THE LEGAL ASPECTS OF THE 1900 BUGANDA AGREEMENT REVISITED

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1. Introduction

In 1894 the Kingdom of Buganda, then known as Uganda, was declared a British Protectorate on the basis of a treaty made the previous year with the *Kabaka* (King) of Buganda.[1] Six years later 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 of England, on the other. The Agreement was called the 1900 Uganda Agreement (hereafter the Buganda Agreement or the Agreement).[2] This Agreement has been variously described as "Buganda's Charter of Rights", "the Magna Carta", "Buganda's Constitution", and so on.[3] It was a landmark in Britain's relationship with Buganda. It survived for fifty-odd years. Anthony Low 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."[4] Apart from the Buganda Agreement there were the 1900 Toro Agreement, and the 1901 Ankole Agreement,

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1 *London Gazette*, 19 June 1894. The Uganda Protectorate was gradually expanded to incorporate other territories. However, there was no prior treaty with any of them accepting Britain's protection.
2 For text see Hertslet, *Commercial Treaties* 23:167.
3 For example, Low and Pratt, *Buganda and British Overrule 1900-1955, Two Studies.* (Oxford, 1960), p.56; Kabaka of Buganda, *Desecration of My Kingdom* (London, Constable, 1967), p.63.
4 *Ibid*, p.3.

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which the British made with the rulers of those two kingdoms.[5] Although the latter Agreements were important in their own ways they did not achieve the prominence of the Buganda Agreement.

This paper examines the legal character of the Buganda Agreement. The hypothesis put forward is that, according to the prevailing view of the British administrators and their legal advisers, both in London and locally, the Crown's powers in Buganda were legally limited by the Agreement. 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 chiefs of Buganda, the legal authority of the Crown was extended. It is not, to stress the point, the object of this paper 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 it is concerned with the influence, if any, which according to their interpretation the Buganda Agreement, as a legal document, had on Britain's policy and administration in Buganda. In a paper of this size it is not, of course, possible to cover all aspects of Britain's rule of Buganda. Consequently, several areas have been selected where the gravest doubt was expressed as to the nature and extent of the authority claimed. The investigation is primarily based upon official correspondence, minutes, memoranda, and contemporary documents kept in London at the Public Records Office.

There are several studies of British/Buganda relations, especially with reference to the Agreement. Invariably these studies concentrate on the socio-political and economic forces which they regard as having been the 'real' limitations on British 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 policy and administration. For instance, Low argues that the Buganda Agreement (which he refers to as a 'quasi-treaty' because "the British had never recognized 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 (i.e., the people of Buganda; singular; Muganda).[6]

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5 For text see Hertslet, *Commercial Treaties* 23:194-199.
6 Low and Pratt, *Buganda and British Overrule 1900-1955, Two Studies*, (Oxford, 1960) p.155. See also Pratt at p.193.

Similar views are expressed by other historians and political scientists.[7] 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 the Search for Justice: Essays in East Africa Legal History*.[8] With reference to the Agreement Morris notes that to the Baganda it:

> was in the nature of a treaty between two kingdoms, binding upon 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.

Morris contends that even though the British did not construe the Agreement in a similar manner and were under no legal obligation to comply with its terms, they nevertheless followed it almost to the letter and sometimes in the spirit.[9] Read argues that the significance of the Agreement was not to be found in legal limitations, which he stresses it did not have, but in the political and moral restraints it engendered.[10] It is part of the object of this paper to establish whether that was indeed the prevailing interpretation of the Agreement.

The Agreement[11]

The Buganda Agreement was so comprehensive that it covered virtually all aspects of government and Buganda's relations with the Protectorate Government. For convenience the Agreement is divisible into three main parts: those affecting, respectively, land, taxation and administration. As to land, it was agreed that 9000 square miles,

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7 For example, Uzoigwe, G., *Uganda: The Dilemma of Nationhood* (N.Y., NOK Publishers, 1982) p.72; Karugire, S., *A Political History of Uganda* (Nairobi, Heinemann, 1980) p.120 *et seq.* Apter, D., *The Political Kingdom in Uganda* (Princeton University Press, 1961), pp.109-33.

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

9 *Ibid.*, pp. 37-38.

10 *Ibid.*, p.277.

11 For a detailed background see Low and Pratt, *Buganda and British Overrule 1900-1955, Two Studies*, chapters 1 and 2.

which was estimated to be half of the land in Buganda, was to be shared amongst the chiefs and notables in private estates, and the remainder was to become Crown land. With reference to taxation, the Agreement provided 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 a contribution towards its maintenance. Furthermore, the Baganda would be subject to the same 'exterior taxation' as was imposed on other parts of the Protectorate. It was however declared that except as stipulated in the Agreement no further 'interior taxation' would be imposed on the Baganda without the consent of their government. With reference to administration, the Agreement provided for a Buganda court system with the *Kabaka* acting through the *Lukiiko* (Council) as the highest court. The jurisdiction of the *Lukiiko* over the Baganda was unlimited, though a right to appeal to the Protectorate courts was granted in some cases. The Buganda 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. As to the other main aspect of administration, namely, legislation, the Agreement provided that all laws and regulations made for the Protectorate were to apply to Buganda except in so far as they were inconsistent with the terms of the Agreement, in which case the latter would prevail.[12] We shall revert to these provisions below.

1902 Uganda Order in Council

The making of the Buganda Agreement coincided with remarkable changes in legal thinking in London. During the last decade of the nineteenth century, there was a controversy amongst British officials, both in London and overseas, as to the nature and extent of the Crown's legal powers in British protectorates. The controversy centered on the issue whether the Crown, by virtue of a protectorate, was entitled to exercise judicial and legislative powers over the inhabitants of a territory and to dispose of the land in the protectorate. At about the time the Buganda Agreement was made the Foreign Office (which was then responsible for the administration of the Uganda Protectorate) was convinced by its legal advisers that by legislation the Crown's authority could be extended to cover almost all aspects of government in British protectorates.[13] Following the

12 Articles 5, 6, 8 and 10.
13 See Reports of the Law Officers to the Foreign Office: 8 August 1899, FOCP/7402; 13 December 1899, FOCP/7403. For a detailed

latest advice formal instructions were issued to the draftsman to prepare a new Order in Council for Uganda (and the other protectorates under its control) to replace the Africa Order in Council, 1889. It was intended that the new Order should give the Crown extensive powers for purposes of administration, raising of revenue, and granting of land titles.[14] These, it should be stressed, were also the main topics in Johnston's negotiations with the chiefs of Buganda.

In view of these changes in legal thinking, it is arguable that the Foreign Office did not regard the Agreement as legally necessary in order to extend the Crown's powers in Buganda. Nevertheless, the Agreement was received in London with enthusiasm, and was scrutinised by a high powered Departmental Committee (which included a senior legal adviser) before the Foreign Secretary ratified it. Significantly, a copy of the Agreement was despatched to the draftsman who was preparing the new Order in Council for Uganda. In fact the latter in the first draft incorporated a provision to the effect that in making Ordinances the Commissioner "shall observe any Treaties" made with the *Kabaka* of Buganda and other indigenous chiefs. In the end this provision was deleted because it was felt that the observation of treaties did not require express provision "as that goes without saying".[15] Ironically when the issue of conflict between the Agreement and the Order (and ordinances made thereunder), subsequently came to the fore in the High Court of Uganda, 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.

The new Uganda Order in Council was promulgated in 1902. It provided for the establishment of a High Court of Uganda which was granted full jurisdiction, civil and criminal, over all persons and matters in Uganda. Moreover, it invested the Commissioner with the

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discussion of the legal controversy in the nineteenth century see Johnston, R.W., *Sovereignty and Protection: A Study of British Jurisdictional Imperialism in the Late Nineteenth Century* (Durham, Duke University, 1973). See also Mugambwa, J., *Evolution of the British Legal Authority in Uganda With Special Emphasis on Buganda 1890-1938* (Ph.D. Thesis, The Australian National University, 1986).

14 Memorandum by Gray (Legal Draftsman), Respecting Law on Uganda, 2 September 1899, FOCP/7402. Johnston was unaware of the legal developments until after the Agreement had been negotiated and signed. See note 13 above, p.136.

15 Gray to Hill, 8 February 1902, FO2/663.

power to 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".[16] On the surface there was nothing which could not legally be done in the Protectorate by the Commissioner issuing appropriate legislation. In contrast, as it may be recalled, the Buganda Agreement (and the Ankole and Toro Agreements) allowed less than full judicial, legislative and administrative powers to the Crown in Buganda. Thus the provisions of the Order and of the Agreement in some respects were in conflict.

2. Conflict between the order and the agreement: jurisdiction

Did the Agreement prevail over the Order? It would seem that right from the beginning the Protectorate officials assumed that the Order in Council was subject to the Agreement. Evidence of this is found in the fact that barely two years after the Order 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. Sadler wanted the Commissioner to be empowered to transfer some purely Baganda cases for trial to the British courts whenever circumstances rendered this desirable. In a despatch to the Foreign Secretary justifying the need for such an amendment, he claimed that the provisions in Article 6 of the Buganda Agreement ("the Kabaka .... 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". He presented his proposals together with a draft Agreement (The [B]Uganda (Judicial) Agreement, 1905) which reportedly the chiefs were ready and willing to sign subject to the Secretary of State's approval.[17]

Consent to amend the Agreement was given without any comment on the Commissioner's reasons for the amendment. No sooner was the amendment signed by the chiefs than an order was issued by the Commissioner and the Buganda Regent chiefs under authority of the Agreement directing that with immediate effect the High Court of Uganda was to hear all divorce cases between Baganda under the Divorce Ordinance, 1904.[18] There cannot be any doubt that part of

16 Article 16.
17 Sadler to Foreign Office, 6 July 1904, FO2/858.
18 Order of 23 January 1905, enclosure Ag. Commissioner to F.O., 16 February 1905, FO2/926.

the reason for amending the Agreement formally was political. However, it is evident that the local officials believed that the jurisdiction of the High Court under the Order 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.[19]

Galt's Murder

This view is reinforced by the incidents relating to the so-called Galt murder case in 1905. Although this case was concerned with the Ankole Agreement, it bore on the interpretation of the Buganda Agreement. Galt, a British official, was allegedly murdered by a Munyankole (man of the Ankole tribe). His alleged murderer was himself murdered, it was suspected by his fellow tribesmen. Two men were arrested and charged with the second murder. Under the Ankole Agreement (Article 6) British courts had exclusive jurisdiction over cases involving people from outside Ankole. Cases in which only Ankole tribesmen were involved could only be dealt with by their chiefs, with a right to appeal to the European officer in charge of the district. There was no mention of further appeal to the British courts.

Since the accused men were charged with murdering one of their own tribesmen, the Uganda authorities classified the case as one

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19 This is also reflected in the various Buganda courts proclamations issued by the Governor. The preamble to the proclamations always cited that the *Kabaka*, chiefs and people of Buganda had agreed to its making, and that the Governor "by virtue of the Agreement and in exercise of the powers conferred" had promulgated the proclamation. In none of the proclamations relating to the Buganda courts was it ever suggested that they were "established" by the Governor under any statutory provision; the proclamations "recognized" and "declared" these courts and their jurisdiction. The High Court held in *Alipo Kabazi v. Kibuka* (1915 (2) U.L.R. 9, at p.11), that the jurisdiction of the Buganda courts was "defined by the Agreement and evidenced by the Proclamation of .... 1908 ...." In contrast proclamations dealing with courts in other parts of the Protectorate expressly cited that the courts had been established by the Governor exercising powers under the Courts Ordinance.

between natives of Ankole and therefore only justiciable to the Ankole chiefs' tribunals. However, because of the political implications of this case the Commissioner decided that it was so grave that it had to be tried in the High Court. To give the 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 ...". 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 from the Foreign office to the Colonial office. Apparently this was the first time the latter had had to deal with the agreements. The immediate impression, even of its lay officers, was that the suspension of the Agreement was legally uncalled for. Risley, Legal Assistant, endorsed the argument that the Ankole Agreement could not oust the jurisdiction of the High Court of Uganda which under the Order had full jurisdiction, civil and criminal, over all persons and all matters in Uganda. In his opinion the annulment of the Agreement was just a political decision which was probably necessary to mark the gravity of the offence. A despatch to this effect was sent to the Uganda Commissioner.

At that stage one would have assumed an end to this matter, but it was not to be the case. Most likely the Uganda officials were taken aback by London's reaction to what they had all along believed to be the legal position. This is evident in the Commissioner's response. He defended his action to suspend the Agreement on the ground that it was consistent with the view which had always been held in Uganda.[20] The issue had by then become academic since the Court of Appeal for Eastern Africa had dismissed the case for want of evidence connecting the accused men with the murder. The Colonial Office did not bother to respond and the matter was dropped.

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20 Commissioner to F.O., 6 July 1904, FO2/858. See also minutes of 3 and 13 October 1905; C.O. to Commissioner, 10 November 1905; Commissioner to C.O., 5 October 1905; CO879/88.

Up to this time none of these conflicting assumptions had been tested in the Uganda Courts, though behind the scenes the two newly appointed judges, Carter and Ennis, were probably playing an influential advisory role.[21] Shortly thereafter the High Court found itself, in the case of *Katosi v. Kahizi*,[22] face to face with the issue of conflict between the Order in Council and the Ankole Agreement. The case originated from the Court of the King 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 Court had jurisdiction to entertain the appeal.

Although the jurisdiction of the High Court under the Order (Article 15) was stated to be complete over all persons and matters 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 that it was advisable for the matter to be clarified before they could proceed with the appeal. At their request a formal reference was made (under section 4 of the Foreign Jurisdiction Act, 1890) by the Governor to the Secretary of State to determine whether the High Court had jurisdiction to hear the appeal.[23]

Risley, to whom the matter was first referred, once again had no hesitation in dismissing the judges' interpretation as unfounded. He reiterated the view that the High Court's jurisdiction under the Uganda Order was not limited by the Agreements. In his opinion, where the Crown had entered into agreements which allowed chiefs to administer justice in cases between natives, the jurisdiction of the chiefs was concurrent with and not exclusive of that of the High

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21 Carter and Ennis wrote a number of formal memoranda expressing their opinions on diverse legal issues and matters of policy. In addition there must have been many informal discussions in which they were involved; it has to be remembered that the official community was very small.
22 [1907] 1 U.L.R. 22.
23 Governor to C.O., 8 April 1907, CO536/13.

Court. Naturally, he thought, in practice the High Court ought to use its jurisdiction sparingly except in grave cases.

On the other hand Cox, Legal Adviser Under Secretary, was skeptical 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 it ought to be construed so as not to impair it." Cox emphasized that he was not denying the fact that the Crown could by force compel the Ankole chiefs to cede the reserved jurisdiction to it:

> ... but I think that some cession of this right by the chiefs or some further Order in C[ouci]l 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[ounci]l for a jurisdiction which has not been acquired by treaty grant usage or sufferance ... [and] that we cannot point to anyone of these things in Ankole as regards the trial of purely native cases.[24]

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* (1902). Although Jenkyns strongly argued that, in 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.[25] With reference to the rest of Cox's argument, a number of queries may be raised. First, 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 which conferred full jurisdiction upon the High Court (and which was subsequent to the

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24 Minutes of 18 and 19 May 1907. Cox was reportedly assured by the Law Officers in a private conversation that they supported his views, Cox to Hopwood, minute of 26 July 1907, *ibid.*

25 P.153. Jenkyns was castigated by subsequent writers for misrepresenting the English legal position. See Jennings and Young, *Constitutional Law of the British Empire* (Oxford, 1938), pp.4-98.

Ankole Agreement) as constituting such an act of force? Secondly, why did he think that it was necessary for either a cession or a new Order in Council to put the matter of the High Court's jurisdiction beyond question? How would the Order he had in mind succeed where the 1902 Uganda Order failed?

Whatever the explanation, the Colonial Secretary was satisfied by Cox's argument in preference to that of Risley. In the despatch sent to Uganda he confirmed the judges' view that in ceding jurisdiction the chiefs reserved jurisdiction in native cases, and "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".[26]

Without more ado, Katosi's appeal was dismissed by the High Court for want of jurisdiction.

3. Legislative powers

The precedent of *Katosi v. Kahizi* was reinforced the following year in the case of *Nasanairi Kibuka v. Bertie Smith*. The issues in the latter case related to the legislative powers of the *Lukiiko* and the Commissioner under the Buganda Agreement and the 1902 Uganda Order in Council. Briefly the facts of this case were as follows. The Land Transfer Law, 1904, purportedly enacted 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*. Smith, an expatriate, entered into an agreement to purchase land from Kibuka, a chief. The Land Commissioner refused to register the land transfer without the *Lukiiko*'s consent. Smith sought to challenge this requirement in the High Court. He contended that the *Lukiiko* had no legislative powers and therefore the so-called Land Transfer Law had no legal effect. Two issues were raised. Firstly, whether the Land Transfer Law had legislative effect? Secondly, whether the legislative powers of the Commissioner were subject to the Agreement?

To put the case in perspective, reference may be made to the provisions of the Order and the Agreement relating to legislation. As we have seen, under the Order the Commissioner's legislative powers were virtually plenary. We have also seen that under the Agreement

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26 C.O. to Commissioner, 31 July 1907, CO536/13.

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. Finally, Article 11 of the Agreement stipulated that the *Lukiiko* could make resolutions in matters concerning the administration of Buganda, which could be effected by the *Kabaka* on 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 was outside the Crown's jurisdiction.[27] But up to the time of the case there had been no legislation which authorized or recognized this legislative power.

Carter, the presiding judge, after theorizing that a right to legislate was an attribute of every sovereign state (which he stressed Buganda had been prior to the Agreement), held that the 1900 Agreement was "not to be regarded as taking away any right or power of the *Kabaka* except by its express provisions therefore whatever powers were his before remain with him, except so far as they are expressly taken away or limited". In his opinion there was nothing in the Agreement which could be interpreted as taking away the *Kabaka*'s powers. Nor was he convinced by the argument that the Order (Article 12) could take away these powers as the Order had to be read subject to the Agreement.[28]

The foregoing judgment not only affirmed that the Commissioner's legislative powers were limited in Buganda by the 1900 Agreement, but also upheld the government's interpretation that the *Kabaka* and his *Lukiiko* had legislative powers which were seen as being part of the remaining - original - sovereignty of the *Kabaka*. With advantage of hind sight, it would seem that the Court missed a crucial point which the plaintiff was apparently trying to establish. As already stated, there was no statutory law at the time which sanctioned or recognized the right of the *Kabaka* and the *Lukiiko* to legislate. Smith'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 had no legislative effect.

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27 Memo Russell, 26 June 1909, encl. Ag. Gov. to C.O. 5 July 1909, CO536/2.
28 [1908] 1 U.L.R. 41, 42. The Court of Appeal for Eastern Africa upheld the judgment, p.45.

But the Court assumed that he was attacking the power of the *Kabaka* and the *Lukiiko* to legislate per se.

Following the case it would seem that Smith's point was realized by the Colonial Office's legal advisers to whom a copy of the judgment was sent. 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 ... Agreement ... as approved by the High Court ... in a recent case.

The Governor was instructed to regularize the position by making an Ordinance which provided explicitly for the right of the *Kabaka* aided by the *Lukiiko* and in consultation with the Governor to enact laws binding upon the Baganda.[29]

Interestingly, once again the Uganda authorities questioned the legality of the Colonial Secretary's instructions. Russell, the local Crown Legal Adviser, demurred at the proposal to clarify the position of the *Kabaka*'s legislative powers under the Agreement by an Ordinance. In his opinion, since the Agreement was not governed by the Uganda Order in Council an Ordinance made under the Order purporting the clarify a doubtful point in the Agreement was likely to be held "*ultra vires* on the ground that it was made in variation of the Agreement". Russell submitted that the proper course to take, unfortunately (as the Baganda chiefs were becoming increasingly reluctant to alter the terms of the Agreement), was by a short amendment to the Agreement. He put forward to the Colonial Office a draft amendment to the Agreement (The [B]Uganda Agreement (Native Laws) 1910) which he proposed to submit to the chiefs. In this draft the right of the *Kabaka* and the *Lukiiko* to make laws binding upon the Baganda was expressly recognized. Since the amendment was mainly in favour of the Baganda, the Uganda officials assured the Colonial Office that no problem in securing their consent was anticipated.

Within the context of the prevailing legal thinking, Russell was right, but it is evident that he was at cross-purposes with the Colonial Office's intention. He assumed that the problem was merely

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29 C.O. to Governor, 13 August 1909, CO536/27.

the vagueness of the provisions of the Agreement, whereas actually the Colonial Secretary was thinking of those legal irregularities which he wanted corrected. Nonetheless Russell's interpretation and proposed Agreement were accepted by the Colonial Office without any further comment.[30] 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 obligations 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 the Ordinance did not affect the legislative powers of the *Kabaka* and the *Lukiiko* under the Agreement.[31]

4. Land and minerals

Matters relating to land and minerals in Buganda provide further evidence that the 1900 Agreement was regarded as a legal constraint upon the Crown's powers in Buganda. While in the rest of the Protectorate all land and minerals were by virtue of the Protectorate declared property of the Crown, in Buganda it was otherwise.[32] Under the Agreement land in Buganda was divided between the Crown and the notables. The Agreement stipulated that the Baganda allottees were to satisfy their allocations from the cultivated or occupied land before the Crown could assert its claim to whatever remained. Because of the latter provision the Government had to wait until 1936, when the survey was completed, before it knew what was left

30 Legal Report encl. Ag. Gov. to C.O., 17 June 1910, CO536/27. C.O. to Ag. Gov., 29 July 1910, CO536/27.
31 Laws of Uganda, vol.1, cap.62. In the case of *Crown v. Kiimba* ([1908-9] (1) U.L.R. 79), a Chief was convicted of an offence of failing to collect the hut tax as he was required to do under the Agreement.
32 UGANDA Order in Council, Article 2. See also the Crown Lands (Declaration) Ordinance, 1922 (Laws of Uganda, 1923, cap.100). Under the Ankole and Toro Agreements private freeholds were granted to a few of the most senior chiefs, but these grants were regarded as carved out of Crown land, Morris and Read, *Uganda: the Development of its Laws*, p.341.

as Crown land in Buganda - mainly forests, swamps, eroded hill tops, and tracts of uninhabitable land in outlying counties.[33]

The land alloted to the chiefs, known as *Mailo* (from the English word 'mile' because allocations were made in square miles), was not officially regarded as Crown land nor was it regarded as granted to the holders by the Crown. With the exception of the power to acquire land compulsorily for public purposes, there was nothing in the Agreement to indicate that the Government could assert any power over *Mailo*. It is noteworthy that, apart from the Registration of Land Titles Ordinance, 1908, no laws affecting *Mailo* were enacted by the Government. Whenever the Administration wanted to impose any policy decision regarding this land, it exerted pressure on the *Lukiiko* to enact the relevant law.[34] There were, of course, very strong political reasons for the Government not to get involved in *Mailo* 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 would seem that the British authorities believed that they had no power directly to intervene in *Mailo* matters by their legislation.[35]

The foregoing point is well illustrated by the issue of rights over mines and minerals in Buganda. The Agreement stipulated in Article 17 that minerals found on *Mailo* belonged to the owner of the estate, subject to the payment of a ten per cent *ad valorem* duty to the Government. In contrast, Article 7(4) of the Uganda Order prescribed that all minerals in, under, or upon any land in occupation of natives "shall vest in the Commissioner ... in the like manner as the mines and the minerals being in, or under any Crown land". Did the latter

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33 Low and Pratt, *Buganda and British Overrule 1900-1955, Two Studies*, pp. 140-141. Earlier attempts by the Administration to assert the Crown's share before all the chiefs' allotments were satisfied, were abandoned when the chiefs, through their lawyer, threatened legal action. See Mugambwa, note 13 above, pp. 208-213.

34 For example, Land Transfer Law, 1904; Land Law, 1908; The Busuulu and Envujjo Law, 1928, etc.

35 In 1920, Chief Justice Carter, in an official memo to the Colonial Office, warned of "the grave legal question which will without doubt some day come for decision before the courts as to the validity" of a proposed law prohibiting *Mailo* owners from disposing of their land to expatriates. The Colonial Secretary, citing Carter's memo, instructed the Uganda authorities not to enact the law, see C.O. to Gov., 18 January 1921, CO536/103.

provisions include minerals in Buganda? This issue did not arise until around 1918, when expatriate firms started showing real interest in prospecting for minerals in Uganda. Since gold and silver were the most precious minerals and the most likely to attract prospectors, the Government sought to lay claim to them even when found on *Mailo*. Hogg, the Protectorate Attorney-General, claimed that the words "all minerals" in Article 17 of the Agreement did not include gold and silver. He reasoned that under the Common Law the Crown had a prerogative 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. Since the Agreement did not expressly mention gold and silver, he concluded that if these minerals were ever found, they would be Government property. He conceded, however, that the matter was quite complicated and ought to be referred to the law officers in London for an authoritative ruling.[36]

Eventually the reference to the Law Officers was made, but not before the Colonial Office legal advisers, Bushe and Risley, had exposed what they considered to be misconceptions in the Attorney-General's argument. Bushe thought that Hogg's theory was based on the assumption 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 to such territory, as existed in England. "This", he said, "appears to me to be an impossible task".[37] Risley concurred, 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. Risley said that, 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. He presumed that Article 7(4) of the Uganda Order 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.

To support his argument Risley came up with a theory based upon proviso 1 to Article 28 of the 1902 Order in Council, by which "any

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36 Enclosure Gov. to C.O., 3 January 1919, CO536/93.
37 Minute 13 February 1919, *ibid.* But see *Nyali Ltd. v. Attorney-General* [1956] 1 Q.B.l, p.16.

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 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 [B]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 ... Agreement, as to lands, other than public lands situated in the Kingdom of [B]Uganda."[38]

It must be emphasized that the theory which Risley was advancing was totally different from the *Katosi v. Kahizi* holding that the Agreements prevailed over the Order in Council. Risley was in effect saying that the Agreement was a "law" under the Africa Order, which was saved by Article 28(1) of the 1902 Order in Council. Thus, in his argument, the *Mailo* owners were entitled to the mines and minerals on their land because the provisions of the Agreement which guaranteed their rights had not been superseded by subsequent legislation.

In a short report the Law Officers expressed the opinion that Article 7(4) of the Uganda Order had to be construed with reference to Article 17 of the Agreement: minerals found on *Mailo* were the property of the owner. 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 Common Law gold and silver presumptively belonged to the Crown and that a grant

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38 Minute of 21 February 1919, *ibid.*

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 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*.[39]

Subsequent attempts by the Administration to negotiate a supplementary Agreement whereby the *Mailo* owners would surrender to the Crown their right to minerals, in return for a ten per cent *ad valorem* duty entitlement, were to no avail. The Baganda preferred to stick to their rights under the Agreement. The matter was dropped.

5. Revenue legislation

The power to make legislation for the raising of revenue was another area of conflict between the provisions of the Buganda Agreement and the Uganda Order in Council. Article 12 of the Agreement provided that a hut and gun tax of four shillings each was 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

39 Report of 16 April 1919, CO536/98.

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. Yet the Administration assumed that the exercise of these powers was subject to the Agreement.

Early Debates

As early as 1903 Judge Ennis 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 country, 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.[40]

After the holding in the case of *Katosi v. Kahizi*, Russell felt that the issue of legislation for the raising of revenue in Buganda needed urgent attention. He 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 Kabaka was and will be necessary for the validity of such charges or fees". 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 which involved import and export, and porter regulations which 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 general application

40 Memo Ennis, 6 October 1903, cited Gov. to C.O., 16 July 1908, CO536/20. The Agreement was amended on a number of occasions to allow for the increase of the hut and gun tax.

without any such "exterior" element, as well as laws of local application.

Russell's fears were immediately echoed by the Governor 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". The Governor 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 legal difficulties arose (as he was advised they were bound to) they might be dealt with accordingly.[41]

Cox, to whom the matter was referred, admitted that it was very difficult to 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. On the basis of his advice the Governor was told that Russell's construction of the Agreement was the correct one. Consequently, he was instructed to negotiate with the Baganda 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 also give the Government all the powers for the future which were necessary.[42]

The idea of proposing to the Baganda to amend the Agreement as suggested by the Colonial Secretary was too much for the Administration. It was feared that since the Agreement had in the previous nine years been amended seven times any attempt to push through another amendment was bound to lead to suspicion and probably rejection. Regretfully, desirable as it was to settle the issue once and for all, it was felt that the timing was not opportune. In the

41 Gov. to C.O., *ibid.*
42 Minute of 19 August, C.O. to Gov., 2 October 1908, CO526/160/20525.

circumstances even Russell strongly supported this view. 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 Baganda refused to accept it (as he was sure they would) since there was no way the Government could legally force them to comply. With the approval of the Colonial Secretary the matter was shelved indefinitely.[43]

The Bicycles Fee Debate

For ten years the issue remained in limbo as far as the Protectorate Government was concerned. Meanwhile a number of ordinances imposing charges and fees were made without any objection from the Baganda, nor was this 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. However, in 1919, following an increase in the fees for the compulsory registration of bicycles under the Bicycles Ordinance, the Buganda authorities for the first time raised an objection pointing out that such an increase without prior reference to them was contrary to Article 12 of the Agreement. The Protectorate officials managed to overcome the problem by explaining to the irate chiefs the value of the Ordinance and the need for 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.[44] It is significant that in none of these cases did the Government try to justify the fees on the ground of its unlimited power under the 1902 Order to legislate for the raising of revenue in the Protectorate. Evidently the assumption was that in Buganda the provisions of the Order were subject to the Agreement.

After 1926 the issue of the bicycle registration fees was never officially raised again with the Protectorate Government, nor for that matter were the other charges or fees imposed in Buganda without the consent of the *Kabaka* and the *Lukiiko* ever formally challenged. However, in 1929, one Yusufu Bamuta (member of the *Lukiiko* and lately its Secretary before his sacking by the Protectorate Govern-

43 Ag.Gov. to C.O., 9 September 1909, C.O. to Gov., 28 October 1909, CO536/28.
44 Encl. Gov. to C.O., 29 January 1930, CO526/160/20525.

ment), purporting to speak on behalf of the people of Buganda, revived the matter. In a petition to the Colonial Secretary, he alleged that the Governor was violating Article 12 of the 1900 Agreement by imposing direct yearly taxes on bicycles, cars and fishing licences without the prior consent of the *Kabaka* and the *Lukiiko* as prescribed in this Article. Consequently he claimed that these taxes were illegal.[45]

As a matter of policy the Colonial Office was inclined to ignore Bamuta's petition, since he was not a representative of the *Kabaka* or the *Lukiiko*. However, because of the seriousness of the issue it raised, the Governor was instructed to write a full confidential report on the substance of the allegations. In the detailed memorandum which ensued, the Governor reviewed the origin of the arguments on the interpretation of the words "interior" and "exterior" taxation as indicated above. He suggested that Russell's interpretation, which had been accepted by the then Colonial Secretary in preference to that of Judge Ennis, appeared to be misconceived. Moreover, 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 have to be held illegal unless the *Kabaka* and the *Lukiiko* agreed to the fees or to the amendment of the Agreement - of neither of which he held forth any prospect. If they refused, the Governor felt that it would be unfair to continue with the fees in the rest of the Protectorate. Since, as he had been advised by his Attorney-General, the opinion earlier expressed was not necessarily binding, he wondered whether Ennis' interpretation ought not to be substituted for Russell's.[46]

Again it is significant that nowhere in this detailed and confidential 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) one certainly would have expected it at least to have raised the point that arguably the Commissioner had unlimited powers under the Order to legislate for the 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

45 7 January 1929, CO536/151.
46 Gov. to C.O., 29 January 1930, *supra.*

(apart from amendment of the Agreement) available to the Administration.

Following the Governor'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 be preferred to that of Russell. The consensus of the non-legal members of the Colonial Office was strongly tilted in favour of the former interpretation. They went to the extent of asking Bushe whether he could think of a sufficient legal 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 ...." But whatever the interpretation it was felt that the Protectorate Government should be instructed to confront the *Kabaka* and the *Lukiiko* with the matter rather than buying time as in 1901.

Bushe obliged. He argued that to sustain Russell's interpretation one had to make certain assumptions. Firstly, that it was proper to apply to a document of this sort strict canons of construction. Secondly, that "exterior" taxation had to be read *ejusdem generis* with customs and porter regulations. 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 technical rules of interpretation. Moreover, he argued that the porter and customs regulations neither constituted a class nor had a common factor 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 upon Article 12 was the one suggested by Judge Ennis.

On the basis of Bushe's advice Ennis's interpretation was accepted by the Secretary of State as the official construction 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 Buganda rulers in some concrete case when he was to confront them with this interpretation. If, however, the objection persisted he

was to secure an authoritative ruling through a judicial process or possibly by an agreed submission to arbitration.[47]

Rex v. Buganda Cotton Company

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, in the case of *Rex v. Buganda Cotton Company*.[48] In this case the accused Company was convicted in the Magistrate Court of purchasing cotton without a licence. It appealed against the conviction on the grounds that the fee imposed under the Cotton Ordinance was "interior taxation" and therefore void since the *Kabaka* had not consented as required under the Agreement.

Chief Justin Griffin, after cautioning himself that the critical words "interior" and "exterior" were not terms of art with a definite 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" was that which was restricted to Buganda. In other words, he upheld Ennis' construction of Article 12 with which he was probably familiar prior to the case. Since Griffin found that the cotton tax was levied throughout the Protectorate Griffin held that it was "exterior" taxation and therefore the 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 had taken considerable time during argument in Court: the effect of a treaty on the power to legislate for the Protectorate. Without citing any authorities (although 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 of defence for private individuals.

This judgment could not have come at a better time for the Protectorate Administration. Not only did it give a construction which assured unlimited legal powers of taxation to the Crown throughout Uganda, it also raised the possibility, albeit *obiter*, that the Agreement, contrary to prior precedents, was not after all legally binding.

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47 Minutes of 30 June, 7 July, and 21 August 1930, on Gov. to C.O., *supra*, C.O. to Gov., 24 August 1930, CO536/160/20525.
48 [1930] 4 U.L.R. 34.

The Governor was so excited that he immediately despatched a copy of the decision to the Colonial Office which, according to the dates, must have crossed with the Colonial Secretary's letter enclosing his interpretation of Article 12. At the Colonial Office a sigh of relief was expressed on hearing of the judgment, especially as it coincided with the Department's interpretation.[49] It is noteworthy that none of the officers, including Bushe, commented on Griffin's *obiter dictum*. However, as we shall presently see, it was another seven years before this issue was resolved.

6. The judicial breakthrough

Developments in other Protectorates

As lawyers know all too well, the law is hardly ever certain, especially if the statutory 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, have to withstand the various legal techniques tending to limit, weaken or distinguish them, before they can 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 legal precedents to guide them. This is not surprising 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. Nonetheless the judiciary gradually settled the issue of the extent of the Crown's power and authority in British protectorates. The precedents established by courts in other jurisdictions eventually affected the legal position in Uganda.

The first clear judicial exposition of the Crown's legal powers in British African protectorates was in the case of *Rex v. Crewe Ex. P. Sekgome*.[50] In this case the British Court of Appeal held that by virtue of the Foreign Jurisdiction Act the Crown's powers were unlimited. The Court further held that irrespective of this Act, an exercise of the Crown's powers in one of its protectorates could not legally be challenged because it was an Act of State. In subsequent cases in which the exercise of the Crown's powers was in issue, the defence of Act of State was invariably pleaded by the Government.

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49 Ag. Gov. to C.O., 29 August 1930, and minutes of 25 September and 12 November 1930, CO536/160/20525.
50 [1910] 2 K.B. 576, C.A.

The *cause célèbre* in this regard is the Privy Council case from Swaziland, *Sobhuza v. Miller and Others*.[51] In this case the Privy Council was emphatic that, as far as the British 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) with local rulers or other Powers.

Jennings and Young (*Constitutional Law of the British Empire*)[52] 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 was to be measured by reference to international law. That approach, they claim, would have vollowed from the theory that international law is part of the law of England. According to Jennings and Young, once this theory was rejected, the courts concerned themselves only with English constitutional law as determining for the Crown's jurisdiction and powers outside British territory.

With due respect the foregoing observation of the learned writers is unassailable. In fact 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.[53] Cases like *Rex v. Crewe* made a clean break with the previous legal reasoning. It is evident from these cases that one of the principal motives for construing the Crown's powers so widely was political: to facilitate British colonialism by abstaining from interference with the administration of the colonies.[54] Whether or not the judicial action was justified is beyond the scope of this study.

How did the developments in other jurisdictions affect the legal position in Buganda? This is the next question to be considered.

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51 [1926] A.C. 518.
52 At pp. 4-8. They cite *West Rand Mining Co. Ltd v. Rex* [1905] 2 K.B. 391, C.A.
53 Johnston, *Sovereignty and Protectorates*, pp. 229-282.
54 For example, Farewell, L.J. in *R. v. Crewe*, pp. 615-616.

Judicial developments in Buganda

The view that the Buganda Agreement was a legally binding document had remained unchallenged for almost three decades prior to *Rex v. Buganda Coffee Company.*[55] Thereafter it was another seven years before, in the case of *Rex v. Kiwanuka*, the matter of the legal efficacy of the Agreement was directly in issue in the High Court.[56] In this case Kiwanuka, a Muganda, was committed for trial for theft in the High Court. On his behalf it was contended that, according to the Buganda Agreement (subject to two exceptions which did not apply in the instant case) Buganda courts had exclusive jurisdiction in all cases in which all parties were Baganda. Consequently, on the authority of *Katosi v. Kahizi*, it was submitted that the High Court had no jurisdiction to deal with the case. Against this argument, the Solicitor-General of Uganda submitted for the Crown that under the Order the jurisdiction of the High Court was complete over all persons and matters in the Protectorate. In cases such as the one before the court, he asserted, its jurisdiction was concurrent with that of the Buganda courts. He sought to distinguish *Katosi v. Kahizi* on the ground that it related to the Ankole Agreement and not the Buganda Agreement. In any case the law had since been enriched by a number of reported cases, especially *Sobhuza II v. Miller.* Following the principle enunciated by the latter case, he maintained that a treaty could not override Protectorate legislation.

The High Court agreed with the argument of counsel for the accused that his submissions were supported by the precedent of *Katosi v. Kahizi* which, the Court emphasized, 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 was stronger than that of the Ankole Agreement in so far

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55 *Supra.* Fifteen years earlier in the Kenya case of *Ol Le Njogo v. The Attorney-General* ("The Masai Case") [1914] 5 EALR 70, the Court of Appeal for Eastern Africa, following the precedent of *R. v. Crewe*, held that the Masai Agreement with the Crown was not justiciable in the courts. Interestingly, Carter, Chief Justice of Uganda sitting as one of the appellate judges, affirmed the precedent of *Katosi v. Kahizi* with reference to the Ankole, Toro and Buganda Agreements. Carter gave no reasons for the distinction between the two cases.

56 Civil Appeal No.38 of 1937, unreported, encl. Governor to C.O., 12 July 1937, CO536/195/40199.

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: Moreover, the Court noted that though the Uganda Order in Council came into force in 1902, it was nevertheless deemed necessary to enter into a supplementary Agreement (The [B]Uganda (Judicial) Agreement, 1905) which empowered the commissioner with the consent of the *Kabaka* to transfer cases involving only Baganda to the British courts:

> Such words would appear to be unnecessary if the High Court was then deemed to have full authority under ... [the 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.

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 a 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.

Addressing itself to the cases cited by the Solicitor-General dealing with the status of the treaties vis-á-vis the Crown's powers, the Court noted that the cases were of such high authority that they could not be ignored. Faced with this dilemma the High 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* had, under the 1900 Agreement, exclusive jurisdiction in cases between natives of Buganda or whether the British courts by virtue of the 1902 Order had concurrent jurisdiction in such cases, regardless of the provisions of the Agreement. This issue was identical with the one raised with the same office in the case of *Katosi v. Kahizi*, except of course that the latter related to the Ankole Agreement.

Discussions at the Colonial Office

Roberts-Wray, Assistant Legal Adviser, who was assigned the task of untangling the legal position, argued, citing *Sobhuza II v. Miller*, that where, as under the 1902 Uganda Order in Council, the power to legislate was unlimited, no Ordinance could 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 ground that it was given before the law on this point had been settled by the Privy Council in this decision. 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. Bushe said that on the basis of *Sobhuza II v. Miller*, there was hardly any doubt left that the Crown's jurisdiction in the Uganda Protectorate was determined by the 1902 Order, which overrode the Agreements.

The lay officers of the Department were mystified by the exposition of the lawyers. Bottomley, Under Secretary, summed up somewhat sarcastically 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 matters should be settled by the three native governments. That view is held in spite of the fact in the case of Buganda that 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 courts.

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 such a judicial decision. This point was also stressed by Bushe. He 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.[57]

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57 Mitchell, Governor of Uganda, happened to be in London. He confirmed that if it were announced that the High Court had parallel

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, the Crown had expressed the extent of its jurisdiction in Uganda:

> Such manifestation may be regarded as an Act of State, unchallengeable in any British Courts, or may be attributed to statutory powers given under the Foreign Jurisdiction Act. The Order is not subject to the Agreement and the Proclamation referred to.[58]

Curiously, the decision was never reported in the Uganda Law Report series which were by then in their fourth 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 Administration. Nonetheless, there is not doubt that the issue of the legal significance of the Buganda Agreement was from that time on regarded as resolved. Thus, in two cases which came before the High Court the following year, the Court was emphatic that the Buganda Agreement had no legal effect unless incorporated in the municipal law.[59]

The outcome

Interestingly, although the Protectorate Government was legally entitled to exercise unlimited powers in Buganda it opted for the status quo. This is understandable. The Buganda Agreement had for over three decades resulted in a reasonably stable relationship between the Baganda and the Protectorate Administration. It would have been political foolhardiness, especially at that late stage of British rule over Buganda, to attempt to exercise all the Crown's

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jurisdiction with the Buganda courts it might lead to serious problems since the Baganda regarded the "with superstitious reverence". Minute 26 October 1937, *ibid.*

58 C.O. to Governor (for transmission to the High Court), 13 November 1937, *ibid.*

59 *Seduraka Servanga v. Edward Khaya*; and *Ziyadi Mukasa v. Musitafa Serwada*, [1938] U.L.R. 28 and 40. In *Mukwaba v. Mukubira* [1954] 7 U.L.R. 74, counsel invoking the Agreement freely conceded that it was not legally binding unless incorporated into the municipal law.

legal powers in Buganda. Thus legislative measures were taken to incorporate in the municipal law selected parts of the Agreement, and to validate whatever had been done previously under its provisions. The first enactment to this effect was the Buganda Native Laws (Declaratory) Ordinance, 1938. 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 of the Ordinance 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, ... 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 ...

Moreover, under section 4 of the Ordinance all laws made by the *Kabaka* and the *Lukiiko* since the execution of the Agreement were retrospectively validated and declared to have been binding upon all Baganda. Ironically, the Ordinance was preceded by a supplementary Agreement with the Buganda authorities, entitled the Buganda (Declaratory) Agreement (Native Laws), 1937.[60] The Agreement was, of course, legally a sham as the Government knew full 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.

Other legislation included the Buganda Courts Ordinance, 1940, and the Native Administration (Incorporation) Ordinance, 1938.[61] The former gave legal effect to the provisions of the Agreement relating to the power of the Buganda courts to administer justice in Buganda. The latter Ordinance recognized the Buganda administration as a body corporate known by the title of "the Buganda Government".

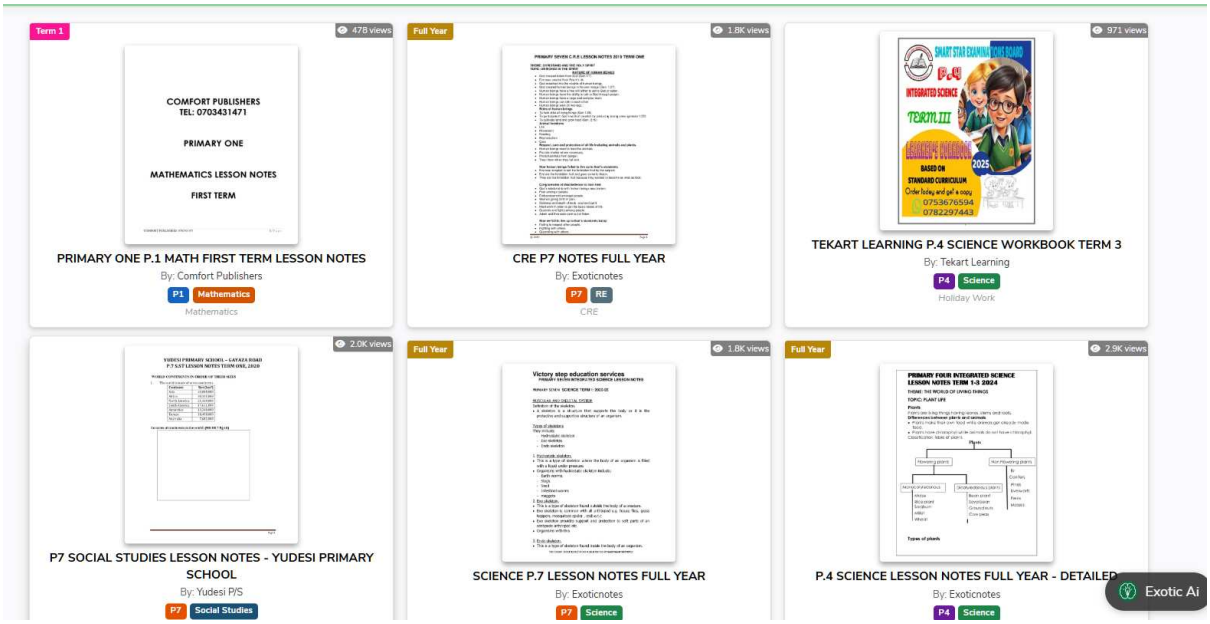
7. Summary and conclusion

Previous writers (historians and lawyers alike) assumed without serious investigation or on the basis of a much later development of legal ideas that the Buganda Agreement only served a political

60 Laws of Uganda, 1951, 2, Chapter 62.
61 Laws of Uganda, 1951, 2, Chapters 72 and 77.

purpose but did not in any way affect the Crown's legal position in Buganda. It is submitted that the evidence examined in this article proves otherwise. It establishes that, according to the prevailing view of the British officials, the Agreement was the source of the Crown's legal power and authority in Buganda. They held that the Crown could not exercise any powers or enact laws beyond those allowed by the Agreement. The Buganda Agreement, in their interpretation, was the supreme law in Buganda. This was so notwithstanding that under the Uganda Order in Council the Crown had unlimited judicial and legislative powers. Admittedly several factors combined to sustain this interpretation, in particular the political stability which the Agreement engendered. But from a legal viewpoint, the most important consideration is the judicial decisions. Once the courts embodied this interpretation in judicial precedents (with the blessing of the Colonial Secretary), it acquired a legitimacy which was hardly ever questioned in thirty years. Contrary to the views of other writers, it was not only the Baganda who believed in the legal efficacy of the Agreement. Many British officials in Uganda and London, were also convinced - until *Rex v. Kiwanuka* - that the Buganda Agreement was a legally binding constraint upon the Crown's legal powers in Buganda. This is evidenced in the many minutes and memoranda, some of which, being confidential, discussed the issues without the constraints which might have limited public pronouncements. 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 legally binding, are in themselves a clear proof of the general view before this case.

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