgotten about the Law Officers' report of 1899, if he ever saw it.

Although instructions were sent to the Governor to proceed as he had proposed, apart from the 1911 Agreement with the Masai, there is no evidence of any other formal agreements with chiefs of the other tribes.⁶¹ Nor is there any evidence to indicate that the fears expressed by Sadler inhibited the East Africa Protectorate Government from disposing of lands occupied or used by the natives. On the contrary, according to some researchers, disposals of such lands continued unabated.⁶²

With reference to Uganda, the Colonial Office in March of 1908 approved in principle the recommendations of the Ennis Committee to declare all land in Uganda Crown lands unless proved otherwise.⁶³ The Committee members subsequently submitted a draft Ordinance, the Crown Lands (Ascertainment) Ordinance, which followed the lines of the Ceylon Crown Lands Ordinances as they had suggested. In substance, the bill provided for a rebuttable presumption that all land in Uganda was the property of the Crown. Where any specific land was required by the Government, it was prescribed that the Governor would invite any person claiming title thereto to lodge the same; if after lapse of three months no person satisfactorily proved his title, the land would irrevocably become the property of the Crown.

This draft was approved by the Colonial Office without any demur. Even Risley, who had earlier expressed some misgivings about the legality of this type of legislation, agreed. He claimed that, according to the Law Officers' report of 1899 (which he had

⁶¹C.O. to Governor, 4 November 1908, CO879/99. The 1911 Masai Agreement replaced the earlier 1906 Agreement. For a general background to these agreements, see Mwangi wa-Githumo, Land and Nationalism, pp.223-241; Sorrenson, Origins of European Settlement in Kenya, pp.190-209.

⁶²Mwangi wa-Githumo, *ibid.*, p.216; Sorrenson, *ibid.*, pp.184-189. G.A. Mungeam, British Rule in Kenya, at p.204, observes that both the Colonial Office and the local Government were unable to withstand the settlers' pressure for land.

⁶³Minute Butler, 15 January 1912, on Governor to C.O., 4 August 1911, CO536/42.

overlooked) "the question had been resolved in favour of the Crown."⁶⁴ Risley did not elaborate, but it is evident that the Law Officers' report had since been reconsidered and given a much wider interpretation than that earlier attributed to it by Cox.⁶⁵ The Law Officers had justified all the land legislation made by the Commissioner which otherwise were illegal, on the grounds of the Act of State doctrine.⁶⁶ Presumably it was on this basis too that Risley concluded that the issue had been resolved "in favour of the Crown".⁶⁷

The Crown Lands (Ascertainment) Ordinance was enacted in 1912, but was never actually brought into force. The immediate reason for this was a realisation that according to its provisions, if any native proved continuous occupancy of land for a period of twelve years or more, since the enactment of the Ordinance, he would acquire a prescriptive title against the Government.⁶⁸ This defect could, of course, have been rectified by appropriate amendment to the Ordinance, but by then there was no urge to proceed with the legislation as there was hardly any demand for land by expatriates. The few there were, were directed to Buganda which was regarded as more politically secure than the rest of the Protectorate.

It was ten years later that another Ordinance, the Crown Lands (Declaration)

⁶⁴Comments in the margin on minute *ibid.* See also C.O. to Governor, 6 March 1912; also the Law Officers' report of 18 August 1908 (L.O.R. No.102, vol. 7), in relation to Gambia Protectorate. Having been told that "there was no civilised sovereign of the country, but merely a number of tribal chiefs none of whom possessed the attributes of sovereignty" the Law Officers held that in the circumstances the Crown was entitled to enact a law declaring all vacant land Crown land.

⁶⁵Above p. 235. Cox had by then left the Colonial Office and replaced by Risley.

⁶⁶Above at p. 127.

⁶⁷In the East Africa Protectorate, under the Crown Lands Ordinance, 1915, "Crown land" was defined as including land which was under the actual occupation of the natives. Because of this definition, and the annexation of that Protectorate, it was held in Wainaina v Murito (1921) 9 K.L.R.102, at p.104, that the natives' title to land was thereby extinguished.

⁶⁸Thomas and Spencer, Uganda Land and Survey, p.54.

Ordinance, 1922, was enacted to replace the 1912 Ordinance.⁶⁹ The new Ordinance provided that any land (including rights therein) in the Protectorate which was not claimed within twelve months from the date of its commencement, namely, 22 March 1922, except where it had been recognised or was thereafter recognised by the Governor under a document as the property of any person, was to be presumed the property of the Crown.⁷⁰ Sections 4 and 5 provided for the appointment of a Special Commissioner who was empowered to carry out inquiries and to report to the Governor whether any claim preferred to any land as against the Crown was established. Where a claim was proved, the Governor was to issue an order vesting the land in the claimant, who would thereupon be placed in possession of the land. The main difference between this and the Ordinance it replaced was that in its case, after the twelve months, the Crown's rights over all lands not claimed within that period was complete and irrebuttable, unless if proved as abovementioned.⁷¹ Indeed, as it turned out, according to Thomas and Spencer, no native claims of any sort were ever lodged within the period, and in fact none were seriously contemplated as no attempt was made to advertise the law.⁷² Consequently, all customary claims to land outside Buganda, were relegated to those of tenants at will of the Crown. Their legal position was not any different from that of their brethren in the Kenya Colony even though their Country was till a Protectorate. Elders of Busoga who in 1930 wanted to institute legal proceedings to challenge the legislation which declared their "traditional lands" Crown land, were sadly advised by their lawyer that that avenue

⁶⁹Laws of Uganda, 1923, 1:chapter 100.

⁷⁰Sections 2 and 3. The Governor reported that the Buganda administration was not consulted before the Ordinance was enacted because Crown land had nothing to do with it, see A.G. Governor to C.O., 16 September 1922, CO536/120.

⁷¹It was held by the East Africa Court of Appeal in the case of R v Jiwabhai (1957/58), 8 U.L.R. 21, that under section 2 of the Ordinance once it was proved that land was in Uganda Protectorate, the presumption arose in favour of the Crown that the land was Crown land "It would then be for the defence to rebut it by proof of one or the other of the matters mentioned therein". (p.26).

⁷²Thomas and Spencer, Uganda Land and Survey, p.55. The Colonial Office, contrary to the advice and request of the local officials, insisted that the Ordinance had to be given wide publicity throughout the country, see minute Bottomley of 11 December 1923, and a telegram to the Governor of the same date, CO536/20. Apparently the instructions were ignored.

was closed, and their only chance was to seek a political solution.⁷³

10.7 SUMMARY AND CONCLUSION

The evidence examined in this chapter indicates that doubt lingered long after the 1902 Uganda Order in Council as to the extent of the Crown's power to deal with land in the Protectorate. This doubt was not unique to Uganda but occurred also in other protectorates.⁷⁴ As we saw in chapter five, in the last decade of the nineteenth century, one of the main reasons against declaring Crown lands in a protectorate was that it could be interpreted as annexation of the territory. In the period discussed in this chapter, there is no evidence that such a fear was still sustained, the Law Officers and subsequent judicial precedents having held that the Crown could not be forced to annex a territory against its will. The problem of conceptualising the English feudal common-law of real property in the context of a protectorate, which was regarded as a foreign territory and thus its land not owned by the Crown, continued to haunt the legal advisers. The problem was eventually solved by reading into the 1899 Law Officers' report (which for some time had been overlooked by the Colonial Office legal advisers) power to make legislation giving the Crown rights over land in the protectorate. Probably this power was justified on the Act of State doctrine which was mentioned in the Law Officers' report.

With regard to Buganda, the position was quite clear to the extent that the Crown's rights were spelt out in the Agreement. Partly due to the conceptual doubts

⁷³Busoga chiefs petition of 8 August 1934, enclosure 8 August 1934, CO536/182/23629. In 1957, in the case of R v Jiwabhai, *supra*, an attempt to rebut the presumption that certain land in Busoga was Crown land by proving that it was hereditary customary land was rejected by the Court.

⁷⁴For example, John Hookey, "Jurisdiction in the British Solomon Islands Protectorate", argues that in the Solomon Islands Protectorate, prior to the first World War, the Colonial Office regarded the Crown's jurisdiction, by virtue of the Protectorate, as limited to people and did not extend to the land, pp.102, *et seq.* Lindley, The Acquisition and Government of Backward Territory, at p.24, wrote that a mere establishment of a protectorate did not entitle the protecting Power to deal with private land rights in the territory except where the land was expressly granted to it by the owners, or where they acquiesced.

mentioned above, and partly because the Agreement was still held to be a legally binding document during this period, the Crown was restricted to only those powers and rights which could positively be read in the Agreement. For this reason, it would seem the Protectorate Government abstained from enacting laws dealing with mailo land: instead it drafted the laws and called upon the Lukiiko to perform the enactment. Supplementary agreements were also negotiated in order to extend the Government's powers over the land. It must be emphasised, though, that it was not merely a question of legal consideration which precluded the Government from asserting powers beyond those conceded to the Crown in the Agreement. Evidence indicates that politics also played an important role. A clear example was the mineral rights controversy; the Colonial Secretary made it clear that he could have authorised the disregarding of the Agreement had the circumstances justified it. Nevertheless, the issue of the binding legal nature of the Buganda Agreement was resolved only much latter and after a lengthy discussion.

In the next chapter I examine the judicial intervention which led to a legal breakthrough for the Protectorate Government.

CHAPTER 11

THE JUDICIAL BREAKTHROUGH

As lawyers know all too well, the law is hardly ever certain, especially if the statute law is general or ambiguous, as long as it lacks judicial precedents from the higher courts. Even then the precedents, irrespective of the courts which set them, would have to withstand the various legal techniques intended to limit, weaken or distinguish them, before they could safely be relied upon to establish the law. One of the major problems which the legal advisers of the Crown faced was that there were few judicial precedents to guide them. The paucity of legal precedent is quite understandable since the people who were most likely to be affected by the exercise of British power were not in a position to challenge its exercise through judicial proceedings. In this chapter, I examine the role of the judiciary in resolving the issue of the extent of the Crown's legal powers and authority in its protectorates and how this subsequently affected the position in Buganda.

11.1 The Foreign Jurisdiction Act, 1890

We have seen that at the time of the enactment of the Foreign Jurisdiction Act in 1890, there was doubt as to whether the Crown could exercise jurisdiction in foreign countries over persons other than British subjects. The understanding of the Foreign Office, which sponsored the bill in Parliament, was that the Act did not, and indeed could not, confer jurisdiction on the Crown over non-British subjects because that was an issue of international law which could not be resolved by municipal law.¹ Notwithstanding this, the preamble of the subsequent Orders in Council, including the 1902 Uganda Order

¹Above at pp. 72-74.

in Council, as a standard practice specified that the Orders had been made “by virtue, and in the exercise of the powers on this behalf by the Foreign Jurisdiction Act, 1890, or otherwise in Her Majesty vested” A number of issues were eventually raised in the courts in this regard. Was the Foreign Jurisdiction Act, 1890, applicable to persons other than British subjects? If it was, did it enable the exercise of such ample powers as were assumed by the Crown in some of the Orders in Council? Irrespective of this Act, did the Crown have plenary powers in its protectorates? What was the legal significance of the treaties between the Crown and the local sovereigns?

In Uganda, as we have already seen, the High Court in a number of cases maintained a view that the Crown’s powers were subject to the agreements. We shall return to the position in Uganda after a general review of the most pertinent judicial decisions from other jurisdictions that led to a breakthrough.

11.2 The King v Crewe Ex Parte Sekgome²

The British Court of Appeal case of R v Crewe is generally regarded as the first to expose the extent of the Crown’s legal powers in its protectorates. The case related to an application for a writ of *habeas corpus* by Sekgome, a Chief in the Bechuanaland Protectorate, who was allegedly detained under a Proclamation which was invalid and thereby he was unlawfully held. The application was unsuccessful but in the process several legal principles were established. First, it was held that a protectorate, according to English constitutional law, was not within the Crown’s dominion; it was a foreign territory. It was noted by Lord Justice Kennedy that the fact the Crown created and controlled all the three branches of government in Bechuanaland Protectorate did not affect its status as a foreign territory because the Crown said so; and no one can force the Crown to annex a territory if it did not want to.³ Consequently, the Court concluded that the Foreign Jurisdiction Act, 1890, was applicable to Bechuanaland Protectorate.

²(1910 C.A. (2) K.B.576)

³At p.616.

Second, it was held that all persons, including non-British subjects, within a British protectorate were subject to the Foreign Jurisdiction Act. Interestingly, one of the judges, Vaughan Williams L.J., cited with approval the views of W.E. Hall (Foreign Jurisdiction of the British Crown, at pages 220-222), that this Act was probably only intended to deal with British subjects. Yet he held that:

... the interpretation which has been acted upon for so many years in Orders in Council and the Proclamation thereunder applying the provisions of the Foreign Jurisdiction Act, 1890, to natives of such foreign countries as well as to British subjects resident in or resorting to such foreign countries makes it impossible to adopt the interpretation suggested by Mr Hall.⁴

Lord Justice Vaughan Williams did not elaborate, but it is obvious that he was mindful of the resultant legal and administrative confusion if the Court were to reverse the interpretation. As we have seen, all Orders in Council recited that they were made pursuant to the provisions of the Foreign Jurisdiction Act. Consequently a contrary judicial decision would have meant, for instance, that these Orders and the proclamations made thereunder, in so far as they purported to apply to non-British subjects were null and void.

Having found that the Foreign Jurisdiction Act was applicable to protectorates and all persons within, the Court next considered the issue of the extent of the Crown's powers under its provisions. In this regard it agreed with the submission for the Crown that the words in Section 12 of the Act, that Orders made in pursuance of powers conferred upon the Queen under the Act "shall have effect as if enacted in this Act", gave to the Orders the effect of an Act of Parliament, and therefore they could not be questioned in Court, except on grounds of repugnancy.⁵ Moreover, the Court continued that, under Section 1 of the Act, the powers and jurisdiction acquired by the Crown were to be exercised "as in a ceded or conquered territory." Since the powers of the Crown in

⁴At p.626.

⁵At pp. 594, 597, and 611-613.

conquered territories were absolute, except or until Parliament intervened, the Court of Appeal reasoned that by analogy the Act authorised the Crown to exercise unlimited powers in the territories to which the Act was applied. The result, Vaughan Williams, L.J., concluded, "is that the Foreign Jurisdiction Act, 1890, gave to Her Majesty absolute powers to say what law should be applied in those territories outside Her Majesty's dominions [T]he Queen may make such laws as she pleases."⁶

11.3 Act of State

Finally, the Court held that irrespective of the Foreign Jurisdiction Act, the exercise of the Crown's powers in British protectorates was unchallengeable in municipal courts because it was an Act of State.⁷ What is an Act of State? The Court in R v Crewe, did not expand, but earlier, in 1906, Lord Justice Fletcher Moulton, in the Privy Council case of Salaman v Secretary of State for India, defined an Act of State as:

... essentially an exercise of sovereign power, ... [which] hence cannot be challenged, controlled or interfered with by municipal courts. Its sanction is not that of law, but that of sovereign power and, whatever it be, municipal courts must accept it as it is, without question. But it may, and often must be part of their duty to take cognizance of it.⁸

Three pre-requisites were laid down for the application of the defence of Act of State: the act can only be committed in a foreign country; if it is against people (or their property) they must be foreigners; and it must be authorised or ratified by the Crown.⁹

Long before the judgement of R v Crewe, there were a number of Indian Privy

⁶P. 607. But F.T. Piggott, The Law Relating to Consular Jurisdiction and Residence in Oriental Countries, at pp. 26-27, argues that section 1 of the Act only entitled the Crown to exercise powers "as in a ceded or conquered territory" in so far as the powers had been acquired.

⁷Pages 606 and 624.

⁸[1906] 1 K.B. 613, at pp. 639-40. For an account of the historical origin of the defence of Act of State, see generally William Harrison Moore, Act of State in English Law (London, John Murray, 1906). Also Kato, L.L., "The Act of State in Protectorates - in Retrospect," 1969, Public Law, 219-235.

⁹K. Pollack, "The Defence of the Act of State in relation to Protectorates," 1963, 26 M.L.R. 138, 139 *et seq.* For a criticism of "the minimum requirements" of Act of State, see a recent case Nissan v Attorney-General (1967) 2 All. E.R. 1238, 1248.

Council cases, some going as far back as the mid-nineteenth century, wherein it had been held that matters involving treaties between the various Indian protected states and the Crown, were Acts of State and therefore were not justiciable in the municipal courts.¹⁰ In view of these decisions it is surprising that the High Court of Uganda and indeed the Colonial Office did not refer to them when dealing with the case of Katosi v Kahizi, and other related cases.¹¹ Perhaps one of the reasons for this was the uncertainty of the status of the African type protectorates. The case of R v Crewe, affirmed that all protectorates, irrespective of the powers assumed therein by the Crown, were foreign territories thereby facilitating the application to them the defence of Act of State and the Foreign Jurisdiction Act.

In subsequent cases in which the exercise of the Crown's powers were in issue, the defence of Act of State was invariably pleaded by the Government. Reference has been made to The Masai Case, which was decided only a year after R v Crewe, where the Court of Appeal for Eastern Africa held that violation of the Masai treaty by the Crown was not justiciable in the Protectorate courts because it was an Act of State. However, the *cause celebre* in this regard is the Privy Council case from Swaziland, Sobhuza II v Miller and others.¹² In this case the Privy Council was emphatic that, as far as the courts were concerned, the subsequent exercise of the Crown's powers in protectorates was not subject to limitations in treaties or conventions (including those by which jurisdiction was originally acquired) made with the local rulers or other powers.

¹⁰For example, Secretary of State for India v Kamachee Boye Sahaba (1859) Moo Ind. at p. 476; The Imperial Japanese Court v Peninsular and Oriental Steam Navigation Co. (1859) A.C. 644.

¹¹However, as we have seen above, the Law Officers suggested the Act of State as a possible legal defence in the event of challenge of the Crown's acquisition of land in Uganda and the East Africa Protectorate.

¹²1926 A.C. 518. Unsuccessful attempts were made in subsequent cases to distinguish Sobhuza, e.g. Hoani Te Heuheu Tukino v Aotea District Maori Land Board (1941) A.C. 308; Nyali Ltd v Attorney-General (1957) A.C. 253.

To sum up the position, the overall effect of the foregoing cases is that whether by virtue of the Foreign Jurisdiction Act, or the Crown's Common law prerogatives or by simply invoking the defence of the Act of State, according to the English municipal law, the Crown's powers outside the realm were plenary.

11.4 The Paradox of the Judicial Role

Authors Jennings and Young (Constitutional Law of the British Empire),¹³ explain that the judges, especially in the nineteenth century, did not construe the Crown's powers so widely because they assumed that the extent of the Crown's jurisdiction had to be measured by reference to international law. This approach, they claim, was influenced by the theory that international law was part of the law of England.¹⁴ According to Jennings and Young, once this theory was rejected the courts concerned themselves with only English Constitutional law as the determining factor of the Crown's jurisdiction and powers outside the British territory.¹⁵

The foregoing observation of the learned writers is undoubtedly correct. In fact, as may be recalled from previous chapters, the Law Officers in the late nineteenth century were at pains to justify the expansion of the Crown's judicial and other powers in British protectorates, on the basis of changes in international law. The cases referred to above made a clean break from the previous legal reasoning. It is evident from these cases that one of the main objectives of the judiciary in construing the Crown's powers so widely was to facilitate British colonialism. This was actually openly admitted in R v Crewe, by Lord Justice Farwell. He stated that:

¹³Oxford, Clarendon, 1938.

¹⁴Ibid., at pp. 4-8. They attributed a similar approach to both Hall (in his Foreign Jurisdiction of the British Crown; and Jenkyns (in his British Rule and Jurisdiction Beyond the Seas): "They [Hall and Jenkyns] were concerned in the first instance; with the powers which a state might by international law, exercise within the territorial limits of another."

¹⁵They cite as authority West Rand Mining Co. Ltd v Rex (1905) 2 K.B. 391 (C.A.); and Commercial and Estates Co. of Egypt v Board of Trade (1925) K.B. 271.

The truth is that in countries inhabited by native tribes who largely outnumber white population such acts [Habeas Corpus, Magna Carta], although bulwarks of liberty in the United Kingdom, might, if applied there, well prove the death warrant of the whites. When the State takes the responsibility of Protectorates over such territories, its first duty is to secure the safety of the white population by whom it occupies the land, and such duty can best be performed by a responsible officer on the spot. There are many objections to the government of such countries from Downing Street, but the Governor's position would be impossible if he were to be controlled by the Courts here, acting on principles admirable when applied to ancient well ordered State, but ruinous when applied to semi-savage tribes.¹⁶

Whether or not the judicial action was justified is a matter for debate. Critics may argue, rightly so, that the judiciary abandoned its traditional role to control the executive in the British protectorates in order to further British interests. Moreover, the judiciary could also be accused of manipulating legal principles to achieve desired political goals. A case in point is the holding that no territory was a British dominion, in spite of the powers assumed and exercised therein by the Crown, unless the Crown said so. This decision enabled the application of the Foreign Jurisdiction Act and the defence of Act of State to British protectorates and spheres of influence.

On the other hand, in the prevailing circumstances, the judicial reluctance to intervene in the administration of British protectorates is perhaps understandable. Firstly, the judges, far removed from reality, were in the worst position to control the administrators on the spot. In any case judicial control is important if the people are aware of their legal rights and utilise the courts to enforce them. This, of course, was not the case during the period investigated. Secondly, as this study has shown, the law was unclear. Lawyers, writers and administrators were confused in their endeavor to apply English and International law principles to a totally different environment. Their task was complicated by the diversity of communities at different level of development and organisation. They resorted to legal techniques (typical example are the numerous

¹⁶Pages 615-616. See also the Masai Case, supra, at p.110.

treaties) in order to satisfy what they deemed to be the legal requirements. The result was contradiction and conflict in the interpretation and application of the law. Thirdly, a strict application of British or International law principles was not necessarily in the best interest of the colonised people.

In view of the foregoing points it is submitted that the judiciary should not be over-criticised when in the end it declared that it had no control over the exercise of the Crown's powers in British protectorates. It was left to the Crown to determine, as a matter of policy, the nature and extent of the power it wished to assume and exercise in each particular region or Protectorate. Theoretically it meant that the colonised people were thereby exposed to arbitrary administration. In practice, political expediency in fact exerted great control over the administration. The clearest evidence of this are the steps, described below, which the Uganda Protectorate Government took following the High Court ruling in Rex v Besweri Kiwanuka, over the legal efficacy of the Buganda Agreement.

How did the developments in the judicial reasoning affect the legal position in Buganda? This is next to be considered.

11.5 The Judicial Developments in Buganda

It has been argued above that since the case of Katosi v Kahizi, the assumption both in London and Uganda was that the agreements with Buganda (as well as Ankole and Toro) were legally binding. It was not until 1930, in the case of Rex v Baganda Coffee Company that the judiciary first expressed doubt about the legal significance of the Buganda Agreement.¹⁷ Some of the facts of this case have already been dealt with.

¹⁷In 1914, in the Masai Case, although Chief Justice Carter held that the Masai Agreement was not justiciable, he affirmed the precedent of Katosi v Kahizi as regards the Ankole, Buganda and Toro agreements.

Briefly, it was contended by counsel for the accused that the Ordinance which his client was alleged to have violated was invalid as it did not comply with the 1900 Agreement (Article 5). Counsel claimed that, where the Crown acquired a territory by a treaty it was bound by its provisions; accordingly the Crown, as instanced by the Governor and the Legislative Council of the Uganda Protectorate, could not legislate for the Kingdom of Buganda in contravention of the Agreement.¹⁸

Sir Charles Griffin, Chief Justice of Uganda, in dismissing the appeal remarked that:

It has been contended that in interpreting statutes, they must be read and applied as subject to existing relevant Treaties and cases were cited in which courts have so expressed themselves. It will, however, be found on examination that the opinions only applied in cases where a statute contains an express reference to a Treaty, so as to incorporate it in the statute and so make it part of the statute. Otherwise the terms of a Treaty are not part of the municipal law and give no right of action and afford no grounds of defence to private individuals. A Treaty is not the creature of the legislature and is not made by the legislative authority so as to bind the subject or to afford the subject rights in a court.¹⁹

The foregoing remarks were made *obiter dictum* as the Court found that the Ordinance was not inconsistent with the Agreement as alleged by counsel. Griffin did not comment on the case of Katosi v Kahizi and the other cases which followed it; neither did he cite any authorities for his statement, though, as he says, many were cited by both sides in the proceedings. However, as we have already seen, the judgment excited the Protectorate Government which was then grappling with the issue of whether it had the power to enact legislation imposing charges and fees upon the Baganda -- in Buganda -- without the consent of the Kabaka and the Lukiiko.

The issue of the legal significance of the Buganda Agreement did not arise again in

¹⁸See Memorandum of appeal (updated) Criminal Sessions case No.5/30 encl. Ag. Gov. to C.O. 29 August 1930, CO536/160/21525.

¹⁹At p. 37, *supra*. See chapter 8 for the reasons for not expressly incorporating the Agreement in the Uganda Order in Council.

the courts until almost seven years later in the case of Rex v Besweri Kiwanuka.²⁰ The case originated in the District Court of Kampala and went on appeal to the High Court. The gist of the case was as follows: Kiwanuka was alleged to have stolen the sum of three hundred and ninety shillings from the Buganda administration. It was not in dispute that the accused was a Muganda; and his lawyer claimed that for this purpose the complainant was also a "Muganda". Counsel claimed that, according to the Buganda Agreement, subject to two exceptions, the Buganda courts had exclusive jurisdiction in all cases in which the parties were Baganda. The two exceptions to this rule occurred, firstly, where a case was transferred by the Buganda courts to the British courts under the provisions of the Proclamation of 1917 or under Article 3 of the 1905 Buganda (Judicial) Agreement; and secondly, where the case came within the purview of clause 2 of the aforesaid Proclamation. He submitted that his client's case did not fall in any of these exceptions and therefore on the authority of Katosi v Kahizi it ought to be dismissed by the Court for want of jurisdiction.

Against this argument, the Solicitor-General of Uganda submitted for the Crown that the jurisdiction of the High Court, under Article 15 of the 1902 Order in Council, was complete over all persons and matters in the Protectorate. In cases such as the one before the Court, he asserted that its jurisdiction was concurrent with that of the Buganda courts. The Solicitor-General sought to distinguish the case of Katosi v Kahizi on the grounds that it did not concern the Buganda Agreement and that it arose from an attempt to transfer to the British courts a case which had originated from a native court whereas in the case before the Court, the proceedings had, from the first instance, been in the British courts. In addition, he submitted that, since the decision of Katosi v Kahizi, the law had been enriched by a number of reported cases especially Sobhuza II v Miller.

²⁰Civil Appeal no. 38 of 1937, unreported, encl. Governor to C.O., 12 July 1937, CO536/195/40199.

Following the principles enunciated by the latter case, he maintained that a treaty could not override any Protectorate legislation.²¹

The High Court, presided over by Hall C.J., and Francis J., agreed with the argument of counsel for the accused that his submissions were supported by the precedent of Katosi v Kahizi which, the Court emphasised, was based on the opinion of the Secretary of State given under Section 4 of the Foreign Jurisdiction Act. As for the Solicitor-General's endeavour to distinguish that case, the Court observed that, if anything, the language of the Buganda Agreement (Article 5) was stronger than that of the Ankole and Toro agreements in so far as it unequivocally stated that in the event of conflict between the Agreement and any laws made for the Protectorate the former would (with regard to Buganda) prevail; whereas the predominance of the provision of the Ankole and Toro agreements over the Protectorate laws was just inferred.²²

Moreover, the Court noted, though the Order in Council came into force in 1902, it was nevertheless deemed necessary to enter into the Uganda (Judicial) Agreement, 1905, Article 3 of which empowered the Commissioner (with the consent of the Kabaka) to transfer cases involving only the Baganda to the British courts:

Such words [in the opinion of the Court] would appear to be unnecessary if the High Court was then deemed to have full authority under Article 15 [of the 1902 Order], for we can hardly think that a mere question of procedure such as transfer between Courts would require such an elaborate foundation as the Agreement.

It seemed to the Court that:

... clause 3 of the 1905 Agreement, was, at that time, rightly or wrongly, considered necessary in order to remove cases from the Native Courts which were thought to have exclusive jurisdiction despite the Order in Council. The recitals to the Agreement of 1905 ... are significant in this connection.

²¹Ibid. See also the Solicitor-General's semi-private letter to Bushe, 26 November 1937, and Governor to C.O., 2 July 1937, *supra*.

²²Article 7 of the Ankole and Toro agreements (respectively) prescribed that the districts would be subject to the same laws and regulations as were generally in force throughout the Protectorate.

Furthermore, the Court remarked that it was significant that the recitals to the Buganda courts proclamations of 1909 and 1917 expressly declared that they were made with the consent of the Kabaka, chiefs and people of Buganda. Although the possibility that the consent was obtained as matter of courtesy could not be ruled out, in the opinion of the Court the most likely explanation was that as late as 1917, the administration still deemed that such consent was necessary.²³

Addressing itself to the cases cited by the Solicitor-General dealing with the status of the treaties vis-a-vis the Crown's powers, the Court noted that the cases were of such high authority that they could not just be ignored. Faced with this dilemma the Court felt that the best and safest course of action was to submit another reference to the Secretary of State under Section 4 of the Foreign Jurisdiction Act to resolve the issue: whether the Kabaka of Buganda had, under the 1900 Agreement, exclusive jurisdiction in cases between natives of Buganda (except as above mentioned) or whether the British Courts by virtue of the 1902 Order had concurrent jurisdiction in such cases, apart from the provisions of the judicial Agreement and the Proclamation of 1917. This issue was identical to the one raised with the same office in the case of Katosi v Kahizi except of course the latter related to the Ankole Agreement.

11.6 Discussions at the Colonial Office

Roberts-Wray, Assistant Legal Adviser, who was assigned to the task of untangling the legal position, noted that the matter needed to be discussed. But he felt that the reference was misconceived. In his opinion the Secretary of State could only be called upon under section 4 of the Foreign Jurisdiction Act, where a court required to know whether or not the Crown had jurisdiction "under Treaty, grant, usage, sufferance, and other lawful means" in a particular foreign territory. But where the Crown had in fact

²³See discussion above at pp. 172-179.

exercised the powers by an Order in Council then, in his view, it was for the court to interpret its effect. Thus, strictly speaking, Roberts-Wray thought that the proper response to the High Court was that it ought itself resolve the issue it posed by determining whether or not under the 1902 Order in Council the High Court had jurisdiction over cases in which only the Baganda were involved.²⁴ Nevertheless, Roberts-Wray argued that on the authority of Sobhuza II v Miller, where, as under the 1902 Uganda Order in Council, the powers to legislate was unlimited, no Ordinance would be challenged on account of its being inconsistent with a treaty. He explained away the opinion of the Secretary of State, in 1907, in the case of Katosi v Kahizi on the grounds that it was given before the law was settled by the Privy Council in this decision.²⁵

Similar views were expressed by Bushe who had succeeded Risley as Legal Adviser to the Colonial Office. Bushe claimed that he had often doubted the opinion given in Katosi v Kahizi. He commended his predecessor for his dissenting views in that case "which everybody ignored" but had since been vindicated by the Privy Council in Sobhuza II v Miller. On the basis of the latter case, Bushe said that there was hardly any doubt left that the Crown's jurisdiction in the Uganda Protectorate was manifested by the 1902 Order in Council which overrode the agreements and the Proclamation of 1917. Consequently, in his opinion, jurisdiction of the High Court was concurrent with that of the native chiefs.²⁶

The other officers of the department were mystified by the exposition of the

²⁴See also above at p. 168.

²⁵Roberts-Wray thought that in any case it was arguable that the High Court's jurisdiction was either by sufferance or on the interpretation of the agreements, concurrent with that of the Buganda courts, minutes of 23 September 1937, on Governor to C.O., 12 July 1937, *supra*. See also Bushe's semi-official letter to the Solicitor-General of Uganda, 1 November 1937, (*supra*).

²⁶Minutes of 4 August, and 28 September 1937; and minute Flood, 5 October 1937.

lawyers. Bottomley, in his minutes, summed up somewhat satirically the legal position as meaning that:

... by Order in Council or by Ordinance under Order in Council, we have undone the reservation in the original Agreements that native legal matters should be settled by the three Native governments. That view is held in spite of the fact in the case of Buganda it was considered necessary to obtain, by an amending Agreement with the native Government, the power even to transfer a case from the native courts to the Protectorate court.

However, Bottomley cautioned against rushing back with this response to the Uganda High Court before discussing with the Governor of Uganda the possible political repercussions of the judicial decision. This point was also stressed by Bushe. He explained that in his minutes he was only trying to ascertain what the legal position was, but he was aware that there might be a need to look into the political aspects of the matter. Bushe advised that, if it appeared that the legal position conflicted with the political requirements, appropriate procedures could always be taken to amend the law accordingly.²⁷

Mitchell, the Governor of Uganda, happened to be in England. In a meeting with Flood, he confirmed that if it were publicly announced that the High Court had parallel jurisdiction in Buganda with the native courts this might lead to considerable difficulties for his administration, since the Baganda regarded the Agreement "with almost superstitious reverence." Nor did he think that it was politically feasible for the Baganda to agree to enter into a supplementary Agreement as they always suspected the motives behind such proposals. In the circumstances, both Mitchell and Flood suggested that the best solution, if it were legally possible, was to amend the Courts Ordinance to provide that the High Court had no jurisdiction in native cases in Buganda except as was provided for in the Agreement.²⁸ However, according to Bushe, their proposal was not

²⁷Minute of 1 October 1937.

²⁸Minute Flood, 26 October 1937.

legally possible since, in his view, any attempt to limit the powers of the High Court (which was complete under the Order in Council) by an Ordinance, would “obviously” be *ultra vires*. In any case in Bushe’s opinion the problem was not so much with the High Court’s jurisdiction as with the subordinate courts established by the Courts Ordinance. For this reason he suggested that the High Court’s jurisdiction ought to be left intact, and instead amendments be made to the Courts Ordinance to exclude from the jurisdiction of the subordinate courts all cases in Buganda which only involved the Baganda. Jurisdiction in these cases would be reserved to the Buganda courts in accordance with the provisions of the Agreement.²⁹

In the meantime, a short response limited to answering the legal question was despatched to the High Court of Uganda. The Court was told that by the 1902 Order in Council, His Majesty had expressed the extent of His jurisdiction in Uganda:

Such manifestation may be regarded as an Act of state, unchallengeable in any British Court, or may be attributed to statutory powers given under the Foreign Jurisdiction Act. The Order is not subject to the Agreement and Proclamation referred to.

The despatch avoided dictating to the Court how the the provisions of the Order ought to be interpreted, since that was deemed to be the duty of the the Court to work out. But “for such assistance as it may afford” the Court was told that, in the opinion of the Secretary of State, it seemed to follow that an Ordinance made under powers conferred by the Order in Council could not be subject to the provisions of the Agreement which had no legislative effect.³⁰

²⁹Minutes of 28 October and 2 November 1937.

³⁰C.O. to Governor (for transmission to the High Court), 13 November 1937, CO536/195/40199.

11.7 The Outcome

Curiously, the decision of the High Court in Rex v Besweri Kiwanuka was never reported in the Uganda Law Reports series which were, by then, in their sixth volume. For such an important case one wonders whether the omission was not deliberate for fear of publicity which might have engendered political problems for the Government.³¹ However, there is no doubt that the issue of the legal significance of the Agreement was from that time regarded as resolved. Thus, in two cases which came before the High Court the following year, namely Seduraka Serwanga v Edward Sulaiman Khaya; and Ziyadi Mukasa v Musitafa Serwada,³² the High Court was emphatic that the Buganda Agreement had no legal significance unless incorporated in the municipal law. Justice Francis's remarks in the latter case, in response to the argument that a certain Proclamation was in conflict with the Agreement, was typical:

The Proclamation in question was made by the Governor under the Courts Ordinance which in turn was enacted under the authority of the Uganda Order in Council, 1902, which is the *fons et origo* of all power -- legislative, judicial and administrative -- in this protectorate. If therefore the Proclamation conflicts with the Agreements the former must prevail.³³

Interestingly, although the Protectorate Government on behalf of the Crown was legally entitled to exercise unlimited powers in Buganda, it opted for the status quo. Bushe, in a semi-official letter to the Solicitor-General of Uganda advised that, if according to the Uganda administration's interpretation of the terms of the agreements, the latter were found to be inconsistent with the laws of the Protectorate, "the best way

³¹In an interesting incident which occurred almost fifteen years later in the case of Mukwaba v Mukubira, supra, the Attorney-General sought to cite Rex v Besweri Kiwanuka in support of his submission, but he apologised to the Court that some pages were missing from the copy of the case kept in the High Court files. On objection of the opposing counsel, which was sustained by the Court, the Attorney-General withdrew the case from his list of authorities, Transcript of the Court Proceedings, at p.262-263.

³²(1938) 6 U.L.R. 28; (1938) 6 U.L.R.40.

³³Ibid., at pp. 41-42. In Mukwaba v Mukubira, supra, counsel invoking the Agreement freely conceded that it was not binding unless incorporated in municipal law, Transcript of the Court Proceedings of the case at p. 574-575. See also Daudi Ndibarama et al v The Engazi of Ankole et al (1960) E.A. 47; Katikiro v Attorney-General (1959) E.A. 382, 1960 E.A. 784 P.C.

to straighten out the tangle would be by comprehensive legislation" to embrace whatever policy the Government desired to pursue.³⁴

The first legislative measure which was taken to incorporate the Agreement was the enactment of the Buganda Native Laws (Declaratory) Ordinance, 1938.³⁵ Its object, as stated in the Preamble, was to "remove doubts as to certain powers of the Kabaka under the [B]uganda Agreement, 1900". Section 3 declared that for removing doubts:

... as from the date and by virtue of the terms of the [B]uganda Agreement 1900, and by virtue of the terms of the Buganda Agreement (Native Laws) 1910, and the Agreement set out in the schedule of this Ordinance, the Kabaka of Buganda has had power to make laws binding upon all natives in Buganda and the right of the Kabaka hereafter to exercise such power is hereby expressly confirmed for so long as the said Agreement shall continue to be of full force and effect but subject always to the terms of the said Agreement and to any amendments

Moreover, under Section 4 of the Ordinance all laws made by the Kabaka and the Lukiiko since the execution of the Buganda Agreement were retrospectively validated and declared to have been binding upon all the natives of Buganda.

Ironically, the Ordinance was preceded by a supplementary Agreement with the Buganda authorities, entitled the Buganda (Declaratory) Agreement (Native Laws) 1937. Its declared object was to remove doubts as to the powers of the Kabaka and the Lukiiko to make legislation affecting the Baganda in Buganda.³⁶ The Agreement was, of course, legally a sham as the Government knew fully well that it was not necessary to enter into it in order to give legislative effect to the laws of the Lukiiko. But it had to be done for political reasons.³⁷

³⁴Bushe to Hone, 1 November 1937, 536/195/40037.

³⁵Bushe to Hone, 1 November 1937, 536/195/40037.

³⁶Schedule to the Buganda Native Laws (Declaratory) Ordinance, 1938, *supra*.

³⁷Compare with the reasons for entering into the Buganda Agreement (Native laws), above at pp. 182-184.

Another step which was taken was to give legal effect to the jurisdiction of the Buganda courts. Roberts-Wray, in one of his minutes in the discussions of Rex v Besweri Kiwanuka, alluded to the possibility of arguing that clause 7 of the Native Courts in Buganda Proclamation, 1917, might be interpreted to have given legislative effect to the Agreement with regard to the jurisdiction of the Buganda courts. The clause referred to read:

The provisions of the [B]Uganda Agreement, 1900, relating to the administration of justice as amended by the [B]Uganda Agreement (judicial) 1905 and this Proclamation and in so far as they are not inconsistent therewith, are hereby confirmed

He was, however, doubtful as to whether the Proclamation itself had any legislative effect.³⁸ Apparently this was because the Proclamation, according to its preamble, declared that it was made by the Governor under the authority of the 1900 and the 1905 agreements, the consent of the Kabaka and the Lukiiko, and under the Courts Ordinance. It was not immediately clear whether or not in making the Proclamation the Governor was actually acting under the provisions of the latter Ordinance.³⁹ Besides, as Bushe added, the exercise of the Governor's powers under the Ordinance (Section 41) was expressed to be subject to other provisions of the Ordinance and any other legislation of the Protectorate. If, therefore, the intention of the Protectorate Government were to allow the Buganda courts exclusive jurisdiction over the cases which only involved the Baganda, Bushe thought that the 1917 Proclamation could not be interpreted to override the jurisdiction of the British courts established by either the Courts Ordinance or any other Ordinance whether already in force or subsequently enacted.⁴⁰

The legal position was subsequently clarified by the enactment of the Buganda

³⁸Minute of 23 September 1937, *supra*.

³⁹Laws of Uganda, 1923, 1:chapter 4. Under section 41 the Governor had the power to establish Native Courts. But it was not stated in the Proclamation that the Buganda courts were established under these provisions. See also above at pp. 174-176.

⁴⁰Bushe to Hone, *supra*. Bushe possibly had in mind, for example, Section 31 of the Courts Ordinance which conferred upon District Courts concurrent jurisdiction with Native Courts.

Courts Ordinance, 1940. The preamble to this Ordinance stated that its object was to make "better provisions for the constitution of native Courts in Buganda, for the Administration of justice and to implement the [B]Uganda Agreement, 1900, and the [B]Uganda (Judicial) Agreement, 1905, as varied by the native Courts in Buganda Proclamation 1917." The Ordinance recognised *inter alia* the Court of the Lukiiko as the Principal Court of Buganda with full jurisdiction over all Africans, except as provided therein.⁴¹ For the present purposes it is not necessary to go into the details of this Ordinance; it suffices to stress that it gave legislative effect to the provisions of the Agreement relating to the administration of Justice in Buganda.

Another important legislation in this regard is the Native Administration (Incorporation) Ordinance, 1938. It invested the Governor with power to declare any African administration a body corporate with its own rights and liabilities; and to enumerate the persons who should comprise it.⁴² Legislative effect was given to the Agreement under Section 13 whereby it was provided that nothing contained in the Ordinance should be construed "to derogate from any rights or privileges secured to any African ruler ... by virtue of the agreement subsisting between the Crown ... and any African ruler." With regard to Buganda this presumably meant, for instance, that the Governor could not appoint somebody else as the ruler of Buganda except the Kabaka who, according to the Agreement, had to be a member of the Buganda royal family. The provision also preserved the honorific title of "His Highness" which was conferred upon the Kabaka under the Agreement.

In pursuance of his powers, the Governor issued a notice in which he declared that the native administration of Buganda was a body corporate and that it would be known

⁴¹Laws of Uganda, 1951, 2: chapter 77, sections 3, 6, and 9.

⁴²*Ibid.*, chapter 72.

by the title of “the Buganda Government”. The notice stated that this government “shall comprise His Highness the Kabaka of Buganda and the Lukiiko *virtute officii*.”⁴³

Thus as a result of the abovementioned ordinances selected provisions of the Buganda Agreement were expressly incorporated in the municipal law. It must be remembered though that, prior to the 1902 Order, the Agreement was part of the law to be applied in Buganda under Article 16 of the Africa Order in Council; indeed it prevailed over the Order itself. Moreover, Article 28(1), as we have seen, saved “any law or practice or procedure established by or under the African Orders” as long as it was not superseded by this Order or any other legislation made thereunder. As suggested above, the effect of this provision was to incorporate the Agreement into the municipal law until it was replaced by legislation. From the available evidence there was only one occasion on which this argument was used to justify the view that the Buganda Agreement was part of the law to be applied in Buganda.⁴⁴ In all other cases the Agreement was assumed to be binding without discussing the theoretical basis.⁴⁵

11.8 Summary and Conclusion

In this chapter we have seen that there were judicial precedents in other jurisdictions which had established that the Crown’s powers in its protectorates were plenary. However, in Buganda, it was not until 1936, in the case of Rex v Besweri Kiwanuka, that this legal position was accepted. The fact that the High Court of Uganda considered it imperative to make another reference to the Colonial Office; and, even more significant, that legislative measures were taken subsequent to this case (some to operate

⁴³Laws of Uganda, 1951, 7:1147.

⁴⁴Minute Risley, 13 February 1919, on Governor to C.O., 3 January 1919, CO536/93, *supra*, above at p. 225.

⁴⁵In Mukwaba v Mukubira, it was argued that the fact that the Crown consistently acted in accordance with the terms of the Agreement was sufficient proof (without need of express legislative measures) that the Crown had incorporated it into the municipal law. The Uganda High Court was not persuaded by this view, see chapter seven.

retroactively) to give legal effect to the provisions of the Buganda Agreement, are, it is submitted, proof that prior thereto Buganda was administered on the assumption that the Crown's powers were legally limited by the Agreement. The irony is that when the Protectorate Government realised that its powers in Buganda were absolute, it took legal steps to limit them. At that late stage the political reality was such that the Protectorate Government did not wish to be seen by the Baganda to wield unlimited powers in their country.

CHAPTER 12

CONCLUSIONS

In the introduction to this study I proposed the thesis that, according to the prevailing view of the British administrators and their legal advisers, both in London and locally, the Crown had limited legal powers and authority in Uganda, in particular Buganda, during the period of my investigation, and that these limitations influenced Britain's policy and administration. I believe that the evidence produced in subsequent chapters establishes that this was indeed the case. Previous writers (historians and lawyers alike) assumed without serious investigation or on the basis of a much later development of legal ideas that the law did not restrict or shape the actions of the colonial administration in any substantial way. The data examined in this study show that the matter was considerably more complex than such an assumption would allow. The evidence demonstrates that the administrators believed that they were under various inescapable legal constraints; they did not appreciate that the Crown -- in the light of later "advances" in legal theory -- had always been entitled to exercise unlimited legal powers in Buganda; for it was only at the end of the period studied that the courts held that, on the basis of judicial precedents from other jurisdictions, the Crown's powers in the Protectorate were absolute.

Because the British recognised the sovereignty of Buganda as a legal fact when they began colonising it the relationship between the two countries was built on treaties. First came the 1890 treaty between the Kabaka and the Imperial British East Africa Company. This was followed by the 1893 provisional treaty with the Crown which was ratified the

following year when Buganda was declared a British Protectorate. Then there was the 1900 Agreement. The evidence shows that these treaties and the Agreement were made on the assumption that, under international law and British municipal law, a claim of a sphere of influence, or even a protectorate, did not entitle the Crown to exercise sovereign powers in the territory. Sovereignty was regarded as vested in whoever was the local ruler, who was free to cede his powers to anybody. Thus the treaties made with Buganda (and with other chiefs elsewhere in the sphere) were regarded at the time as the basis and measure of the authority acquired in Buganda. The legal significance attached to these treaties becomes even more apparent when one compares the terms of the 1893 treaty with those the Crown made with other rulers in the east Africa sphere. Since the British Government did not wish to assume any responsibility outside Buganda, the latter treaties were carefully drafted so as to exclude any provision conferring sovereign powers (other than control over the territory's foreign relations) upon the Crown. The purpose of the latter treaties was to prevent the chiefs from ceding their sovereignty to rival European states without Britain's consent -- thereby preserving the territory for Britain's eventual occupation.

The fact that Buganda was declared a British Protectorate on the basis of a treaty was crucial in the evolution of British authority in the country. It reinforced the conviction of the British officials in Uganda and the Foreign Office, that the treaty defined the extent of the Crown's powers in that country. They always cited its provisions to justify their legal position not only to the Baganda but also in their confidential correspondence. Where the treaty was silent, the assumption was that the matter was outside the Crown's jurisdiction.

I have suggested that even under the 1889 Africa Order in Council, which was the fundamental law of the Protectorate, the official interpretation of the legal status of the

treaty as the measure of the Crown's power in Buganda could still be seen as correct. A point which previous writers have missed is that the Order incorporated into the municipal law of the territory to which it applied, any treaty made by the Crown with a local ruler. Moreover, it provided that the provisions of these treaties prevailed over any law applied to the Protectorate, including the Africa Order in Council.

Although Uganda was one of the last British protectorates to be declared in Africa, there was still considerable doubt as to the nature and extent of the Crown's authority by virtue of being the protecting Power. The prevailing British interpretation of international law was that a state claiming a protectorate was not entitled to exercise judicial or legislative power over the inhabitants of the protectorate or foreigners within the territory except with their consent or that of their sovereign. Indeed the Africa Order in Council was drafted within this legal framework. At the turn of the century there was a dramatic change in legal thinking in London. The Foreign Office let itself be convinced by its legal advisers that the Crown, by virtue of the protectorate, could enact legislation to extend its powers and authority within the protectorate irrespective of treaties with the local rulers. Hence at the time the mood at the Foreign Office was that the Crown's powers were virtually unlimited. In fact a proposal to annex Uganda, and other protectorates under the control of the the Foreign Office, was rejected by the Foreign Secretary as unnecessary since most of the impediments which might have called for such action had been removed. A new Order in Council for Uganda which was comprehensive of the Crown's powers was prepared to replace the outdated Africa Order in Council. Like all adaptations in legal theory, the changes were influenced by the socio-political climate. But this study shows that intricate legal arguments were also involved in the changing of the law.

The evolution of British authority in Uganda was complicated by the Buganda

Agreement which Johnston made, unaware of the foregoing changes in the legal thinking. Historians Low and Pratt, and others, have stressed the political and economic goals of this Agreement.¹ However, the view expressed by these writers that the British entered into this Agreement knowing that it had no legal effect, is hardly convincing. This thesis shows that the Agreement was deemed legally necessary by all those involved in making it, in order to expand the Crown's legal powers in Buganda. Contrary to what Low says, the Agreement was made precisely because the British continued to recognise Buganda's sovereignty even after declaring it to be under their protection.

Although the Agreement allowed the Crown to exercise extensive powers in Buganda, there were still restrictions. Jurisdiction of the British courts over the Baganda was limited; and any Protectorate legislation which was inconsistent with the Agreement did not apply to Buganda. Moreover, the Agreement stipulated in some detail various aspects relating to Buganda's relations with the Protectorate Government which included a division of land between the Crown and the Buganda oligarchy; the nature and extent of the Commissioner's control over the Kabaka's government; and taxation. The result was that whereas under the 1902 Uganda Order in Council the Crown had absolute powers in the Protectorate, under the Agreement they were limited.

In view of the changes in the legal theory described above, any conflict between the Agreement and the Order should have been resolved in favour of the latter. The Agreement should have been regarded as a document which served a political purpose, but which did not in any way affect the Crown's legal position in Buganda. Yet that was not the interpretation adopted by the local officials. They thought that the treaty and the Buganda Agreement were the source of the Crown's power and authority in Buganda. Consequently they held that the Crown could not exercise any powers or enact laws

¹Above at p.....

beyond those allowed by the Agreement. The Agreement, in their interpretation, was the supreme law in Buganda.

A number of factors combined to sustain this interpretation. One was that for over five years after the Agreement and the new Order were made the arrangement worked smoothly. The Protectorate Government had such wide powers under the Agreement that British officials were not generally hindered by its terms in the administration of the country. Besides the Baganda generally cooperated with the Protectorate Government; if they had not, arguments to weaken the Agreement might have been precipitated. The result was that the Buganda Agreement had a strong political foundation during the critical, initial period. Secondly, the transfer of Uganda Protectorate affairs from the Foreign Office to the Colonial Office meant a loss of continuity with reference to the officers who were directly involved and aware of the circumstances under which the Order and the Agreement were made. In the third place Cox, a senior legal adviser to the Colonial Office, strongly supported the Uganda officials' interpretation. Cox managed to persuade the Colonial Office to the view that this interpretation, which it had earlier rejected, was correct. On the basis of his reasoning it is evident that he belonged to the old school of thought. He was not aware of the legal developments at the turn of the century. Cox believed that the Uganda Order in Council was based on the Buganda Agreement (and those of Ankole and Toro); consequently, he concluded that any conflict between them had to be resolved in favour of the latter.

The fourth factor responsible for sustaining the interpretation that the Agreement limited the Crown's powers in Buganda, involved the judicial decisions. Once the courts embodied this interpretation in judicial precedents (moreover with the blessing of the Colonial Secretary), it acquired a legitimacy which was hardly ever questioned during the period studied. The Agreement was upheld to the letter -- even when the Baganda were

unlikely to complain -- because the Protectorate Government believed that any act which was inconsistent with the Agreement, or which could not be justified under its provisions, was illegal and, if challenged in the courts, was bound to be declared null and void. The Agreement was regarded as the fundamental law in the British/Buganda relationship. Hence, on this basis, a unique legal system was developed in the Uganda Protectorate.

The Government had to negotiate supplementary agreements, with the increasingly reluctant Buganda administration, to increase its powers under the Agreement. This study establishes that the supplementary agreements were negotiated not merely for political reasons, as Low and others have claimed,² but because they were regarded as legally essential whenever the Crown wanted to expand its powers in Buganda. Further, it was not only the Baganda who believed in the legal efficacy of the Agreement; many British officials, both in Uganda and London, were also convinced -- until Rex v Besweri Kiwanuka -- that the Buganda Agreement was a legally binding document and a constraint upon the Crown's legal powers in Buganda. The legislative measures which were taken to incorporate the Agreement into the Protectorate law, and to give legal effect to all prior actions and decisions which had been made on the assumption that the Agreement was a legal document are clear enough proof of the interpretation before this case.

The debate about the achievements and lessons of colonial rule is usually charged with emotion. At one extreme there are those who strongly contend that British colonialism was nothing but economic exploitation of the dependent countries for Britain's interest. At the other extreme are those who sing the praises of Britain's success and the "sacrifice" she made to "develop" or "civilise" her former colonies. However,

²Above at pp. 3-6.

whichever viewpoint one takes, two important lessons certainly emerge from the British/Buganda relationship.

In the first place, although in the end political and economic forces are the main constraints upon any administration, be it a colonial or an independent state government, the law, as a semi-autonomous factor, can and does play a significant role in limiting the power of the government. We have seen that the Protectorate Government was restrained by the fear that the exercise of power which was beyond the Agreement might be declared illegal by the judiciary.

Secondly, the foundation for "constitutionalism" or rule by a government with legally limited powers, was laid during the period investigated. Prior to the twentieth century Buganda was administered by despotic monarchs. The Buganda Agreement introduced a system of power sharing which effectively restricted the authority of the Protectorate Government. The study provides a scope for further investigation of a this model: the impact of the Agreement and the British/Buganda relationship in the development of the rule of law in Uganda, both colonial and the independent state. Morris expresses his surprise that as late as 1960 the Ankole, Buganda, and Toro agreements were still argued in the Uganda courts even though it had long been established that they were not legally binding.³ It is submitted that part of the reason must be that over the years a constitutional convention had been established. There was an expectation that the Government's powers were limited.

It is painful for a Ugandan to admit, twenty-five years after political independence from the British, that the roots of constitutionalism have been destroyed by successive regimes. Presently the country is in political turmoil. There are, of course several reasons

³ Above at page 5n.

for this. One can only hope that the foundation laid by the British/Buganda relationship will some day be used to develop an effective legal control of the Government which, it is submitted, is essential for the restoration of peace.⁴

⁴On 17 December 1985, an agreement was signed between the Uganda Government and the National Resistance Movement, a guerrilla organisation which controls about half of the country, to share the powers of the Government. At the time of writing the details of this agreement are not available to the author, however, it is hoped that those who are involved in its implementation will make use of the experience of the Buganda Agreement.

APPENDIX 1

PROVISIONAL AGREEMENT BETWEEN KABAKA MWANGA AND MWANGA AND PORTAL. 29 May 1893.¹

AGREEMENT between Mwanga, King of [B]Uganda, and Sir Gerald Portal, ... Her Majesty's Commissioner and Consul-General for East Africa, &c.

1. Whereas the Imperial British East Africa Company have now definitely withdrawn from Uganda.

2. And whereas I, Mwanga, King of [B]Uganda am profoundly and sincerely desirous of securing British protection for myself, my people and dominions: as also assistance and guidance in the government of my country.

3. I, the said Mwanga, do hereby pledge and bind myself of the the following conditions, with the object of securing the British protection, assistance, and guidance before mentioned:-

4. I undertake to make no Treaties or Agreements whatsoever with any Europeans of whatever nationality without the consent and approval of Her Majesty's Representative.

5. I freely recognise that so far as I, the King, am concerned, the sole jurisdiction over Europeans and over all persons not born in my dominion, and the settlement of all cases in which any such persons may be a party or parties, lie exclusively in the hands of Her Majesty's Representative.

6. In civil cases between my subjects the Court of Her Majesty's Representative shall be a Supreme Court of Appeal, but it shall lie entirely within the discretion of the said Representative to refuse hear such appeals.

7. In criminal cases where only natives are concerned, it is left to the discretion of Her Majesty's Representative to interfere, in the public interest and for the sake of justice, to the extent and in the manner which he may consider desirable.

8. And I, Mwanga, the King, undertake to see that due effect is given to all and every decision of the Court of Her Majesty's Representative under Article 6 and 7.

9. I, Mwanga fully recognise that the protection of Great Britain entails the complete recognition by myself, my Government, and people throughout my Kingdom of [B]Uganda and its dependencies, of all and every international act and obligation to

¹Hertslet, Map of Africa by Treaty, 1: 393-396.

which Great Britain may be a party, as binding upon myself, my successors, and my said Government and people, to such extent and in such manner as may be prescribed by Her Majesty's Representative.

10. No war or warlike operations of any kind shall be undertaken without the consent of Her Majesty's Representative, whose concurrence shall also be obtained in all serious matters of State, such as the appointment of Chiefs or officials, the political or religious distribution of territory, &c.

11. The assessment and collection of taxes, as also the disposal of revenues of the country, are hereby made subject to the control and revision of Her Majesty's Government in such manner as they may from time to time direct.

12. The property of Her Majesty's Government and of their officers, and of all servants of Her Majesty's Government, shall be free from the incidence of taxes.

13. Export and import duties on all goods leaving or entering [B]Uganda and its dependencies shall be leviable by Her Majesty's Government for their sole use and benefit. These duties shall be fixed in accordance with the provisions of the General Acts of Berlin and Brussels of 1885 respectively, and of any international Agreements arising from the same, and to which Great Britain is or may become a party.

14. The foreign relations of [B]Uganda and its dependencies are hereby placed unreservedly in the hands of Her Majesty's Representative.

15. Slave trading or slave raiding, or the exportation or importation of people for sale or exchange as slaves, is prohibited. I, Mwanga, also undertake, for myself and my successors, to give due effect to such laws and regulations, having for their object the complete ultimate abolition of the status of slavery in [B]Uganda and its dependencies, as may be dictated by Her Majesty's Government.

16. In consideration of the above engagements on the part of Mwanga, King of [B]Uganda, I, Gerald Herbert Portal, ... on behalf of Her Majesty's Government, do hereby agree to appoint and leave a British Representative with a sufficient staff to carry out the provisions of this Agreement, which is entirely subject to the approval and ratification of Her Majesty's Government, and is therefore only binding until such a time as the decision of Her Majesty's Government can be conveyed, and reach [B]Uganda. In the event of Her Majesty Government being willing to assent to the above conditions and terms, Mwanga, the King, undertake hereby, on behalf of himself and his successors, to make a Treaty in the above or similar sense either in perpetuity or such specified period as Her Majesty's Government may desire.

17. The present Agreement supersedes all other Agreements or Treaties whatsoever made by Mwanga or his predecessors.

18. This Agreement shall come into force from the date of its signature.

In faith whereof we have respectively signed this Agreement, and have thereunto affixed our seals: Kabaka and Portal.

APPENDIX 2

TREATY. GREAT BRITAIN AND [B]UGANDA. 27 AUGUST, 1894.¹

TREATY between Henry Edward Colvile, ... Her Majesty's Acting Commissioner for Uganda, for and on behalf of Her Majesty the Queen of Great Britain, ... and Mwanga, King of [B]Uganda, for himself, his heirs, and successors.

1. Whereas Her Majesty's Government has sanctioned the Agreement between Mwanga, King of [B]Uganda, and Sir Gerald Herbert Portal, ... made at Kampala on the 29th day of May, 1893;

2. And whereas Her Britannic Majesty has been graciously pleased to bestow on the said Mwanga, King of [B]Uganda, the protection which he requested in that Agreement:

3. I, the said Mwanga, do hereby pledge and bind myself, my heirs, and successors, to the following condition:- [Here follow word for word, the same Articles, 4 to 15, as appear in the Treaty of 29 May 1893, Appendix 1]

16. The present Treaty supersedes all other Agreements or Treaties whatsoever made by Mwanga or his predecessors

17. This Treaty shall come into force from the date of its signature.

In faith whereof we have respectively signed this Treaty, and have thereunto affixed our seals: Colvile and Kabaka.

¹Hertslet, Map of Africa by Treaty, 1: 396

APPENDIX 3

AGREEMENT BETWEEN Sir H. H. Johnston, ... AND THE KABAKA, CHIEFS, AND PEOPLE OF [B]UGANDA, RESPECTING THE BOUNDARIES AND ADMINISTRATION OF THE UGANDA PROTECTORATE.

Signed at Mengo March 10, 1900.¹

WE, the undersigned to wit, Sir Henry Hamilton Johnston, K.C.B., Her Majesty's Special Commissioner, Commander-in-Chief and Consul-General for the Uganda Protectorate and adjoining territories, on behalf of Her Majesty the Queen of Great Britain and Ireland, ... on the part, and the undermentioned Regents and Chiefs of the Kingdom of [B]Uganda on behalf of the Kabaka (King) of [B]Uganda and the Chiefs and people of [B]Uganda, on the other part, do hereby agree to the following Articles relative to the government and administration of the Kingdom of [B]Uganda:-

1. (Description of the boundary of Buganda).
2. The Kabaka and Chiefs of [B]Uganda hereby agree henceforth to renounce in favour of Her Majesty the Queen any claims to tribute they may have had on the adjoining provinces of the Uganda Protectorate.
3. The Kingdom of [B]Uganda in the Administration of the Uganda Protectorate shall rank as a province of equal rank with any other province into which the Protectorate may be divided.
4. The revenue of the Kingdom of [B]Uganda, collected by the Uganda Administration, will be merged in the general revenue of the Uganda Protectorate as will that of the other provinces of the Protectorate.
5. The laws made for the general governance of the Uganda Protectorate by Her Majesty's Government will be equally applicable to the Kingdom of [B]Uganda except in so far as they may in any particular conflict with the terms of this Agreement will constitute a special exception in regard to the Kingdom of [B]Uganda.
6. So long as the Kabaka, Chiefs, and people of Uganda shall conform to the Laws and Regulations instituted for their governance by Her Majesty's Government, and shall co-operate loyally with Her Majesty's Government in the organisation and administration of the said Kingdom of [B]Uganda, Her Majesty's Government agrees to recognise the Kabaka of [B]Uganda as the Native Ruler of the Province of [B]Uganda under Her

¹Hertslet, Commercial Treaties, 23: 167.

Majesty's protection and overrule. The King of [B]Uganda shall henceforth be styled His Highness the Kabaka of [B]Uganda. On the death of a Kabaka, his successor shall be elected by a majority of votes in the Lukiko or Native Council. The range of selection, however, must be limited to the Royal Family of [B]Uganda, that is to say, to the descendants of King Mutesa. The name of the person chosen by the Native Council must be submitted to Her Majesty's Government for approval, and no person shall be recognised as Kabaka of [B]Uganda whose election has not received the approval of Her Majesty's Government. The Kabaka of [B]Uganda shall exercise direct rule over the natives of [B]Uganda, to whom he shall administer justice through the Lukiko or Native Council, and through others of his officers in the manner approved by Her Majesty's Government. The jurisdiction of the Native Court of the Kabaka of [B]Uganda, however, shall not extend to any person not a native of the [B]Uganda Province. The Kabaka's Courts shall be entitled to try natives for capital crimes, but no death sentence may be carried out by the Kabaka or his Courts without the sanction of Her Majesty's Representative in Uganda. Moreover, there will be a right of appeal from the Native Courts to the principal Court of Justice established by Her Majesty in the Kingdom of [B]Uganda as regards all sentences which inflict a term of more than five years' imprisonment or a fine of over 100l. In the case of any other sentences imposed by the Kabaka's Courts, which may seem to Her Majesty's Government disproportioned or inconsistent with humane principles, Her Majesty's Representative in Uganda shall have the right of remonstrance with the Kabaka, who shall, at the request of the said Representative, subject such sentence to reconsideration.

The Kabaka of [B]Uganda shall be guaranteed by Her Majesty's Government from out of the local revenue of the Uganda Protectorate a minimum yearly allowance of 1,500l. a year. During the present Kabaka's minority, however, in lieu of the abovementioned subvention, there will be paid to the master of his household, to meet his household expenditure, 650l. a year, and during his minority the three persons appointed to act as Regents will receive an annual salary of 400l. a year. Kabakas of [B]Uganda will be understood to have attained their majority when they have reached the age of 18 years. The Kabaka of [B]Uganda shall be entitled to a salute of nine guns on ceremonial occasions when such salutes are customary.

7. (Deals with allowance to be paid to the Kabaka's mother).

8. All cases, civil or criminal, of a mixed nature, where natives of the [B]Uganda

Province and non-natives of that province are concerned, shall be subject to British Courts of Justice only.

9. (Describes the counties into which Buganda is divided for administrative purposes, and the appointment of county chiefs).

10. To assist the Kabaka of [B]Uganda in the government of his people he shall be allowed to appoint three native officers of State, with the sanction and approval of Her Majesty's Representative in Uganda (without whose sanction shall not be valid):- A Prime Minister, otherwise known as Katikiro; a Chief Justice; and a Treasurer or Controller of the Kabaka's revenues. These official shall be paid at the rate of 300l. a year. Their salaries shall be guaranteed them by Her Majesty's Government out of the funds of the Uganda Protectorate. During the minority of the Kabaka these three officials shall be constituted the Regents, and when acting in that capacity shall receive salary at the rate of 400l. a year. Her Majesty's Chief Representative in Uganda shall at any time have direct access to the Kabaka, and shall have the power of discussing matters affecting [B]Uganda with the Kabaka alone, or during his minority, with the Regents; but ordinarily the three officials above designated will transact most of the Kabaka's business with the Uganda Administration. The Katikiro shall be *ex officio* the President of the Lukiko, or Native Council; the Vice-President of the Lukiko shall be the native Minister of Justice, for the time being; in the absence of both Prime Minister and Minister of Justice, the Treasurer of the Kabaka's revenues, or third Minister, shall preside over the meetings of the Lukiko.

11. The Lukiko, or Native Council, shall be constituted as follows:-

In addition to the three native Ministers, who shall be *ex officio* senior members of the Council, each Chief of a county (20 in all) shall be *ex officio* a member of the Council. Also each Chief of a county shall be permitted to appoint a person to act as his lieutenant in this respect to attend to the meetings of the Council during his absence, and to speak and vote in his name. The Chief of a county, however, and his lieutenant, may not both appear simultaneously at the Council. In addition, the Kabaka shall select from each county three Notables, whom he shall appoint during his pleasure, to be members of the Lukiko or Native Council. The Kabaka may also, in addition to the foregoing, appoint six other persons of importance in the country to be members of the Native Council. The Kabaka may at any time deprive any individual of the right to sit on the Native Council, but in such a case shall intimate his intention to Her Majesty's

Representative in Uganda, and receive his assent thereto before dismissing the member. The function of the Lukiko will be to discuss all matters concerning the native administration of [B]Uganda and to forward to the Kabaka Resolutions which may be voted by a majority regarding measures to be adopted by the said Administration. The Kabaka shall further consult with Her Majesty's Representative in Uganda before giving effect to any such Resolution voted by the Native Council, and shall, in this matter, explicitly follow the advice of Her Majesty's Representative. The Lukiko, or a Committee thereof, shall be a Court of Appeal from the decisions of the Courts of First Instances held by the Chiefs of counties. In all cases affecting property exceeding the value of 5l. or imprisonment, exceeding one week, an appeal for revision may be addressed to the Lukiko. In all cases involving property or claims exceeding 100l. in value, or a sentence of imprisonment exceeding five years, or sentences of death, the Lukiko shall refer the matter to the consideration of the Kabaka, whose decision when countersigned by Her Majesty's Chief Representative in Uganda shall be final. The Lukiko shall not decide any questions affecting the persons or property of Europeans or others who are not natives of [B]Uganda. No person shall be elected to the Lukiko who is not a native of the Kingdom of [B]Uganda. No question of religious opinion shall be taken into consideration in regard to the appointment by the Kabaka of members of the Council. In this matter he shall use his judgment and abide by the advice of Her Majesty's Representative, assuring in this manner a fair proportionate representation of all recognised expressions of religious belief prevailing in Uganda.

12. In order to contribute to a reasonable extent towards the general cost of the maintenance of the Uganda Protectorate there shall be established the following taxation for Imperial purposes, that is to say, the proceeds of the collection of these taxes shall be handed over intact to Her Majesty's Representative in Uganda as the contribution of the Uganda Province towards the general revenue of the Protectorate. The taxes agreed upon at present shall be as follows:

- * (a) A hut tax of 3 rupees, or 4s. per annum, on any house, hut, or habitation, used as a dwelling place. (b) A gun tax of 3 rupees, or 4s. per annum, to be paid by any person who possesses or uses a gun, rifle, or pistol.

The Kingdom of [B]Uganda shall be subject to the same Customs Regulations, Porter Regulations, and so forth, which may, with the of Her Majesty, be instituted for the Uganda Protectorate generally, which may be described in a sense as exterior taxation;

but no further interior taxation, other than the hut tax and gun tax shall be imposed on the natives of the Province of [B]Uganda without the agreement of the Kabaka, who in this matter shall be guided by the majority of votes in his Native Council. This arrangement, however, will not affect the question of township rates, lighting rates, water rates, market dues, and so forth, which may be treated apart as matters affecting municipalities or townships; nor will it absolve natives from obligations as regards military services, or the up-keep of main roads passing through the lands on which they dwell. A hut tax shall be levied on any building which is used as a dwelling place. A collection of not more than four huts, however, which are in a separate and single inclosure and are inhabited only by a man and his wife, or wives, may be counted as one hut. The following buildings will be exempted from the hut tax:...[the residence of the Kabaka and his household, and the official residences of his ministers and of the county chiefs]. As regards the gun tax, it will be held to apply to any person who possesses or makes use of a gun, rifle, pistol, or any weapon discharging a projectile by the aid of gunpowder, dynamite, or compressed air.... [Exemptions from the gun tax were granted to the Kabaka, his ministers, chiefs, and other notables].

13. (Deals with the right of the Kabaka to conscript his subjects for military service, if called upon by the Protectorate Government).

14. (Deals with the duty of the Kabaka's government to maintain in good repair all roads in Buganda).

15. The land of the Kingdom of [B]Uganda shall be dealt with in the following manner:

Assuming the area of the Kingdom of [B]Uganda as comprised within the limits cited in this Agreement, to amount to 19,600 square miles, it shall be divided in the following proportions:-

	Sq. miles.
Forests to be brought under control of Uganda Administration	1,500
Waste and uncultivated land to be vested in Her Majesty's Government, and to be controlled by the Uganda Administration	9,000
Plantations and other private property of His Highness the Kabaka	350
Plantations and other private property of the Namasole	16
Plantations and other private property of the Namasole, mother of Mwanga	10
To the Princes: Joseph, Augustine, Ramazan, and Yusuf-Suna, 8 square miles each	32

For the Princesses, sisters, and relations of the Kabaka	90
To the ... chiefs of counties 20 in all, 8 square miles each (private property)	160
Official estates attached to the posts of [chiefs of counties], 8 square miles each	160
The three Regents will receive private property to the extent of 16 square miles each	48
And official property attached to their office, 16 square miles each, the said official property to be afterwards attached to the post of the three native Ministers	96
Mbogo (the Mohammedan Chief) will receive for himself and his adherents	24
Kamuswaga, Chief of Khoki, will receive	20
One thousand Chiefs and private land owners will receive the estates of which they are already in and which are computed at an average area of 8 square miles per individual, making a total of	8,000
There will be allotted to the three Missionary Societies in existence in Uganda as private property, and in trust for the native churches as much as	92
Land taken up by the Government for Government stations prior to the present settlement (at Kampala, Entebbe, Masaka, &c., &c.)	50
Total	19,600

After a careful survey of the Kingdom of [B]Uganda has been made, if the total area should be found to be less than 19,600 square miles, then that portion of the country which is to be vested in Her Majesty's Government shall be reduced in extent by the deficiency found to exist in the estimated area. Should, however, the area of [B]Uganda be established at more than 19,600 square miles, then the surplus shall be dealt with as follows:-

It shall be divided into two parts, one-half shall be added to that amount of land which is vested in Her Majesty's Government, and the other half will be divided proportionately among the properties of the Kabaka, the three Regents or Native Ministers, and the ... Chiefs of counties.

The aforesaid 9,000 square miles of waste or cultivated, or uncultivated land, or land occupied without prior gift of the Kabaka or Chiefs by Bakopi [peasants] or strangers, are hereby vested in Her Majesty the Queen of Great Britain ... and Protectress of Uganda, on the understanding that the revenue derived from such lands shall form part of the general revenue of the Uganda Protectorate.

The forests, which will be reserved for Government control, will be, as a rule, those forests over which no private claim can be raised justifiably, and will be forests of some

continuity, which should be maintained as woodland in the general interests of the country.

As regards the allotment of the 8,000 square miles among the 1,000 private landowners, this will be a matter to be left to the decision of the Lukiko, with an appeal to the Kabaka. The Lukiko will be empowered to decide as to the validity of claims, the number of claimants, and extent of land granted, premising that the total amount of land thus allotted amongst the Chiefs and accorded to native landowners of the country is not to exceed 8,000 square miles.

Europeans and non-natives, who have acquired estates, and whose claims thereto have been admitted by the Uganda Administration, will receive title-deeds for such estates in such a manner and with such limitations, as may be formulated by Her Majesty's Representative. The official estate granted to the Regents, Native Ministers, or Chiefs of counties, are to pass with the office, and their use is only to be enjoyed by the holders of the office.

Her Majesty's Government, however, reserves to itself the right to carry through or construct roads, railways, canals, telegraphs, or other useful public works, or to build military forts, or works, or defence on any property, public or private, with the condition that not more than 10 per cent. of the property in question shall be taken up for these purposes without compensation, and that compensation shall be given for the disturbance of growing crops or of buildings.

16. Until Her Majesty's Government has seen fit to devise and promulgate Forestry Regulations, it is not possible in this Agreement to define such forest rights as may be given to the natives of Uganda; but it is agreed on behalf of Her Majesty's Government, that in arranging these Forestry Regulations, the claims of the Baganda people to obtain timber for building purposes, firewood, and other products of the forest or uncultivated lands, shall be taken into account, and arrangements made by which under due safeguards against abuse these rights may be exercised gratis.

17. As regards mineral rights: The rights to all minerals found on private estates shall be considered to belong only to the owners of those estates, subject to a 10 per cent, *ad valorem* duty, which will be paid to the Uganda Administration when the minerals are worked. On the land outside private estates, the mineral rights shall belong to the Uganda Administration, which, however, in return for using or disposing of the same must compensate the occupier of the soil for the disturbance of growing crops or

buildings, and will be held liable to allot to him from out of the spare lands in the Protectorate an equal area of soil to that from which he has been removed. On these waste and uncultivated lands of the Protectorate, the mineral rights shall be vested in Her Majesty's Government as represented by the Uganda Administration. In like manner the ownership of the forests, which are not included within the limits of private properties, shall be henceforth vested in Her Majesty's Government.

18. In return for the cession to Her Majesty's Government of the right to control over 10,550 square miles of waste, cultivated, uncultivated, or forest lands, there shall be paid by Her Majesty's Government in trust for the Kabaka (upon his attaining his majority) a sum of 500l., and to the two Regents collectively 600l., namely, to the Katikiro 300l., and the other two Regents 150l. each.

19. Her Majesty's Government agrees to pay to the Mohammedan Uganda Chief, Mbogo, a pension for life of 250l. a year, on the understanding that all rights which he may claim (except such as are guaranteed in the foregoing clauses) are ceded to Her Majesty's Government.

20. Should the Kingdom of [B]Uganda fail to pay to the Uganda Administration during the first two years after the signing of this Agreement, an amount of native taxation, equal to half that which is due in proportion to the number of inhabitants; or should it at any time fail to pay without any just cause or excuse, the aforesaid minimum of taxation due in proportion to the population; or should the Kabaka, Chiefs, or people of [B]Uganda pursue, at any time, a policy which is distinctly disloyal to the British Protectorate; Her Majesty's Government will no longer consider themselves bound by the terms of this Agreement.

On the other hand, should the revenue derived from the hut and gun tax exceed two years running a total value of 45,000l. a year, the Kabaka and Chiefs of counties shall have the to appeal to Her Majesty's for an increase in the subsidy given to the Kabaka and the stipends given to the Native Ministers and Chiefs, such increase to be in the same proportional relation as the increase in the revenue derived from the taxation of natives.

21. Throughout this Agreement the phrase "Uganda Administration" shall be taken to mean that general government of the Uganda Protectorate which is instituted and maintained by Her Majesty's Government; "Her Majesty's Representative" shall mean the Commissioner, Governor, or principal official of any designation who is appointed by Her Majesty's Government to direct the affairs of Uganda.

22. In the interpretation of this Agreement, the English text shall be the version which is binding on both parties.

Done in English and Luganda at Mengo, in the Kingdom of [B]Uganda, on the 10th March, 1900.

Signed by Johnston, Her Majesty's Special Commissioner, Commander-in-Chief, and Consul-General, on behalf of Her Majesty the Queen of Great Britain, and by the three Regent Chiefs, and four Chiefs of the counties, on behalf of the Kabaka, chiefs, and people of Buganda.

APPENDIX 4

**AGREEMENT BETWEEN THE BRITISH GOVERNMENT AND
THE [MUKAMA] (KING)] ... AND CHIEFS OF TOR[o],
RESPECTING THE BOUNDARIES, ADMINISTRATION, &c, OF THE
DISTRICT. Signed at Fort Portal, June 26,
1900.¹**

1. [Description of the boundary of Toro.]

2. [Description of the territory to which the Agreement was applicable.]

3. By this Agreement the Chief Kasagama is recognised by Her Majesty's Government as the [Mukama] or supreme Chief over all that part of the Tor[o] district which is included within the limits of the above-mentioned administrative subdivisions;.... So long as the [Mukama] and Chiefs abide by the conditions of this Agreement they shall be continued to be recognised by Her Majesty's Government as the responsible Chiefs of the Tor[o] district. They shall be allowed to nominate their successors in the event of their demise, and the successors thus nominated shall in the like manner be recognised by Her Majesty's Government as their successors to the dignity of Chieftainship, on the understanding that they equally abide by the terms of this Agreement. But should the [Mukama] or the Chiefs herein named fail at any time to abide by any portion of the terms of this Agreement, they may be deposed by Her Majesty's Principal Representative in the Uganda Protectorate, and their title and privileges will pass to any such other Chiefs as Her Majesty's Principal Representative may select in their place.

Should the [Mukama] of Tor[o] -- Kasagama or his successor -- be responsible for the infringement of any part of the terms of this Agreement, it shall be open to Her Majesty's Government to annul the said Agreement, and to substitute for it any other methods of administering the Tor[o] district which may seem suitable.

4. All the waste and uncultivated land which is waste and uncultivated at the date of this Agreement, all forests, mines, minerals, and salt deposits in the Tor[o] district shall be considered the property of Her Majesty's Government, the revenue derived therefrom being included within the general revenue of the Uganda Protectorate; but the natives of Tor[o] district shall have the same privileges with regard to the forests as have

¹Hertslet, Commercial Treaties, 23:194-199. The 1901 Ankole Agreement is identical with this Agreement.

been laid down and formulated in the aforesaid Regulations in force in the Uganda Protectorate as are applicable to the natives of each province or their administrative division of the Protectorate within such province or administrative division. Her Majesty's Government shall have the right of enforcing on the natives of the Tor[o] district, as elsewhere in the Uganda Protectorate, the protection of game; and in this particular it is agreed that within the Tor[o] district the elephants shall be strictly protected, and that the killing or capture of elephants on the part of the natives of the Tor[o] district shall be regulated by the principal European official placed in civil charge of the district.

5. There shall be imposed henceforth on the natives of the Tor[o] district the same taxation as in force by Proclamation in the other provinces or districts of the Uganda Protectorate, to wit, the hut and gun tax. All revenue derived from customs duties, hut taxes, salt deposits, or any other sources whatever, shall be paid direct to the Principal Officer in civil charge of the Tor[o] district. No Chief in the Tor[o] district shall levy on other Chiefs, or on natives, tributes or gifts of any kind, except such as may be directly sanctioned by Her Majesty's Principal Representative in the Uganda Protectorate, and as are specified in this Agreement.

6. Justice as between native and native shall be administered direct by the recognised Chiefs of the six sub-divisions. In all cases where a sentence of over three months' imprisonment, or a fine exceeding 5l. in value, or where property over 5l. in value is concerned, an appeal shall lie from the divisional Native Courts to the Lukiko of the [Mukama] of Tor[o]. In cases where imprisonment exceeds the term of one year, or property involved exceeds the value of 100l., an appeal shall lie from the decision of the [Mukama], or his Lukiko, to the principal European officer in civil charge of the district of Tor[o]....

....All cases between the natives of the district of Tor[o] and natives of other districts of the Uganda Protectorate, or between natives and foreigners, shall be tried by the British Magistrate in the district of Tor[o], and shall be removed altogether from native jurisdiction.

7. From out of the total annual revenue received in the shape of hut taxes and gun taxes from the six administrative divisions above specified in the Tor[o] district, 10 per cent. of the total value shall be paid to the [Mukama]; and of the total value of the taxes remitted by the Chief of each sub-division, 10 per cent. shall be remitted to the recognised

Chief of such sub-division.... In addition to the percentage of the taxes, the [Mukama] of Tor[o], as [Mukama], shall be granted an estate from out of the waste lands of the Tor[o] sub-division of an area of 16 square miles, provided, however, that such estate may not include within its limits any area of forest or any salt deposit. The Katikiro, or principal Minister of the [Mukama] of Tor[o], shall, in his official position, enjoy the usufruct of an estate to be allocated out of the waste lands of the Tor[o] sub-division, of an area of 10 square miles, not, however, to include any large area of forest or any salt deposit within its limits. In like manner, and with the same reservations, the Namasole, or the existing Queen-Mother of Kasagama, shall receive from out of the waste lands of the Tor[o] sub-division an estate of not more than five square miles. The recognised Chiefs of the other sub-divisions of the Tor[o] district shall enjoy, in their official capacity, the usufruct of an estate of 10 square miles out of the waste lands in their respective sub-divisions; the private estates to be guaranteed to Kasagama, the present [Mukama] of Tor[o], shall not exceed 50 square miles in area, of which amount 25 square miles must be held in the sub-division of Tor[o] proper. The private estate of the Katikiro shall not exceed 16 square miles, those of the Namasole 16 square miles, and those of each existing Chief of a sub-division, as named in this Agreement, of 16 square miles each.

In all respects the Tor[o] district shall be subjected to the same Laws and Regulations as are generally in force throughout the Uganda Protectorate.

Signed by ... Sir Henry Hamilton Johnston and the [Mukama] and Chiefs of Tor[o], at Fort Portal, on the 26th day of June, 1960.

SELECT BIBLIOGRAPHY

This study is mainly based on official documents located in London, in the Public Records Office, the Foreign Office Library, and the British Museum Library; and the National Library of Australia, Canberra. The files used are too numerous to list, however, full details are given in the footnotes throughout the text.

PRIMARY SOURCE

- Annual Blue Books for the Uganda Protectorate.. 1901-1904.
- Colonial Office Records CO 536 (Uganda).
- Colonial Office Records CO 685 (Uganda).
- Colonial Office Records CO 96 (Gold Coast).
- Colonial Office Confidential Prints 879 (Africa).
- Colonial Office Confidential Prints 885 (Miscellaneous).
- Foreign Office Records FO 2 (Africa).
- Foreign Office Records FO 534 (Pacific).
- Foreign Office Records FO 834 (Law Officers)
- Foreign Office Confidential Print FOCP 403 (Africa).
- Law Officers' Reports LOR 5 volumes.
- Uganda Protectorate Government Gazette..... 1908-1920.

SECONDARY SOURCE

This section of the bibliography is confined to those books and articles which have been of direct relevancy to the study. The more general background materials have not been included.

- Adewoye, A., "The Judicial Agreements in Yorubaland," *Journal of Africa History*, (1971): 607.
- Alexandrowicz, C.H., *The European African Confrontation: A Study in Treaty Making* (A.W. Sijthoft-Leiden, 1973).
- , "The Partition of Africa," in Ingham, K, ed., *Foreign Relations of African States*, Colston Papers no. 25 (1975) :129.
- Allott, Anthony., "The Development of the East African Legal System During the Colonial Period," in Low, D.A, and Smith, Alison, ed., *History of East Africa*, 3 vols., (Oxford, 1976), 3: 348.
- Anene, Joseph.C., *Southern Nigeria in Transition 1884-1906: Theory and Practice in a Colonial Protectorate* (Cambridge University Press, 1966).
- Anson, W.R., *Law and Custom of the Constitution*, 4th ed., edited by Keith (Oxford, 1935).

- Barbar, J, *The Imperial Frontier* (Nairobi, E.A.P.H, 1968).
- Baty, T, "Protectorates and Mandate," *British Yearbook of International Law*, (1921-22): 109.
- Bennett, Gordon., "Aboriginal Rights in International Law," *Royal Anthropological Institute of Great Britain and Ireland*, Occasional Paper no. 37 (1978).
- Crawford, James., *The Creation of States in International Law* (Oxford, 1978).
- Coupland, R., *The Exploitation of East Africa, 1856-1890* (London, 1939)]
- De Kiewiet, M.J., "History of the Imperial British East Africa Company, 1876-1895," Ph.D. Thesis, London, 1955.
- Dunbar, A.R., *A History of Bunyoro-Kitara* (Nairobi, OUP, 1965).
- Evatt, E., "The Acquisition of Territory in Australia and New Zealand," in Alexandrowicz, C.H., ed., *Grotian Society Papers*, (1968): 16.
- Fawcett, J.E.S., *The British Commonwealth and International Law* (London, Stevens, 1963).
- Galbraith, John.S., *Mackinnon and East Africa, 1878-1895* (Cambridge, 1972).
- Ghai, Y.P. and McAuslan, J.P.W.B., *Public Law and Political Change in Kenya: A Study of the Legal Framework of Government from Colonial to the Present* (Nairobi, OUP, 1970).
- Gray, Sir John, "Early Treaties in Uganda," *Uganda Journal*, 12.1 (1948): 25-42.
- , "The Year of the Three Kings of Buganda, Mwanga - Kiwewa - Kalema 1888-1889," *Uganda Journal*, 14-15 (1950-51): 15.
- Hailey, M., *Native Administration in the British African Territories*, 5 vols. (London, 1953).
- Hall, William Edward., *Foreign Power and Jurisdiction of the British Crown* (Oxford, 1894).
- , *International Law* (Oxford, 1889 and 1904).
- Halleck, *International Law*, 3rd ed. (London, Paul Kegan, 1893).
- Harlow, Vincent; Chilver, E.M; and Smith, Alison, ed., *Oxford History of East Africa*, vol. 2 (Oxford).
- Haydon, E.S., *Law and Justice in Buganda* (London, Butterworth, 1960).
- Hertslet, Edward., *The Map of Africa by Treaty*, 3 vols. (London, Frank Case, 1967).
- Hertslet, Lewis., *A Collection of Treaties and Conventions Between Great Britain and Foreign Powers and the Laws, Decrees, and Orders in Council ... So Far as they Relate*

- to Commerce and Navigation; and to the Slave Trade ... Compiled From Authentic Documents*, 31 vols., (London, HMSO, 1841-1925).
- Hill, M.F., *Permanent Way: The Study of the Kenya and Uganda Railway* (London, Hazel Watson, 1949).
- Hookey, John., "Jurisdiction in the British Solomon Islands Protectorate: A Legal and Historical Analysis." Ph.D. Thesis, London, 1968.
- Ibingira, Grace., *The Forging of an African Nation* (New York, Viking Press, 1973).
- Ingham, Kenneth., *The Kingdom of Toro in Uganda* (London, Mathuen, 1975).
- , *The Making of Modern Uganda* (London, Allen and Unwin, 1958).
- Jennings and Young, *Constitutional Law of the British Empire* (Oxford, 1938).
- Johnston, Sir Harry., *British Central Africa* (London, 1902).
- , *The Uganda Protectorate*, 2 vols. (London, 1902).
- Johnston, Ross.W., *Sovereignty and Protection: A Study of British Jurisdictional Imperialism in the Late Nineteenth Century* (Durham, Duke University, 1973).
- Jorgensen, Jan Jelmart., *Uganda: A Modern History* (London, Croom Helm, 1981).
- Kabwegere, Tarsis., *The Politics of State Formation; the Nature and Effects of Colonialism in Uganda* (Nairobi, EALB, 1974).
- Kagwa, Apolo., *The Kings of Buganda*, Translated by M.S.M. Kiwanuka, (Nairobi, EAPH, 1971).
- Kamanda, Alfred., *A Study of the Legal Status of Protectorates in Public International Law* (Ambilly-Annemasse, 1961).
- Kimble, David., *A Political History of Ghana* (Oxford, 1963).
- Kiwanuka, Semakula., *A History of Buganda From the Foundation of the Kingdom to 1900* (London, Longman, 1971).
- Kato, L.L., "Act of State in a Protectorate -- in Retrospect," 1969 *Public Law* 219-235.
- Louis, Roger Wm., "The Anglo-German Hinterland Settlement of 1890 and Uganda," *Uganda Journal*, 27 (1963), 71-83.
- Low, Donald Anthony., *Buganda in Modern History* (London, Weidenfield and Nicolson, 1971).
- , "British Public Opinion and the Uganda Question, October - December 1892," *Uganda Journal*, 18-19 (1954-55) p.81.
- , and Pratt, R. Cranford., *Buganda and British Overrule 1900 - 1955, Two Studies* (Oxford, 1960).

- Lindley, M.F., *The Acquisition and Government of Backward Territory in International Law* (London, reprinted ed., New York, Negro Press, 1969).
- Liversage, V., *Land Tenure in the Colonies* (Cambridge, 1945).
- Lugard, F.D., *The Dual Mandate in British Tropical Africa* (London, Blackwood, 1926).
- , *The Rise of Our East African Empire*, vol.1 (London, 1893).
- , "Treaty Making in Africa," *Journal of the Royal Geographical Society*, (1893) p. 54.
- Maine, H.S., *International Law* (London, 1888).
- Maini, Krishna., *Land Law in East Africa* (Nairobi, OUP, 1967).
- Mamdani, Mahmood., *Political and Class Formation in Uganda* (New York, Monthly Review Press, 1976).
- Matson, A.T., "Macdonald's Expedition to the Nile 1892-1899," *Uganda Journal*, 29(1), p.98.
- McDermott, P.L., *Imperial British East Africa or IBEA : A History of the Formation and Work of the Imperial British East Africa Company* (London, 1893).
- McEwen, A.C., *International Boundaries of East Africa* (Oxford, Clarendon, 1971).
- McNair, Arnold.D., *International Law Opinions, Selected and Annotated*, 3 vols. (Cambridge, University Press, 1956).
- Moore, Harrison., *Act of State in English Law* (London, John Murray, 1906).
- Morris, Henry Francis., *A History of Ankole* (Kampala, EALB, 1962).
- , "The Murder of St. G.Galt," *Uganda Journal*, 24 (1960), p.1.
- , and Read, James Stuart., *Indirect Rule and Search For Justice - Essays in East African Legal History* (Oxford, Clarendon, 1972).
- , *Uganda: The Development of its Laws and Constitution* (London, Stevens, 1966).
- Mukherjee, Ramkrishna., *The Problem of Uganda; A Study in Acculturation* (Berlin, Akademie-Verlag, 1956).
- Mungeam, G.H., *British Rule in Kenya, 1895-1912* (Oxford, 1966).
- Mutesa, Edward, *Desecration of My Kingdom* (London, Constable, 1967).
- Nabudere, Wadada, *Imperialism and Revolution in Uganda* (London, Onyx Press, 1980).
- Newbury, Colin., "Treaty, Grant, Usage and Sufferance: The Origins of British Colonial Protectorates," in Wood, G.A, and O'Connor, P.S., *W.P.Morrell: A Tribute Essay in Modern and Early Modern History Presented to W.P.Morrell* (Dunedin, University of Otago Press, 1973).

- Oliver, Roland., *Sir Harry Johnston and the Scramble For Africa* (London, Chatto and Windus, 1959).
- Oppenheim, L., *International Law*, ed. Lauterpacht, 7th ed; vol.1 (London, Longmans, 1948).
- Palley, Claire., *The Constitutional History of Southern Rhodesia 1888-1965, With Special Reference to Imperial Control* (Oxford, 1966).
- Perham, M., *The Lugard Diaries* (London, Faber, 1959).
- Piggott, Francis Taylor., *Exterritoriality: The Law Relating to Consular Jurisdiction and Residence in Oriental Countries* (London, Clowes, 1892).
- Polack, K., "The Defence of Act of State in Relation to Protectorates," (1963) 26 *Modern Law Review* 138.
- Roberts, Andrew., "Evolution of the Uganda Protectorate," *Uganda Journal*, 1 (1963): 95-106.
- Roberts-Wray, Kenneth., *Commonwealth and Colonial Law* (London, 1966).
- Robinson, Roland, and Gallagher, John, with Denny, Alice., *Africa and the Victorians: The Official Mind of Imperialism* (London, Macmillan, 1961).
- Rutherford, Geddes.R., "Spheres of Influence: An Aspect of Semi-Suzerainty," *American Journal of International Law*, 20 (1926): 300-25.
- Rutherford, J., *The Treaty of Waitangi and the Acquisition of British Sovereignty in New Zealand, 1840* (Auckland University, 1949).
- Smith, Herbert Arthur., ed., *Great Britain and the Law of Nations: A Selection of Documents Illustrating Views of the Governments in the United Kingdom Upon Matters of International law*, 2 vols. (London, P.S.King and Sons, 1932).
- Snow, A.H., *The Question of Aborigines in the Law and Practice of Nations* (Washington, 1919).
- Sorrenson, M.P.K., *Origin of European Settlement in Kenya* (Nairobi, OUP, 1968).
- Tamuno, T.N., *The Evolution of the Nigeria State: The Southern Phase 188-1914* (Lagos, Longmans, 1972).
- Taylor, Hannis, *A Treatise in International Public Law* (Chicago, Callingham, 1901).
- Thomas, H.B., "Imperatrix v Juma and Urzee," *Uganda Journal*, 7 (1940), pp. 70-84.
- , "More Early Treaties in Uganda, 1891-96," *Uganda Journal*, 13 (1949): 171.
- , and Scott, R., *Uganda* (Oxford, 1935).
- , and Spencer, A.E., *A History of Uganda Land and Surveys and of the Uganda Land and Survey Department* (Entebbe, Government Printer, 1938).

- Tucker, A.R., *Eighteen Years in Uganda and East Africa*, 2 vols. (London, 1908).
- Uzoigwe, Godfrey., *Britain and the Conquest of Africa: The Age of Salisbury* (Ann Arbor, University of Michigan, 1974).
- , ed., *Uganda: The Dilemma of Nationhood* (New York, Nok, 1982).
- Verzijl, J.H.W., *International Law in Historical Perspective* (A.W.Sijthoff-Leiden, 1961).
- Wade, E.C.S., "Act of State in English Law," *British Yearbook of International Law*, 15 (1934), 98.
- West, Henry.W., *Land Policy in Buganda* (Nairobi, EAPH, 1975).
- Westlake, John, *Collected Papers of John Westlake on Public International Law* (Cambridge, 1914).
- Wight, Martin., *British Colonial Constitutions 1947* (Oxford, 1952).