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The Zimbabwe Law Review is no longer a thing of the past!

You may have been starting to think that the Zimbabwe Law Review had become redundant. One unkind person went as far as to suggest that we should rename our journal "The Historical Law Review" !

Unfortunately we had fallen a few years behind in the production of the Review. The last issue to appear previously was Volume 7 / 8 covering the years 1989 and 1990. The Editorial Board of the Review sincerely apologises to all of valued subscribers and buyers of the Review for the inconvenience caused to them. In order to speed up the process of getting up to date we decided to combine Volumes 9 / 10 (1991 and 1992) of the Review into a single number. Those who have subscribed in advance will be receiving their ordered issues within the near future. The next volume, Number 11 (1993), will be ready for distribution within the next few months. The Editorial Board would like to assure you that in the future the Law Review will be produced on a more regular basis.

We hope that you will renew your interest in this publication by renewing your subscriptions if you have allowed them to lapse. Details of current subscription rates are to be found on the cover of the Review. There is a reduced price for those ordering a set of the Zimbabwe Law Review.

We would like to call for the submission of articles, book reviews and casenotes for consideration for inclusion in this publication. These are momentous times for Southern Africa. Democratic rule has finally come to South Africa after so many years of struggle, suffering and oppression. We would like to take this opportunity to extend our heartfelt congratulations to the people of South Africa on the attainment of their liberation from apartheid rule.

In Southern Africa there is an urgent need to analyse and debate topical matters such as issues relating to development and reconstruction, equitable land redistribution, the impact of economic structural adjustment programmes, the protection of human rights, democracy and constitutionalism and the protection of the environment. We call for the submission of articles on these and other important issues.

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The Editorial Board would like to extend its sincere gratitude to the Raul Wallenberg Institute of the University of Lund in Sweden for its generous donation of desktop publishing equipment to the Faculty of Law of the University of Zimbabwe. This equipment was donated for use in the production of the Zimbabwe Law Review and other Faculty publications. This current number of the Zimbabwe Law Review was produced using this equipment.

"POPULAR JUSTICE", RESISTANCE COMMITTEE COURTS AND THE JUDICIAL PROCESS IN UGANDA (1988-1992)

by

J oloka-Onyango*

**We are opposed to a situation where justice is a preserve of the privileged
few and where it is sold like a commodity to the highest bidder.
Justice must be made easily accessible to every Ugandan who requires it.
This principle is the cornerstone of our policy.**

— Yoweri Museveni —

A Broad Introduction

Some variant of the above-quoted theme is virtually always the take-off point of President Yoweri Museveni's speeches whenever he encounters a group of lawyers, judicial officers or other "legalities" in some way connected with the Administration of Justice in Uganda. Indeed, at the address to the Uganda Law Society in 1987 from which the above extract is drawn, Museveni scathingly attacked law, the legal profession and the Judiciary for various inadequacies. (Museveni, 1989:57). Less prominent National Resistance Movement (NRM) officials intermittently repeat aspects of the same theme up to the present time.¹

This posture *vis a vis* the issue of justice in Uganda under the NRM administration, derives in large part from the guerrilla experience of the movement, which operated autonomously of state central and local governmental structures, and was *ipso facto* forced to develop alternative forms of governance and administration, including dispute resolution. Resistance Councils and Committees ("RCs" in local parlance) operated in clandestine fashion and as a support mechanism for the guerrilla combatants in a highly decentralised fashion. This was essential to effectively deal with the emergence of local crises in an expeditious and democratic fashion. Fired by this experience, once in power the NRM proclaimed its intention radically to alter

* Lecturer, Faculty of Law, Makerere University.

¹ At a training program organised for Resistance Committee Executives by the secretariat of the National Resistance Movement (NRM), the Director of Legal Affairs (Jotham Tumwesigye), asserted that there were significant problems existing in the administration of justice in Uganda. The system was "elitist" and irrelevant to existing conditions and those responsible for its administration (the Judiciary) lacked initiative and the social consciousness necessary to deal with the demands of the majority of the populace. (Training Program, September 24-29, 1991).

the character of the administration of justice in Uganda in order to institute a system of "... popular democracy and a decent level of living for every Ugandan" (NRM, 1986:7).²

This article sets out critically to address the nature and the substantive content of the judicial powers aspect of RCs in Uganda and their link to the phenomenon of "Popular Justice" in Uganda. In this respect, it builds on the earlier, more general studies about the Resistance Council system in Uganda (Ddungu, 1989; Oloka-Onyango, 1989, and on the NRM government as a whole (Mamdani, 1988). Furthermore, it develops further the most serious attempt to deal with the phenomenon of Popular Justice since 1986 ... a work that was truncated by the author's tragic demise (Berkeley, 1988).³

My basic thesis is that the efficacy of RCs as viable alternatives to traditional methods of dispute resolution (namely the courts), attained their heyday under the guerrilla experience in which they were initiated (1981 to 1985). Following the capture of state power and the institutionalisation of judicial power in these bodies, the notion of "popular justice" has suffered considerable setbacks. In part this is because of a failure by the state power to radically alter the framework of political, social, economic and cultural conditions within which they operate, which has led the traditional "guardians" of the law to reassert their hegemony.

A number of theoretical issues, based on the actual operation of the RC Court system, are explored in this study. First, of course, is the very concept of "popular justice" — a notion that has for long tantalised lawyers, sociologists and politicians. It holds not only populist attraction, but is viewed by Progressives across the board as the only viable alternative to traditional, exclusive and costly forms of dispensing justice. The late Anton Lubowski put the case most forcefully, when he urged for a more decentralised and popular adjudicatory system for an independent Namibia,

People should be encouraged to use informal arbitration and mediation to resolve minor disagreements — people's courts at their best. Communities should be encouraged to elect individuals from among themselves to act as arbitrators in certain matters... Such local courts should ... be staffed with judges elected from the communities they serve — not necessarily legally — trained people, but persons known in the community for their sense of justice and fairness. Like small claims courts, such courts would have a limited jurisdiction, and legal practitioners would be excluded from participating altogether (Lubowski, 1989:18)

There is by no means any agreement that "popular justice" is a good thing, but the basic argument of this paper is that it is inevitable within a context of stark disparities in wealth and power, and the ideological domination of present traditional fora for the adjudication of disputes by archaic and exclusionist ideas about justice.

² The main political philosophy of the Movement is derived from the Ten Point Programme that outlines the essential objectives of the struggle and the means envisaged for its achievement. Despite continuous reference to its ideals, it is debatable whether in point of fact it forms more than an attempt to galvanise the popular classes against the order in existence at the time.

³ There have been several student research papers that have dealt with the issue of the exercise of RC judicial powers. Only Berkeley however, sought to make a systemic examination of the linkage with the notion of popular justice.

My second concern is how "popular" the justice exercised under the framework of RCs in Uganda has been; how it is linked to the phenomenon of "grassroots democracy" and its operation alongside, or in opposition to the traditional systems of justice. The third is related to the character of the state at this particular historical juncture in the development of the political economy of post-colonial Africa. Of particular interest is how the attempt to introduce new forms of governance, more democratic methods of administration and a system of "popular justice", respond to the question: **How far can attempts at reform extend?** This last point is of critical import in Uganda and Africa as a whole, not only on account of the past several decades of human rights violations, but also, given the raging debate about new democratic directions in the 1990s.⁴

To achieve these objectives, I have divided the paper into 3 parts. Part I examines the intricacies of the general concept of "popular justice" within the global arena, and in its African variant. In addition, we discuss the nature of the Judicial process in Uganda and briefly introduce the twin phenomena of "grassroots democracy" and popular justice as expressed through the system of Resistance Committees. In Part II, we undertake a critical consideration of the salient aspects of the Resistance Committees (Judicial Powers) Statute, 1987 — the law that conferred judicial powers on RCs — and consider specific aspects of its operation. In Part III, we critically examine the overall impact of the conferment of such powers in RCs — the response of the general public, the reaction of the traditional organs of the Judiciary, and finally present the probable directions in which the regime will evolve in the future. This is of particular significance in light of specific proposals for reform and amendment of the system and the general debate on Uganda's constitutional future. In concluding the paper, we revisit the arguments traversed and critique both the main critics and the basic failings of the system, and pose a number of theoretical constructs which are considered essential for a system of genuine popular justice to be successfully ramified in the Ugandan context.

I. Popular Justice And The Struggle For Democracy

A. The Global Scene

It is now a widely accepted principle of political theory that one of the essential prerequisites of a democratic society, is that popular sectors of society should be effectively involved in the political process of decision-making (Pateman, 1970). Such involvement must of necessity directly impinge upon their political, social, economic, cultural, legal and institutional existence. This is of course the subject of much varied interpretation, canvassing the issue of periodic elections (as contained in the various international human rights instruments), to that over the degree and extent of the accountability of publicly-elected officials (Steiner, 1988), to the issue of whether or not economic and social rights can and should be justiciable (Dias, 1990:44).

Until the demise of the Eastern European systems of government, there was also much debate over the social and economic underpinnings of a democratic society,

⁴ Several aspects of this debate are traversed in the Anyang Nyong'o/Mkandawire/Shivji debate, carried out in the pages of *Codesria Bulletin*, which was sparked by Nyong'o's paper, (1988: 71-86).

versus or in relation to the civil and political aspects of its manifestation. Unfortunately, the far-reaching events of the past few years have done little to advance the debate save to reinforce the erroneous view that the Western model outranks any other in terms of espousing the “will of the people” and that it is the system *par excellence* for real participation and empowerment. It is particularly disappointing to note that the “pro-democracy” struggles now engulfing the continent devolve essentially to the issue of multi-versus single-party systems, rather than a serious critique of the actual degree of democratic participation achievable within either, against the backdrop of the context of the African political economy (cf Kibwana 1991, Oloka-Onyangó, 1991).

In contrast, the question of “popular justice” still evokes ideological fissures of old. On the one hand you have those who even decry the possibility of the existence of such a notion, equating it to “Mob Justice”, while others believe that unless the broad sectors of society actually control the fashion in which the Judicial power is exercised, you cannot speak of democratic government. Lawyers imbued in the Common Law system in particular, look on in horror at any attempt to give judicial power to anybody other than the traditional Judiciary.

Viewed in historical perspective, the concept of popular justice is quite clearly linked to the attempt to move away from capitalist forms of adversarial, costly and highly technical methods of dispute resolution. As such, they originated in and found the greatest degree of expression within the erstwhile socialist economies — the People’s Society of the USSR being the earliest forms. This is not to say that in Western societies, similar expressions of disharmony with the legal and judicial system are absent. Many prominent jurists and judges have been at the forefront in decrying some of the more distinctly unjust aspects of the Common Law system (Gyandoh, 1989: 139-141). One of the most innovative and interesting attempts at an alternative adjudicatory system in fact emerged from the travails of the 1960s struggle for African-American liberation in the USA.

The objectives of the New York Law “Commune” as it was known, were succinctly described in a book tantalisingly entitled “Law Against the People”, in the following manner:

The young lawyers and non-lawyers wanted to create a new kind of law firm partly as an act of political honesty. It was not simply that the legal profession avoided its responsibility to defend political activists. More seriously, the rebels recognised the inherently undemocratic nature of the legal profession, which they viewed as conservative, elite and oriented to the upper middle class. The aim of the Commune therefore, was to transform this lawyer-client relationship. In addition, as a political collective, the members would challenge the traditional lawyer/client relationship, but more importantly, in relation to how the concept of justice was perceived and realised in American society; “Abstruse rules and esoteric terminology prevent the masses of the people from perceiving how the law relates to their lives...” In response to these problems in the system and the immediate issue of constructing solid legal defences to the persecution of Civil Rights activists (particularly the Black Panthers), it was believed that Commune lawyers, would close the gap between lawyer and client by turning legal jargon into everyday language and by encouraging mutual decision-making. They would work as closely as possible with political groups, not only in an advisory capacity, but in the actual planning of legal strategy as part of a political program (*ibid.*)

Clear limitations were apparent in this strategy. First, it confined itself to the lawyer/client relationship, omitting any strategy for dealing with the conditions that led to

the monopolisation, and alienation of the profession from the broad masses of society: esoteric terminology is but one aspect of the problem. (Kennedy, 1983). Secondly, the political program of the movement was inchoate, and in practical terms did not proceed beyond the immediate needs of the time. Finally, it sought to simplify the law, but not to overturn the essential foundation upon which legal principles were constructed.

Thus, just as was the case with the Civil Rights struggle within which it was born, Lecourt's "communitarian" ideals about law were hijacked, transformed and rendered impotent as a tool for the liberation of the legal regime and the system of justice from its traditional capitalist and exclusionist objectives. "Poor People's Law" has become as much accepted as the food stamps of the Welfare state, namely, as a palliative to the most egregious manifestations of a legal regime that has nothing whatsoever to offer in terms of socio-economic and political liberation. According to Fernando Rojas, such "Traditional Legal Services" as those that now predominate in developed capitalist economies have been wholly 'captured' by the system: "Lawyers who practise traditional legal services ordinarily adopt a combination of hierarchical, paternalistic and philanthropic attitudes towards clients or beneficiaries. Rather than questioning the hierarchical position of lawyers and social scientists, traditional legal services reinforce it" (Rojas, 1988:210).

Popular justice within the erstwhile socialist economies achieved a much higher degree of institutional expression and went a considerable distance in transforming both the legal regime and the system of the Administration of Justice. Whether or not this actually led to the liberation of the popular classes from social, economic and political oppression, would require much deeper exposition than is attempted in the present discussion.

B. The African Context

The experience of popular justice within the African continent is of much greater relevance to our present discourse for three reasons. In the first instance, post-colonial African countries all share profound dissatisfaction with the inherited rules of colonial African procedure and practice, for, as Robert Seidman noted:

What was received in Africa... was a sharply truncated version of English law. In commercial matters, English law was applied without particular regard for any special circumstances in the colonies. The restrictions upon the activities of entrepreneurs implied by the Welfare state, rather than bringing about at least a limited redistribution of wealth, had the consequence merely of maintaining the physical life of the African employees. On the political side, the democratic elements of English law were equally absent. What law was received was applied with remarkable rigidity and judicial conservatism (Seidman, 1969: 78-79).

As a consequence of this experience, many African states seek (even if somewhat atavistically) to re-create the conciliatory systems of dispute resolution that are believed to have prevailed in pre-colonial Africa. Secondly, they are all fired by the wider objective of the struggle to achieve political transformation that impinges on the social, economic and cultural realities that have characterised the post-independence conditions of African society. Thus, while in Mozambique the systems of popular justice evolved directly out of the colonial struggle, in Libya, Ghana and Uganda, they were specifically directed against the post-colonial regime that had nurtured corruption, nepotism, the denial of human rights and general political turmoil. Finally, whereas the motive force for alternative systems of justice outside

Africa (especially in Latin America) have in large part been forced by the existence of powerful pressure groups within civil society, in the African context, this has in the main been introduced by the state itself.

Invariably, the actual manifestation and operation of popular justice in each country is marked by significant distinctions. Assessing the Mozambican attempt to introduce a system of popular justice throughout the length and the breadth of the country, Sachs and Welch (1991) generally credit the system as having been "valuable and capable of being put into effective operation...", noting at the same time that this has required substantial adaptations and modifications, "... most of which have pointed in the direction of reinforcing what might be called internationally accepted procedures, values and methods of training." (*ibid*). They make the point that it is difficult to assert whether this represents a capitulation to "traditional" (read "capitalist") forms of legal order or simply reflect a universality in the applicability of legal principles — a point that we shall subsequently revert to in considering the Ugandan case.⁵

Considerably more hostile is the treatment of the system of "Popular Tribunals" in the Ghanaian context, perhaps on account of the jurisdiction they exercise over matters of a criminal nature. Sam Gyandoh (1988) asserts that the Tribunals have led to "... a monstrous travesty of justice, which in turn exposes the entire political system... to widespread hatred, ridicule and contempt." (p142). He concludes that the entire legal process has become closely enmeshed with the political universe, to the point where the two become almost indistinguishable (p157). According to one US-based human rights group the tribunals are a sheer abortion of justice,

Revolutionary or not, in practice the people's tribunals in Ghana are a mockery of justice. Ostensibly established to facilitate the administration of justice, and to make it more accessible to ordinary people, they have in fact become an arm of the government. They have undermined respect for the judicial system as an impartial body that is capable of promoting justice and respect for the rule of law (Africa Watch, 1992:23).

How does the case of the exercise of judicial power by Uganda's Resistance Committees fare in light of the past four years of its existence and operation? To what degree does it draw upon or distance itself from those experiments aimed at the transformation of the legal regime in similar African contexts? What are the lessons to be drawn from the Ugandan attempt? The answers to these and the other issues involved in the evolution and operation of Uganda's experiment with popular justice are the subject of the following sections of the paper.

C. The Case Of Uganda

The exercise of judicial power in post-independence Uganda has differed little in substance from the colonial system in which it was developed and nurtured. Commencing with the August 11, 1902 Order-in-Council, which stipulated that the

⁵ Despite certain drawbacks, it is nevertheless fairly clear that the system of People's courts in Mozambique made significant inroads into the alteration of the abject status of women, access to land and a sense of empowerment among the popular classes. It is a mark of sheer irony that in the current wave of "democratisation" and privatisation, these courts have been abolished under World Bank/IMF advice on the spurious grounds that such courts are too expensive to maintain.

law applied by the Courts shall comprise, *inter alia*, various named Acts of the United Kingdom in force at that date, the substance of the Common Law, Doctrines of Equity and Statutes of General Application, as well as indigenous laws and customs, **provided always** that they were not "... repugnant to justice or morality ...", the substantive content of judicial power has been to ramify the Common Law with all its attendant (and archaic) rules of practice and procedure. The Judicature Acts (of 1962 and 1967) did little to alter this position, despite the fact that the latter statute was passed immediately following the 1966 Revolution, whereby Uganda (and the legal regime in particular) was supposed to have attained the stage of total independence, or in legal jargon "autochthony". Indeed, the event sparked such debate among the intelligentsia at the time, that the editor of its flagship magazine — *Transition* — was subsequently detained without trial, together with one of the main participants in the debate.⁶

The use of military force produced a pliant Judiciary, hamstrung by the decision in the case of *Uganda v Commissioner Of Prisons, Ex Parte Matovu*,⁷ that sanctioned the overthrow of the previous order by extra-constitutional means. Thus, up to 1971, absent a few controversial cases relating to the confiscation of property and the deprivation of life, the Courts steered well clear of any attempt to propound a radical interpretation of the legal order, sanction state power, or even promote the observation and protection of human rights. The debilitating extent of this addiction to positivism was clearly demonstrated in the case of *Difasi v Attorney General*.⁸ Indeed, in the face of extensive powers of detention vested in the Executive, the Courts often refrained from even inquiring into the validity of a claim involving the abuse of power.

The era of military rule (1971 to 1979) was even more debilitating to the judicial process. By way of presidential decree, Idi Amin usurped much of what used to be the province of Judicial fiat and converted it into Executive prerogative to be exercised by Military and para-military elements in the state. With but an initial

⁶ In a pointed critique of the "New Order" and the Judiciary that was involved in the interpretation of it, Dl. W. Nabudere stated: "A closer look at the (1967) Constitution however shows that the Old Order was preserved. Article 115 preserves existing laws. Articles 116 and 117 preserve existing public offices. Articles 119-122 preserve among other things (the) Queen's rights and privileges and bestows them on the President. Article 126 preserves the Parliament which does not enact new laws of the "Revolution" to put into effect its "ideology", on the contrary, it continues to enact laws of a Colonial character (e.g. hanging robbers, who have incidentally increased since the "Revolution", without suggestions as to how to combat the social causes of it). It perpetuates an "independent judiciary" within the meaning attached to it by imperialism and neo-colonialism. it leaves intact a Police Force which is more vicious against the people than the colonialists ... In our case the 1967 Constitution in the main preserves the Old Order and leaves it intact." (*Transition* 37, 1967:12).

⁷ *Matovu's* case has remained like a Damocles sword over the independent operation of the Judiciary in Uganda. Applying Kelsen's Pure Theory of Law and State, and placing extensive reliance on the Pakistani case of the *State v Dosso & Another* PLD 1958 SC 533, the court declined to find that the abrogation of the independence Constitution by then-Prime Minister Milton Obote was illegal. Despite the subsequent debunking of *Dosso's* case in Pakistan, Ugandan courts remain addicted to its essential elements (cf Ssempermbwa, 1974).

⁸ [1972] EA 355. See further, Kasule (1985).

muted attempt at protest that led to the abduction and disappearance of the then Chief Justice, judicial power under the Military regime assumed the posture of a toothless dog (International Commission of Jurists, 1977:62).

Amin's demise in 1979 heralded an attempt to revert to some fundamentals of bourgeois principles of the Rule of Law, and accordingly, the Judiciary was resuscitated somewhat⁹, only to be immediately eclipsed by the Civilian dictatorship that was in place between 1980 and 1985. In the meantime, a guerrilla insurgency had developed in the country-side, led by Yoweri Museveni's National Resistance Movement (NRM).

Drawing ideological and tactical inspiration from the Angolan and Mozambican revolt against colonial rule, the NRM built its onslaught against the civilian dictatorship on the basis of a system of grassroots peoples cells, dubbed "Resistance Committees." Reports of their operation at the time point to the critical involvement of the people in the essential elements of governance and participation. This extended to the exercise of judicial power in and *ad hoc* fashion, without extensive rules of procedure, nor indeed with any reference to written law or established legal principles. At the same time, they were not an attempt to revert to custom, pure and simple. In the words of one active participant in the evolution of the system, they relied essentially on common sense. In this way, RCs gave pride of place to popular justice in a real sense, albeit the guiding spirit (or text) behind their operations, was the inchoate political philosophy of the NRM's "Ten-Point Program."

In mid-1985, following the collapse of the Obote Administration, the NRM moved out of the "Luwero Triangle", the initial arena of its operations. The spread of the Movement to the rest of the Southern and Western regions of the country provided a foundation for a critical phase in the expansion of the Movement and its fighting wing, the National Resistance Army (NRA), eventually culminating in the capture of state power in January 1986.

From the outset, the NRM proclaimed its intention to radically transform the essential elements of governance and participation in the country. At his inaugural speech, Museveni stated:

No one should think that what is happening today is a mere change of the guards: **it is a fundamental change in the politics of the country.** In Africa we have seen so many changes that change as such is nothing short of mere turmoil. We have had one group getting rid of another only for it to be worse than the group it displaced. Please do not count us in that group of people: the NRM is a clear-headed movement with objectives and a good membership (Museveni, *op cit*, emphasis added).

Paramount in the program to introduce "fundamental change" was the system of Resistance Committees — the essential features of which have been critique

⁹ In the Constitutional case of *Kayira & Ssemwogerere v Rugumayo, Omwony Ojok, Ssempebwa & 8 Others* (No. 1 of 1979), the court went so far as to declare that the removal of Y.K. Lule — the first post-Amin President — was not legal, but the judgment is only of jurisprudential value since two successive regimes had come to power by the time the court delivered its judgment. It is important to note however, that the Court still found that *Matovu's* case and Kelsen's Pure Theory were applicable.

elsewhere.¹⁰ For the present purposes, it is necessary only to highlight and examine the judicial powers aspect of these organs and the fashion in which they represent the first serious attempt to introduce a regime of popular justice within the Ugandan political economy.

2. Resistance Committees And The Judicial Powers Statute

A. An Outline Of The Law

As part of the process of ramifying the system of Resistance Committees and Councils throughout the entire country, RCs were institutionalised by the Resistance Councils and Committees Statute (No. 9 of 1987), which laid out the essential parameters of the administrative and quasi-legislative powers of these new organs of governance. The primary feature of the RCs was that their executive organs comprised essentially elected, rather than appointed individuals. This was part of a bid to move away from the situation in which accountability was wholly absent, and local chiefs exercised life and death control over their minions.¹¹ The Resistance Committees (Judicial Powers) Statute (No. 1 of 1988) established the scope and the content of the judicial powers of these same bodies. These included *inter alia*, matters relation to their composition, jurisdiction, remedies and appellate powers. A brief review of the main features of this statute is therefore essential.

All Resistance Committees in every village (RCI), parish (RCII) and sub-county (RCIII) were established as Courts (Section 1); and consisted of the members of each such village, parish or sub-county (s 2) Under Section 3 of the statute, the quorum, of each Court was established at not less than five out of the nine Executive Committee members, presided over by the Chairman of the RC, or in his absence the Vice Chairman or a member elected from among those present, with provision being made for the co-option of other members of the RC in order to make a quorum in cases where one was lacking. The essential procedural rule of the Courts is set out in S.3(5) of the statute,

Every question arising before the court shall be determined **by consensus** and in default of a consensus shall be determined by a majority of the members sitting ... (emphasis added).

Procedural issues of a typical judicial hearing are dispensed with as the Courts essentially apply rules of Natural Justice — each party being allowed to call

¹⁰ A recent criticism of the RC courts asserts that, "Whatever allegations of popular support might be put forward by some of our politicians it is clear that the RC system has had to be propped up to save it from collapse. When sugar went the only remaining base for the RCs was that they could judge very few criminal cases and a bulk of civil cases. In this way they remained with a tool still to threaten the people into apparent support for one feared to be completely indifferent lest one's case would not receive a fair hearing." (Muhumuza, 1992:12).

¹¹ According to the Report of the Commission that inquired into the local government system, "There has never been anything functionally specific about the duties of a Chief, in the colonial period, or since. 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 the tax, who subsequently arrested the peasant, and who later heard his appeal if the peasant felt there had been a miscarriage of justice!" (Uganda government, 1987:13).

witnesses, be cross-examined by any member of the Court, and tender in all kinds of evidence. Significantly, under s12(2), no party to a suit before an RC Court may be represented by an Advocate unless in proceedings dealing with the violation of the RC's by-laws — a reflection of the necessity to restrict access to these courts by professionals.

The essential aspects of the RC's jurisdiction are contained in Sections 4 to 18 of the Statute. In sum, RC courts are empowered to hear all cases concerning civil disputes over debts, contracts, assault and/or battery, conversion and/or damage to property and trespass (Schedule 1). They also exercise jurisdiction over matters of a Customary nature concerning:-

- i) Land
- ii) The marital status of women;
- iii) The paternity of children;
- iv) The identity of Customary heirs;
- v) Impregnation of or elopement with a girl under 18 years of age, and
- vi) Customary bailment. (Schedule 2)

A momentary limitation of Shs. 5, 000/- (then equivalent to US\$10) was placed over matters relating to the issues in Schedule 1 of the Statute, while the trial of Schedule 2 items was unrestricted. The jurisdiction of RC Courts was thus envisaged to involve matters of a small nature, partly on account of the logistical impasse that had engulfed the higher Magistrate's Courts, but also in the quest to confer a measure of actual power in these organs. In addition, it was also intended that RCs exercise primary jurisdiction over all matters of a customary nature, regardless of the pecuniary amounts involved.

Many of the provisions of the statute concerning the question of jurisdiction duplicate those traditionally found within the Common Law system of institution and hearing civil suits. These include the provision of notice to the parties (s 9), witness summons (s 11), recording the proceedings (s 15), Court hours (s.11), information on rights of appeal (s 17) and the doctrine of *res judicata* (s 18). A significant departure is that whereas the language of all traditional Courts in the system is English, s.14 stipulates that "... proceedings of the Court shall be in the language of the Court" which the definition section of the statute (s 37), states "... means the language that the Court may determine to be its language." In most instances, this is the main indigenous language of the locality in which the Court is exercising jurisdiction. Combined with the provision barring Advocates from participating in RC Court proceedings (s 12.2), this stipulation marks an attempt to de-alienate the process of the RC Courts, by ensuring that proceedings are understood by the majority of participants.

Much less innovation is apparent in the remaining parts of the statute concerning remedies (ss 19-25) and appeals (ss 26-29), although there is a clear emphasis on non-adversarial methods of resolving disputes. Indeed, one of the most common remedies employed by the RC Courts is that of reconciliation (s 7 (a)), which almost wholly absent as an applied remedy in the traditional Courts. The system of appeals essentially permits a case to proceed right through the hierarchy of RC Courts, culminating with the Chief Magistrate, and (with the leave of the Chief Magistrate), to the High Court (s 26.2 (d)). Leave to appeal in the last instance will only be granted where the Chief Magistrate is satisfied "... that the decision against which an appeal

is intended involves a substantial question of law or is a decision appearing to have caused a substantial miscarriage of justice." (s 26.3). An appellate court is empowered to reopen a case in total and to hear it *de novo* (s 28), and may either reverse, or vary the decision of the lower Court, increase or reduce the compensation awarded or fine imposed, or substitute any order or combination of orders stipulated in s 7 for those of the lower court. (s 29).

Four years down the road, an assessment and critique of the experience of RC Courts in the exercise of their judicial powers, invariably reveals a number of interesting facts, and theoretical constructs on the dynamics of popular justice in Uganda. This is the subject of the following examination.

B. The Ramifications Of The Judicial Powers Law

Unsurprisingly, RCs enthusiastically embraced the conferment of judicial powers and began to exercise their jurisdiction over most disputes at the local level, even before the ink had dried on the Judicial Powers statute. In the majority of cases, the exercise of judicial power was carried out without reference to the law, because, in the first instance, few of the RCs (particularly at the lower levels of the system) were availed with the statute. Inevitably, this meant that in some instances due process of law was not observed and judgments were issued that were based on considerations extraneous to the notion of popular justice. Court sessions have been held without the necessary quorum being realised; chairpersons have unilaterally made decisions in the absence of their colleagues on the court; the jurisdictional powers of the court and pecuniary) have been overlooked and RC Courts have been known to impose criminal sanctions (which they are not empowered to) or to enforce remedies that clearly violate established principles of natural justice. In a recent assessment of the operation of the RC Court system, Ason Muhumuza has written,

Their procedure was never the same in any two sessions. In some RC courts the crowd of spectators were allowed to shout at the suspect and eventually order could not be maintained. They use past acts of the suspect to reach easy decisions. Statements like "who does not know that you are a thief?" are commonly made. Not much different from mob justice (Muhumuza, 1992:13).

The issue of RC's alleged abuse of jurisdiction and power has perhaps elicited most concern from opponents of the system.¹² In some cases, RC Courts have expelled village residents for alleged involvement in "witchcraft", adultery or simply because such person had "misbehaved", and is thereby deemed undesirable. RC courts have also been utilised to achieve the expulsion and dispossession of minorities who have lived in areas for years, but on account of increasing economic strife (such as the struggle for land) or growing insecurity, become easy subjective scapegoats for the objective reality of marginalization. The gender-biased application of customary principles, has also become another area of conflict. This is of particular concern in the arena of personal law involving succession, land ownership and divorce. Many nationalities throughout Uganda accord women the status of second-class citizenship, whereby they are disallowed from inheriting property and their male counterparts are given preferential treatment (Tamale, 1991). A number of customary

¹² The New York Bar Association quotes one Magistrate as having said, "... RC courts frequently exceed their authority, issuing judgments in excess of their jurisdictional limits and, on occasion, adjudicated murder cases." Busutil et al (1991):

practices provide for the take-over of a deceased man's property by his relatives, rather than by his spouse; although polygamy is an acceptable practice within most traditional contexts, the offspring of such associations are sometimes not given due consideration. Within such a framework, the justice meted out by RC courts is bound to be problematic.

The temperature of the debate over the conferment of judicial powers in RCs rose by several notches when the NRM government announced in 1991 that it intended to introduce an amendment to the Statute that would, "... harmonise the relationship between Resistance Committee Courts and Magistrates Courts; to rationalise and make better provisions relating to the jurisdiction of Resistance Committee Courts; (and) to confer criminal jurisdiction on Sub-county, Division and Town Resistance Committee Courts..." (Preamble to Bill 18 of 1991). **The essence of the bill was** to confer criminal jurisdiction on the higher level RC Courts, and to absorb the lower level Magistrate Courts into the RCs. When the Bill reached the National Resistance Council — the interim legislature — it was of no surprise that the lawyers in the House made the most vociferous objections, suggesting that a kind of jury system be established to replace the RCs. ("CMs Want Jury", *New Vision*, January 23, 1992). A day later, the House rejected the Bill and the Attorney General was asked to draft another.¹³

The Uganda Law Society's condemnation of the proposed Bill extended from the contention that the Administration of Justice is a major constitutional issue and should thus be left to the Constitutional Commission to decide, to the argument that RC Courts violate the principle of the separation of powers.¹⁴ The magistrates complained about the issue of tenure of their office, among several other objections raised, and asserted that their incorporation into RC Courts would make them **governmental**, rather than **Constitutional** appointees. This, they claimed, would diminish respect for the rule of law. It is important to reproduce their objection *in extenso*,

What we shall have is a situation where the Chairman/Recorder/Clerk or whatever, will be appointed by government. All other members will be elected RC officials who can be recalled by the electorate any time.. Once the committee is dissolved, we wonder whether its chairman will not follow suit. We can foresee a situation, therefore, where the officials are most likely to pass their judgment targeting it on the prospect of winning

¹³ See, "NRC Rejects Bill," *New Vision*, January 24, 1992: 1. The government still insists however, that it has no intention of handing over judicial function to any other committee or body, other than RCs. The Director of Legal Affairs, "... stressed that the Government will only concede to dropping functions of RCs arresting suspected criminal suspects." (See, "RC Powers Confirmed," *New Vision*, April 25, 1992:1).

¹⁴ The Law Society argued that "... the vesting of judicial powers into (sic!) the Resistance Committees, which committees are also vested with Executive and Legislative powers, fundamentally offends against the principle of separation of powers ... and consequently also undermines the Judicial independence of the courts ... Resistance Committees and Councils are basically political organs whose role and functions are thus political in nature, and as such it is fundamentally wrong to vest them with judicial powers which powers must be exercised apolitically, and independent of the executive and the Legislature." (Letter from the Executive of the Uganda Law Society to the Hon. Attorney General/Minister of Justice, Ref: LS90, dated October 25, 1991:3)

the next general elections when the law according to the Magistrate/Chairman may be to the contrary. Yet the verdict will be in favour of which litigant carried the highest votes. The Association feels that the tenure of office of these Magistrates will simply be uncertain. It appears to be a dismissal in disguise.¹⁵

RC Court Executives have themselves also expressed dissatisfaction with the fashion in which the judicial powers aspect of their work is actually executed, but in particular make the point that this has been on account of a lack of the support and the knowledge of the law that they are empowered to exercise. They point out too that the decisions of their courts are often ignored by higher-level courts or by law-enforcement agencies; the security agencies are very demoralising; often parties are forced to compromise over a matter; the raising of a quorum is sometimes difficult, leading the Chairperson to exercise the powers of the court, eventually becoming the rule rather than the exception, and finally, the fact that there is no remuneration for the services rendered.¹⁶

Of all the institutions of the state (somewhat unsurprisingly), it is with those that exercise coercive powers of arrest and detention that RC Courts have come into most intense conflict. These include the Police, the Army and the Intelligence organs of government. Here, the conflict is not simply one of a clash of jurisdiction, such as whether a case of assault is criminal (thereby calling into play Police sanction) or civil (which leaves it in the hands of the RCs). Rather, it is the problem of the highly militarised context that continues to pervade the Ugandan scenario. Consequently, RC officials have been subjected to harassment, arrest and torture (extending to death), on account of their activities, including the exercise of their judicial powers.¹⁷

All in all, therefore, the conclusion that emerges is that the passing of the Judicial powers law has resulted in several problems — both in the administration of “popular justice” as well as in the relationship of RCs with other organs of law enforcement and the administration of justice. Of interest, is the question of **why** is this so?, particularly in light of the fact that the RC system (as a local administrative structure) has in general enjoyed widespread acceptance and support in Uganda.¹⁸

3. Revisiting “Popular Justice” In Uganda: The Prospects

The preceding account of the impact of the passing of the Judicial powers law, may read to some like a rather damning condemnation of the RC system in its exercise

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- ¹⁵ Letter from the President, Uganda Magistrate's Association to the Minister of Justice/Attorney General, Ref: P/UMA/91-92, dated October 28, 1991:3. See further, letter from Musalu-Musene, Chief Magistrate, Kabale/Rukungiri District to the Minister of Justice, date August 24, 1990.
- ¹⁶ This information was derived from interviews with various RC Executives, as part of a wider on- going research project, concerning the exercise of judicial powers.
- ¹⁷ In a fairly recent incident in Mbale, Eastern Uganda, one RC official was abducted by Army officers from a nearby barracks, severely tortured and eventually murdered, in retaliation for having reported about NRA mistreatment of civilians to the Press. (“Brave RC official killed,” *New Vision*, August 7, 1991).
- ¹⁸ In a survey of “organised” (principally middle class) groups, conducted by the present writer on Constitutional issues in Uganda, RCs received overwhelming support from 77% of the respondents, although the tally with respect to their exercise of judicial powers was certainly more circumspect. (CBR, 1991: 16-17).

of such powers, and by extension, of the whole notion of popular justice in Uganda. Our view is quite to the contrary. Instead, it reflects only the limitations of the system, not a critique of the conferment of judicial powers upon RCs.

It is a revelation of the various range of forces extant in the current Ugandan political economy, as well as the resilience of old forms of legal and political hegemony. Ultimately, it is a critique of the political framework within which the NRM government has sought to introduce a regime of "popular justice" without simultaneously attempting to break down the structures of social, economic and legal domination that they inherited from the ancient regime.¹⁹ As Sachs and Welch point out in recounting the Mozambican experience with people's courts,

It is not simply a question of balance, that is, of balancing out the popular aspects with professionalism and the professional aspects with community involvement. There has to be a clear understanding of the kinds of work issues to be tried, their level of seriousness and the consequences of the trial for the litigants and for the society at large ... The problem facing those who wish sincerely and profoundly to transform the colonial-type structures of justice and replace them with new structures that clearly serve the interests of the people, is precisely how to create the conditions both institutionally and subjectively for the integration of these so-called universal standards of justice into a popular community-based system. (Sachs and Welch: 22-23).

Instead of attempting to introduce a minimum level of reform of the inherited systems, these have been retained intact. Secondly, the NRM's conceptualisation of law reform has been technical and bureaucratic. It fails to take into account the social, class and historical characteristics of the legal system. This is most clearly demonstrated by the passing of the Law Reform Statute in 1990. This statute simply fails to deal with the various problematic issues raised by the existence and operation of a legal regime that is essentially antagonistic to the broader sectors of society. Thus far, the NRM has failed to make a serious reflection and appraisal of this regime and to re-direct its orientation towards a truly popular mechanism of dispensing justice.

In this scenario the law on RC judicial powers was constrained insofar as it did not attempt to challenge the forms and the substance of traditional structures of dispensing justice by the normal courts. Indeed, apart from the emphasis on reconciliation, popular participation and the emphasis on reconciliation, popular participation and consensus decision-making, one could say that they are simply another tier in the judicial system. Once these powers became legislated, then the initiative that has characterised their operation in the "bush" was stifled. In a context where these powers are not legislated, then objections such as those raised by Muhumuza (*supra.*) to the changing procedures adopted by the courts, do not hold much substance. The point would really be the substance of the proceeding, and not its technicalities. Once legislated in the manner of the Judicial Powers law, then the reverse is true. Consequently, it is not surprising that the condemnation of the courts have been most vociferous from the so-called guardians of the profession — the traditional courts and the lawyers.

¹⁹ Indeed, a litany of ills and problems of traditional courts can likewise be unearthed, where recent cases such as that of the "Guilford Four" in Britain, and that of Rodney King in California, demonstrate that "proper" justice is not always correct and unproblematic.

Ultimately therefore, the NRM schema for the institution of "popular justice" in Uganda is principally a populist approach, which, although directed at the grass-roots, in substance merely creates another level of the court system. Likewise, the continuing intransigence of the NRM on the issue will simply result in greater antagonism towards the system. There are additional problems: No attempt was made to simultaneously educate RCs about how to execute their powers, neither was there an attempt to raise their powers, neither was there an attempt to raise their consciousness over issues such as the status of women, and the question of individual rights. Add to this the fact of a lack of any systematic program of training (both on the technical and the substantive questions on the administration of justice), such exercise of judicial power will inevitably result in the problems we have recounted. As Ddungu points out the respect to the RC system as a whole,

Without a combination that backs popular hopes with popular capacities, attempts to transform society in a progressive direction are bound to come to nought. Without freedom of popular organisation, there is no possibility of building popular capacities. And without popular capacities, revolution remains mythical, (Ddungu, op cit 45)

But the operation of RCs in Uganda today is but a microcosm of the political economy that characterise present-day realities in Uganda. The other, and one which brings into bold relief the limitations of the current regime, relates to the NRM's general attitude towards constitutionalism, respect for basic rights and freedoms and prevailing social and economic relations. Under the yoke of IMF/World bank conditionality, the notion of popular participation is rendered quite mythical; the coercive instruments of the state remain beyond any effective and consistent sanction and despite the exercise of promulgating an new constitution for the country, the NRM has belied its commitment to genuine constitutional order. With such transgressions at the macro level, it is clear that the NRM's notion of popular justice cannot be the avenue for true liberation of the broad, struggling sectors of Ugandan society.

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