

1971

Book Review of Law without Precedent: Legal Ideas in Action in the Colonial Courts of Busoga

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Repository Citation

Palmer, Larry I., "Book Review of Law without Precedent: Legal Ideas in Action in the Colonial Courts of Busoga" (1971). *Faculty Publications*. 516.

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LAW WITHOUT PRECEDENT: LEGAL IDEAS IN ACTION IN THE COLONIAL COURTS OF BUSOGA. BY LLOYD A. FALLERS. Chicago: The University of Chicago Press, 1969. Pp. xi, 365. \$12.00 hardbound.

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One might question the value of a well-written, yet relatively short, scholarly work that proceeds for 100 pages before the author is able to state explicitly that he is ready to "turn to the main business of this study" ¹ But given the controversial nature of the literature on African customary legal systems, ² a scholar undertakes an enormous intellectual task if he hopes to make a major contribution to the field of comparative legal studies. Lloyd Fallers, an anthropologist, has made such a contribution by using the analyses of several Anglo-American jurists ³ in his study of the legal reasoning of litigants and judges of the colonial courts of Busoga. ⁴ Fallers' work is an important contribution for legal scholars interested in interdisciplinary studies. His book is an example of the type of integration of law and a social science that we have come to expect in modern scholarship. His use of legal theories and methodologies in his analysis of the social science data is both highly sophisticated and critical. In developing his major thesis that the Soga legal system operates as a system of social control, "without overt communication about the application of legal concepts—without precedent or legislation," ⁵ Fallers demonstrates both the applicability and the inapplicability of analyses from our legal system, with its strong notion of precedent. ⁶

A lawyer would be naive to rely upon the notion that he has been trained to "get to the essence" of materials and on that rationale skip

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¹ L. FALLERS, *LAW WITHOUT PRECEDENT: LEGAL IDEAS IN ACTION IN THE COLONIAL COURTS OF BUSOGA* 100 (1969).

² See March, *Sociological Jurisprudence Revisited, A Review (More or Less) of Max Gluckman*, 8 *STAN. L. REV.* 499 (1956), and Gluckman's reply, *id.* 767. The author acquaints the reader with this controversy between the leading writers in the field early in his work. L. FALLERS, *supra* note 1, at 9-14.

³ *E.g.*, H. L. HART, *THE CONCEPT OF LAW* (1961); E. LEVI, *AN INTRODUCTION TO LEGAL REASONING* (1948); K. LLEWELLYN, *JURISPRUDENCE: REALISM IN THEORY AND PRACTICE* (1962).

⁴ Busoga is part of what is now Uganda.

⁵ L. FALLERS, *supra* note 1, at 312 (emphasis in original).

⁶ See sources cited note 3 *supra*.

lightly through the first 100 pages. A thorough comprehension of these three chapters is essential to an understanding of the results of the cases and Fallers' analysis of them. His discussion of the relationship of the Busoga legal system to the stresses in that society during the period of colonization is excellent.⁷ In particular his demonstration that the function of the colonial courts under British rule is, in many respects, consistent with the Soga's previous system of political authority⁸ may help lawyers to understand the relationship of law and legal institutions to the transformation of societies. Fallers demonstrates that Soga litigants and judges use legal reasoning in the sense that they employ "categorizing concepts"⁹ in determining legal controversies. Deciding that a certain course of conduct fits within a recognized concept of legal wrong among the Soga is a means of distinguishing legal standards from merely moral ones.¹⁰ Before the common-law trained lawyer is able to comprehend the application of Soga legal reasoning to the cases involving marital rights and land rights, he must understand that law is a "cultural system"—a system of ideas—intimately linked to the Soga social system.¹¹

In an examination of the material¹² on marital and land rights in the next four chapters, Fallers' application of Soga legal reasoning results, at times, in a superb synthesis of the "case law" on a particular subject. The parameters of the concept of "sufficient reason" for harboring a man's wife, for example, are developed from cases in a fashion that demonstrates the law's function in Soga society.¹³ Although husbands have been occasionally unsuccessful in actions against their in-laws because there was "sufficient reason" for the wife to be in her parents' household, Fallers' synthesis of all the cases illustrates that the legal concept of harboring without reason is used to place the burden of keeping a marriage together on the wife and her parents. Despite the stress of new ideas about the role of Soga women—primarily a form of cultural change—legal concepts in the marital area are relatively stable. In a case where newer ideas about the status of women are in conflict with traditional notions, judges are likely to be more explicit in their legal reasoning and their disagreement about the result, because how a particular judge will apply legal concepts to the facts of the case depends upon his view of the status of women.¹⁴ In the

⁷ L. FALLERS, *supra* note 1, at 1-72.

⁸ The author draws heavily upon his own work on political authority among the Soga. L. FALLERS, *BANTU BUREAUCRACY: A STUDY OF CONFLICT AND CHANGE IN THE POLITICAL INSTITUTIONS OF AN EAST AFRICAN PEOPLE* (1965).

⁹ L. FALLERS, *supra* note 1, at 20. The term is borrowed from E. LEVI, *supra* note 3.

¹⁰ Cf. L. FALLERS, *supra* note 1, at 85.

¹¹ *Id.* 14.

¹² In addition to the case materials selected, the author interviewed judges whom he had met. *Id.* 2.

¹³ *Id.* 156-68.

¹⁴ *Id.* 323.

area of land law, Fallers' organization of the cases indicates that Soga litigants' search for new legal concepts that protect the newer uses of land, such as leasing, is a reflection of the increasing commercialization of land.¹⁵ Prior to the colonial period, the chief's authority over his constituents was undifferentiated from his authority to allocate land. Fallers argues that the Soga legal system needs new concepts to protect newer land uses because differentiation of political authority and power to allocate land represents a great social change for the Soga.

The final chapter is a comparative discussion of the distinctive features of Soga legal reasoning. Compared to the Anglo-American legal system, the Soga legal system is less explicit in its communication of legal concepts, but more popular in the sense that legal concepts are known by a large number of the populace. Not unsurprisingly the Soga legal machinery is readily accessible to the litigants. Because the Soga judges and bench enjoy a high degree of respect and authority, which correlates with the degree of legalism of the court's adjudication,¹⁶ law performs a different function in Soga society than it performs in other African legal systems—the Lozi,¹⁷ the Arusha,¹⁸ or the Tiv.¹⁹ Fallers concludes with a short discussion of the implications of his work for the attempts of leaders of independent Uganda to adapt the customary legal system to contemporary needs.²⁰ He shows the inappropriateness, in light of Soga legal concepts of wrongs in the marital area,²¹ of national legislation to be applied in local courts, making adultery an offense. He suggests that the official government policy of leaving the customary system alone would perhaps be a more effective means of adaptation of customary law than codification (the means used by neighboring Tanzania and Kenya) if the customary courts were equipped with a reporting system that would tend to encourage more explicit communication of legal concepts.²²

Throughout the book, use of the present tense means the period 1950-1952, when the research was conducted. Fallers, however, makes the reader fully aware of the relevance of this circumstance in that there are inherent methodological problems in the use of twenty-year-old research data. He attempts to overcome as many of these problems as possible through explicit discussion and the use of appendices, one

¹⁵ *Id.* 224.

¹⁶ *Id.* 329-31.

¹⁷ See M. GLUCKMAN, *THE JUDICIAL PROCESS AMONG THE BAROTSE OF NORTHERN RHODESIA* (1955).

¹⁸ See P. GULLIVER, *SOCIAL CONTROL IN AN AFRICAN SOCIETY: A STUDY OF THE ARUSHA: AGRICULTURAL MASAI OF NORTHERN TANGANYIKA* (1963).

¹⁹ See P. BOHANNAN, *JUSTICE AND JUDGMENT AMONG THE TIV* (1957).

²⁰ The author's statements about post-independence politics in Uganda, L. FALLERS, *supra* note 1, at 332-35, are already out of date since Major General Idi Amin led a successful coup d'état of the Obote government. *N.Y. Times*, Jan. 26, 1971, at 1, col. 7. This is perhaps a demonstration of the inadvisability of such statements since his comments are relevant regardless of who heads the Uganda Government.

²¹ L. FALLERS, *supra* note 1, at 334.

²² *Id.*

on Soga kinship and the other on the case records and the methods of selection. Despite these problems, his work should be carefully studied by American lawyers. Legal scholars in interdisciplinary areas must begin, in their use of social science data and techniques, to match the sophistication demonstrated by Fallers, a social scientist, in his use of legal materials. Because Fallers' study offers a thesis to explain the relationship of the change of legal concepts and social transformation, American lawyers can use his work as a basis for formulating hypotheses about the relationship of legal and social change in our own society.
