

REVIEW

Law Without Precedent: Legal Ideas in Action in the Courts of Colonial Basoga. LLOYD A. FALLERS. University of Chicago Press, Chicago, 1969. Pp. xi, 365. \$12.00.

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Professor Fallers, an anthropologist, who went to East Africa to study the politics and administration of Soga society, found the preoccupation of the Basoga with litigation and the arts of adjudication sufficient to attract his own skilled mind to a study of the Basoga courts and law. As he states in his preface, he found their excellent court records irresistible so he proceeded to collect as much material as he could without really knowing what he would do with it. For many years since collection of this material he has been trying to determine why he found it so fascinating. The present book results from his conclusion that a theory of law occupies an especially strategic place in socio-cultural studies because one must take seriously both ideas and social relations.

The Basoga are a rural people inhabiting a portion of present-day Uganda where Lake Victoria spills into the Nile. To the traditional society of a rich subsistence culture based on the banana have been added valuable cash crops: cotton, peanuts, and coffee. Nevertheless, the society remains a rural society with no urbanism in sight.

British colonial legislation and practice, as is well known, left wide areas of law to be supplied by "native law and custom" which according to the Native Courts Ordinance of 1941 was to govern both the substance and procedure of adjudication. Unlike Llewellyn and Hoebel's attempt to discover and describe a pure indigenous "Cheyenne" law, before influenced by colonists, Fallers regards Soga law as in continuous development, and his interest is in how it develops and not with an attempt to assess foreign sources for the development nor to discover what it was before the British influence became paramount in the 1890's.

The thesis of Fallers' analysis is that Basoga judges, without written precedents as the Anglo-American legal tradition understands them, engage in "legal reasoning." He finds the view of law of H.L.A. Hart (*The Concept of Law*) and of legal reasoning of Edward Levi to be particularly congenial for his analytic purposes. Legal reasoning is "the application to the settlement of disputes of *categorizing concepts* that define justiciable normative issues" which must be decided by a

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process of "inclusion or exclusion." Hart states that law involves the combination of "primary rules of obligation" with "secondary rules" which are rules about the primary rules. The secondary rules specify the ways in which the primary rules may be conclusively ascertained, introduced, eliminated, varied, and the facts of their violation conclusively determined. The legal mode of social control requires that values with respect to human conduct be reduced to normative statements which are sufficiently discrete that it may be authoritatively determined whether or not in a particular case a particular rule has been violated.

Fallers takes two spheres of Soga life represented in the cases for the years 1950-52 which he collected: the field of sexual relations and marriage and the field of rights in land. An important basis of the selection of these two fields is the "difficulty" which the court system appears to have with them, measured both by their frequency and by the number of appeals. In each classification of cases Fallers proceeds from the "run of the mill" in the sense that the judges experience little difficulty in finding the facts and in fitting them into an appropriate category where the normative rule is relatively stable to a final set of situations where a cultural or social change is obviously taking place. The illustration of change in the marriage field is a child marriage case in which a woman given in marriage by her father is allowed to be divorced on the basis of her assertion without a "ground" for divorce that she no longer loved her elderly husband. In the land field the final conflict considered was the development of a "contractual tenancy" arising neither from allocation by a headman or official administrative allocator nor from inheritance, but from a "loan" of land for a particular purpose by a person who had in the historical past been a beneficiary of the two recognized methods of allocation.

The common theme of these materials for Professor Fallers is that here he has a legal system of social control which has concepts and categories which change but which exist without overt communication, that is, without precedent or legislation. The legal systems with which Hart and Levi were concerned make use of devices for communicating rules or conceptual applications both among courts and between courts and litigants, but the system with which Fallers is concerned has not developed a system of communicating, a requirement for law according to Hart. While the young Basoga acquire a command of the system in the process of growing up, by attending court and listening to their elders' out-of-court legal conversation, neither of these processes of education makes the conceptual structure of the law very explicit. It took Fallers' analysis of the cases to uncover the subsidiary concepts by inference from the arguments, questions, and decisions of those who participate in the trial process.

In a sense the Year Book reports were in the form of the report of

Basoga cases but for the comments of Coke and other reporters. Fallers has performed the work which the analyzer-reporters of the Year Book cases did for Anglo-American law. A puzzling question is: What was it that induced the Year Book reporters to add to the reports their comments which often made explicit the subsidiary concepts? Why was this regarded as important? Fallers suggests that without this categorizing tendency of the precedent reporting system in Anglo-American law "it would be impossible to maintain order within a rapidly changing legal system." It is only when the society and the law are relatively static can uncommunicated categories and concepts continue to exist. While change can occur in this system, it probably can exist only if the change is more gradual than it has been in most of Anglo-American legal history. Fallers does not hazard a guess as to the future.

Fallers also attempts to put Basoga legal culture into perspective by comparing them with the Barotse, Tiv and Arusha as shown in the works of Gluckman, Bohannan, and Gulliver. All four cultures indicate a "litigious" nature. The Arusha in adjudication attempt to assess the whole situation using moral and political arguments. The Soga, on the other hand, attempt in the process of litigation from the decision to make a "case" (complaint) in court through the interrogation and arguments to determine whether a set of facts falls within the reach of one particular concept. While much is listened to, most is excluded and the interrogation set forth in the Fallers text indicates how interrogation by the judges is more designed to eliminate matters than to develop the whole circumstances. Between these two extremes Fallers places the Barotse and Tiv. Consensus or agreement is important for the Arusha and Tiv but the concept of wrong is developed by the judges without an attempt to produce consent in the Soga and Barotse cultures.

What lessons can one learn from this excellent study of a single legal system about law and social reform in both developing nations and in highly developed nations? After his cases were collected but before he completed his analysis, Professor Fallers and the reviewer were members of a "team" of experts to make recommendations about reform of the land law of the Basuto in southern Africa. We faced a problem which by "hindsight" I can see Professor Fallers knew how to deal with from his experience with the Basoga. We concluded in our recommendation that reform of *process* should *precede* substantive reform. Like the the Basoga, the Basuto had a well developed concept of allocation by a village headman and chief; unlike the Basoga, the political and administrative functions of chieftanship had not been as clearly separated from the land allocating function. Unlike the Basoga, the Basuto had not developed a very complete idea of inheritance. Like the Basoga, the Basuto had developed an "under-

ground" or "extra-legal" system of "loaning" land. We concluded that development of citizen's advisors to the allocating chief was the best way of regularizing and developing a set of concepts about land tenure and that we should not try to state a more or less finished system of relationships concerning land but should expect a system to develop in accordance with expectations. The "gamble" was a belief that developing ideas and concepts would result from a system in which the allocator was accountable. It remains to be seen whether in the last half of the 20th century any citizenry has "time" to rely on evolving concepts as the method of change. Professor Fallers shows that if a tendency to categorize has already developed and if confidence in the system of adjudicators is maintained, change can occur and occur quite rapidly whether there is a public system of precedents or not.

Western jurisprudence tends to see in the work of anthropologists concerning less industrialized societies rewarding points of comparison and even insights as to the meaning of our own concepts. Perhaps we need to reanalyze our own system as if we had no commentators, and systemizers of the past; as if we too were a rich legal system without precedent. Professor Fallers shows us how it can be done.