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**POLICE POWERS, HUMAN RIGHTS AND THE  
STATE IN KENYA AND UGANDA: A  
COMPARATIVE ANALYSIS**

J. Oloka-Onyango\*

Although when seeking the cure for the individual who has become a social misfit it is important to study his environmental background, it is too easy to make his background the excuse for his social behavior. It may well be that these background influences are so strong that they become overwhelming, but to accept them as an overriding excuse for wrongdoing denies the existence of that "divine spark" in human beings which differentiates them from the beast. They have a will and choice between good and evil. Some fail, but others faced with similar circumstances eschew evil and do that which is right. This view is as soundly based as that view that crime is the result of environmental stresses, which most people, including the law abiding, are likely at one time or another to meet. The same is true *pari passu* of human societies. If it were not true, how then is it that other tribes, beset with the same or a very similar set of circumstances, have survived and continue to survive without the horrors of *Mau Mau*?

—F.D. Corfield,

*Historical Survey of the Origins and Growth of Mau Mau*, London, Her Majesty's Stationery Office, May 1960, at 7.

**I. The Foundation of the Comparison**

Taken from the "official" account of the *Mau Mau* Uprising in Kenya, the preceding quotation might appear wholly unrelated to the task at hand: a comparative examination of police powers and human rights

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abuses in the two East African countries of Kenya and Uganda. Indeed, the fact that resistance to colonialism was not duplicated to the same extent in each indigenous community may substantiate the postulations that lie at the core of the study.

The relevance of the statement lies in its relationship to the perceptions and the objective reality of the police function in East African society, viewed from the vantage-point of the ruling class, which characterizes resistance to the *status quo* as “wrongdoing” by the “social misfit.” It comes as no surprise, therefore, that it forms part of a “psychological” and “sociological” background chapter in a study made in the penultimate stage to Kenya independence.

The study also serves as an important pivot for arriving at a comprehensive historical and sociological appreciation of the evolution and present-day manifestation of the state in the two neocolonial countries. Absent a thorough understanding of the nature of the state and its links to the political economy of underdevelopment, the parameters of police powers and the coextensive link to the abuse of human rights in the two countries cannot be fully comprehended. Indeed an extensive reliance will be placed on the study to demonstrate the structural origins of the police function particularly in Kenya — inextricably linked to resistance to colonial rule, of which the *Mau Mau* Uprising was only the most overt expression.

Immediate problems arise in drawing comparisons between two entities that have starkly different historical experiences with the police. In Kenya, it is quite appropriate to speak of “police powers” vested in a distinct arm of the state that has through independence remained relatively differentiated (though by no means autonomous) from the rest of the coercive state apparatus. In Uganda, on the other hand, where military *coups d’etat* have proliferated, attended by the creation of a host of quasi-military and military organizations that have usurped the powers of the police, it may simply be an academic exercise to speak of police powers vested in a police force as such.

A number of factors permit us to examine what *prima facie*, are topics that may best be considered separately. The first concerns societal perceptions about the police. In a mid-1970s survey of undergraduate students at Makerere University in Uganda and the University of Nairobi in Kenya, Tibamanya Mushanga found “a very deep dislike of the police.”<sup>1</sup> This is not surprising: Virtually nobody likes the police, and

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1. TIBAMANYA MWENE MUSHANGA, *CRIME AND DEVIANCE: AN INTRODUCTION TO CRIMINOLOGY* 211 (1976).

this is an almost universal sociological phenomenon, particularly among the oppressed classes in society.<sup>2</sup>

The second relates to the extent of police brutality in each country. The case of Uganda has been fairly well documented, and a recent account in the *New African* magazine demonstrates its continuation, despite the overall improvement in "security" heralded by the rise to power of the National Resistance Movement (NRM).<sup>3</sup> In Kenya throughout the past year examples of police brutality have been in abundance,<sup>4</sup> resulting in a recent surprising, albeit belated and halfhearted castigation of the high incidence of deaths in police custody by President Daniel arap Moi.<sup>5</sup>

A third and perhaps the most important factor relates to the common historical and socioeconomic heritage shared by the two countries. Both were colonized by the same power — indeed at one stage they were taken as a single administrative unit, British East Africa.<sup>6</sup> In relation to the evolution and nature of the police, it was the King's African Rifles (KAR) — a military force — that initially executed the police function, in tandem with punitive expeditions against "recalcitrant" indigenous communities.<sup>7</sup> Indeed, well after the "pacification" of Uganda and the signing of the Buganda Agreement in 1900, the Troops of the "Kenyan Regiment" (the 3rd Battalion) of the KAR were often joined by their Ugandan counterparts (the 4th Battalion). In the legal and factual situation, one is forced

2. Mushanga explains why this is the case:

In East Africa, where colonialism has left a great scar on the minds of the people, there has developed a categorical use of discretion (by the Police) for the civilians. The sons of well-to-do-men, the men themselves and their wives, the rich and the politically well-known may have their cases withdrawn but not those of the common men. This all leads to brutality and the inhuman treatment of fellow men. Physical assault on innocent or suspected citizens is a common practice of the Police. Verbal insults and degrading references are extremely common. Police use violence even when the suspect has not resisted arrest.

*Id.* at 191.

That perception is not merely confined to so-called "crime waves." Cf. Baker, Nienstadt, Everett & McClearly, *The Impact of A Crime Wave: Perceptions, Fear and Confidence in Police*, 17 LAW & SOC'Y REV. 319-337 (1983).

3. *Uganda: Grinding Towards Victory*, 257 NEW AFR. 21 (1989). An examination of the situation in the early years of the NRM, and in particular the status of human rights, was undertaken by Amnesty International in an October 1987 *Aide Memoir* to the government.

4. See, e.g., *Oblivious to the World*, WEEKLY REV. at 16 (Nairobi, Jan. 20, 1989); also, *Mystery of the Dying Suspects*, WEEKLY REV. at 20 (Nairobi, Feb. 17, 1989).

5. *Outcry Over Deaths in Custody*, WEEKLY REV. at 11 (Nairobi, Feb. 24, 1989).

6. This was under the administrative aegis of the Imperial British East Africa Company (IBEAC), before the British government stepped in to save the company from bankruptcy.

7. See H. MOYSE-BARTLETT, *THE KING'S AFRICAN RIFLES* (1956).

to rely instead on an appraisal of studies on administrative powers, criminal law and procedure, tortious actions against the state and its agents, detention, public emergencies and more general historical, journalistic and sociological accounts.<sup>8</sup>

Our task however is a more modest one. First, we set out to present an overview of the origin, character, evolution and present day operation of the police function, and to relate it to the nature of the state in the two countries.

Secondly, through an examination of the case-law on the subject, we shall show how the Judiciary (ostensibly the principal check on governmental power) has responded to police abuses and the effect, if any, this has had on the substantive protection of the individual and society. The study concludes by examining the present position of police powers and the status of human rights' protections in each country.

## II. The Historical Genesis and Parameters of Police Powers

### A. *The General Framework*

As ex-colonial countries, an appreciation of the origins and nature of police powers in both Kenya and Uganda can only be derived from a grounding in the political economy of capitalism in its most developed stage — imperialism.

The evolution of the police as a public, bureaucratized arm of the state only occurs once capitalist society emerges from the fetters of feudal production and enters the period of *laissez faire* commerce. Rather than resulting in a loosened grip over the everyday lives of the domestic population, capitalism in fact tightens that grip, primarily in the quest to ensure that social relations remain pacific and stable.

According to Spitzer, the modern capitalist state arose to pervade more thoroughly private and public existence and overcome the "irrationalities" of precapitalist rule and to articulate, direct and coordinate the process of the rationalization of social and economic relations.<sup>9</sup> Within such circumstances, it is no longer sufficient to permit the police function to vest in private individuals, where loyalties are specific and internalized

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8. See, *inter alia*, Y. GHAI & J.P.W.B. MCAUSLAN, PUBLIC LAW AND POLITICAL CHANGE IN KENYA (1970); G.W. KANYEIHAMBA, CONSTITUTIONAL LAW AND THE GOVERNMENT IN UGANDA (1975); and E. VEITCH, EAST AFRICAN CASES ON THE LAW OF TORT (1972).

9. Stephen Spitzer, *The Political Economy of Policing* in CRIME AND CAPITALISM: READINGS IN MARXIST CRIMINOLOGY 314, 325 (David F. Greenberg ed. 1981).

as was the case in the early 18th century, rather than generally protective of the socialized production process.<sup>10</sup>

This corresponds to Marx' general observation that once capitalist production has become fully developed, breaking down all resistance to its advance, the conditions of the mode of production are viewed by the working class as self-evident "laws of Nature." Henceforth, direct force outside the arena of economic interaction is still used, but only exceptionally as the laborer can be left to the "natural laws of production," i.e. to their dependence on capital, a dependence springing from, and virtually guaranteed in perpetuity by, the conditions of production themselves.<sup>11</sup>

The public police power emerges in the process of achieving this breakdown of resistance because:

- 1) The background, training and social development of the work force is crucial to the "pacification" process;
- 2) The discretionary control previously exerted by self-interested intermediaries or local ruling classes in individual feudal fiefdoms is inimical to the socialization of the capitalist process of production, and;
- 3) The evolution of social relationships outside the sphere of production governed by either random priorities or by allegiance to precapitalist sources of authority perpetuates a fragmented working class.<sup>12</sup>

### **B. The Colonial Context**

With respect to the colonial situation, certain distinctions to the preceding generalizations are evident. Here, the evolution of the state and the establishment of capitalism in the less developed areas of the world are from the onset attended by a high level of violence.<sup>13</sup> A number of socioeconomic factors explain this circumstance. First, the new mode of production represented not only a clash at the level of production, but an upheaval in cultural mores, social existence and political structures. Whereas in Europe the social milieu and hierarchical structures of feudalism were familiar and distasteful terrain to both incipient worker and bourgeois classes alike, in pre-colonial Africa an entirely different situation prevailed.

10. *Id.* at 326-327.

11. KARL MARX, *CAPITAL* 689 (Moscow 1977).

12. Spitzer, *supra* note 9, at 325.

13. Eboe Hutchful, *The Modern State and Violence: The Peripheral Situation*, 14 INT'L J. Soc. L. 153-178 (1986).

Thus, the spurious claims to a "civilizing mission," the termination of the "obnoxious" slave trade, or the allegedly high mortality rates of "inter-tribal" conflict could not of themselves, persuade the indigenous populations of the necessity for a new order. This explains the early spontaneous resistance to colonial rule: The *Maji Maji* rebellion in Tanganyika, *Dina ya Musambwa* in Kenya, and the military campaigns by Kabalega and Mwangi in Uganda.<sup>14</sup> By the same token, it provides the reason for the chicanery or overt threat and use of military force, intrinsic to the "negotiated settlement" epitomized by the treaty.<sup>15</sup>

Second, inherent in the emergence of imperialism was the drive for cheap labor, the capture of domestic markets and the establishment of enclaves, and the quest for and exploitation of raw materials.<sup>16</sup> The demise in Europe of feudal relations of production in which the serf was "liberated" from servitude to the manorial lord in order to "freely" exchange labor in the market place, did not have its equivalent in Africa. The primary mode for the incorporation of African society into the capitalist system (especially in "Commonwealth" Africa) took place under the formula of "indirect rule," in which indigenous political structures were left largely intact and colonial policy disseminated through a network of traditional chiefs, augmented by "native" quasi-official administrators.<sup>17</sup>

The omnipotence of the colonial state found expression in the District Officer, the Legislative Assembly and ultimately, the Governor.<sup>18</sup> With the exception of attempts by settlers to lay claim to a direct interest in and right to colonial territory, as in the case of Kenya, the structure of colonialism once fully developed was primarily "African" in form although essentially alien in substance.<sup>19</sup> Because the system was in substance

14. See M. KIWANUKA, *FROM COLONIALISM TO INDEPENDENCE: A REAPPRAISAL OF COLONIAL POLICIES AND AFRICAN REACTIONS 1870-1960* (1973).

15. See Thurston's description of the treaty-making process as an "amiable farce." A. THURSTON, *AFRICAN INCIDENTS* (1905).

16. See D.W. NABUDERE, *THE POLITICAL ECONOMY OF IMPERIALISM* (1978); and W. RODNEY, *HOW EUROPE UNDERDEVELOPED AFRICA* (1972).

17. The omnipotent power of the chief—existing to the present day—is captured in the 1987 REPORT OF THE COMMISSION OF INQUIRY INTO THE LOCAL GOVERNMENT SYSTEM IN UGANDA: "It was the chief who enumerated the property of the peasant, who assessed it, who decided upon the tax to be paid, who collected the tax, who charged the peasant in case of failure to pay that tax, who subsequently arrested that peasant, and who later heard his appeal if the peasant felt there had been a miscarriage of justice." Quoted in M. Mamdani, Paper on Uganda presented at the Aspen Institute Conference on *State Crimes: Punishment or Pardon?*, (Wye Woods, Md, Nov. 4-6, 1988).

18. See HENRY F. MORRIS & JAMES S. READ, *INDIRECT RULE AND THE SEARCH FOR JUSTICE: ESSAYS IN EAST AFRICAN LEGAL HISTORY* (1972).

19. Cf. Ian R.G. Spencer, *The First World War and the Origins of the Dual Policy of Development in Kenya, 1914-1922*, 9 *WORLD DEV.* 735 (1981).

foreign and directed to the unmitigated exploitation of indigenous wage-labor, this bifurcated mode of administration heightened, rather than reduced, the levels of violence employed.

Third, the state that emerged in colonial Africa was fully developed, while at the same time manifestly alien to the structures upon which it was superimposed.<sup>20</sup> This explains why the Reception Clauses that imported the alien legal regime (1902 in Uganda, 1897 in Kenya), applied the laws prevailing in England prior to the date of reception, with lip-service recognition to indigenous laws and customs (attended by the negating proviso that subjected the application of the latter to a manifestly subjective test of "repugnancy.") The clause was in fact a thinly-veiled shroud over Christian morality. It also explains the absence of a framework of "constitutionalism" — the crowning achievement of bourgeois revolution. Underpinning all of this was the necessity to counteract the tendency of the rate of profit to fall — the principal factor leading to the rise of colonialism.<sup>21</sup>

Against this background, the police function in both colonial Kenya and Uganda evolved overtly and primarily to pacify the laboring masses in the bid to establish and maintain agricultural cash crop production for the external market.<sup>22</sup> Unlike the modern capitalist state where the training and social development of the work force occurred apace with the transformation in the relations of production — a process that gradually became more ideological — colonial capitalism necessitated an increased recourse to direct violence in order to remain productive.<sup>23</sup> The justification for this was found in the necessity to maintain "security" and thus ensure "development." In the succinct words of one member of the colonial legislature in Kenya:

[s]ecurity must be the cornerstone of our development, for without security — and good security — the whole edifice will topple to the ground. We may talk of increased settlement, of expanding services; we may indulge in Development and Reconstruction day-dreams, but those day-dreams will never become the reality we hope unless the safety of the life and people who are living in this colony can be assured.<sup>24</sup>

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20. See C. Leys, *The Over-developed Post-colonial State: A Re-evaluation*, 5 REV. AFR. POL. ECON. (1976).

21. See V.I. LENIN, *IMPERIALISM — THE HIGHEST STAGE OF CAPITALISM* (Moscow 1972).

22. See Munro, *The 'Peasant' Economies, in BRITAIN IN TROPICAL AFRICA, 1880-1960: ECONOMIC RELATIONSHIPS AND IMPACT* 40-50 (1984).

23. See F.G. FANON, *THE WRETCHED OF THE EARTH* (C. Farrington trans. 1963).

24. Kenya Legislative Council Debates — Official Report — 3rd Session, 5th Sitting, Vol. XLIV, at 467 (Nov. 29, 1951) (Hon. Mrs. Shaw).



Violence by the state was applied both within the sphere of production relations (i.e. economics) and to social and political relations as a whole. This is revealed *inter alia* in the laws and the practice of forced labor; the prohibitions against loitering and vagrancy; the consumption of native liquor; compulsory taxation; collective punishment; internal exile, deportation and detention-without-trial.

Each was enforced by either *criminal* or *quasi-military* sanctions, and yet, the underlying cause of resistance to them was often social, economic or political. The police function in ensuring their enforcement, reinforced by the judicial-cum-administrative sanction of their violation, is unfettered. Hence the police function emerges in diametrical opposition to any notion of respect for individual and societal rights and freedoms. This was the general picture. How was the scenario played out in its microscopic, country-specific form?

### Colonial Kenya

The overt and immediate antagonism to colonial rule in Kenya led to the necessity to sidestep most traditional organs of indigenous authority and to the selection of individuals who were more pliable to the objectives of colonial rule. The legislative tool used to effect this measure was the Village Headmen's Ordinance of 1902, the first instrument that set up an administrative machinery in the colony. It provided for the appointment of headmen charged with the task of maintaining law and order, extended in 1912 and 1937 by the Native Authority Ordinances.<sup>25</sup> A regular Police Force was established during the early phase of the formation of the colony and governed by the provisions of the Police Ordinance.

Two elements characterized the office of Village Headman, who later evolved into the notorious Home (Kikuyu) Guard, that was to plague the *Mau Mau* resisters. First, they were primarily governmental appointees and thus owed little or no allegiance to the communities in which they were deployed, even though they were often drawn from within the community. According to Corfield:

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25. Section 8 of the Native Authority Ordinance stipulated *inter alia*:

Any headman may from time to time issue orders to be obeyed by the natives residing or being within the local jurisdiction for any of the purposes following:

e) prohibiting any action or condition which in the opinion of the headman might cause a riot or a disturbance or a breach of the peace;

f) prohibiting natives from holding or attending any meeting or assembly within the local limits of his jurisdiction which in his opinion might tend to be subversive of peace and good order.

It was normal practice to appoint headmen from among those who had some local respect. In the course of time the more senior of these headmen were referred to as chiefs, but although a large number of them by virtue of their personal qualities rose to positions of accepted authority, positions which some of them might have achieved without government influence, they were not African chiefs in the normally accepted sense.<sup>26</sup>

This served the interests of the colonial power precisely, as it could draw upon a pool of indigenous servants to police societies about which it had little direct knowledge, and thus guarantee compliance with its edicts by proxy. Hence, the headmen were instrumental in suppressing the unrest that followed the introduction of the notorious *Kipande* — brethren to the *Pass* in South Africa — in 1915 and an arbitrary increase in the Poll Tax in the early 1920s.<sup>27</sup>

Conversely, this planted the seeds of intense antagonism towards the headmen, crystallizing with the brutal measures of the Emergency employed to douse the *Mau Mau* uprising: “They have from the first been regarded as Government employees, and thus held appointments which were ‘extraneous’ to the accepted tribal (sic!) form of authority such as it was among the Kikuyu.”<sup>28</sup>

The significance of the Home Guard to the police function — first as an auxiliary arm of the police and later as a complementary one — is captured by the following observation at the height of the Emergency in Kenya: “This organization [i.e. the HG], improvised almost over the weekend at the beginning of the Emergency, has gone from strength to strength, and has established itself in such a way as to make a valuable contribution to the policing of this city [Nairobi], as the reduction in the crime statistics for the reserved areas clearly proves.”<sup>29</sup> The growth of the Home Guard, from 250 in 1950 to 1,900 in 1956, demonstrates its contribution to the pacification of anti-colonial resistance. This was attended by a heightening resort to violence and the violation of a broad spectrum of human rights.<sup>30</sup>

26. F.D. Corfield, *Historical Survey of the Origin and Growth of Mau Mau*, 235 (London, HMSO, May 1960).

27. *Id.*

28. *Id.* See also L. LEAKEY, *DEFEATING MAU MAU* 112-113 (1954).

29. Member for Law and Order, at 445 (Hansards Parliamentary Debates, Nov. 27, 1952).

30. The extent of the uprising and the massive resources deployed in order to contain it is illustrated by the following statistics on the general administration of prison services in Kenya at the time. In 1952, total staff of the Prisons Department amounted to 43 European officers and 1,100

From the outset the Police was vested with paramilitary powers of enforcement. One of the most striking aspects of the ordinances that governed the Police function, is the detailed attention to discipline. However, it was discipline directed primarily at the prevention of insurrection within the force, rather than proscribing the over-zealous use of its powers against civilian society. Thus, there is a total absence, even in later statutes, of provisions outlining sanctions against police officers for the abuse of power, save to apply the general provisions of the Penal Code to conduct deemed criminal. The Criminal Procedure Code contained stipulations regarding powers of arrest, search and detention, but was likewise silent on the sanction of their abuse, a task that was relegated to judicial scrutiny. The reasons underlying such an omission, require no explanation.

The increasing significance of the Police and the Home Guard to counter-insurgency efforts is captured by examining a number of statistics. The regular Police Force increased by 55% over the 1950/51 period, while the reserves stood at 5,500-strong in November 1951. Likewise, appropriations for the police forces and the Home Guard grew from 728,000 in 1939 to 1,398,370 in 1952.<sup>31</sup> It was also over this period that the forces underwent a process of "modernization" with the provision of a wireless system capable of transmitting 200,000 messages in a year, and improved transportation facilities.

None of this augured well for the observation or protection of human rights, a situation that was worsened by the indiscriminate abuse of power — a reflection, in part, of the mode of training employed and the isolation of police forces in barracks.<sup>32</sup> Although attributed to the dire conditions

Africans handling a daily average of 9,000 prisoners accommodated in 58 prisons and 41 detention camps for minor offenders. At the height of the emergency (1953-54), the staff had increased to 457 Europeans and 14,000 Africans handling a daily average of 86,634 prisoners housed in 176 prison establishments.

31. See BLUE BOOKS and STATISTICAL ABSTRACTS of the Kenya Colony, 1938-1952.

32. A report by the Kenya Police Commission on the Emergency situation, the Minister for Internal Security explained the mode of training:

The overriding need to deploy still more and more police in the troubled areas made it necessary to curtail the training given to such an extent as to deprive it of all semblance of a grounding in normal police duties. There was at first an almost complete disruption of the training scheme constables being posted for duty having been at the training school for anything from a few days to two months. The training courses were reorganized so as to give constables a three month recruitment course, but of necessity this included only the bare minimum of instruction in police duties proper and went

of the Emergency, it is important to note that the first formal police training school in Kenya was only established in 1948 and comprised, in the main, a center for instruction in counter-insurgency methods.

From a strictly legal standpoint, the wide-ranging powers vested in the police were justifiable in the absence of any form of protection written into the Police Code and only scantily outlined in the Criminal Procedure Code. Without a constitution and faced by a judiciary only too willing to assist the state's efforts to suppress "terrorism," it is not surprising that human rights issues did not feature prominently throughout the colonial era.

While much of the police function and consequent brutality that attended it under colonialism was monopolized by the Police and Home Guard, a significant proportion of that violence emanated from specialized organs, catering for "security" and "political" intelligence, counter-insurgency and criminal investigation. In Kenya, these organs evolved into the Special Branch, today the most-feared of the various elements of the Police Force in that country.

The factor of "intelligence" plays a prominent role in comprehending the nature of the police function in Kenya — past and present. It is also important for an appreciation of the extent of the violation of rights such as privacy, freedom of expression and the right of assembly, as against "clandestine operations," a euphemism for abduction or political assassination. In the post-war period, with the upsurge in nationalism, this aspect of policing society became extremely important, and, thus, all the more sophisticated.

Intelligence was in the first instance garnered from a network of "informers," much praised by L. Leakey as having been critical to the subjugation of the *Mau Mau*.<sup>33</sup> Prior to 1945, a Special Branch of the Criminal Investigation Department (CID) working under the Director of Civil Intelligence, collated and sifted intelligence garnered from local police formations and the administration.<sup>34</sup> Following the war, the division underwent a process of reform and consolidation as intelligence work was viewed as critical to the success of police operations and in the destruction

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little beyond drill, weapon training, and the installation of discipline into men who are largely illiterate and who had in many instances little or no experience of life outside their own villages.

Kenya Legislative Council, Vol. LXIII, at 332 (Oct. 21, 1954).

33. LEAKEY, *supra* note 28, at 110-117.

34. CORFIELD, *supra* note 26, at 34.

of anti-colonial sentiment.<sup>35</sup> As part of this process, the Special Branch was separated from the CID and placed under the direct control of the Member for Law and Order, rather than the Commissioner for Police. Nevertheless, intelligence services never were and remain to this day, beyond the purview of legislative enactment or judicial scrutiny, a point to which we shall revert in analyzing police powers following independence.

### The Uganda Protectorate

While in Kenya the colonial government to a large extent created the “chieftaincies” to perform its administrative functions, in Uganda this was mainly achieved via the political settlement encapsulated in the Buganda Agreement of 1900 and the various other agreements with the lesser kingdoms. Buganda in this way became the central administrative unit from which colonial policy throughout the rest of the protectorate was disseminated through the “export” of Baganda chiefs, already cognized as such within their indigenous communities and greatly elevated by the provisions of the 1900 Agreement.<sup>36</sup> Hence, according to Mukherjee, “In this way, the British utilized the loyal Baganda as harbingers of their colonial rule in the Uganda protectorate to create their allies and thus finally to stabilize their position over the whole area. In return the devoted servants got their rewards — in bribes or otherwise.”<sup>37</sup>

Despite the fact that chiefs in Uganda claimed a greater authenticity than most of their Kenyan counterparts, this did not expand the parameters of their power. The Native Authority Ordinance of 1919, No. 17, made this explicit. It stipulated that a “chief” was only such if so recognized by the government, or by the “tribe” of his jurisdiction, the latter ultimately subject to any orders of the government. Thus while the legislation required them to maintain order (§ 3), prevent crime, arrest, seize and detain people and cattle (§ 5), etc., Provincial and District Commissioners retained the power to sanction them, and in this capacity, dropped their administrative powers and acted as judicial officers (§§ 7 and 8; also § 13) — a mere legal fiction. Of particular importance is the

35. Secretariat Circular No. 16 (Sept. 13, 1986), quoted by CORFIELD, *supra* note 26, at 32-33.

36. One of the most infamous of these chieftains was Semei Kakungulu, largely credited with the “pacification” of Uganda’s eastern region (Bukedi, Bugisu, Tso and Busoga), with a brutality and efficiency that still rebounds today. See Gray, *Kakunguru in Bukedi*, 27 UGANDA J. 52-53 (1963).

37. See R. MUKHERJEE, UGANDA: AN HISTORICAL ACCIDENT? 152 (1985) (Originally published as THE PROBLEM OF UGANDA: A STUDY IN ACCULTURATION (1956)). The 1914 Poll Tax Ordinance exempted police officers and other administrative officials from the payment of taxes as a further incentive to assure loyalty.

fact that abuse of authority — the offense most approximating a human rights violation *circa* 1989 — came last in a list of offenses that dealt primarily with insubordination, neglect of duty or disobedience (§ 13).

Harry Johnston, Uganda's first colonial Governor, is largely credited with the decision to establish a Constabulary to assist the civil authority, following the military pacification of the protectorate. This was established on March 31, 1902 with a force of 1,415 and augmented by a Volunteer Reserve Force of British Administrative Officers.<sup>38</sup> In 1903 the Uganda Rifle Corps was created as an auxiliary force to be used to quell any trouble which might arise following the admission of indigenous Ugandans to the army. Finally in 1908, the Uganda Police Force was set up with the responsibility for preserving peace and preventing crime.<sup>39</sup>

As in Kenya, the Police was largely drawn from and often played a parallel function to the Kings African Rifles, all of which was essentially directed to ensuring the perpetuation of colonial rule and agricultural production. Mukherjee again:

Indeed, so important are the institutions of police, prisons and defense to the colonial government that the budgeted expenditure on these three heads in 1951 was more than double that on agriculture, nearly twice that on education, more than one-half that on medical, and nearly thirty-five times that on labor.<sup>40</sup>

As a critical element in ensuring conditions conducive to agricultural production, the Police in Uganda was from the outset primarily a mercenary force, having been drawn from Emin Pasha's Sudanese Troops, whose pact with Sir (later Lord) Frederick Lugard was critical in ensuring the destruction of resistance to the British in Buganda. Jorgensen says:

Whether due to height requirements, British stereotypes of martial races, a colonial reluctance to man the coercive apparatus with more educated southerners, or simply the difficulty of recruiting laborers from the major commodity-producing areas, the military and the police

38. H.B. THOMAS & R. SCOTT, *UGANDA* 265 (1935).

39. The exact date of the establishment of the Police is unclear, reflecting a controversy rooted in the collapse between the military and police forces under colonialism, already alluded to. Jorgensen, relying on Moyse-Bartlett (*supra* note 7), retraces the police to Lugard's small IBEA force, in existence since the early 1890s. According to him this grew to 2,085 men comprising remnants of Emin Pasha's Sudanese troops and eventually became the core of the Uganda Rifles in 1895. A reorganization of the force followed the 1897 mutiny with the addition of Baganda and Indian troops. The Uganda Police Force was established two years later in 1899. See JAN J. JORGENSEN, *UGANDA: A MODERN HISTORY*, 119-120 (1981).

40. MUKHERJEE, *supra* note 37, at 164.

(to a lesser extent) tended to be drawn from the labor reserves.<sup>41</sup>

The practice directly meshed with the colonial “divide and rule” policy, as well as being a reflection of the fact that cash crop production had been more effectively introduced in the southern and eastern parts of Uganda. Here, in part, lay the seeds of Uganda’s post-colonial turmoil, and indeed the usurpation of the police function by the military. We examine this point at greater length in the pages that follow.

### III. Police Powers in the Early Post-colonial Setting

The transition to independence in East Africa (Uganda in 1962 and Kenya in 1963), did not represent a marked transformation, either in the relations of production or in the apparatus of government.<sup>42</sup> This is revealed through a cursory examination of the post-colonial legal regime and in particular, the functioning of the organs of government. As we noted earlier, the Police Act paid more attention to the issue of internal discipline within the force than it did to external relations with society at large.<sup>43</sup> According to Douglas Brown:

The powers of the police in making arrests and investigating crime are defined in general terms. They are not closely defined in relation to each offense and the exercise of powers of arrest does demand caution and good sense on the part of the police. Abuse of their powers could result in police powers being curtailed. The rules are presented in general terms to allow the police discretion.<sup>44</sup>

Two important distinctions have to be recognized though: the introduction of a Constitution in both countries and the process of indigenization that was accelerated following independence.<sup>45</sup>

41. JORGENSEN, *supra* note 39, at 119.

42. See M. MAMDANI, *POLITICS AND CLASS FORMATION IN UGANDA* (1976); and D.W. NABUDERE, *IMPERIALISM AND REVOLUTION IN UGANDA* (1980).

43. See Laws of Uganda, Police Act (U), ch. 312, § 26(3) (1964).

44. DOUGLAS BROWN, *CRIMINAL PROCEDURE IN UGANDA AND KENYA* 28-29 (2d ed. 1970).

45. These were quantitative rather than *qualitative* differences. In the words of Yash Ghai these constitutions should be looked at

not as providing neutral framework for political competition, with the right within fairly recognized and impartial rules, to organize and contest, but instead as a weapon in the political struggle itself, so that the constitution becomes, or more precisely, is made, a handmaiden to the party in power, as a means to the retention of power.

Y. Ghai, *Constitutions and the Political Order in East Africa* (Inaugural Lecture), 5 (University College Dar-es-Salaam, Feb. 1970).

In both countries, the Police Act as derived from the colonial legislation remained intact, but it was primarily in other areas of the legal regime that the full parameters of police powers were entrenched. At the same time, the transformation in governance led to the intensification of fissures within each country that had previously been suppressed by the omnipotence of the colonial state.<sup>46</sup> In Uganda this manifested itself a "federalism," while in Kenya the problem was described as "left-wing opportunism," epitomized by the then Vice President Oginga Odinga. In any event, it was the political and socioeconomic context of the post-colonial era that fashioned the extent of police powers, and the crises endemic to the neocolonial state that necessitated their expansion.<sup>47</sup>

Both governments initially expressed a manifest distaste for the excesses of colonialism, and, in particular, the curtailment of human rights reposed in the Emergency Powers Statutes and the detention-without-trial regulations. That distaste was signified in the Bill of Rights sections of both Constitutions and in explicit statements condemning the practices of the colonial rules. The 1961 election manifesto of the Kenya African National Union (KANU) for example stated:

Much of the current legislation denies African people their rights and severely restricts their freedom . . . . The Preservation of the Public Security Ordinance (1957) and the Detained and Restricted Persons (Special Provisions) Ordinance (1959) are other legislation currently employed to detain Africans for eight years without trial but they are also detained under conditions which are inhuman. . . .

KANU is pledged to remove all these undemocratic, unjust and arbitrary practices.<sup>48</sup>

This election promise was followed through in 1963 with the repeal of the Emergency Powers Order in Council of 1939, although emergency powers were still liberally spliced throughout the new Constitution.<sup>49</sup> At the same time the Criminal Procedure Code provided *inter alia* that any

46. On Uganda, see Sookdeo, *Understanding the Violence in Uganda*, 5 TRANSFR. F. 17-31 (Spring 1988). For a treatment of the Kenyan situation see C. LEYS, *UNDERDEVELOPMENT IN KENYA* (1975).

47. In both countries, wanton acts of police violence, especially against persons in custody that were unrelated to political causes, continued. See, for example, the discussion of the policemen at Makupa Police Station in Mombasa, Kenya, who unlawfully assaulted two students (Republic of Kenya, Official Report, House of Representatives, First Parliament, Fourth Session, Vol. IX, 31 May 1966, cols. 183-186), and the Ugandan case of *Muonge v. The Attorney General*, 1967 E. Afr. L. Rep. 17, which concerned the 1964 Nakulabye Riots, where the Police went on a rampage.

48. Manifesto of the Kenya African National Union (1961).

49. See Independence Constitution of Kenya, articles 19, 27, and 29.



person who was detained by the police would have to be brought before a Magistrate and charged within twenty-four hours of his arrest.

In 1965, however, a constitutional amendment relaxed the conditions governing the declaration of an emergency by providing for a simple majority vote permitting the President to make such a declaration. On May 25, 1966, following the formation of the Kenya People's Union (KPU) by Oginga Odinga, a resolution was passed urging the government to pass a Preventive Detention Act immediately, in order to "ensure the security of the state."<sup>50</sup> Within seven days the Attorney General had prepared and tabled the Constitution of Kenya (Amendment No. 3) Bill, which sailed through Parliament in a single day. The amendment removed existing controls over the exercise of emergency powers and vested the President with powers that exceeded even those previously exercised by the colonial governor. It further amended the 1960 Preservation of Security Act to provide *inter alia* for detention-without-trial if the President felt "satisfied" that such action was indeed necessary.<sup>51</sup>

The impact of the preceding laws on police powers is fairly clear, especially in light of the fact that the State of Emergency declared by Kenyatta on July 25, 1966 remained in force by periodic extension until August 15, 1982.<sup>52</sup> It was over this period that Josiah M. Karuiki and Tom Mboya, among others, were assassinated in questionable circumstances; Oginga Odinga and several other political opponents were detained, opposition political parties proscribed and the Special Branch worsened its reputation for brutality. In all, a total of seventy-nine people

50. The KPU was subsequently banned in 1969, its leaders thrown into detention. Thereafter, Kenya became a *de facto* one-party state, a situation made legal in 1982.

51. Mirungi, *Legal Aspects of Detention Without Trial in Kenya*, 14-23 (Sept., 1982, Nairobi, Kenya) [Mimeo].

52. In fact, police activity over this period was largely under the control of the General Service Unit, an organization that was:

recruited and trained as policemen, but, . . . formed into companies under their own commander. They are deployed throughout the country when the local or district police are faced with a crime wave, civil disturbance, threats to the safety of life and property or the disruption of public tranquility, which requires extra police to be drafted into the area to assist them to restore law and order and to keep the peace. Whilst the Kenya General Duty Police is deployed throughout the country to carry out normal day-to-day policing, something more is required to meet emergencies. This duty falls to the GSU.

See Republic of Kenya (Official Report), House of Representatives, 1st Parliament, 2nd Session, Vol. V, 13 July, 1965, col. 858 (Argwings-Kodhek, Asst. Minister of Internal Security and Defence).

were officially detained in abysmal conditions vividly described by Ngugi wa Thiongo.<sup>53</sup>

It is not really surprising that the Police Act remained substantially intact throughout this period, because the provisions of the Emergency gave police officers (as agents of the President) almost unfettered powers of arrest and detention.<sup>54</sup> The blind eye turned by the judiciary only exacerbated the situation.

In Uganda, parallel developments took place soon after the disintegration of the marriage of convenience between Milton Obote's UPC and the Kabaka Yekka! (KY) party of the Buganda monarchy. 1965 witnessed the promulgation of the Police (Amendment) Act.<sup>55</sup> Under new section 32.2, the Inspector General was vested with the unfettered power to prohibit any assemblies or processions that he believed were likely to cause a breach of the peace — a thinly-veiled attempt to prevent opposition political parties from holding rallies. Until 1966, this provision was liberally invoked, but became superfluous with the banning of opposition parties and the declaration of a state of emergency.

The heightening mood of intolerance, paralleled by the ever-expanding gambit of police powers — *de facto* and *de jure* — culminated in the Deportation Validation Act,<sup>56</sup> section 1 of which indemnified the government from "all penalties and liabilities" which may arise in the course of carrying out deportation orders against opponents of the government who had been the main victims of the 1966 *putsch*.

The extent to which detention-without-trial had become a permanent fixture in the exercise of police powers is represented in part, by the number of people arrested and detained under emergency regulations. Between 1966 and 1971, over 560 people were listed in the *Uganda Gazette* as having been arrested under the provisions of the new Emergency Regulations. This figure does not accurately convey the extent of the use of the device as a weapon of political repression or the role of the Police in executing it. First, under Article 21(6)B of the 1967 Constitution, the government was required to publish in the *Official Gazette* notification of the detention of persons after not more than twenty-eight days of incarceration. Obviously, many were imprisoned for a lesser period. Also,

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53. N.W. THIONGO, *DETAINED: A WRITER'S PRISON DIARY* (1981).

54. See Conboy, *Detention Without Trial in Kenya*, 8 GA. J. INT'L & COMP. L. 441 (1978).

55. See Act No. 5 (1965).

56. Deportation Validation Act, No. 14 (1966).

a good number were placed on remand — a tool that achieved the same objective, but which sidestepped the necessity for notification.

These developments were augmented by the creation of additional forces to complement the police function. The General Service Unit (GSU) was established in April 1964 as a paramilitary force under the tutelage of MOSSAD — the Israeli intelligence network.<sup>57</sup> A Special Police Force (SPF) that doubled as a Presidential Bodyguard, also operated as an intelligence unit and exercised a hybrid of military and police powers. All in all, by 1971, the Police had been grossly eclipsed by the more “aggressive” organs of the state, while at the same time this did not significantly diminish its general powers of sanction against the public, although on the whole they became less overtly generated by political motives. That had become the exclusive preserve of the more specialized units — the GSU and the SPF.

All of the preceding factors, as well as prevailing socioeconomic and political developments in the domestic and international political arena, culminated in the January 1971 *coup d'état* in which Milton Obote was replaced by his army commander, Idi Amin.<sup>58</sup>

In the wake of these developments, several events took place that represented a significant evolution in the nature of police powers, while, at the same time, demonstrated the contradictions intrinsic to the assumption of power by the military in conditions of increasing socioeconomic crisis and political instability. Amin repealed the State of Emergency, but at the same time banned all form of political activity and suspended critical elements of the 1967 Constitution.<sup>59</sup> This effectively vested him with “supreme” powers of government through the promulgation of decrees. With regard to the Police, the government passed the Evidence (Amendment) Decree,<sup>60</sup> stipulating *inter alia* that no confession made to a police officer shall be admissible in a criminal proceeding unless it is made in the presence of a Magistrate.<sup>61</sup> In light of the previous record of

57. Kanyeihamba writes: “Members of the General Service, penetrated not only the civil service, the UPC and the cabinet, but also the Judiciary, the police and the armed forces . . . . The power of the National Assembly had been so effectively eroded that in most cases the government ruled without it.” G. KANYEIHAMBA, *CONSTITUTIONAL LAW AND THE GOVERNMENT IN UGANDA* 41 (1975).

58. For an account of Amin’s coup, see generally DAVID MARTIN, *GENERAL AMIN* 84-90 (rev. ed. 1978).

59. See Legal Notice No. 1 of 1971 and The Suspension of Political Activities Decree (No. 14 of 1971).

60. Decree No. 25 (1971).

61. *Id.*, sections 24.1 and 24.2. See further, The Evidence (Statements to Police Officers) Rules (SI 43-1).

the Police particularly under the Emergency, this amendment was welcomed. Odoki stated:

It is hoped that the new law will eradicate what has been called "Police violence" in the conduct of investigations especially for the purpose of extracting confessions. The new law can be justified on the principle that the administration of justice requires the balancing of the public interest and the interest of the accused . . . . The new law is aimed at producing safeguards for the interests of the accused against excessive zeal in the enforcement of the criminal law.<sup>62</sup>

However, such commendation of the military government was to prove short-lived as police powers began, as a practical and legal matter, to be usurped by military and quasi-military forces. This was evident in the Armed Forces (Powers of Arrest) Decree,<sup>63</sup> which in fact predated the Evidence Decree, as well as Robbery Suspects Decree (RSD).<sup>64</sup> Both laws conferred extensive powers of arrest and sanction on persons other than police officers. The latter enactment, especially, confirmed that the retention of a police force for the enforcement of law and order, only served cosmetic, or at most, employment purposes.

First, the RSD changed the grounds on which an arrest for robbery could be made. It also altered the basis for determining the degree of force that could be applied in the execution of such an arrest, and finally, by substituting a subjective test of reasonableness, for the objective one earlier in existence, it made it easier for a "security officer" to arrest suspects. These laws more than any other, served to formalize the institution of the reign of terror that prevailed in Uganda throughout the seventies. They were augmented by the creation of a number of agencies that assumed police functions but exercised them in a brutal fashion, and wholly outside the realm of any sanction whatsoever. These included the State Research Bureau, The Public Safety Unit (of the Police) and the Military Intelligence.

Before examining police powers in the 1980s and beyond, it is necessary to consider the response of the judiciary to the abuse of human rights by the Police, against developments in the legal regime in Kenya and Uganda during the early years of independence.

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62. Odoki, *Recent Reforms in the Law Relating to Confessions in Uganda as Introduced by the Evidence (Amendment) Decree*, 1 UGANDA L. FOCUS 19-28, 27-28 (October, 1972).

63. Decree No. 5 (1971).

64. Decree No. 7 (1972).

#### IV. Judicial Responses to Police Abuses

The preceding analysis demonstrates the wide arena encompassed by police powers in both Kenya and Uganda and that they often extend beyond the mandate conferred. Here we examine the fashion in which the judiciary has responded to challenges to the abuse of that power by the Police.<sup>65</sup> The colonial period is left out of this examination because to a large degree the courts never fundamentally questioned the extent or the abuse of police powers.<sup>66</sup> Consequently, as Douglas Brown notes, "Few cases are to be found in the East African law reports concerning the exercise of police powers. Police powers are in general similar to those existing in England although the Police Act differs in many details from the English Police Act 1964."<sup>67</sup>

The promulgation of constitutional provisions protecting the individual following independence changed this position somewhat.<sup>68</sup> A number of interesting decisions regarding the extent of police powers have been made by the courts. Thus, according to E. Veitch writing in 1972,

the Courts in East Africa are more concerned with the delineation of the powers of those in positions of authority and the rights of the citizens subject to authority. They are therefore more concerned with the balancing of the citizen's rights of freedom and his equal interest, shared by the government, in the efficient enforcement of the criminal law. The concern of the Judges reveals the function of the law.<sup>69</sup>

65. Until 1977, the East African Court of Appeal (EACA) was the highest judicial authority in the area and heard appeals from Kenya, Uganda and Tanzania. Following the creation of separate appeals courts for each country, the tendency to check governmental power has seriously diminished. Paradoxically, it is the courts in Uganda that have generally pursued a more independent line than either of their counterparts.

66. In fact, as we have continuously argued, the notion of human rights was absent from the colonial conceptualization of justice. Cf. Seidman, *The Reception of English Law in East Africa Revisited*, 2 E. AFR. L. REV. 47 (1969), and M. SLATER, *THE TRIAL OF JOMO KENYATTA* (1965). It should be noted that the colonial Courts in East Africa only imported the English principles governing the power to arrest without a warrant in the post-war period (See *Mwangi son of Njoroge*, 21 E.A.C.A. 377 (1954)), and even then, in light of the emergency conditions prevailing in both countries, they did not present an insurmountable obstacle.

67. BROWN, *supra* note 44, at 29.

68. Constitutional provisions were liberally invoked to bolster arguments about the protection of the individual. In the debate over the Makupu Police incident (*see supra* note 50), Martin Shikuku stated: "We feel the freedom of individuals is guaranteed in the Constitution of the country, and we in this parliament are the custodians of that Constitution. We shall be failing in our duty if we let the freedom of the people be interfered with by the police, just because they happen to be in the police force."

69. E. VEITCH, *EAST AFRICAN CASES ON THE LAW OF TORT* 13 (1972).

This is not entirely correct, as both the judges and the law have not always and consistently been in favor of the protection of the rights of the citizen. Hence, even where the courts have actually censured the police or other coercive elements of the state, a strict distinction was made between matters criminal and those of a "political" nature.<sup>70</sup>

This is evident in cases that have involved chiefs or local district administrations, or those that are not overtly political. Thus, as late as 1969, the Court of Appeal could express its concern at the rising incidence of unlawful detention exercised by local administrations.<sup>71</sup> Nevertheless, they did not challenge the substance of emergency powers, but only remonstrated against their indiscriminate usage: "[t]he Emergency Regulations deal with public safety and subversive activities, outside of the purview of crime. . . . When the C.I.D. therefore arrogates to themselves or are permitted to deal with matters which are the proper concern of a special and separate branch, it is not surprising that suspicion is aroused and courts ring and abound with recriminations."<sup>72</sup>

Where they in fact dared to venture into the political arena, their power of review was curtailed by legislative or administrative action. Thus, § 126 of the Criminal Procedure Code (Amendment) Act of 1969 in Uganda limited a magistrate's discretionary power to grant bail to accused persons and gave clear guidelines to be followed. Such curtailment is also

70. See Katende & Kanyeihamba, *Legalism and Politics in East Africa: The Dilemma of the Court of Appeal for East Africa*, 8 *TRANSITION* 43-54 (1973).

71. In *West Nile District Administration v. Dritoo*, 1969 E. Afr. L. Rep. 324, the court stated, "I am perturbed at the casual way in which, it appears, arrests are being made and at the frequency with which we hear of unlawful detention." See also *Sindano v. Ankole District Administration* (H.C.C.C. No. 463 of 1969, unreported). The case of *Muwonge v. The Attorney General*, 1967 E. Afr. L. Rep. 17, straddled the fence. Here the court of appeal held the government vicariously liable to pay compensation to the plaintiff who had been wantonly and recklessly shot by a policeman who was part of a force sent to quell a riot.

For Kenyan cases, see *Muhuri v. The Attorney General* (1964, unreported), where the court declared the provisions for collective punishment illegal and *Kioko v. The Attorney General* (1964, unreported), where the constitutionality of vagrancy legislation was in issue.

72. Ag. Chief Justice Jones in *Re: Ibrahim*, 1970 E. Afr. L. Rep. 162. However, later in his judgement the same judge stated,

one cannot look behind a valid detention order, as it must be assumed that a Minister ought to be, and is deeply concerned, about the liberty of the subject, and only issues a Detention Order after considering all the information before him. In coming to a conclusion he weighs all the evidence and acts (not merely on the advice of a Police officer only). In particular he has the interests of the state in mind and he is assumed to have acted judicially in arriving at the conclusion.

true of the effect of the various emergency laws passed in both countries and, with respect to Uganda, to the intervention by the military.

The courts of independent Uganda early adopted a positive attitude regarding the issue of individual freedoms insofar as there were attempts by the Police or other administrative bodies to violate them. In the case of *Yekosofati Ssekaggo v. The Lango District Administration*, which involved the unlawful arrest and detention of the plaintiff by a chief, Justice Fuad stated:

So important is regarded a person's right to personal liberty in Uganda, that elaborate provisions are contained in the Constitution to safeguard that right. The plaintiff was treated in a manner that suggested that those responsible for his arrest and detention were in total ignorance of any legal sanctions whatsoever.<sup>73</sup>

Such a Judicial posture was possible in conditions of relative stability, without the government feeling that it constituted a direct threat to its control. Within conditions of intensifying crisis, however, this position was soon abandoned altogether, in part on account of government intolerance to any form of opposition.

Detention regulations involving directly political issues in Uganda were first challenged in the case of *Grace Ibingira and Others v. Uganda*.<sup>74</sup> The five plaintiffs in that case (all former cabinet ministers), challenged their arrest and detention as unlawful. The court had no difficulty in finding their detention unlawful and thus ordered their release. The reaction of the government was angry, the Attorney General declaring that the decision left some doubt over the correct interpretation of the Constitution. Had there been a higher court to which to appeal, he stated, he would have done so.<sup>75</sup> To comply with the decision, the government released the detainees for a few minutes and then ordered their redetention. This was followed soon after by a law insulating the government against legal action by the defendants in connection with their unlawful detention. On subsequent appeal by the plaintiffs, the High Court refused to declare the second detention unlawful.<sup>76</sup>

A pattern soon followed. Thus in *Re: E.S. Lumu & 4 Others*,<sup>77</sup> the applicants were arrested and placed in police custody. A warrant of arrest

73. High Court Civil Suit No. 465 (1965, unreported).

74. 1966 E. Afr. L. Rep. 306 (appeal taken from Uganda).

75. G.L. Binaisa, 61-65 Hansards Parliamentary Debates 1078 (1966).

76. 1966 E. Afr. L. Rep. 445.

77. High Court Misc. App. Nos. 31-35 of 1966.

was applied for on the following day and issued under the provisions of the Deportation Ordinance.<sup>78</sup> The applicant's argument that the arrests were manifestly illegal, in part because of the time at which the warrant was issued, was rejected. The Court stated that though belated, the warrant was nevertheless valid.

The case that confirmed the judiciary's reluctance to intervene on the part of individual freedom when faced by sensitive political questions was *Uganda v. Commissioner of Prisons ex parte Matovu*.<sup>79</sup> The case involved a direct challenge to the 1967 Constitution, passed in the aftermath of the removal of the Kabaka of Buganda from the Presidency. While the Court concluded that it had the power to hear such a challenge, it declared that it could not order the release of the plaintiff detained under the Emergency Regulations, nor rule on the validity of the 1967 Constitution because, "Courts, legislatures and the law derive their origins from the Constitution, and therefore the Constitution cannot derive its origins from them, because there can be no state without a Constitution."<sup>80</sup>

In Kenya, though the political crisis never duplicated the situation in Uganda, the court in the case of *Ooko v. The Attorney General*<sup>81</sup> applied the same position. Considering the extent of the safeguards under the preventive detention law and the court's ability or willingness to enforce them, the court stated that it was not part of its duties to consider the merits of a detention order.<sup>82</sup>

Following the 1971 coup in Uganda, the courts attempted once again, to revive a concern for the individual protections guaranteed by the Constitution, particularly in the wake of the decrees conferring extensive powers of arrest in the army and the military police. In *Efulayimu Bukonya v. The Attorney General*, Justice Fuad stated:

There appears to be a widespread but mistaken belief not only among the general public and apparently even in legal circles that the police, soldiers and private persons lawfully entitled to arrest without warrant, persons whom they reasonably suspect of having committed or being about to commit designated offenses, may shoot in cold blood should they fail to acquiesce in their arrest.<sup>83</sup>

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78. Cap. 46, Laws of Uganda.

79. 1966 E. Afr. L. Rep. 514 (appeal taken from Uganda).

80. Chief Justice Udo Udoma, *id.* at 540.

81. 1966, unreported.

82. See GHAI & MCAUSLAN, *supra* note 8, at 11.

83. High Court Civil Suit No. 730 of 1971.



This heightened scrutiny by the judiciary over the actions of government agents led directly to the Proceedings Against the Government (Protection) Decree,<sup>84</sup> which stipulated that civilian courts could no longer grant any relief in actions against the military for injuries sustained as a consequence of measures taken to maintain public order and security and the enforcement of law and order. The decree was so broad as to preclude the grant of any relief against the government for virtually any injury inflicted by security personnel. It was a blatant attempt to muzzle the judiciary, and the then Chief Justice in particular, who had emerged as a forceful opponent of the usurpation of police powers by the military.<sup>85</sup> Thus, the power of the judiciary was significantly eroded. Despite this decree, in *G. Nsubuga v. The Attorney General*<sup>86</sup> the Court refused to give the law a wide and liberal interpretation, and awarded damages to the plaintiff for having been illegally arrested and imprisoned by the police.

The vesting of judicial powers in the Military Tribunal, the Defence Council and the "Economic Crimes" Tribunal led to the further erosion of any protections previously extended by the judiciary.<sup>87</sup> Furthermore, since the SRB, the PSU and Military Intelligence monopolized the violation of human rights abuses, the sanction of their activities by the traditional courts became all the more difficult, let alone the fact that the general public had grown increasingly reluctant to challenge the authorities. This situation continued until the overthrow of the Amin government in 1979.

### V. The Situation Today

The end of the 1970s marks a significant turning point in the historiographies of both Uganda and Kenya. In 1978, Daniel arap Moi took over the presidency of Kenya and has remained in power ever since. In April 1979, Idi Amin's military machine was defeated in a war with Tanzania.<sup>88</sup> With respect to Uganda, the political situation has remained highly unstable, culminating in the re-ignition of gross human right's violations in the Obote II period (1981-July 1985), and that of the UNLA under General Tito Okello (July 1985-January 1986). For that purpose,

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84. No. 8 of 1972.

85. See the report of The International Commission of Jurists [ICJ] (Michael Posner), *Violations of Human Rights and the Rule of Law* 21 (Geneva, May 1974).

86. Uganda Law Reports 74 (1973).

87. See Decree Nos. 3 and 12 of 1973, and 3 of 1975. See further, ICJ Report, *supra* note 85, at 20-24.

88. For a comprehensive account of the war and its aftermath, see T. AVIRGAN & M. HONEY, *WAR IN UGANDA: THE LEGACY OF IDI AMIN* (1982).

our concluding examination of police powers in Uganda today briefly considers the period until 1986, before turning attention to the situation under Yoweri Museveni's NRM (January 1986 to the present). We begin our examination of the prevailing situation in the two countries by looking at Kenya.

### *A. The Kenyan Police and the Disintegrating Facade of Stability*

Since arap Moi assumed power over a decade ago, the human rights' situation in Kenya has deteriorated significantly and, correspondingly, the Police has become even more an instrument of repression. This in large part stems from the 1982 attempted coup by Kenya Air Force personnel and an upsurge in clandestine resistance to the *status quo*.<sup>89</sup> It is also related to the deteriorating levels of social and economic existence and to the ever-widening disparities in the ownership and distribution of the means of production.

A number of factors point to the continuity in the philosophy of the KANU government, the first being the promulgation of the Constitution (Public Security) Order of 1978,<sup>90</sup> which effected Sections 4(1) and (2)(a) and (b) of the Preservation of Public Security Act,<sup>91</sup> soon followed by the Public Security (Detained and Restricted Persons) Regulations, identical to those existing previously.<sup>92</sup> On December 12, 1978, arap Moi released all political detainees, but since that time he has thrown several more political opponents into jail, following arrests and trials that are a travesty of accepted norms of justice. Among these are included over 1,000 military personnel court-martialled for treason in mid-September 1982, and over 132 alleged to have been arrested or to have "disappeared."<sup>93</sup> Furthermore, 58 people are said to have been killed by the security forces since 1981.<sup>94</sup>

In recent years, the performance of the Moi government has come under intensified scrutiny in the international press and by human rights'

89. This is primarily represented by a group called "Mwakenya" — a Kiswahili acronym for the "Union of Nationalists for the Liberation of Kenya."

90. See KENYA GAZETTE, Oct. 17, 1978.

91. See Legal Notice No. 222 of 1978.

92. See Legal Notice No. 234 of 1978.

93. See Appendices 4 and 5 of UMOJA WA KUPIGANIA DEMOKRASIA KENYA (UNITED MOVEMENT FOR DEMOCRACY IN KENYA), MOI'S REIGN OF TERROR: A DECADE OF NYAYO CRIMES AGAINST THE PEOPLE OF KENYA 55-60 (1989).

94. *Id.* Appendix 1, at 45-49.

organizations, prominent among them being Amnesty International.<sup>95</sup>

With respect to the issue of detention, a July Amnesty report states:

Kenyan law stipulates that anyone who is arrested must be brought before a Court or released within 24 hours. However, for over a year the authorities have repeatedly ignored this requirement. Prisoners have 'disappeared' for several days and in some cases weeks after arrest. Over 75 prisoners who have pleaded guilty to political offenses and all of the 10 prisoners who have been detained before June 1987 under Public Security Regulations have been subjected to prolonged periods of unacknowledged and incommunicado detention by the Special Branch. During that time they effectively 'disappeared.'<sup>96</sup>

The writ of *habeas corpus* has become largely ineffective and, in certain instances, for example in the case of Stephen Karanja — allegedly shot by members of the Special Branch — has led to embarrassing consequences for the government and its security forces.<sup>97</sup> Torture of detainees, especially those alleged to be members of the clandestine organization "Mwakenya," is said to be widespread, and encompasses a variety of methods, from the "swimming pool"<sup>98</sup> to systematic beatings that leave no traces of assault.<sup>99</sup> A monopoly of detention and torture methods today vest in the Special Branch. It is above the law, and has fine-tuned its erstwhile reputation for brutality. Most torture victims aver that it is officers of the Special Branch who tortured them in a special interrogation center situated in Nyayo House in the center of Nairobi or at Nyati House, the national headquarters of the agency.<sup>100</sup>

The courts have compounded the situation by failing to question the legality of detention orders and declaring their hands tied once confronted

95. See AMNESTY INTERNATIONAL, *TORTURE, POLITICAL DETENTION AND UNFAIR TRIALS* (1987) [hereinafter *TORTURE*], and *HUMAN RIGHTS IN KENYA* (Nov. 1988).

96. *TORTURE*, *supra* note 95, at 7.

97. Karanja was picked up by officers of the Special Branch and placed in custody. His wife and relatives, unaware of his whereabouts applied to the Court for a writ of *habeas corpus*. The judge ordered the production of the body and was informed that he had been shot and buried in a cemetery in Eldoret. The judge granted an order of exhumation, but the state failed to turn up the right body, until the case reached the stage where the Judge was preparing to hold the chief prosecutor in the case in contempt of court. See *Death in an Eldoret Forest*, NAIROBI L. MONTHLY 8-10 (Sept. 1987).

98. *TORTURE*, *supra* note 95, at 13. The "swimming pool" method of torture involves the flooding of a cell with water (between ankle and knee-deep). The detainee is left to stand in the water naked for several hours at a time (and even days). The usual consequence is influenza or serious pneumonia and some detainees have reportedly died from the same. Reports have also been made of the detainees' feet swelling and being infected with rot.

99. *Id.*

100. *Id.* at 18-22.

by them.<sup>101</sup> This was most recently demonstrated in the case of Raila Odinga Odinga (the son of ex-Vice President Odinga Odinga), detained for the second time on August 30, 1988. At the *habeas corpus* hearing to ascertain his whereabouts and secure his production before the court, the state produced a detention order which the court refused to show counsel for the applicant, in agreement with the state counsel that, "production [of the DO] discharges the burden upon the respondents. Cause has been shown and [the] burden has been discharged." The court neither inquired about the date on which the order had been issued, nor why the prosecution had twice requested an adjournment of the proceedings without producing the DO.<sup>102</sup>

Instead, in ruling against the applicant, the judge stated:

I do not see the point of allowing further argument in the matter since the matter has been taken out of the hands of the Court. The best thing to be done would be for those concerned for Mr. Odinga to stand back (sic!) and consider what is best to be done, and to bring whatever application the law allows.<sup>103</sup>

The *Odinga* case is not an aberration, and the courts have been particularly reluctant to inquire into "Mwakenya" detentions or to impartially weigh allegations of torture. In the single instance where the possibility arose of a judge censuring the state authorities, he was removed from the case and subsequently resigned from the bench.<sup>104</sup>

All of the preceding events have of course led to a much more intensified concentration of power in the hands of the police, the Special Branch and the Criminal Investigation Department. One of the most apparent side-effects of this is the upsurge in the deaths of people while in police custody. Worse still is the fact that out of the nearly sixty

101. Williams, *Kenya: A Legal System in Turmoil*, Special to the LOS ANGELES TIMES, May 1, 1988, at 8.

102. See R. Odinga, *The High Court will not Examine the Validity of Detention Order*, NAIROBI L. MONTHLY 31-32 (Oct. 1988).

103. *Id.* at 32.

104. This was the *Steven Karanja* case, *supra* note 94. When the judge threatened to hold the state prosecutor in contempt of court for failure to comply with the writ, the case was removed from his consideration. See NAIROBI L. MONTHLY, 35-42 (Oct. 1987). See also the interview of Justice Schofield, in the NAIROBI L. MONTHLY 6-7 (Jan. 1988). In response to a question concerning whether the Chief Justice was acting in the interests of justice in disinvesting the judge from further hearing the case, Schofield retorted: "Any lawyer knows that he is not acting in accordance with the law. I cannot operate in a system where the law is so blatantly controlled by those who are supposed to be its supreme guardians."

documented deaths in police custody under the Moi government, only a few have been investigated.<sup>105</sup>

The situation is compounded by a recent change in the Constitution (another one-day amendment), which extended the period over which suspects charged with offenses carrying a sentence of death could be held in police custody before being brought before a court from twenty-four hours to fourteen days. It is no simple coincidence that the amendment simultaneously removed security of tenure from judges and vested the President with the power to dismiss them at will. Thus it is that the police in Kenya today are at the peak of their power — a fact that does not necessarily reflect a heightened stability in the political and wide socio-economic situation in the country. We amplify this point in our concluding remarks, following a glimpse at the case of Uganda in the 1980s.

### ***B. Post-Military Uganda and the Reconstruction of the Police***

#### ***(1) Phase One (1980-1986)***

In the aftermath of the Amin period, one of the most debilitating factors precluding a return to normalcy has been the omnipotence of military force within the realm of political, social and economic interaction in the country.<sup>106</sup> It is thus obvious that it continues to hold control over the police function and of the force itself.

The opportunity to reconstitute and reconstruct the Police and other security forces was lost through the intense factionalism that attended the jostling for political power.<sup>107</sup> As Mamdani points out:

In the wake of the fleeing soldiers of Amin's army — but also in the teeth of the factional struggle — was organized the new repressive apparatus of the post-Amin regimes. The result was that the factionalism inside the dominant classes — even more so than in the Amin period — was almost mechanically reproduced inside the repressive organs of the state. There was not one but several armies; not one but several

105. Among them were Gregory Byaruhanga and Peter Karanja. The former was a Ugandan teacher and the inquiry into his death was the result of the uproar from the Uganda government, with whom relations have been turbulent. At the inquest into the latter's death, the Chief Magistrate ordered the Attorney General to conduct further investigations. See P.N. Karanja, *The Chief Magistrate Gives His Ruling*, NAIROBI L. MONTHLY 17-22 (March 1988).

106. For general discussions on post-military Uganda, see, for example, UGANDA NOW: BETWEEN DECAY AND DEVELOPMENT (H. Hansen & M. Twaddle eds. 1988); BEYOND CRISIS: DEVELOPMENT ISSUES IN UGANDA (P. Weibe & C. Dodge eds. 1987); and Special issue on Uganda, 15 UFAHAMU (Winter 1986/87).

107. See T.V. SATHYAMURTHY, *THE POLITICAL DEVELOPMENT OF UGANDA* (1986).

intelligence services. Each responded to a different center of power. No one in the state could have an idea of the combined numerical strength of these forces.<sup>108</sup>

That factionalism led to the retention of the bulk of the police force that had existed under the Amin regime, but also, attempts to use it as a political weapon, in addition to the earlier function as a tool of repression. Thus from 1979 to 1981 the office of Inspector General changed hands at least four times. At the same time, the Uganda National Liberation Army (UNLA), together with the forces of the Tanzanian army were deployed in urban areas in a bid to maintain law and order that began to unravel once again soon after the UNLF came to power.<sup>109</sup>

Instructors from foreign police forces, notably Britain and Tanzania, were retained in order to institute new training programs for recruits, and to re-instill an atmosphere of discipline within the ranks and among the officers. This did little to stem the tide of illegal detentions, torture and deaths in custody.<sup>110</sup> The political situation in fact reached such a high degree of instability, that a dawn-to-dusk curfew was declared in Kampala early in 1980, soon followed by a coup by the military commission of the UNLF, supported by the UNLA.<sup>111</sup>

The Police, in collaboration with the army, played a significant role in ensuring favorable political conditions for the return to power of Milton Obote's UPC in the run-up to the elections called for late 1980. This consisted of the denial of permits to hold political rallies to organizations such as the Democratic Party (DP) and to the newly-formed Uganda Patriotic Movement (UPM), and the withholding of police protection in the event that permits were issued.<sup>112</sup>

With Obote's return to power, repression in Uganda became more systematic, though at the same time, it was decentralized. That decentralization was epitomized in the creation of a host of new governmental agencies (official and clandestine), established to maintain "law and order" in the country. The most notorious of these were the National Security Agency (NASA) and the rejuvenated Special Force.<sup>113</sup> The second

108. Mamdani, *NRA/NRM: Two Years in Power* [Text of a public lecture at Makerere University, Kampala on Mar. 3, 1988].

109. See generally, *African Research Bulletin* [Political].

110. See AMNESTY INTERNATIONAL, *UGANDA: EVIDENCE OF TORTURE* (1985) [hereinafter *UGANDA*].

111. *African Research Bulletin*.

112. See Minority Rights Group, *Uganda and the Sudan* 2-3 and 8-10 (Report No. 66, London, Dec. 1984).

113. *UGANDA*, *supra* note 110.

time around there were no pretensions about the para-military nature of the latter, from its military combat-style uniforms, to the counter-insurgency training methods (disseminated primarily by North Korean instructors), to the weaponry it used (semi-automatic AK-47 and G-3 sub-machine rifles and pistols). The British retained its training program with the Police and extended it to the UNLA, but this did little to ameliorate the commission of abuses by either organization.<sup>114</sup>

Thus from 1980 to 1985, the regular police force was once again eclipsed, although they played a more prominent role in arresting, detaining and torturing suspects than they had under the Amin regime, a reflection perhaps, of the fact that the government claimed to be "civilian" and "elected."

The judiciary was divided in its response to the re-ignition of human rights' abuses. Part of it (including the Chief Justice) comprised UPC sycophants, only too willing to allow the government to get away with violations of the law. However, a number of judges consistently maintained a position in protection of illegally incarcerated individuals and condemned torture, allegations of which were brought to their attention.<sup>115</sup> This did little to stop the government and, even where detainees were ordered to be released, they would simply be re-arrested outside the court precinct. Once again, the use of the tool of remand was resumed, with arrested persons making periodic, fortnightly appearances, while the courts were told "investigations" into their cases continued. If the illegal detention was challenged and ruled as unconstitutional, the government would respond by issuing a formal detention order and transfer the detainee from the Central or other police station, to the Maximum Security Prison at Luzira. Many were also held outside formal centers of incarceration, to the extent that locations such as "Summit View" on Kololo Hill (a Kampala suburb) became the first point of investigation for one to ascertain a detainee's whereabouts.

It is unnecessary to state that these measures only provided a mirage of stability to the Obote regime. A continuing and intensifying guerilla war, insurrection within the ranks of the UNLA and deteriorating political and economic conditions, culminated in the July 1985 coup by the UNLA,

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114. See *A History of Military Assistance*, 3 AFR. CONFIDENTIAL 27 (Feb. 26, 1986).

115. A number of cases were prosecuted to the end, primarily to justify the detentions and as part of a facade of upholding the rule of law. In one prominent case, involving an opposition Member of Parliament, the Court acquitted the defendant of treason, despite the fact that the government clearly sought his conviction. See *Uganda v. Yoweri Kyesimira* (H.C. Crim Session Case No. 134 of 1983; unreported).

plunging the country into a state of anarchy. Needless to say, these events did little to resolve the crisis as the UNLA under Tito Okello was more preoccupied with defeating the growing guerilla movement. Thus the Police, together with the military, continued to abuse human rights indiscriminately. The collapse of the peace talks between the government and the guerilla forces under Yoweri Museveni, led to the assumption of power by the National Resistance Movement (NRM) and its army (NRA).

*(2) Phase Two (1986-The present)*

Elsewhere we have dealt more extensively with the issue of prevailing conditions in Uganda under the NRM and in particular in relation to the issue of societal freedoms, "grassroots democracy" and the phenomenon of militarism.<sup>116</sup> Drawing in part from that analysis, here we focus on the extent to which the NRM/NRA represents the possibility for the fundamental reconstruction of the police force and a reorientation and reformulation of police powers in Uganda, to the extent that human rights abuses will indeed be considered a thing of the past.

In its ten-point program, formulated while still in the "bush," the NRM ranks "security" as second only to democracy in its struggle to introduce "fundamental change" in Uganda.<sup>117</sup> On the second anniversary of assuming power, the NRM listed the following as being its major achievements in the area of security:

The recruitment of a nationally-balanced army, with a professional code of conduct and the same for the police and local defence forces (people's militia);

- The establishment and legalization of two security (intelligence) organizations;

- The recruitment of Local Defence Forces for every district under the aegis of Resistance Committees, '... to reinforce the police in maintaining law and order in their area,' and,

- Formulation of a Code of Conduct for the NRA, making it an offence for any soldier to abuse, insult or molest a civilian, extort

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116. See Oloka-Onyango, *Law, 'Grassroots Democracy' and the National Resistance Movement in Uganda*, 17 INT'L J. SOC. L. 465 (1989).

117. See Y. MUSEVENI, TEN-POINT PROGRAMME OF NRM 8 (1986):

As soon as the NRM takes government, not only will the state inspired violence disappear, but so will even criminal violence. Given democracy at the local level, a politicized army and police and the absence of corruption at the top as well as interaction with the people, even criminal violence can disappear. Thereby, security of persons will be restored and so will security of legitimately owned property.



money or property, and to kill a civilian or prisoner of war.<sup>118</sup>

There is little doubt that these are laudable achievements, in light of the fact that “security” had become as scarce as any other essential commodity in Uganda’s scarcity-ridden political economy. The promulgation of a Code of Conduct for the NRA represents the first time in the constitutional history of the country that such a measure has been taken, as does the legalization of the government’s intelligence services.

As far as the subject-matter of this study is concerned, two main questions come to mind: *To what extent have these measures introduced a fundamental change in the nature and execution of police powers? How far are human rights abuses and violations by the police and the other security agencies phenomena of the past?*

Regarding the first question, the establishment of Resistance Committees (RCs) extending from the village level up to the districts has in some measure extended the parameters of police powers to organizations other than the traditional police and security agencies. Section 15 of the statute that legalized the RCs provides *inter alia* that a Resistance Committee shall “be responsible for the implementation of the policies and decisions made by its Resistance Council, and;

- (a) assist the police and chiefs in the maintenance of law and order;
- (b) oversee security in the area;

...

- (d) at the village and parish levels, vet and recommend persons in the area who should be recruited into the Armed Forces and Prisons service, and

...

- (i) generally monitor the administration of the area and report to the appropriate authority any incidents of mal-administration, corruption and misuse of government property.<sup>119</sup>

The creation of new bodies has been attended by the attempted restructuring of the old. The regular police, considered understaffed, badly trained and corrupt, was given a new Inspector General, who initiated a screening exercise of all police officers. The objective was ostensibly to weed out all those who were corrupt, below the acceptable minimum educational standard, or had committed human rights abuses. Out of an original establishment of 22,000, only 3,000 remained.

118. NRM SECRETARIAT, *THE POLITICAL PROGRAMME OF THE NRM: TWO YEARS OF ACTION 25* (1987).

119. § 15, *The Resistance Council and the Committee Statute*, 1987.

According to Amnesty International,

This meant that the system was unworkable, so another 3,000 of the least egregious offenders were reinstated and a rapid recruitment program was launched to train new recruits. The aim was to raise the number of personnel to about 10,000, then to slow down recruitment so as to allow the new officers to be absorbed and gain experience.<sup>120</sup>

Originally, neither the new legislation governing the security forces, the Code of Conduct of the NRA, or any other enactment vested the army with special powers of arrest, as under previous governments. A number of NRA personnel have been summarily executed having been found guilty of violating the Code, and a few are being held in custody.

Seen in isolation, these measures point to sincere attempts to prevent the resurgence of the human right's crisis of the 1970s and early 1980s. But what of the other side of the coin? First, a war against the government has festered in the north and the government has perceived of the problem as *military* or *criminal*, ignoring the political facets of the problem. Furthermore, the NRA has almost unfettered powers of arrest in areas that are disturbed by rebel activity. Neither has the incorporation of the Code or the other statutory provisions — such as those relating to arrest and detention — been enforced to the full, even in areas that are relatively tranquil.

All of this is compounded by the essentially militaristic philosophy of the NRM that permeates all the policies of the “interim, broad-based” government. That philosophy manifested itself early. In introducing the RC statutes for debate in the interim parliament, Museveni concluded his speech thus:

The NRA will be the guarantor of security of those political trends that pursue legitimate causes, using legitimate methods. Note that I am using ‘legitimate’ and not legal. ‘Legitimate’ is a political word. It refers to legitimacy of a cause, whether or not there is law backing it at that particular time.<sup>121</sup>

The question of “legitimacy” or “legality” is a critical one, both in reviewing the RC statute and when considering other NRM legislation that impinge upon the issue of human rights in Uganda today. With respect to the RCs there are problems in the overall control exercised over them by the NRM, raising questions about their autonomy and indeed,

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120. AMNESTY INTERNATIONAL, UGANDA: THE HUMAN RIGHTS REPORT 15-16 (Mar. 1989).

121. See Namakajo, *Uganda: Vested Interests Expected to Oppose Laws*, AFR. NOW (June, 1987). Also cited in Oloka-Onyango, *supra* note 116, at 470.

the extent to which they are intended to replace the old administrative and political structures. With respect to their vesting powers over the selection of security officials, it is noticeable that this is only at the village and parish level — presumably the NRM reserves that power for itself at the district and national level.

Several new laws have been passed in the National Resistance Council (NRC) — the interim legislature — that belie the NRM claim to introducing “fundamental change.” Among these are: the Constitution (Amendment) Statute, the Penal Code (Amendment) Bill, the Magistrates Courts (Criminal Procedure (Special Provisions) Bill, and a recent amendment to Legal Notice No. 1 — the instrument on which the NRM claim to legitimacy rests.<sup>122</sup>

The Constitution (Amendment) Statute changed Article 21 of the Constitution, which provides that nothing done under the authority of the declaration shall be held inconsistent with or in contravention of Article 15 of the Constitution, to the extent that such has been authorized by the declaration. Article 15 provides for equal protection before the law, the presumption of innocence and a fair trial, and other due process protections.

The other legislation attempted to make significant changes in the powers of the government and its security forces. The crux of the Magistrate’s bill, was section 6 that extended the definition of “police officer” in the 1970 Magistrate’s Courts Act to include a member of the NRA. This brings the government full circle, even if on the whole the NRA has exemplified better discipline than its predecessors. Although pressure from progressive circles within Uganda managed to prevent incorporation of the more blatant aspects of those bills, the victory may prove hollow in light of Museveni’s dichotomous analysis of “legitimacy” and “legality.” In considering police powers and human rights abuses in the country today, this issue must always remain in perspective.

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