Inventing Necessity: Law and Revolution in Postcolonial Africa

Necessitas non habet legem – Publilius Syrus[1]

A baobab has fallen / Plants will miss your shade – Issa Shivji[2]

On the morning of April 15, 1966, the four jets of the Uganda Air Force traced lazy ovals in the sky above Kampala. The streets below were quiet except for the soldiers shifting in their gear at checkpoints throughout the capital city. Ninety-odd men made their way through the deserted streets to the National Assembly. Each Member of Parliament found a freshly bound copy of a draft constitution in their pigeonholes. Two months earlier, Prime Minister Milton Obote had issued his 'Statement to the Nation by the Prime Minister' announcing a coup suspending first Parliament, and then Sir Edward Mutesa II, the President of Uganda and Kabaka of Buganda. Now, in the parliamentary session that followed, Obote led a polite debate surrounded by soldiers on his proposed 'interim' constitution. The opposition parties left in protest, but the remaining members passed it in the name of 'we the people of Uganda hereby assembled in the name of Uganda'[3] by 55 votes to 4. Later that day, Obote was sworn in as country's first Executive-President under the 'pigeonhole constitution' (as Ugandans came to call it) that effectively 'emasculated' Parliament as an independent legislature.[4]

The Ugandan coup of 1966 was only one of the many unconstitutional changes of government in former British colonies during the first decade of African decolonization. The British government had granted independence to first Sudan (1956) and Ghana (1957), and then most other African colonies with the notable exceptions of the two white-ruled states: South Africa and Rhodesia.[5] Yet elected governments in many countries were soon deposed by would-be usurpers. Judges in Uganda and elsewhere soon faced a novel legal puzzle when asked to adjudicate on the validity and legitimacy of the usurpers' legal order. Their answers moved elliptically around two questions: when did a new legal order replace an old one? And how should judges act when asked to adjudicate this question? Judges answered the problem by appealing two new common law doctrines. The first doctrine, state necessity, invented an ancient lineage from de Bracton to Maitland to find that the courts would recognize the legality of all of

[1] On the eve of the Roman Republic's collapse, the freed slave Syrus observed that necessity had no law as a new generation of emperors broke through the old constitutional limits. Early modern humanists later put this aphorism to work as they sought to make legal rules conform to political necessity: Quentin Skinner, *The Foundations of Modern Political Thought: Volume 1, The Renaissance* (Cambridge, 1978), 254.

[2] Issa G. Shivji, 'A Baobab Has Fallen (Tribute to Samir Amin)', in *Poems for the Penniless*, trans. by Ida Hadjivayanis (Dar es Salaam, 2019), 40.

[3] *Constitution of Uganda, 1966*, promulgated 15 April 1966 [1966 Constitution], preamble.

[4] Yash Ghai, 'Matovu's Case: Another Comment', *Eastern Africa Law Review*, 1 (1968), 71.

[5] In both cases a minority white government declared itself sovereign from the British government and over the African peoples it claimed to rule. The Union of South Africa declared itself a republic in 1961 and immediately left the Commonwealth of Nations. Four years later the Rhodesian government followed with the Unilateral Declaration of Independence ('UDI') granting itself 'sovereign independence'. According to the UDI text, 'the people of Rhodesia have witnessed a process which is destructive of those very precepts upon which civilization in a primitive country has been built, they have seen the principles of Western democracy, responsible government and moral standards crumble elsewhere, nevertheless they have remained steadfast': 'Proclamation by Prime Minister' (1966) 5 *International Legal Materials* 230.

the usurpers' acts necessary to preserve the state in an emergency.[6] The second doctrine, revolutionary legality, transformed Hans Kelsen's conceptual analysis of revolutions into a pragmatic legal test for when a court would recognize the legality and legitimacy of a new constitution. Chief Justice Muhammad Munir of the Pakistan Supreme Court invented the doctrine in the *Dosso* case (1959) by stating that a revolution would succeed in establishing a new legal order if and only if 'it satisfies the test of efficacy and becomes a basic law-creating fact.'[7] In the mid-1960s onwards, judges across the Commonwealth of Nations, including the Judicial Committee of the Privy Council, would adopt and adapt these two doctrines to deal with their respective political crises.[8]

This article is an intellectual history not of this Commonwealth jurisprudence,[9] but the discourse it sparked among academics in British and African law schools in the decade from 1965. These judicial decisions, as Claire Palley noted at the time of the Rhodesian cases, were 'manna for jurisprudes.'[10] The cases fed arguments in dozens of law journal articles across the Commonwealth, including new volumes published by African universities in Accra, Dar es Salaam, Kampala, Lagos and Nairobi. I will read these transnational legal arguments on law and revolution within contemporary discourses of Cold War liberalism (and its rivals).[11] Academic interest in the doctrine of necessity was never merely intellectual. At stake—at least for some intervenors—was the future of liberal legal orders in the form of independent African states disciplined by Westminster-model constitutions characterized by representative democracy and limited government. The threat to this order came from revolutionary governments that aimed to overthrow this ideal of formal equality (both internationally and domestically) in pursuit of African socialism or white domination. 'Should courts enforce the dictates of […] Fascist or Communist revolutionaries or terrorists,' worried Palley, 'if any of these groups seize power?'[12] The answers to these questions relied on competing representations of the nature of law, which imagined different models of the modern state and its possible futures.

The first part of this paper sets out the liberal paradigm of legal positivism that aimed to

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[6] *Special Reference No. 1*, [1955] 1 Fed. Ct. Rep. 439.

[7] *The State v. Dosso and Another*, Supreme Court, (1959) 1 Pakistan Law Reports, 849.

[8] The modern Commonwealth problem of law and revolution first arose after the 1954 constitution coup in Pakistan, and then spread to other Commonwealth jurisdictions in Cyprus (1964), Rhodesia (1966), Uganda (1967), Ghana (1970) and Nigeria (1971). Key cases include *Attorney-General of Cyprus v. Mustapha Ibrahim*, (1964) CLR 195 [Supreme Court of Cyprus]; *Madzimbamuto v. Lardner-Burke N.O.*, (1966) No. GD/CIV/23/66 [High Court of Rhodesia]; *Madzimbamuto v. Lardner-Burke N.O. (2)*, Gen. Div. [1968] 2 S. Afr. L.R. 284 [High Court of Rhodesia]; Dhlamini v. Carter (2), [1968] 2 S.A. 464 [High Court of Rhodesia]; *R. v. Ndhlovu*, [1968] 4 S.A. 515 [Supreme Court of Rhodesia]; *Uganda v. Commissioner of Prisons, Ex parte Matovu*, [1966] 1 EA [High Court of Uganda]; *Sallah v. Attorney-General*, (1970) 2 S.O. [Court of Appeal, Ghana]; *Lakanni v. Attorney-General (Western State)*, (1971) 1 U.I.L.R. (Pt. 2) 201 [Supreme Court of Nigeria]; *Adejumo v. Johnson*, [1972] All N.L.R. 159 [Supreme Court of Nigeria].

[9] There is a very large literature on the judicial reasoning in coup cases: see *e.g.* Nicholas Aroney and Jennifer Corrin, 'Endemic Revolution: HLA Hart, Custom and the Constitution of the Fiji Islands', *Journal of Legal Pluralism and Unofficial Law*, 45/3 (2013), 314–39; Faqir Hussain, 'Doctrines of Revolutionary Legality and Necessity: Their Application in the Commonwealth Countries', *Journal of Law and Society (University of Peshawar)*, 11/19 (1992), 25–46; Farooq Hassan, 'Juridical Critique of Successful Treason: A Jurisprudential Analysis of the Constitutionality of a Coup d'etat in the Common Law', *Stanford Journal of International Law*, 20 (1984), 191; Leslie Wolf-Phillips, 'Constitutional Legitimacy: A Study of the Doctrine of Necessity', *Third World Quarterly*, 1/4 (1979), 99. On jurisprudence and emergencies more generally, see Victor V. Ramraj, ed., *Emergencies and the Limits of Legality* (Cambridge, 2009); David Dyzenhaus, *The Constitution of Law: Legality in a Time of Emergency* (Cambridge, 2006); Nasser Hussain, *The Jurisprudence of Emergency: Colonialism and the Rule of Law* (Ann Arbor, 2003).

[10] Claire Palley, 'The Judicial Process: U.D.I. and the Southern Rhodesian Judiciary', *Modern Law Review*, 30/3 (1967), 263–87.

[11] For a critical reading, see Samuel Moyn, 'Carlyle Lectures: The Cold War and the Canon of Liberalism' (University of Oxford, 2022).

[12] Palley, 'The Judicial Process: U.D.I. and the Southern Rhodesian Judiciary', 281.

separate questions of law from those of politics. This analytical distinction corresponded to two discrete scholarly tasks: legal theorists concerned with the necessary conditions for the existence of a legal system versus those concerned with the normative values ensuring a legitimate political order. The difficulty faced by judges was that legal positivism—whose British form dominated common law legal education—denied that a conceptual analysis of law could provide any practical guidance for how judges should decide hard cases in difficult places. Some judges responded by appealing to the doctrine of necessity, while others transformed the positivists' conceptual analysis of revolution into a practical test for adjudicating the existence of new legal orders. It was this move that a number of contemporary legal scholars came to criticize as a mere alibi for judges' political preference. Insisting on the positivists' sharp distinction between what law was and what it ought to be, they proposed different solutions for how judges could best adjudicate these difficult questions without resort to legal fictions. Better, they argued, to simply resign from the bench or explicitly defend those political choices.

The paper next considers a rather different analysis by John Finnis. While operating within the then dominant tradition of analytical philosophy, his analysis began from the natural law insights of analytical Thomism. Finnis' central concern was with how judges should act to preserve the national community that persisted through momentary unconstitutional changes of government. His intervention was remarkable for two reasons. First, his embryonic theory of Thomist law reconnected jurisprudence to politics and ethics. This allowed him to argue that judges could appeal to political and moral values in these hard cases in difficult places. Second, these values were oriented to the common good of the national community. In these Cold War revolutionary situations, judges had a moral duty to uphold these basic values if a usurper aimed to overthrow them. For Finnis, Commonwealth judges had a special duty to uphold basic civil and political rights, as well as property rights, against any revolutionary government committed to a socialist program to abolish 'neocolonialism'.

The final section of the paper shifts to Kampala and Dar es Salaam. In the 1960s, a new generation of African and 'Third World' lawyers and legal scholars debated the role of the judiciary in the post-independence state. Their decolonizing discourse, in the words of Getachow and Mantena, was less a 'critique of Eurocentrism than an effort to shift the terrain of theorizing'.[13] They did so in the pages of *Transition*, an intellectual magazine based in Kampala, and in the academic discourses centred on the new Faculty of Law at University College, Dar es Salaam. This 'Dar es Salaam' school of law and postcolonial political economy challenged both the analyses of both legal positivism and the new natural law. Instead of presuming a homogenous social space within the modern state, these scholars looked to the historical formation of the colonial and postcolonial African state through the racializing effects of imperial capitalism. What they saw was neither an aggregation of discrete individuals nor an organic community of citizens. Instead, they described a hierarchy of racialized groups structured by the logics of customary law and tribal essentialism that had been specifically designed by colonial administrators to deny civil society and unified nationalities to African subjects. Any analysis of revolutionary legality—and the duties of judges adjudicating on it—had to begin from this critique of the postcolonial political economy.

Conceptualising Coups

'The [Oxford] linguistic philosophers have their job cut out for them,' claimed Ernest Gellner,

[13] Adom Getachew and Karuna Mantena, 'Anticolonialism and the Decolonization of Political Theory', *Critical Times: Interventions in Global Critical Theory*, 4/3 (2021), 359.

'to rationalize the loss of English power.'[14] While he was referring to the mid-century analytical philosophers, especially Ludwig Wittgenstein and J.L. Austin, his claim might also have applied to Herbert Hart and the Oxford legal philosophers he trained. It was no coincidence that Hart revived analytical jurisprudence in the decade of decolonization as the UK granted independence to its remaining African colonies (and elsewhere). In the 1950s, he reinforced the legal philosophy of John Austin (itself an expression of utilitarian political philosophy purged of Bentham's political radicalism) with the bracing rigour of analytical philosophy. His remarkable achievement was to identify 'persistent' problems for general jurisprudence that were segregated from larger questions of politics and ethics. By the 1960s, however, a new generation of Oxford-trained legal scholars struggled to understand and respond to the coups and revolutions that beset their homelands in the aftermath of decolonization.

In 1965, the 84 year old Hans Kelsen published a reply to Julius Stone in defence of his concept of the *Grundnorm* or basic norm. Stone (as with many before him) had criticized the 'mystery and mystique' of the basic norm that seemed to be conjured up by the jurist as a kind of legal scientist.[15] Kelsen answered that his basic norm was a metaphysical presupposition of a pure theory of law. Any given law in a legal system was created by another higher law: for instance, emergency detention regulations were valid only if enabled by an emergency powers act, which in turn was valid if provided for by the constitution. To explain the normativity of the constitution itself, the jurist had to posit an authorizing norm—the basic norm—whose validity was presupposed. Legal science, as Kelsen explained, must respect Hume's is-ought distinction that we could not derive a prescriptive statement (what 'we ought to do') from a descriptive statement (what 'is). Since laws were normative 'ought' rules, when the chain of validity came to an end with a written constitution, the jurist could only appeal to a further norm to explain the normativity and validity of a legal system. Here Kelsen firmly rejected Stone's claim that the basic norm was created by jurist or judges: neither 'the science of law' nor 'the judge in performing his function of applying and creating law' were in so doing creating the basic norm.

Kelsen's reply to Stone on the eve of the UDI expressed the central philosophical assumption of legal positivism. General jurisprudence was properly the scientific study of legal norms. It was thus exclusive concerned with prescriptive statements—at least when describing the normativity of a legal system. But empirical statements did have importance in certain circumstances. For Kelsen, this was especially true when describing whether a new basic norm had superseded an existing one. In a revolution where republican usurpers overthrow a monarchy, Kelsen concluded that 'one presupposes a new basic norm, no longer the basic norm delegating law making authority to the monarch, but a basic norm delegating authority to the revolutionary government'.[16] While this was a necessarily conceptual description, Kelsen could only explain the normativity and validity of the new government's legal order by positing a 'principle of effectiveness'. This principle stated that a legal order's validity depended on the social facts of whether 'individuals whose behaviour the new order regulates actually behave, by and large, in conformity with the new order'.[17] Thus, the legal scientist ultimately had to appeal to an empirical inquiry into whether the population in fact obeyed the new laws before they could presuppose a new basic norm and legal order.

Four years before Kelsen's response, Herbert Hart had published his concept of law in the idiom

[14] Ved Mehta, *Fly and the Fly-Bottle: Encounters with British Intellectuals* (New York, 1983), 37–38.
[15] Julius Stone, 'Mystery and Mystique in the Basic Norm', *Modern Law Review*, 26/1 (1963), 34–50.
[16] Hans Kelsen, *Introduction to the Problems of Legal Theory*, trans. by B. L. Paulson and S. L. Paulson (Oxford, 2022), 59; see also Andrei Marmor, 'The Pure Theory of Law', *Stanford Encyclopedia of Philosophy*, 2021.
[17] Hans Kelsen, *General Theory of Law and State*, trans. by Anders Wedberg (Cambridge, 1949), 118.

of analytical philosophy.[18] Here he distinguished between primary and secondary rules. Primary rules were the mass of legal norms enabling or prohibiting specific actions. Secondary rules, in contrast, allowed for the change, adjudication and recognition of primary rules. Instead of a presumed basic norm, Hart identified an ultimate rule of recognition (in the UK, 'what the Queen in Parliament enacts is law') whose existence was a social fact. His concept of law presumed a centralised state as the natural and possibly exclusive political form associated with a modern legal system, yet the United Kingdom was still a global empire ruling over hundreds of millions of subjects in 1961.[19] Yet Hart only ever acknowledged this fact at the margins in illustrations for legal puzzles, especially his use of the British Commonwealth to illustrate his analysis of the 'embryology of legal systems'.[20] In a 'schematic, simplified outline,' he showed how a new legal system could develop out of an old one—an analogous problem to that of revolution. The UK Parliament would establish a colony with a legislature, executive and judiciary by statute. This colonial government was a creature of its mother Parliament, and so shared its ultimate rule of recognition. At some point in the future, however, the colonial courts 'no longer recognized' the legislative authority of the UK Parliament. At this point the colonial legal system had a new rule of recognition that severed it from the enacting statute of the UK Parliament, which was now only a 'historic fact'. Hart recognized that his outline covered many different actual developments ranging from a mutually agreed independence to a violent break. But he did not explain if and how judges could determine whether a new legal order had been established in the latter case. Instead, Hart simply said that judges got their authority to decide 'previously unenvisaged questions concerning the most fundamental constitutional rules' from the very act of so deciding these cases. 'Here,' he concluded, 'all that succeeds is success.'[21] (Conversely, as S.A. de Smith would write of unsuccessful revolutions, '[n]othing fails like failure.'[22])

Despite their differences, both Kelsen and Hart sharply distinguished between jurisprudence as a legal science and law as a social practice. Jurisprudence was a science whose object of study was legal normativity. Kelsen, in his rebuke of Stone, claimed to have 'never confused the legal *norm* with the statements of the legal science whose object is legal norms.'[23] Yet for all the remarkable clarity, if not simplicity, of these two models of legal systems depended on their purity—a total conceptual quarantine from politics, ethics and the social sciences more generally. Thus, Hart used the Pakistani constitutional crises of the 1950s as a mere illustration of the emergence of a new rule of recognition.[24] Similarly, in his analytical restatement of Kelsen's concept of a legal system, Hart's student Joseph Raz would illustrate his clarification of the principle of efficacy with the example of Rhodesia.[25] In neither case, however, were these analyses intended to provide practical guidance to how judges should resolve such questions. To do so, as Kelsen and Hart repeatedly insisted, was to violate the is-ought distinction that was the foundation of all conceptual knowledge of law as a distinct normative order.

Yet, through a misreading of Kelsen's legal science, Chief Justice Munir and other Commonwealth judges had transformed a conceptual analysis of revolutions into a common law

[18] H.L.A. Hart, *The Concept of Law* (Oxford, 1961).

[19] On the influence of British colonial anthropology on Hart's thought, see Coel Kirkby, 'Law Evolves: The Uses of Primitive Law in Anglo-American Concepts of Modern Law, 1861-1961', *American Journal of Legal History*, 58/4 (2018), 535–63; Peter Fitzpatrick, *The Mythology of Modern Law* (London, 1992), 183–210.

[20] Hart, *The Concept of Law*, 120–23.

[21] Hart, *The Concept of Law*, 153.

[22] S. A. de Smith, 'Constitutional Lawyers in Revolutionary Situations', *University of Western Ontario Law Review*, 7 (1968), 102.

[23] Hans Kelsen, 'Professor Stone and the Pure Theory of Law', *Stanford Law Review*, 17/6 (1965), 1132.

[24] Hart, *The Concept of Law*, 118.

[25] Joseph Raz, *The Concept of a Legal System: An Introduction to the Theory of a Legal System* (Oxford, 1970), 205.

doctrine to provide a practical test for adjudicating on the existence of a legal system. Neither Kelsen nor Hart entered into the academic debate on revolutionary legality, but their positivist paradigm framed the dominant questions and answers even among interlocutors holding very different political and moral beliefs. The defining feature of these debates was thus a sharp separation of law from politics and ethics. In the aftermath of the Rhodesian Universal Declaration of Independence (the white colonial government's rejection of British sovereignty), Tony Honoré set the parameters of the law and revolution debate in the first *Annual Survey of Commonwealth Law*—the massive compilation and analysis of major cases from the courts of the Commonwealth of Nations published jointly by the Oxford Law Faculty and the British Institute of International and Comparative Law. He identified two theoretical puzzles for general jurisprudence: how a wrongful act could create a lawful authority and how such new legal orders could create valid laws.[26] The leading answer given by judges and scholars, Honoré noted, was Kelsen's analysis of revolutions in *The General Theory*. This answer had many critics, including Hart who had questioned this metaphysical move to ground the ultimate source of a successful legal revolution in a new *Grundnorm* and instead explained the 'birth' of a new legal system by an empirical appeal to 'success' assessed from social facts. But Honoré warned that 'the most misleading theory is that to be neutral between different political values.'[27] In large part this paradox was built into legal philosophies that took as their oft-unspoken assumption the modern Western state—whether the legal realism of Ross (Sweden), or the legal positivism of Kelsen (Weimar Germany without its empire) or Hart (the United Kingdom without its empire). The ferocity and diversity of answers attested to both the theoretical difficulty of explaining revolutionary legality as a radical discontinuity between two legal systems, and the political consequences of judges' practical application of different theoretical answers.

The first attempt to solve the Rhodesian puzzle was by a young Oxford law tutor, John Eekelaar. He had arrived at the Law Faculty from Johannesburg on a Rhodes scholarship. The Rhodesian UDI was a personal trauma turned legal puzzle.[28] 'Academic speculation over the centuries,' he began, 'descended from the ivory towers to confront and help to shape political reality.'[29] In *Madzimbamuto*, the High Court judges employed the doctrines of necessity and revolutionary legality to recognize those Rhodesian government's laws 'necessary' to maintain order as *de facto* valid without coming to any conclusion as to whether it had successfully established a new legal order. The result, as Eekelaar put it, 'the *grundnorm* is split' since the High Court recognised the limited validity of both the 1961 and 1965 constitutions.[30] He noted that this seemingly neutral stance between the usurpers and the British government nevertheless would ensure that the white government could enforce the essential laws of racial segregation: the Land Apportionment Act, African Land Husbandry Act and African Affairs Act. However, he added that this might not extend to the Rhodesian government's plan to strengthen African chiefs as a conservative check on the African nationalist movement.[31]

On the fundamental question of whether a new basic norm or rule of recognition existed in Rhodesia, Eekelaar pointed out the recursive logic in Hart's account. If the ultimate rule of recognition was a social fact, the empirical evidence was primarily whether officials, especially judges obeyed this new rule. Yet the dilemma facing judges was that they were asked to decide

[26] Tony Honoré, 'Reflections on Revolutions', *Irish Jurist*, 2 (1967), 268. Honoré also referred to Olivecrona's framing of the problem as 'how acts of violence can give rise to "binding" rules': Karl Olivecrona, *Law as Fact* (Oxford, 1939), 2.

[27] Honoré, 'Reflections on Revolutions', 278.

[28] As Eekelaar recalled decades later upon his retirement, he could no longer return home after the coup: *Pembroke College Record, 2009-2010*, 2010, 18.

[29] J. M. Eekelaar, 'Splitting the Grundnorm', *Modern Law Review*, 30/2 (1967), 156.

[30] Eekelaar, 'Splitting the Grundnorm', 175.

[31] Eekelaar, 'Splitting the Grundnorm', 169.

whether such a new basic norm or rule of recognition existed. For Hart (and similarly for Kelsen), this was no paradox since their analysis was purely conceptual and what basic norm judges followed was simply empirical evidence of effectiveness or social fact. But by translating this analysis into a legal test, judges had trapped themselves in a paradox. The only way out was to acknowledge that in hard cases like these judges 'must be decided by criteria outside the pre-existing legal system and which is therefore non-legal and "personal".'[32] Judges should not resign, Eekelaar concluded, because they had sworn a judicial oath to uphold legality—the fundamental principle that governments obey the constitutional order.

The Rhodesian UDI was also personal for Claire Palley, the South African legal scholar who published her doctorate at the University of London on the constitutional history of Southern Rhodesia on the eve on this white revolution.[33] Palley had moved with her husband, Ahrn Palley, to Rhodesia to escape the apartheid regime of South Africa. Yet they found another colonial regime committed to the supremacy of the white race in Africa. In 1965, Ahrn Palley was re-elected to Highfield seat, which included a number of black African townships on the edge of Salisbury, and became known as the sole dissenting voice in the white-only legislature. Although separated from her husband by this time, Claire Palley shared his commitment to the British government's promise for the gradual extension of the franchise to non-white subjects culminating in eventual majority rule. Her immediate intervention drew on her constitutional history and American legal realists to criticize the Rhodesian judges for masking their political preferences with legal alibis. In her realist analysis,

> judges like other mortals cannot escape their own philosophies and will, when reasons are nicely balanced, reach a decision that will be consonant with their own beliefs, even though genuinely attempting to set aside their own standards of values and to ascertain in an objective spirit what ordering of the life of the community will be in the circumstances before the court best accord with the law.[34]

While careful to state that 'the judges, being Europeans from the ruling power élite, are merely white Rhodesians in black robes,' Palley did insist that their conception of the 'public interest' was shaped by their political and moral convictions in the context of 'a plural society in which political and economic power is wielded by a European minority'.

In her synthesis of judicial biography and case law criticism, Palley showed how different Rhodesian judges' convictions shaped their choice of which legal doctrines would be answer the problem of revolutionary legality in the *Madzimbamuto*, *Ndlovu* and related cases. Justice Lewis of the High Court, for instance, was described as a member of the Rhodesian 'Establishment,' and critical of both the British government and African subjects (and the prospect of majority government).[35] Lewis had accepted the Kelsenian argument in *Madzimbamuto*, but held that the facts were still ambiguous since neither the UK nor Rhodesia had effective control. For Palley, the ultimate question was the proper nature of the judicial function. Constitutions, she claimed, were 'made for the preservation of man in society and must not be enforced if they will result in destruction of the state.'[36] Yet the Rhodesian judges had masked their preferences in the 'conflicts of value between different groups in the community' by appealing to seemingly neutral

[32] J. M. Eekelaar, 'Rhodesia: The Abdication of Constitutionalism', *Modern Law Review*, 32/1 (1969), 34.
[33] Claire Palley, *The Constitutional History and Law of Southern Rhodesia, 1888-1965, with Special Reference to Imperial Control* (Oxford, 1966).
[34] Palley, 'The Judicial Process: U.D.I. and the Southern Rhodesian Judiciary', 264.
[35] Palley, 'The Judicial Process: U.D.I. and the Southern Rhodesian Judiciary', 265–66.
[36] Palley, 'The Judicial Process: U.D.I. and the Southern Rhodesian Judiciary', 280.

and objects doctrines of necessity and revolutionary legality.[37] This was especially dangerous in a colonial society like Rhodesia were a decision to prefer 'order' above all else was in effect to preserve the political economy of white supremacy.

At this point, Palley conceded that the judges' choice between the 1961 and 1965 constitutions were alike in that they upheld a legal system 'dominated by a … ruling white minority'.[38] Yet she distinguished the two constitutions on the grounds that the former allowed for the 'gradual improvement' of African subjects ultimately leading to majority rule, while the latter foreclosed that possibility altogether. Here then were the limits of Palley's own political imagination: the political, economic and social development of the African subjects, with judges as protectors of the 'just rights' of these 'disenfranchised' and conquered' majority, during a period of benign British tutelage leading to majority government. While this placed Palley in a tiny minority of white subjects in Rhodesia, it also denied the claims made by the leading African nationalist movements calling for immediate independence under a democratic government just like Ghana had been granted eight years earlier. [more on Palley's Cold War framework.[39]]

In the paradigm of legal positivism, the creation of a new legal order was a question of *is* rather than *ought*. It was thus a question of social facts properly answered by an empirical inquiry aggregating the obedience of individuals in a given society to the old and new basic norms (or ultimate rules of recognition). Yet this conceptual analysis gave cold comfort to judges asked to adjudicate on the legitimacy of new legal orders proclaimed by usurpers. As Professor S. A. de Smith, the Commonwealth constitutional law expert at LSE, remarked, the doctrines of necessity and revolutionary legality were 'fundamentally political judgments dressed in legalistic garb.'[40] Commonwealth judges trained in the 'narrowly positivist approach,' he continued, would try to find a doctrine or rule to justify—and indeed mystify—what were really personal political choices in very hard cases. In concluding his reflection on contemporary coup cases, de Smith appealed to W.H Auden's poem, 'Law Like Love,' to affirm the separation thesis of legal positivism that 'the law is the law. But politics are politics.'[41]

Communities and the Common Good

Several contemporary observers of African and other coups remarked on a striking distinction between these unconstitutional changes of government from the earlier cases like the French and Russian revolutions. None of these coups changed—or even aimed to change—the fundamental mass of colonial laws and regulations inherited from their erstwhile British ruler. 'Despite the revolutionary change effected by the *coup d'état*,' noted Burnett in his analysis of the 1966 Ghana coup, 'the legal order of Ghana remained remarkably stable.'[42] It was precisely this fact that John Finnis developed in his distinctive critique of the legal positivist paradigm for analysing unconstitutional changes of government. Where positivists emphasized the necessary *discontinuity* in a legal system, he argued that coups were characterised by the essential *continuity* of the legal order across these violent changes of government. His criticism was also a deeper critique of what he saw as the utilitarians' mistaken rejection of an earlier philosophical tradition following Aristotle and Thomas Aquinas that insisted on the necessary connection of

[37] Palley, 'The Judicial Process: U.D.I. and the Southern Rhodesian Judiciary', 281.
[38] Palley, 'The Judicial Process: U.D.I. and the Southern Rhodesian Judiciary', 282.
[39] Claire Palley, 'Rethinking the Judicial Role: The Judiciary and Good Government', *Zambia Law Journal*, 1/1 (1969), 1–35.
[40] de Smith, 'Constitutional Lawyers in Revolutionary Situations', 94.
[41] de Smith, 'Constitutional Lawyers in Revolutionary Situations', 110.
[42] William Harvey Burnett, 'Post-Nkrumah Ghana: The Legal Profile of a Coup', *Wisconsin Law Review*, 4 (1966), 1101.

jurisprudence to politics and ethics.

Finnis was well-placed to make a critique of contemporary coup cases. He would be appointed the Rhodes Reader in the Laws of the British Commonwealth and the United States in 1972, which recognized the Australian's pre-eminence as a comparative constitutional scholar.[43] From 1968 onwards, Finnis had published most of his constitutional analyses in the *Annual Survey of Commonwealth Law*, where he was responsible for critical surveys of both the white settler states—Canada, Australia, New Zealand—and the newly independent African states.[44] While legal positivist analyses applied Hans Kelsen's analysis of the apparent *discontinuity* in legal systems, Finnis instead insisted on the *continuity* of (national) communities and their values through time. His analysis opened up new possibilities for political action by judges and others faced with such crises. In the Cold War context, Finnis proposed a 'general principle' to explain how moments of revolutionary discontinuity were in fact bridge by a deeper legal continuity grounded in the underlying (national) community that persisted across any change of government in all but the most radical revolution. Importantly, his principle also provided practical guidance for action when judges faced the crises provoked by coups or revolutions.

Finnis intervened in contemporary debates by drawing attention from superficial discontinuity to deeper continuity in a series of extended studies in the *Annual Survey*. Regarding the Rhodesian UDI, he argued that the Rhodesian and British judges as well as academic commentators had shown a 'lack of logic' in their 'positivist constitutional analysis'. 'The truth,' Finnis wrote,

> is that the ultimate source of law and legal authority, to which appeal must be (and is) made when other sources give forth an uncertain sound, is that set of values and principles which, in the judgement of the reasonable man, are available to guide everyone (including judges seeking to do right according to law) in conscientiously upholding the substantive law and common good of the relevant community.[45]

Here Finnis gestured towards that source of authority that subsisted across the apparent legal discontinuity of a revolutionary rupture. In his doctoral analysis of judicial power, Finnis had taken 'values' to be the ethically-oriented actions of actors through legal institutions and doctrines over time. This explained how he could reject the 'lack of logic' in orthodox analyses of revolutionary legality that struggled to ground judges' decision—as well as their authority to make such decisions—by locating the relevant *Grundnorm* or rule of recognition in either the old or new legal system. Instead Finnis argued that, at least in revolutionary moments, judges' derived their authority from the fact that they were originally 'lawfully appointed and accepted as the judges in their community.' Judges retained their authority so long as they upheld the community's values and until it was removed by officials acting within the positive laws validly enacted within the rules of the new legal order.

In 1973, Finnis published his first sustained critique of legal positivism in the second series of the *Oxford Essays in Jurisprudence*.[46] This volume also reproduced Dworkin's 'Taking Rights Seriously' and included John Eekelaar on revolutionary legality.[47] These essays captured a

[43] In addition to his *ASCL* contributions and other journal articles, Finnis authored 'Commonwealth and Dependencies', in *Halsbury's Laws of England*, 4th edn (London, 1974), VI, 315–601.

[44] Studies of Finnis' thought almost always pass over his work on Commonwealth constitutional law in silence: *cf.* Richard Ekins, 'Constitutional Principle in the Laws of the Commonwealth', in *Reason, Morality and Law: The Philosophy of John Finnis*, ed. by John Keown and Robert P. George (Oxford, 2013), 398–412.

[45] *ASCL 1969* (1970), 77.

[46] John M. Finnis, 'Revolutions and Continuity in Law', in *Oxford Essays in Jurisprudence: Second Series*, ed. by A.W.B. Simpson (Oxford, 1973), 44–76.

[47] Hart and Simpson also contributed respective chapters on Bentham's legal thought and the ahistoricism of legal

common contemporary concern with the problem of how judges should decide hard cases in divided societies. In his essay Finnis moved from his discrete constitutional analyses of revolutionary jurisprudence in the *Annual Survey* to a philosophical critique of the 'theory of legal discontinuity' applied by Commonwealth judges.[48] But his ultimate target was the legal positivism of Kelsen and Hart. Finnis began by making a common distinction in the Commonwealth cases and orthodox positivist commentary between a 'mere *coups d'état*' that left a constitutional order intact and a revolution that imposed a new legal order.[49] In this sense all cases of constitutional change would result in a new legal order—whether (purportedly) lawful devolution or unlawful revolution. Finnis observed that the rule of recognition for India was 'what the Queen in the Imperial Parliament enacts is law' until Pakistan established its own constitutional order with its Constituent Assembly created by the Indian Independence Act promulgated by the Westminster Parliament in 1947.[50] Was the source of the validity for Pakistan's legal order its own constitution-making moment or the British enacting legislation?

Finnis rejected the legal positivists' solution as an empirical and theoretical evasion. It was empirically misleading since there was no such common consent to independence in most British colonies at independence. It was theoretically misguided since it could not answer (Ross) or 'simply and silently omitted' (Hart) when and how a new legal order was formed.[51] Finnis focused on Hart's claim that the existence of a rule of recognition was a matter of social fact. In the case of Pakistan, a legal theorist could only say whether a new legal order existed in the present by reference to the empirical fact of whether its officials believed it did from the internal perspective. in *Dosso*, the Supreme Court had relied on Kelsen to find something like that. But this answer had two problems. Finnis used a hypothetical example of the Australian rule of recognition changing in 1942 from 'what the Westminster Parliament enacts is law' to 'what the Canberra Parliament enacts is law'. The new rule of recognition would have to include a clause that all rules valid under the old rule of recognition (*i.e.* the vast majority of ordinary laws) were still valid in the new legal order.[52] But it was unclear to Finnis why there was a 'break' in the rules of succession in colonial independence cases when the new rule of recognition referred to those enacted under the old rules.

The second question followed from Hart's answer that there was no need to ask this question since the determination of a new rule of recognition was a simple social fact. Here Finnis disaggregated Hart's rule of recognition into its more complex elements, especially rules of competence (governing the distribution of powers) and rules of identification (determining what

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positivism.

[48] Finnis, 'Revolutions and Continuity in Law', 45.

[49] Even if a mere coup only claimed to change the rules of competence—in particular, the rule governing the succession of persons to legal office—the act must also alter the rules of succession of rules. Finnis used Katorowicz's study *The King's Two Bodies* to show that English law had long recognized this point. A successful usurper both remained an illegal occupier of the office of the king yet bound his (legal or illegal) successor by his legal acts. Finnis pointed out that any such usurper would necessarily violate a rule of succession of rules that ultimately went back to the *Grundnorm* of the historically first constitution. If successful, this modest usurper would create a new legal order even if he claimed to limit his coup to rules of competence: Finnis, 'Revolutions and Continuity in Law', 47–48.

[50] Finnis noted Wheare's study of Pakistan and other former colonies that showed how new governments often performed some unauthorized legal act in establishing their new constitutional order. For Wheare this was also a *political* act intended to break the chain of validity to the British constitution: Finnis, 'Revolutions and Continuity in Law', 52.

[51] Finnis, 'Revolutions and Continuity in Law', 55. Ross had argued that this 'evolution' was theoretically sound: an *amended* constitutional amendment rule could not derive its valid from old amendment rule since that rule would no longer exist. But Hart pointed that there was no such conflict since the two amendment rules related to *different times*: H.L.A. Hart, 'Self-Referring Laws', in *Festskrift till Ägnad Karl Olivecrona*, 1964, 316.

[52] As Finnis noted, Hart did seem to accept this point: see H.L.A. Hart, 'Review', *Harvard Law Review*, 78 (1965), 49.

was a valid law). In a revolution, it was not clear that rules of identification required acceptance by new officials in the same way that rules of competence did. In other words, it seemed possible that revolutionaries could change only the rule of competence while leaving the other rules valid by the old (and unchanged) rule of identification. This seemed to suggest an alternative explanation of how a successful revolution could perpetuate (some) constitutional continuity across time, and so distinguish between 'mere *coups d'état*' and revolutions aimed at radical social transformation.

After disaggregating the rule of recognition into rules of competence and rules of identity, Finnis proposed a 'general principle' to explain continuity in legal systems: 'A law once validly brought into being, in accordance with criteria of validity *then in force*, remains valid until *either* it expires [...] *or* it is repealed in accordance with conditions of repeal in force *at the time of its repeal*.'[53] After a successful revolution an old power-conferring rule might not exist, and so have no forward looking authority. But the old rule still existed insofar as it validated those older laws not explicitly expired or repealed according to a new power-conferring law. Finnis then described the rule of identification as a distinctly 'post-independence component of the "rule of recognition"'.[54] The advantages of his general principle were practical and principled. It met 'lawyerlike demand for a root of title without imperilling the independence and autochtony of a new state or the stability of an *octroi* constitution'. It also provided a sound theoretical explanation of continuity through constitutional change. Finnis added that his general principle explained 'the most general and basic *function* of "the law",' which was to provide 'a present guide to actions' (especially for judges, as well as citizens more generally) by conserving past legal rights and future reasonable expectations.[55] Judges could use his general principle as a doctrinal tool to resist revolutionary governments that aimed to radically transform the (postcolonial) state—a move Finnis condemned as 'a sowing of the whirlwind' that 'deliberately seeks the total subversion of the order of society.'

Having set out his general principle and its practical value, Finnis recalibrated his attack on the concepts of a legal system as a sequence of sets of legal rules and principles. For Kelsen and Hart these were given a single identity over time by reference to the *Grundnorm* or rule of recognition. Here Finnis turned to Eric Voegelin's then unpublished paper on 'The Nature of Law' to argue that the continuity of a legal system as a sequence of sets of rules over time made as much sense as Zeno's paradoxical description of motion as a sequence of points.[56] In different ways, Kelsen and Hart had both failed to explain how a legal system as a set of valid rules had a single identity that persisted through time. Hart had offered the rule of recognition to remedy the 'defect' of pre-legal social rules that were only rules insofar as the group followed them. But Finnis asked why we should describe as a 'defect' the fact that legal rules depended on the community for their existence. The way out of this paradox was to ground legal continuity in a given community as 'a function of the continuity and identity of the society in whose ordered existence in time the legal system participates.'[57] 'In times of crises,' he concluded, the lawyer must appeal to 'the great "unincorporated society" in which he lives.'[58]

Finnis supported his theoretical claims by the empirical facts compiled in his *Annual Survey* studies of revolutionary jurisprudence in Rhodesia, Pakistan and Uganda. In these postcolonial

[53] Finnis, 'Revolutions and Continuity in Law', 63 [emphasis in original].
[54] Finnis, 'Revolutions and Continuity in Law', 64.
[55] Finnis, 'Revolutions and Continuity in Law', 65.
[56] Finnis, 'Revolutions and Continuity in Law', 69. This paper was published posthumously as Eric Voegelin, *The Nature of Law and Related Legal Writings*, ed. by Robert Anthony Pascal, James Lee Babin, and John William Corrington, The Collected Works of Eric Voegelin, 34 vols (Baton Rouge and London, 1991), XXVII.
[57] Finnis, 'Revolutions and Continuity in Law', 69.
[58] Finnis, 'Revolutions and Continuity in Law', 70.

courts judges had concluded that a new legal order existed only after they accepted the colony was, 'as a matter of "fact", a distinct society with its own accepted power structure and intelligible commonweal, not merely a fragment of imperial power and commonweal'. He agreed with Raz that in the final analysis a legal system, as with other forms of social life like religion, 'depends on the identity of the social forms to which they belong.'[59] At this point legal theorists could only explain the identity and continuity of a legal system by an appeal to other social sciences. Here Finnis again invoked Voegelin, this time as a guide to interpreting that 'original master of the philosophy of human affairs,' Aristotle.[60] In his inquiry into the *polis*, Aristotle had first found that the identity of society (*polis*) changed after the imposition of a new constitution (*politeia*). But he had added that there was a further question of whether a *polis* was bound to fulfill its past obligations if its *politeia* changed. In Voegelin's reading, Aristotle had answered this question by changing his mind to find that the *polis* did in fact retain its identity after revolutions, and thus might have ethical obligations that persisted through such constitutional changes.[61] This reading of Aristotle supported Finnis' general principle, which explained how a state's legal system could change without any change in its community.

Only the 'social sciences' of history and ethics could provide an ultimate answer for Finnis as to the continuity and identity of a legal system. 'Analytical jurisprudence,' he wrote, 'is intrinsically subalternated either to history or to ethics or to both, it cannot be an independent discipline, with a viewpoint of its own.'[62] Finnis again quoted approvingly from Voegelin's analysis of Aristotle's turn to the *polis* as the unit of historical study when he claimed that

> the process was well under way in which the object of inquiry expands from the order of the concrete societies to civilizations which belong to the same type of order, and ultimately to the order of history of a mankind which is no finite unit observation at all as it extends indefinitely into the future.[63]

Hart had resisted an appeal to ethical reasons like 'communal or civil friendship (*philia politike*)' in his account of officials' 'internal point of view' that valid laws should be followed.[64] But Finnis doubted whether Hart's minimal account was sufficient to explain the motivation of officials—let alone ordinary citizens—for obeying laws. Instead the answer to why people accepted law as 'a specific type of moral reason for acting' was to be found in a theory of history that refused the positivist rejection of value and judgment.[65]

In his turn to ethics, Finnis called for jurisprudence to 'rejoin the programme of philosophizing about human affairs' first and properly identified by Aristotle.[66] A return to history and ethics had two implications for the future direction of jurisprudence. First, jurisprudence should take the standpoint of the *spoudaios* (or 'serious person' in Finnis' translation) acting in the world, rather than the 'scientific observer' favored in the legal positivism of Kelsen and Hart. This move would reorient jurisprudence from a positive description of legal norms toward a practical guide to (ethical) action within the constraints and possibilities of law. Second, jurisprudence

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[59] Raz, *The Concept of a Legal System: An Introduction to the Theory of a Legal System*, 188–89.

[60] Finnis, 'Revolutions and Continuity in Law', 71. He referred here to Eric Voegelin, *Order and History: Plato and Aristotle*, ed. by Dante Germino, The Collected Works of Eric Voegelin, 34 vols (Columbia and London, 2000), XVI.

[61] Finnis, 'Revolutions and Continuity in Law', 72.

[62] Finnis, 'Revolutions and Continuity in Law', 72.

[63] Finnis, 'Revolutions and Continuity in Law', 73 quoting; Voegelin, *Order and History: Plato and Aristotle*, XVI, 389.

[64] Finnis, 'Revolutions and Continuity in Law', 73.

[65] Finnis, 'Revolutions and Continuity in Law', 74. He expanded on this argument in John M. Finnis, 'Reason, Authority and Friendship in Law and Morals', in *Jowett Papers 1968-1969* (Oxford, 1971), 101–24.

[66] Finnis, 'Reason, Authority and Friendship in Law and Morals', 75.

should shift away from the 'penumbral' or 'hard' cases considered by Hart and favored by Dworkin. Finnis dismissed these as 'secondary or deviant cases' that distorted and distracted us from the central question of why we should follow laws 'as standards for action in the present'.[67] In this analysis, 'the problem for the jurist is the same as the problem for the historian or for the good man wondering where his allegiance and his duty lie.'[68] Not only did people live their lives as 'a project in time,' but so too did society require a continued ordering sustained by shared values.[69] Even in exceptional revolutionary moments, men still desired 'justice and *philia politike*, which demand legal coherence and continuity and respect for acquired rights.'[70]

Finnis ended his intervention with arguing how an appeal to the shared values of a community provided judges and other actors with practical reasons to renounce radical revolutions. He had begun listing such values including justice and *philia politike*, as well as Thomist values like friendship.[71] For Finnis these values—however provisionally sketched—would set an ethical limit that would deny legitimacy to more radical revolutionary programs. Commonwealth judges were bound to recognize the legitimacy of a coup establishing an effective new legal system, but only insofar as it did not transgress the common values of the community. By privileging order and continuity, Finnis provided a justification for the reproduction of the central institutions of colonial rule that Nkrumah, Nyerere and several other African leaders hoped to overcome through self-determination as a state-led project of national development. The practical implications of his general principle were evident by contrasting his analyses of the Rhodesian UDI (1965) and Ghanaian military coup (1966). Despite long affirming his opposition to white domination and racial segregation, Finnis did not find the Rhodesian government's motivation to evade the British government imposing a non-racial franchise relevant to his jurisprudential conclusion that the Rhodesian UDI was legitimate since it only aimed at a change of the rule of competence. In contrast, Finnis was expressly hostile to the more radical political programmes of African socialist governments in Ghana and Tanzania. He described Kwame Nkrumah's government as a 'corrupt centralising administration' in part because its constitutional reforms had threatened acquired property rights. Similarly, Julius Nyerere's Arusha Declaration signaled a turn 'inwards, placing its hopes in a stringent puritan self-sufficiency.'[72] For Finnis, these constitutional reforms (whose proponents aimed to end the deep structural legacies of colonial rule) threatened to sow whirlwinds that could only end in anarchy.

Critiques of Postcolonial Political Economy

In the framework of Cold War liberalism, tyranny and anarchy were the respective dangers facing a society of individuals or a community of citizens. Despite the important differences between Hart and Finnis, their jurisprudential analyses presumed a unified social space within the modern state. In the 1960s, however, African intellectuals asked different questions about the crises of revolutionary legality. They understood the defining crisis of independence as a lack of the sameness essential for unity. Almost no African state coincided with a population who saw themselves as a 'nation'. Nkrumah, Obote, Nyerere and other independence-era African leaders were driven by a collective project in 'worldmaking': to forth new 'nations' within the historical space and its heterogeneous populations inherited from the colonial states.[73] In this context, a new generation of scholars began a critique of the (neo)colonial political economy to better

[67] Finnis, 'Revolutions and Continuity in Law', 75–76.
[68] Finnis, 'Revolutions and Continuity in Law', 75.
[69] Finnis, 'Revolutions and Continuity in Law', 76.
[70] Finnis, 'Revolutions and Continuity in Law', 76.
[71] Finnis, 'Reason, Authority and Friendship in Law and Morals', 101–24.
[72] *ASCL 1967* (1968), 74 & 81.
[73] Adom Getachew, *Worldmaking After Empire: The Rise and Fall of Self-Determination* (Princeton, 2019).

understand the nature of the African postcolony as a distinctive form of the modern state. The answers they gave suggest different analyses of revolutions and the duties of judges adjudicating on their legitimacy.

In eastern Africa, it was the Ugandan *Matovu* decision and the military coup against Nkrumah that set of a fierce debate in the pages of *Transition*, the leading pan-African intellectual magazine edited by Rajat Neogy in Kampala.[74] In its first edition, Naphtali Akena Adoko, head of the General Service Unit security and intelligence service, defended the new 1967 Constitution passed to replace the 'pigeonhole constitution' forced on Parliament in the coup a year before. Here was a new democratic order fitting the needs of a new nation building unity out of 'electors who consist of people of no formal education and no training in the art of modem government'.[75] A few issues later, Picho Ali, a hardline Marxist-Leninist lawyer trained at the Moscow State University and Secretary for Research in the President's Office, also defended the new constitution.[76] He was especially concerned to defend the legitimacy of the new government and the constituent assembly created in haste to pass the new constitution. Ali's case largely rested on the High Court's decision in *Matovu*. 'What happened in Uganda in 1966 was a revolution and from a juristic point of view,' Ali insisted, 'the decisive criterion of a revolution is that the order in force is overthrown and replaced by a new order in a way which the former had not itself anticipated.'[77]

Later that year, Ali responded to the Obote government's critics by enforcing a hard Soviet line on the ideological commitment required of judges in a revolutionary African state.[78] He argued that law (and the state) was part of society's superstructure, and thus expressed the 'legal will' of the dominant class. In a postcolony like Uganda, the capitalist colonising class had been replaced by 'the people,' who he defined as 'a group of social classes—the peasants, workers (both manual and mental workers) etc.' Thus, Ugandan judges needed to accept the 'principle of ideological parity' that law should reflect the revolutionary values and aspirations of the African working class. When confronted with a case when a legal rule would thwart those aspirations, judges had a duty to advance the will of the people rather than apply the rules literally. Ali defined the latter approach as legal positivism (what he called the 'pure theory of law' or 'normative school of jurisprudence') defended by (mostly) expatriate British judges and some African lawyers. By substituting formal 'justice' for the substantive vindication of the people's will, for Ali, was nothing less than a betrayal of the African revolution against colonialism.

[74] For histories of the *Transition* affair, compare Muniini K. Mulera, 'A Frightened President, Courageous Magistrate and the Case against Neogy and Mayanja', *Monitor*, 22 October 2018 <https://www.monitor.co.ug/uganda/oped/columnists/muniini-k-mulera/a-frightened-president-courageous-magistrate-and-the-case-against-neogy-and-mayanja-1785276>; Andrew N. Rubin, *Archives of Authority: Empire, Culture, and the Cold War* (Princeton, 2012); Bernard Tabaire, 'The Press and Political Repression in Uganda: Back to the Future?', *Journal of Eastern African Studies*, 1/2 (2007), 195–202; D. Wadada Nabudere, *Law, the Social Sciences and the Crisis of Relevance: A Personal Account* (2001), 52–60; Frances Stonor Saunders, *Who Paid the Piper?: CIA and the Cultural Cold War* (1999); Zie Gariyo, *The Media, Constitutionalism, and Democracy in Uganda* (Kampala, 1993); Peter Benson, *Black Orpheus, Transition, and Modern Cultural Awakening in Africa* (Berkeley, 1986), 177–204.

[75] Akena Adoko, 'The Constitution of the Republic of Uganda', *Transition*, 33 (1967), 12.

[76] Ali was one of many African students educated in Soviet Bloc universities in the 1960s: Constantin Katsakioris, 'Return from the USSR: Soviet-Educated Africans, Politics and Work, 1960s–2000s', *Canadian Journal of African Studies*, 55/2 (2021), 278. Ali was killed by Amin in 1972.

[77] Picho Ali, 'The 1967 Republican Constitution of Uganda', *Transition*, 34 (1968), 13.

[78] Picho Ali, 'Ideological Commitment and the Judiciary', *Transition*, 36 (1968), 47–49.

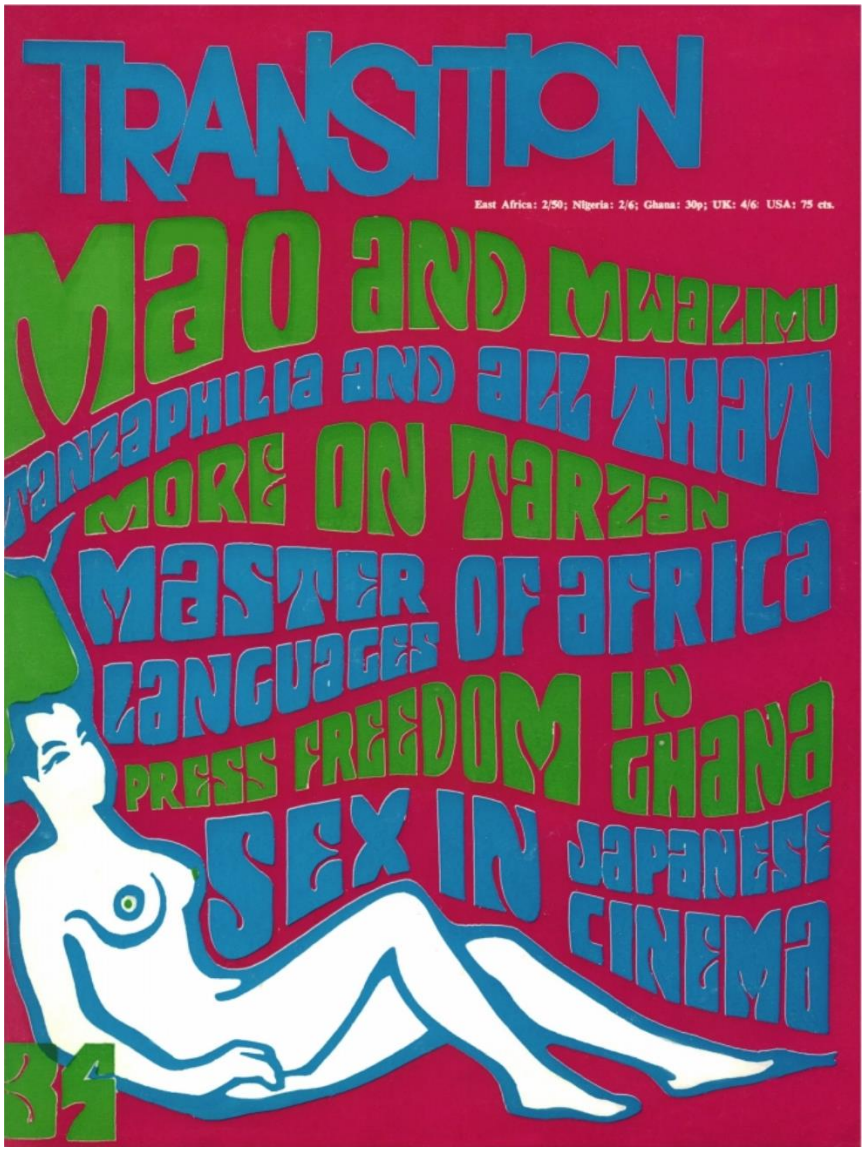

Figure 1. Transition *magazine cover, no. 34*

The bomb lit by Ali exploded the next year. Letters flooded into *Transition* from leading lawyers rejecting what they saw as the subjugation of the judiciary to an undemocratic and even illegitimate government. To ward off the Ali's 'blindly foreign ideologies,' John W. R. Kazzora, a Middle Temple trained barrister and past President of the Uganda Law Society, repeated the articles of his English common law faith in independent courts ensuring 'certain and fair' judgments under 'the rule of law'. Others rejected Ali's claim that the Ugandan people (and their revolutionary government) had a coherent socialist ideology like Nyerere's Tanzania. If it did have such an ideology, asked Abu Kakyama Mayanja, why hadn't the Ugandan government ruling with a massive majority under its own constitution simply passed the revolutionary laws necessary to realise the people's will? The answer, he suggested, was 'that far from wanting to change the out-moded colonial laws, the Government of Uganda seems to be quite happy in retaining them and utilising them, especially those laws designed by the Colonial Regime to suppress freedom of association and expression.'[79] Mayanja's public rebuke was especially shocking since he was an MP in Obote's Uganda's Peoples Congress since 1964 (he was also a

[79] 'Letters to the Editor', *Transition*, 37 (1968), 15.

Lincoln Inn trained barrister and Cambridge graduate).[80] Shortly after the coup, Mayanja had published a short article in *Transition* on then President Obote's proposals for a new constitution for Uganda.[81] After a dispassionate description of the plan to centralise power in the new office of the President, Mayanja wrote that 'the truest test for a successful constitution is whether it provides for a change of government by constitutional means, without recourse to revolution.'[82] The proposed constitution failed this test because it aimed to impose national unity by executive domination 'without carefully evaluating or allowing for the strength of existing tribal feeling'.[83] The result would be an authoritarian and illiberal constitution that abolished traditional African institutions and norms—and thus a victory for white supremacists like Ian Smith who argued that Africans were unready for self-government. But Mayanja's real provocation (which ultimately triggered Obote to shut down *Transition*) was his claim that Obote's government had not 'Africanised' the judiciary because of 'tribal considerations,' namely the problem of balancing appointments to represent the 'tribes' that constituted Uganda.

In contrast to these constitutionalist arguments, D. W. Nabudere, another London-trained (Lincoln Inn) barrister and University of London law graduate, pointed on the hypocrisy of Ali's claim that the 1967 Constitution was a '"Revolution in law" as well as fact' (citing Ali citing the High Court in *Matovu*).[84] Nabudere pointed out that the new legal order in fact upheld the central legal institutions of the colonial political economy from the extensive executive prerogatives, the 'Mailo land system', the police ('more violent … than the colonists!') and the underlying 'capitalist mode of production'.[85] In particular, the Constitution gave special status to those 'laws protecting the interests of the capitalist ruling class of the Western imperialist countries'. While most critics reiterated a faith in the common law and the Westminster constitutional model, Nabudere took a further step of asking how even a self-proclaimed revolutionary Ugandan government had largely preserved the colonial legal order. He agreed with Ali's claim that the superstructure of the judiciary and the legal order more generally was created by and dependent upon its materialist base. But he insisted that the first revolutionary task was 'to ascertain the type of economic base we have—and hence its politics and ideology.' The answer, Nabudere stated, was that Uganda was a 'neo-colony or semi-colony'.

The *Transition* magazine and the civil discourse it sustained ended abruptly on 18 October 1968. Acting under the same state of emergency powers that triggered *Matovu*, Obote ordered soldiers to arrest Mayanja and Rajat Neogy, the magazine's editor, and charge them with sedition for writing that the Ugandan government had not yet Africanised the judiciary.[86] Mayanja was severely beaten and both were held in isolation in the maximum security Luzira Upper Prison until a heated public trial that pitted the Attorney-General, Godfrey Lukongwa Binaisa QC (and another Lincoln's Inn barrister), against Sir Dingle Foot QC, one of the great peripatetic barristers defending new nationalist leaders across the Commonwealth at the end of empire.[87] The judge, Chief Magistrate Mohammed Saied, a Kenyan Asian, acquitted both accused men on the grounds that their claim was a reasonable grievance and so permitted under freedom of

[80] Joseph Kasule, *Historical Dictionary of Uganda* (London, 2022), 162; Jonathan L. Earle, *Colonial Buganda and the End of Empire: Political Thought and Historical Imagination in Africa* (Cambridge, 2017), 218–19.

[81] Abu Mayanja, 'The Government's Proposals for a New Constitution of Uganda', *Transition*, 32 (1967), 20–25.

[82] Mayanja, 'The Government's Proposals for a New Constitution of Uganda', 22.

[83] Mayanja, 'The Government's Proposals for a New Constitution of Uganda', 23.

[84] Nabudere described his bachelor of laws at the University of London as 'very much in the English positivism tradition based on John Austin': Nabudere, *Law, the Social Sciences and the Crisis of Relevance: A Personal Account*, 80.

[85] 'Letters to the Editor', 11.

[86] Up to this time Obote was a regular reader of, and even once contributed to, *Transition*: Benson, *Black Orpheus, Transition, and Modern Cultural Awakening in Africa*, 101.

[87] Meredith Terretta, 'Anti-Colonial Lawyering, Postwar Human Rights, and Decolonization across Imperial Boundaries in Africa', *Canadian Journal of History*, 52/3 (2017), 467.

speech.[88] As Mayanja and Neogy stepped out of the courtroom, however, they were rearrested, as was Nabudere and Sebukima that year, when the state of emergency was extended across the country. Neogy rejected demands to censor his magazine, but was only released from solitary confinement after Obote annulled his Ugandan citizenship (an ominous portent of Amin's mass expulsion of 'Asian' residents in 1972). Now stateless, he had no choice but to close *Transition*, and leave for exile in New York and then Ghana.

Nabudere's call for a critical study of the political economy of the African 'neo-colony' was taken up in a most peculiar place: the University College of Dar es Salaam. By the mid-1960s, this once sleepy port on the Swahili coast had become one of the great Cold War 'cities that lay on the fault lines of international geopolitics and anti-imperial struggles' that connected the First, Second and Third Worlds.[89] In his opening address for the new Faculty of Law in 1961, Nyerere laid out the ideological mission of the new African law school:

> We are just undertaking a Herculean task, the task of building a united, democratic and free country. An essential part of o national philosophy must be a legal profession of great integrity which not only knows the formalities of law but also understands the basic philosophy which underlies our society. Our lawyers and Judiciary must, in other words, not only appreciate that law is paramount in our society, they must also understand the philosophy of that law.[90]

Nyerere also reassured his audience that the judiciary must be independent and impartial, and that any iniquitous law could be changed by parliament. In 1966, however, the Tanzanian government had expelled over 300 University students for resisting the new system of compulsory national service. The next year, his Arusha Declaration called for the construction of an African state driven by twin ideologies of socialism and *ujamaa* (the kiSwahili word 'familyhood').[91] All these changes heightened the revolutionary fervour at the University College of Dar es Salaam. At the time, recalled the Jamaican scholar Horace Campbell then teaching history there, the expatriate social scientists were teaching the 'rights of men', the importance of the 'market' and the building of 'modern political institutions'.[92] Yet a new influx of radical young scholars from across Africa and the wider Commonwealth of Nations flocked to the peaceful sanctuary of Dar es Salaam.

Peace, however, did not mean calm. In 1968, the Law Faculty had tried to respond by creating a new compulsory course, 'East African Society and Economic Problems,' run by the 'brilliant young Marxist' Sol Piccioto.[93] According to Josaphat Kanywanyi, the new law curriculum aimed to create 'a thinker, all-round and knowledgeable lawyer who was an agent of change for a "revolutionary East Africa'.[94] But the next year a group of radical law students from the

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[88] Reproduced in 'The Judgment [in the Transition Sedition Trial in Uganda]', *Transition*, 1971, 38, 47–49.

[89] George Roberts, *Revolutionary State-Making in Dar Es Salaam: African Liberation and the Global Cold War, 1961-1974* (Cambridge, 2021), 4.

[90] Julius Nyerere, *Freedom and Unity (Uhuru Na Umoja): A Selection from Writings & Speeches, 1952–1965* (Oxford, 1967).

[91] The Tanzanian government published *Mwongozo* ('Guidelines') policy in 1971, which intensified the socialist goals of the Arusha Declaration. The authors also drew the lesson from recent coups in Guinea and Uganda that there was now an existential 'threat to African regimes which were committed to equality and supportive of liberation movements.': quoted in George M. Roberts, 'Politics, Decolonisation, and the Cold War in Dar Es Salaam c.1965-72' (unpublished Ph.D, University of Warwick, 2016), 180.

[92] Horace Campbell, 'The Impact of Walter Rodney and Progressive Scholars on the Dar Es Salaam School', *Social and Economic Studies*, 40/2 (1991), 105.

[93] Issa G. Shivji, 'Lionel Cliffe, 1936–2013: A Comradely Scholar in Nyerere's Nationalist Tanzania', *Review of African Political Economy*, 41/140 (2014), 284.

[94] Nabudere, *Law, the Social Sciences and the Crisis of Relevance: A Personal Account*, 77. The new course covered topics like 'Social Evolution and the Pre-colonial History of East Africa' The Rise of Capitalism in Europe,' 'The

University Students African Revolutionary Front, including Issa Shivji and Yoweri Museveni, occupied the Faculty of Law. In their student paper, *Cheche* ('Sparks,' inspired by *Iskra*, Lenin's newspaper), they rejected the imported American 'case method' and its 'Law and Development' paradigm, instead demanding their law professors to teach the law in its social, economic and historical context aligned with the socialist goals set out in the Arusha Declaration.[95] In 1970, the Nyerere government intervened directly by reconstituting the University with an explicit mission to 'preserve, transmit and enhance knowledge for the benefit of the people of Tanzania in accordance with the principles accepted by the people of Tanzania'.[96]

At the Faculty of Law, the young dean Yash Pal Ghai began his own experimental synthesis of British legal positivism and Marxist critiques of the African postcolony in 'the most exhilarating period of my life'.[97] He and a colleague, Patrick McAuslan, work for the Tanganyika (Tanzania after 1965) African National Union to create a one-party state. For Ghai, this great experiment would only succeed if the internal party constitution adopted the principles and institutions of constitutionalism. Nyerere asked Ghai and McAuslan to advise the TANU government on its proposed interim constitution to merge Tanganyika and Zanzibar, and establish one-party rule (with an exception for Zanzibar) on the principle of *ujamaa*. The proposed reform aimed to abolish the neo-colonial shackles on the state by imposing a new socialist order aimed at indigenizing and equalizing society. Some of Ghai and McAuslan's proposals were incorporated in the 1965 interim constitution.[98] They had proposed two independent bodies, an ombudsman and an electoral commission, to provide a legal check on key processes of administrative and democratic accountability within the single part structure. They also advised rolling back the colonial-era laws on preventative detention that permitted indefinite imprisonment without trial—laws which the Tanzanian and neighbouring African governments had inherited from colonial rule and likewise used freely against their political opponents after independence. Ghai hoped his proposals would further decolonise the state by abolishing the undemocratic and arbitrary legal legacies inherited from British colonial rule.

The Presidential Commission on the Establishment of a Democratic One Party State also recommended that the nation needed to both develop the rule of law and limit the jurisdiction of courts to keep them out of 'political' areas—making a specific reference to the US Supreme Court's resistance to Roosevelt's New Deal.[99] It was shortly after its report was published that Ghai entered the law and revolution debate with a law journal comment on *Matovu*—the only article he penned as editor in the first edition of *Eastern Africa Law Review* published at Dar es Salaam. Unlike nearly all other contemporary scholarly critiques, he looked at the seemingly narrow question of when a court could limit executive action against individual liberty in a time

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Colonial Situation,' and 'Case studies in East African Development'

[95] Issa G. Shivji, ed., *Limits of Legal Radicalism: Reflections on Teaching Law at the University of Dar Es Salaam* (Dar es Salaam, 1986); Issa G. Shivji, 'Reflections: An Interview with Issa G Shivji', *Pambazuka News*, 22 January 2009 <https://www.pambazuka.org/food-health/reflections-interview-issa-g-shivji>.

[96] *University of Dar es Salaam Act*, no. 12, 1970, s. 4(a).

[97] Shivji, 'Reflections: An Interview with Issa G Shivji'; Yash Ghai, 'Biography' <http://www.queensu.ca/edg/sites/webpublish.queensu.ca.edgwww/files/files/members/researchers/ghai/Ghai_PRS.pdf>. The following paragraphs draw on my longer study of Ghai: Coel Kirkby, 'Commonwealth Constitution-Maker: The Life of Yash Ghai', in *Commonwealth History in the Twenty-First Century*, ed. by Richard Drayton and Saul Dubow (2020), 61–80.

[98] Their recommendations are summarized and analysed in Yash Ghai and Patrick McAuslan, 'Constitutional Proposals for a One Party State in Tanzania', *East African Law Journal*, 1 (1965), 124–47; J. P. W. B. McAuslan and Yash Ghai, 'Constitutional Innovation and Political Stability in Tanzania: A Preliminary Assessment', *Journal of Modern African Studies*, 4/4 (1966), 479–515.

[99] *Report of the Presidential Commission on the Establishment of a Democratic One-Party State* (Dar es Salaam, 1965), 102–3; see also R. B. Martin, 'In the Matter of an Application by Michael Matovu', *East African Law Review*, 61 (1968), 67.

of emergency. Reading the High Court's reasons, Ghai likened the three judges to the majority of Law Lords in the House of Lords in *Liversidge v. Anderson*, whom Lord Atkin in dissent dismissed as 'more executive-minded that the executive.' Indeed, Udoma, Sheridan and Jones had cited the *Liversidge* majority to conclude that there could be no challenge in a court to the Minister's belief that detention was necessary under the emergency powers law. While Ghai made a careful technical critique the judges' reasoning, he also insisted on putting this reasoning in the context of the Ugandan state. 'One reason that in many newly independent countries there is so much emphasis on written constitutional guarantees,' he wrote, 'is an absence of total faith in the political and administrative processes.'[100] Thus, the courts had an especially important function—in fact a 'constitutional mandate'—to protect individual rights. Another worry for Ghai was the apparently minor issue that the 'independent and impartial tribunal' established under the Constitution and regulations to review the detentions was composed of a judge and two District Commissioners. These two officials, he insisted, were 'executive officers … very much concerned with the maintenance of law and order.'[101] Ghai concluded by calling the *Matovu* decision 'a dangerous precedent' that sanctioned the arbitrary abuse of executive power under the same state of emergency that much of independent Africa lived.

In his concern that the courts protect individual liberty from arbitrary executive active, Ghai shared the liberal sensibility of his African peers writing in *Transition* and defending Matovu, Mayanja, Neogy and others in the courts of Kenya, Uganda and Tanzania. Yet his analysis also hinted at Nabudere's concern to situate these critiques in the particular political economy of the African postcolony. He even agreed with Adoko who in his defence of the 1967 Constitution had written that most Ugandans still 'identify the Central Government, with its laws, and trappings as belonging to alien people'.[102] The understand the postcolonial African state, including the judiciary, a scholar first had to under its historical formation under British imperialism. This was Ghai's main intellectual project: a massive study of the Kenya colonial and post-colonial political economy, *Public Law and Political Change in Kenya* (1970), co-authored with McAuslan. Their book was framed around the liberal problematic of 'legitimacy' in Kenya before and after independence. While the authors favoured constitutional government as the best hope for an African future, they were also aware of the persistent legacy of colonial government: 'Law was second only to weapons of war in the establishment of colonial rule.'103 In this analysis, colonial rule was 'inimical to the development of constitutionalism'. If Ghai was critical of the actual structure of British colonial rule, he did approve of some aspects of its legal order and administration. In particular, he appreciated how British commissioners had travelled across Kenya to address the question of minority claims for secession before independence. He also valued the objectivity—as an ideal if not always the actual practice—of British officials mediating between antagonistic African, European and Asian communities.

Ghai was not alone in his experiments in a critique (post)colonial political economy. From the mid-1960s onwards, there was an explosion of explicitly Marxist (as well as Maoist) Shortly after his ousting by coup, Nkrumah published *Neo-Colonialism: The Last Stage of Imperialism*—a clear allusion to Lenin's *Imperialism: The Highest Stage of Capitalism* (1965).[104] He argued that the particular condition of the African postcolony was the contradiction of political independence and economic domination. 'For those who practice it, [neo-colonialism] means power without responsibility,' wrote Nkrumah, 'and for those who suffer from it, it means exploitation without

[100] Ghai, 'Matovu's Case: Another Comment', 71.
[101] Ghai, 'Matovu's Case: Another Comment', 73.
[102] Adoko, 'The Constitution of the Republic of Uganda', 10.
[103] Yash Ghai and J. P. W. B. McAuslan, *Public Law and Political Change in Kenya; A Study of the Legal Framework of Government from Colonial Times to the Present* (Nairobi, 1970).
[104] Kwame Nkrumah, *Neo-Colonialism: The Last Stage of Imperialism* (London, 1965).

redress.'[105] In his political elegy for Nkrumah in *Transition*, Mazrui had called him the 'Leninist Czar' since he successfully organised mass politics in Ghana (and with less success across the continent), yet transformed independent government into a kind of modern monarchical tyranny that would kill those democratic futures.[106] Walter Rodney, who also taught in the Faculty's law and political economy course, was also finishing his own critical study of the African postcolony. 'Development was universal,' Rodney wrote in *How Europe Underdeveloped Africa* (1972), 'because the conditions leading each economic expansion were universal.'[107] But Europe had colonized Africa, and so distorted its natural development into unnatural underdevelopment. Mahmood Mamdani, another young ex-pat scholar from Uganda, later recalled how this book 'broke colonialism down to a raw exercise of power relations and envisaged Africa's renewal within a socialist framework'.[108] Mamdani, Shivji and a new generation of Dar es Salaam scholars would develop the these critiques into a new .[109]

The Dar es Salaam school of postcolonial political economy died a death repeated across the continent in the 1970s. British and American funding to universities—the material basis for their brief flourishing—dried up across the continent as the sites of Cold War contest shifted elsewhere. At home, Nyerere increasingly clamped down on the University's independence after 1970. In this inhospitable climate, the epistemic world sustained by these funds fell apart. African law journals closed from lack of money and even paper (some kept alive for a few more years printed on hand-mimeographed onion paper): Ghai's *Eastern Africa Law Review* in 1977; the University of Nairobi's *East African Law Review* in 1976; and the *University of Ghana Law Journal* in 1977. Many key members of the Dar school were pushed and pulled abroad: Ghai left for home to escape the growing backlash against Asians in Dar es Salaam, only to escape again to Yale in 1971; Rodney returned home to Guyana in 1974 only to be assassinated six years later; Mamdani returned to Uganda after Amin's overthrow in 1979 (only to be expelled and made stateless five years later by Obote's new government). Picho Ali, who had started the *Transition* debate by defending the *Matovu* decision, was executed by Amin's soldiers in 1971. Even African judges did not escape this harsh decade. In 1968, Obote fired Udoma with the excuse that he needed to Ugandanise the High Court (only to replace him with his junior, Sir Dermot Sheridan).[110] David Jeffrey Jones, the third judge in *Matovu*, made a harrowing escape from Amin's Uganda in 1971.[111] The last judge was Benedicto Kiwanuka, the last colonial Chief Minister and Grey's Inn barrister. He had beenhad been imprisoned by Obote in 1969, and then released by Amin who appointed his as the first Ugandan African Chief Justice of the High Court in 1971. Only a year later, however, Kiwamuka was murdered in military detention—either tortured and burned alive, or shot dead by Amin himself.[112]

Conclusion

[105] Nkrumah, *Neo-Colonialism: The Last Stage of Imperialism*.

[106] Ali Mazrui, 'The Leninist Czar', *Transition*, 26 (1966), 8–17.

[107] Walter Rodney, *How Europe Underdeveloped Africa* (London, 1972).

[108] Mahmood Mamdani, 'The African University', *London Review of Books*, 40/14 (2018), 29–32.

[109] Mahmood Mamdani, *Politics and Class Formation in Uganda* (London, 1976); Issa G. Shivji, 'From the Analysis of Forms to the Exposition of Substance: The Tasks of the Lawyer-Intellectual', 1 & 2 (1972), 1–8. On the internal debates of this Dar es Salaam school of Marxist thought over the 1970s, see Y Tandon, ed., *The Debate on Class, State and Imperialism* (Dar es Salaam, 1982).

[110] Udoma returned to Nigeria and led the Supreme Court to justify the Nigerian military coup: Daly, 'The Portable Coup: The Jurisprudence of "Revolution" in Uganda and Nigeria', 753–54. Sheridan's father, Sir Joseph Alfred Sheridan, had served as Chief Justice for the colonial courts of both Tanganyika and Kenya.

[111] Amin had appointed Jones to inquire into the disappearance of two American journalists. After completing his inquiries, Jones fled to the UK and mailed Amin his report that concluded that Amin's soldiers were the murderers: Ogenga Otunnu, *Crisis of Legitimacy and Political Violence in Uganda, 1890 to 1979* (Cham, 2016), 291.

[112] https://en.wikipedia.org/wiki/Benedicto_Kiwanuka

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