

# TRADING PLACES

## RECOGNIZING AND RECREATING LEGAL PLURALISM IN COLONIAL UGANDA

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Through a close reading of a specific phase in the lawmaking process in colonial Uganda, this essay documents several related propositions about Legal Pluralism in industrializing society. First, Legal Pluralism provides a theory of certain kinds of political change accompanying industrialization. Classic Pluralism, at least since the beginning of the twentieth century, has viewed Society as congeries of associations, and Law as being about the recognition of their reality (Maitland 1911). Here it will be suggested that Law may be involved not in their recognition alone, but in their making and unmaking.

Secondly, Legal Pluralism implicitly contains a program that contests the privileging of Legal Centralism, as Arthurs (1985) and Galanter (1981) have argued for England and India respectively. Here, similar evidence is presented for Uganda with the object of further developing the analysis of both Legal Pluralism and Legal Centralism not as forms, but as processes.

Thirdly, the analysis of a specific piece of colonial legislation in Uganda suggests that Legal Pluralism as a process is by no means uniform or progressive: hence the case that follows is one not of pluralism alone, but also of *depluralism*.

Finally, theory in Legal Pluralism challenges a juristic view of purposive law (Moore 1978; Woodman 1983). The analysis that follows thus begins to formulate the complexity of purpose behind legislation in one African context.

### Cultural Pluralism in Colonial Uganda

The moral, social and legal relations that concern us here are those that shaped relations between an African majority and Asian and European cultural

minorities in Uganda in the late 1930s. Tropical economies such as Uganda inspired J.F. Furnivall's classic portrayal of the plural society:

Each group holds by its own religion, its own culture and language, its own ideas and ways. As individuals they meet, but only in the market-place, in buying and selling. There is a plural society, with different sections of the community living side by side, but separately, within the same political unit ... In the economic sphere there is a division of labour along racial lines. Natives ... Indians and Europeans all have different functions. (1948:304).

Furnivall explains the successful working of this system of cultural discriminations as a matter of social wills and social consciousness. The different groups, he says, have "no common standards of conduct beyond those prescribed by law" (Furnivall 1948:311).

Colonial government found in the concept of *rule of law* an ideology that both justified and legitimized domination. Laws and legal institutions provided administrators with practical mechanisms for shaping the economic and social transformation of the societies they governed. At the same time, those whom they ruled used the law others shaped to develop strategies for coping with, and opposing, colonialism. For some groups in Uganda, as we shall see, Law provided the arena for political challenge; for others it proved a vehicle for conservation and privilege.

In Uganda the law was as significant for its representation of the composition of society as for its enactments. Legislation represents competing attempts to impose models of what society should be on others (Humphreys 1985). The plural society model of tropical economies and the racial discriminations of colonial territories rested alike on law and law-like regulation.

### The Trading Ordinance, 1938

Ordinance No. 19 of 1938, an Ordinance to Amend and Consolidate the Law relating to Trading had a comparatively short official history immersed in a cloudy set of received representations from special interests. The political context of the ordinance is barely hinted at in the correspondence between the Governor of Uganda and the Colonial Office in London and that which is suggested is extremely partial. Racial issues are raised, dealt with or set aside, at quite specific moments in the legal process. The official record opens on 16 August 1938 when the bill was presented to the Uganda legislature; it was

enacted into law less than two months later on 14 October; on 7 November the Governor sent two authenticated and ten printed copies of the ordinance to London.<sup>1</sup>

The ordinance contained thirty clauses. These dealt with its title; interpretation (i.e. definitions of hawker, commercial traveller, stores, licensing officer, etc.); the establishment of trading centres under an earlier ordinance; the recognition of scheduled areas in the kingdom of Buganda<sup>2</sup> with a similar function; prohibitions on non-native trade outside of towns or trading centres; prohibitions on natives trading within three miles of a township or trading centre, and on natives trading on behalf of non-natives. Specifications followed of stores for which licences were required; modes of application for them; grounds for their denial; and provision for the exhibition of licenses. Provisions were made for accounts to be kept and hawkers and commercial travellers regulated. Penalties were set out for infringements of the ordinance and provision was made for the Governor to change the rules. Finally, three pieces of existing legislation (including the Buganda non-Native Trading Ordinance) were repealed.

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1 The Confidential Despatches exchanged between the Uganda Protectorate and the Colonial Office in London (PRO.CO 536/200) provide the primary data for the following analysis. They include the 10 page text of the Bill; a 3 page Explanatory Memorandum by the Uganda Attorney-General; and a 9 page transcript of the speech of the Finance Secretary presenting the bill to the Legislative Assembly. The manuscript and marginal comments of the Colonial Office bureaucrats, including two Legal Advisers, provide insights into "the Colonial Office mind" (Hyam 1979) as does more general correspondence (PRO. CO 536). Sessional and administrative papers on the Uganda legislature (PRO CO 685) and two government publications, *The Uganda Official Gazette* and *Laws* were also used. I am grateful to Barnard College for sabbatical leave and the funding of my travel to Zagreb.

2 The British required the military assistance of the Buganda kingdom in establishing and extending colonial rule throughout Uganda. In return, they permitted the retention of Buganda law within the bounds of the kingdom (Haydon 1960; Vincent 1982, 1988a, 1989). Not only traders in Buganda but also agricultural producers were privileged in the making of the colonial state as I document in an analysis of the categorization of exhibitors along racial and ethnic lines in *The Uganda Agricultural and Industrial Exhibition of 1903* (Vincent 1988b).

Here we shall be concerned with five clauses in particular. Clauses 5 and 6 distinguished, in terms of locality, between native (i.e. African) and non-native (i.e. Asian and European) traders. Clause 10 categorized those not eligible for trading licences, singling out so-called "purdah-women", and provided for bookkeeping. Clauses 12 and 13 required accounting procedures and, in their original form, specified the languages in which the requirement had to be met.

### Clauses 5 and 6: Town and Country

Hegemonic categories tended to receive implementation in colonial Uganda through the manipulation of space.<sup>3</sup> Thus distinctions between native and non-native traders were expressed through the distinction between town and countryside, mirroring, not incidentally, the tensions of capitalist development. Clause 5 prohibited non-natives from trade in the countryside, restricting them to towns, trading centres and, in Buganda, the non-scheduled areas (i.e. localities where Baganda landlords had not previously established their own trading operations). It also prohibited natives from trading within three miles of an urban area and from trading on behalf of non-natives. Because this clause was carried over from earlier legislation, it received automatic approval from the Colonial Office in 1938.

In effect, this legislation served to maintain racial discriminations between Asians and Africans. While rendering them non-competitive against each other, presumably on the grounds that Africans were not fairly placed to compete, it made partnerships between Asians and Africans illegal. It also rendered inoperable as business partnerships the interracial marriages that had already been entered into by Asian traders and local African women living in the countryside. Such contracts had been made in many cases in order to circumvent legal restrictions on Asian settlement. Asians were viewed as immigrants or settlers and were not allowed to own land or live at more than half a mile distance from a country road. The Trading Ordinance repeated this earlier categorization and so passed unquestioned in spite of the Finance Secretary's professed desire to introduce new legislation that dealt solely with trade and trading interests, to do what was best for trade. He did not, of course, cite Bentham but he might well have done so - a point to which I shall return.

In at least three ways the new legislation reflected and created further grounds for the controlled transformation of the market economy. First, it continued to

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3 I owe this formulation to discussion with Sally Merry in Zagreb after my presentation of a longer draft of this paper.

uphold the privileged position of capitalist landowners and entrepreneurs in Buganda. It discriminated between the natives of the Buganda kingdom and those of the rest of the country, allowing the Baganda to maintain a trading privilege already enjoyed within the kingdom. This advantaged the more developed region around the capital, Kampala, at the expense of the up-country districts and furthered the uneven development of the economy that industrializing capitalism required. Both ethnic (native Baganda *vis à vis* members of all other native ethnic groups) and racial (Asians *vis à vis* Africans) discrimination served, although it did not legally recognize, class interests. It handicapped the smaller Asian trader, stereotypically one who 'lived off the smell of an oil rag' in the bush, while it protected the wealthier urban Asian shopkeeper. Combined with spatial qualifiers, ethnic categorization restricted the small African trader in the countryside while protecting the African businessman who could afford an urban licence. The legislation recognized race and ethnicity but not class distinctions already well developed within the industrial agricultural economy. That it also effectively served to lower the status of women (a process that has long been seen to be a characteristic of capitalist development) will become clearer from discussion of another clause.

#### Clause 10: Bookkeeping and Purdah Women

Subsection (2) of clause 10 read:

A licensing officer may, in his discretion, refuse to issue a trading licence to any person who (a) in his opinion, is under the age of eighteen years; or (b) is a purdah woman; or (c) is an undischarged bankrupt; or (d) has ... been convicted of any bankruptcy offence; or (e) has [previously] had his licence cancelled; or (f) fails to satisfy the licensing officer that he has made satisfactory provisions for the keeping of proper books of account.

Four of the recognized categories of persons denied licences may be considered neutral in terms of the prevailing racial and ethnic categorization: minors, undischarged bankrupts, recent bankrupts and previous offenders. Two need to be examined more closely given the political climate of the late 1930s.

Bookkeeping was clearly a desirable administrative requirement for the control of trading but in many cases this provision served to place Asian traders at an advantage. They were renowned for their accountancy while bookkeeping had no place in an African's education. Nor was it likely that an African would learn this particular skill through an apprenticeship since financial matters were kept

closely within the family circle of the Asian trader. Like the focus on space in the earlier example, the premium placed on a bureaucratic skill served to implement the hegemonic racial category.

The ban on 'a purdah woman' engaging in trade was apparently intended to counter 'dummy trading operations' and was not directed against Muslim women *per se*. Nevertheless, it served to reinforce the moral sense of the dominant European administrative class in Uganda that to engage in trade was a masculine prerogative.<sup>4</sup> But this is not a sufficient explanation. In colonial Nigeria purdah women (African Muslims) were renowned traders who deployed small boys in the open market place and won for themselves considerable independence.

In his memorandum to the Colonial Office, the Attorney-General explained that Clause 10 was a response to repeated demands from the Uganda Chamber of Commerce. In fact, it was also a response to the Indian Association of Kampala, made up predominantly of Hindu businessmen. Both were exclusively male domains. The Attorney-General justified gender discrimination by referring to 'recent scandalous cases' (presumably of dummy trading) but I have been unable, as yet, to find out what was involved. The timing of the legislation suggests that, possibly, the discriminatory sub-section reflected the influx of a small but growing number of Ismaili businessmen newly arrived in the country. The Indian Association might then have made the insistent demands in order to protect their near monopoly trading interest.

#### Clause 12: The Language of Accountability

Clause 12 required that accounts be kept by all licensed traders. This legislation, too, has a history which did not appear in the correspondence between the Governor and the Colonial Office. The clause provided that accounts be kept where the maximum selling value of goods on hand exceeded 5000 shillings, a not inconsiderable sum in Uganda in the late 1930s. A fine of 2000 shillings or six months imprisonment sanctioned the legislation and provision was made for appeal to a magistrate's court. If the account books were not kept in English, public funds were then made available for their translation, the costs to be paid by the trader if the appeal failed.

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<sup>4</sup> I word this observation in this way to draw attention to its class component. British administrators in Uganda took the same line with respect to all women, Asian, African and European, as evidence presented elsewhere (Vincent 1971, 1982) demonstrates.

Here "the tracks left by combatants and their allies" (Kidder 1979:300) are clearer than was the case with the Indian Association interests discussed above. A Special Committee Report presented to the Legislative Council on 21 October 1938, attached as Appendix H to the Council's minutes (PRO CO 685/26) failed to enter into the Colonial Office file on Trading Legislation in Uganda. One of its recommendations was that one sentence in Clause 12 of the draft bill should be deleted. That sentence read: "Such books of account shall be kept in English, Gujerati, Swahili or any native language of the Protectorate." The amendment was accepted and the final Ordinance made no reference to any language other than English.

There are two points to make. First, what might have been taken as a positive encouragement to smaller African and Asian traders in the form of legal recognition of their mother tongues, was not only diminished but became hedged about with legal impediments. The African marketing cooperatives emerging in Uganda at this time saw this as racial discrimination (Shepherd 1955); in that it operated to discourage their enterprise (compare Fitzpatrick and Baxter 1979) it was also a displaced recognition of class interests. Second, the amendment of the bill suggests that, within the legislative process in Uganda in the late 1930s, a *phase of legal depluralization* had been reached. Discussion of a further clause will elucidate the point.

### Clause 13: Natives and the Privileging of Buganda

Clause 13 reflected the *status quo* in Uganda in 1938 and was not subjected to discussion by the lawmakers. All urban licences and all licences in the Buganda kingdom were to be issued by the central government; licences for rural stores outside of Buganda were to be issued by the Native Administration, the branch of government empowered to recognize customary law in daily trading in the countryside. Again, as throughout the Ordinance, dual racial and ethnic discriminations were legislated in spite of the Finance Secretary's bureaucratic insistence that there was,

no justification for racial discrimination in townships and trading centres; if an African can afford to keep a shop in a township, where he must conform with township building and other standards, he should be able to pay the same fee as a Non-Native. The fee for licences to trade in townships and trading centres has therefore been fixed without regard to the race of the trader. (PRO CO 536/200)

As the Secretary's speech to the Legislative Council continues, however, it becomes clear that he envisages this state of affairs only in the Buganda kingdom where Africans already own urban shops. Up-country the non-native trader is protected against intrusive African competition. Yet, he reiterates, "A Trade Law should deal with trading *as* trading, and take no account of the race of the trader" (PRO CO 536/200).

What was going on? The possible superficiality of the official Uganda position on race blindness is suggested by the somewhat patronizing marginal comment of one Colonial Office reader who suggested that 'race equality' might be more convincingly encouraged if Clause 13 began "No person ..." rather than "No native ..." (PRO CO 536/200). On the other hand, we might also see this Ugandan shift in associational recognition as an attack on pluralism and an attempt to rationalize, centralize and homogenize State law. The Benthamite moment was comparable. Given the state's preferential treatment of large businessmen within their own kingdom, small Baganda traders were beginning to contest the racial trade barrier, reaching out to the economically less developed areas of the outlying provinces. And, even more significantly, Africans throughout the territory were beginning to form 'combinations', to use the nineteenth century English term, to take the marketing of their crops into their own hands.<sup>5</sup>

### Contextualizing Legal Discourse

Town and country, bookkeeping and purdah women, accountancy and privilege, race and ethnicity - such was the structuring of legal discourse in colonial Uganda. This, in turn, was "part of the discourse about good and bad states of society ... [a manifestation of] competing attempts to impose models of what society should be on others" (Humphreys 1985:251). This was the colonial model of developing industrial capitalism in legal form.

What, then, of the other partner to the discourse on trade legislation in colonial Uganda? What of 'public opinion' in this culturally plural society? What of the alternative 'standards', definitions and legal recognitions among natives and non-natives, African and Asian, locked within the developing capitalist economy? Is there any evidence of a competing legal consciousness in the legislative record? Again, we turn to minority reports on the Trading Bill and to other events in Uganda in the late 1930s that challenged the colonial

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5 A full account is to be found in Vincent 1988a.

government's moral position and its hegemonic utterances. At the time, The Uganda Trading Ordinance of 1938 was justified on the grounds that it protected Africans against the ruthless ambitions of immigrants and settlers, both Asian and European. Yet, by 1938, two contradictions made such an ideology suspect in the eyes of many of Uganda's multiracial population.

One contradiction lay in the political condition of the majority population. Africans were not represented on the Legislative Council, their interests supposedly being served by Official Members, all British colonial officers. In 1938 these consisted of the Governor, Acting Chief Secretary, Attorney-General, Treasurer and the Directors of Medical Services, Agriculture and Education. Two Europeans and two Asians were appointed as Unofficial Members. These were a bank manager, an insurance representative and two company executives. Thus eleven non-Africans, several with commercial investments in the territory, were denying Africans legislative power while at the same time supposedly legislating in their interest.

A second contradiction was simply demographic. In 1938, after forty-nine years of colonial rule, many non-Africans could hardly be considered immigrants or settlers. Many had been born in the territory. That there might, indeed, be problems in distinguishing natives from non-natives was clearly recognized in the 1938 trading ordinance. Its final clause read "Where any doubt arises as to whether any person is a native or non-native for the purpose of this Ordinance, the decision of the Governor ... shall be conclusive and binding" (PRO CO 684/4).

It has been suggested (Ghai and Ghai 1970) that racial discrimination functioned within the colonial state to protect the Asian community, providing a recognized niche in the plural society and lessening the tensions of open market competition. Young Asians, including immigrants, were able to enter the trading community without arousing the hostility of Africans. The well-defined legalistic construction of a discrete Ugandan Asian community (a legal fiction, as we have seen) cushioned its members against the violence experienced in other colonial territories.

This may have been so, but it is important to recognize that Asians (like the African cooperative members referred to earlier) *did* protest legal discrimination on the basis of race. Thus, when the Special Committee report on the Trading Ordinance was placed before the Legislative Council on 21 October 1938, it

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contained a minority report from an Asian Unofficial Member, M.M. Patel. This read:

In signing this Report, I wish to state that I consider that the native and non-native trader should be subject to the same restrictions and should enjoy the same rights. I cannot, therefore, accept the many clauses in the Bill which are based upon the principle of racial discrimination between traders, a principle which I consider to be unsound (PRO CO 685/26).

The hidden agenda of the Indian Association, and the new dilemmas it faced in the late 1930s, were referred to earlier in our discussion of purdah women. Here a comparative point needs to be made. If Asians in Uganda attempted to use law to protest discriminatory racial legislation within the fold, as it were, Africans used law more aggressively to counter colonial domination itself. Thus Ignatius Musazi, founder of the (largely marketing) cooperative movement in Uganda, spoke of,

the continuous struggle over the years of his people against what appeared to be a very subtle but deliberate system of exploitation and discrimination. In prices and economic opportunity in general the Europeans and Indians of the Protectorate had established a legal system which made it impossible for the African peasants to advance beyond the stage of being simply suppliers of raw materials for the factories of the foreigners. (Shepherd 1955:20)

By 1938 some fifteen African cooperative marketing societies had come into being and were about to unite to form the Uganda Growers Cooperative Union and extend their operations throughout the colonial territory. It was the prospect of imminent trans-ethnic trading 'combinations', I would suggest, that brought the 1938 Trading Ordinance into being. A year previously a government-proposed Cooperative Bill had been bitterly contested by Asian and European commercial interests in Kampala and their lobbies in London. Before its first reading in the Legislative Council, the Governor had felt obliged to reassure members that the proposed legislation was not intended to foster or protect the development of cooperative societies but to control them. The Cooperative Bill was then relegated to a Special Committee and the Trading Ordinance with which we have been concerned rushed through the legislative chamber and the Colonial Office in a matter of months.

## Conclusion

In presenting a micro-historical analysis of a specific piece of legislation, this essay has arrived at two highly general conclusions of significance to Legal Pluralism as a theory of certain forms of political change. First, it may be read as countering any tendency to associate Classic Legal Pluralism with colonial and post-colonial societies and a New Legal Pluralism with complex, modern, industrial societies (Merry 1988). This essay suggests that those who accept this dichotomy take the part (the colonial state) for the whole (the development of complex, modern, industrial capitalism).

Research in Uganda's legal history has suggested the necessity of viewing the colonial state as one in which colonial and capitalist interests are, at times and in places, at odds. This essay has centred on, what I have called, a Benthamite moment when the colonial regime moved, through legislation, to redefine its 'rationale' for capitalist economic development - the industrialization of agriculture and the manipulation of a free market. In so doing, it has revealed some of the differences and dissension within the law-making (European and Asian) elite which, I have argued elsewhere (Vincent 1982) themselves reflect structural and processual tensions between colonialism and capitalism. Recognition of this historical trajectory thus brings past colonial and modern complex societal experience into one legal and analytical discourse.

Finally, it is clear that rule of law in Uganda furthered the agricultural industrialization of that colonial state. Law was transformative in that it affected every dimension of social life - the relationship of women to men, the division of labour, kinship rights and duties, property relations, residence and association - as this discussion of five clauses in the Trading Ordinance of 1938 has shown. Yet, although law was transformative, the lawmaking process itself was neither uniform nor progressive. Nor was the lawmaking elite monolithic. Examining the paper trail left behind in the process by which one piece of legislation was enacted has made it clear that Uganda's legal recognition of racial and ethnic pluralism was both a discontinuous and contested policy. This essay thus argued that understanding is advanced by viewing Legal Centralism and Legal Pluralism not as forms but as processes which, as Bentham so fully realized, are also processes of social control and economic change.

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