LAW WITHOUT PRECEDENT

Legal Ideas in Action in the Courts of Colonial Busoga

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The social sciences are not staked out like real estate. Even in the law, the sanctions for trespass are not heavy.
—Karl Llewellyn

In their zeal not to be bureau-ridden, the American people achieved the other extreme of being court-ridden.
—Roscoe Pound

1 An African Legal System in Comparative Perspective

Karl Llewellyn, a legal scholar of restless intelligence, liked to think of jurisprudence as, among other things, a social science. Devoted as he was to the improvement of advocacy and adjudication as practical arts in the service of justice, he also felt it useful, from time to time, to step back from the role of teacher of professional craftsmen to that of observer and analyst and to view the advocate, the judge, the litigant, and the law itself as sociocultural phenomena, inextricably bound up with, influenced by, and influencing their environs; society and culture. He even felt it worthwhile to look beyond his own tradition to the lawlike institutions of American Indians in search of a more adequate conception of things legal. His “realistic jurisprudence” involved putting the insights thus obtained to work in the interest of more effective advocacy and adjudication.

However excessively expansive this view of the field may appear to some, it continues a dialogue between jurisprudence and the social sciences that has persisted since the beginnings of the modern scientific study of society and culture, among whose founders lawyers—from Maine to Weber—were prominent. The dialogue is a natural one because lawyers work professionally with normative or moral concepts
—concepts of a sort which are also central to the study of society and culture. Whatever else law is about, it concerns the major institutionalized values of societies, the values to which people are sufficiently committed to be willing to impose them upon themselves in an authoritative manner. Such values are “cultural” in the sense that they form elements in the interrelated system of ideas shared by a people; and they are “social” in the sense that commitment to them underlies the mutuality of expectations upon which ordered social life rests. An interest in legal institutions leads quite naturally into a concern with the culture of which the values they uphold form a part and with the social system out of which the disputes which they exist to prevent and settle arise. And of course, vice versa.

My own interests were drawn to legal matters because the Basoga, whom I had visited with the intention of studying the politics of the colonial situation, give great attention to legal institutions. Like many other African peoples, they go to court readily and frequently; they admire and cultivate the arts of litigation and adjudication and they take great pleasure in discussing legal affairs. This common African characteristic has sometimes drawn unfavorable comment, as if “litigious” necessarily meant “quarrelsome”; but of course that implication may be quite unjustified, as it is, I think, in the case of the Basoga. To a sympathetic American observer, whose own society has made maximal use of the law court as an arbiter of social order, they seem not unduly contentious, but simply virtuously law-regarding. Indeed, as a product of such a system (though no lawyer), I may perhaps accept too uncritically the Soga tendency to try to solve all problems by litigation. At any rate, it is a fact that the Basoga, like the Americans, pour a great deal of their energy and talent into legal activity. Approaching the study of their society and culture, one is quickly drawn into legal concerns; and the study of their courts and law provides a particularly good point of departure for investigating other aspects of their society and culture.

Law, I am suggesting then, whether or not it is in some sense a feature of all human societies, is one to which societies may give varying degrees of prominence and value. This book concerns the legal institutions of a people who regard it highly and cultivate the skills associated with it. Only on one level, however, is it “about” the law of the Basoga. Like most anthropologists, I write in the hope that my intensive study of a particular sphere of life in one society may have some significance for the understanding of that sphere in some other societies and even—just possibly—in societies generally. I hope, that is to say, to contribute something to the comparative study of legal systems.

The Soga legal system is one among several ethnic or “tribal” systems which exist together within the national legal system of Uganda. Therefore the most obvious comparative context for the institutions with which I shall be concerned is that of the historically recurrent phenomenon to which the term “customary law” has usually been attached. Customary law is not so much a kind of law as a kind of legal situation which develops in imperial or quasi-imperial contexts, contexts in which dominant legal systems recognize and support the local law of politically subordinate communities. Like the peasant community with which it is so often associated, it is characterized by its relation to a wider, more learned, and politically more powerful system. Usually, what is called customary law is unwritten, but it is significant that those who write about law that is unwritten but yet has not been in some sense “received” into a superordinate system, tend not to use the term; Barton writes simply of “Itugao law,” Pospisil of “Kapanku law.” Customary law is folk law in the process of reception.

Soga legal institutions find earlier counterparts in the Roman and Islamic empires and in the medieval empires and kingdoms of the West. Today, similar institutions exist throughout much of the “Third World,” wherever the new national states retain arrangements—often inherited from European colonial empires—for receiving diverse systems of local, ethnic law. The future of these institutions is an important question for the new states and for students of their development, for it is often through them—especially in Africa, where litigation is so highly regarded as a means of social control—that governments impinge most intimately upon the lives of ordinary people. I shall, therefore, within the limits imposed by a case study, pay some attention to the future of customary law within the modern African political context.

I also hope to add something to the continuing interdisciplinary

2. I have analyzed politics and administration in colonial Busoga in my Bantu Bureaucracy.
5. Roy Franklin Barton, Itugao Law; Leopold Pospisil, Kapanku Papuans and Their Law.
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exploration of the legal dimension in human societies in general. Again, this is a case study and not a general treatise, but even a case study, if it rises above the most mindless description, must proceed within a comparative perspective. This is especially true when one writes about institutions which are not one’s own, for an audience to whom they are also exotic. At the very least, one must translate with some self-conscious care observations drawn from one language and social milieu into another and for this purpose one needs a conceptual place to stand. I shall, therefore, while analyzing Soga institutions, have to consider some aspects of the general concept “law” and related notions.

Finally, this study will involve some discussion of the relationship between thought and social relations in human affairs. The argument concerning their relative influence has been a dominant—perhaps the dominant—theme in social science and related areas of philosophy for more than a century, despite the repeated attempts by reductionists to bring it to an end by assigning one element or the other to epiphenomenal status. Today the issue is again a lively one, especially in anthropology (though of course the movements concerned run far beyond the boundaries of any one discipline); functional, evolutionary, and ecological perspectives, often in combination, contend with a variety of new emphases upon the primacy of thought, of which “formal semantic analysis” and the “structuralism” of Lévi-Strauss are the most prominent. Since all the reductionists seem to me unhelpful, I view much of the argument as misconceived and will try to demonstrate, through the analysis of legal institutions, the utility of a view which gives both thought and action their due.

Most of the discussion of these larger themes will be left for chapter 8 when the Soga material, having been analyzed, will be available for reconsideration and for juxtaposition with other bodies of data. Here it is necessary only to indicate the framework within which the analysis will proceed:

**Law and the Logic of Comparative Inquiry**

Most of the concepts used in analyzing social and cultural phenomena are, in their origins, Western “folk concepts”—concepts used by Western people in thinking and speaking about their own institutions. We begin with words like “religion,” “family,” “government”—and “law”—words denoting particular Western sociocultural phenomena in all their complexity. When we attempt to use such words to describe and analyze the institutions of other societies, we find, naturally, that they do not suit the material at all precisely and we are faced with the problem of finding a conceptual place to stand that will allow us to take account of the distinctiveness, and yet recognize the basic commensurability, of diverse societies and cultures.

One response to these difficulties is, of course, that of Fielding’s Mr. Thwaekum, who, when called upon by his colleague, Mr. Square, to recognize certain similarities among the world’s religions, declared:

> When I mention religion, I mean the Christian religion; and not only the Christian religion, but the Protestant religion; and not only the Protestant religion, but the Church of England.

This sort of conceptual ethnocentrism will not do, of course, for it involves abandoning the comparative enterprise altogether, but the remedy is not as obvious as it is sometimes thought to be. On the one hand, a thoroughgoing relativism is of little use. Describing and analyzing other societies and cultures entirely “in their own terms,” merely substituting other sets of folk concepts for our own, tends to leave us with an array of incommensurable, particular phenomena. On the other hand, it is difficult, perhaps impossible, to spin off from our own imaginations a fully developed set of culturally neutral concepts for analyzing societies comparatively. A “comparative science of society” is not, in my view, something which can be constructed in a burst of conceptual creativity; instead it is a process in which the intensive investigation of the particular case and reflection upon as much of the human experience as one has access to engage in a kind of dialogue. One must, inevitably, begin one’s investigation with a general rubric, like “law,” which is “culture-bound” by virtue of its origin. This procedure is dangerous or misleading only if it remains unrecognized and intellectually undisciplined.

Recognizing that “law” does not, and cannot, have a universal, “culture-free” meaning because the intellectual millennium has not yet arrived, one adopts what strikes one as the most adequate conception of it—the product of others’ reflections upon it, perhaps modified by one’s own. One then “tries it out” on what appears to be the analogous phenomenon in the society under study. The ways in which it fails to “fit” are enlightening in two respects: First, they lead one to ask revealing questions about the case under study. The concept of law with which one began “made sense” in the sociocultural context from which it was drawn; one understood how such a system worked—both the legal system and the wider sociocultural system of which it was a part. One understood what “law” meant to people within the system, in the context of their values and beliefs, and one understood the

7. Lloyd A. Fuller, “Societal Analysis.”
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consequences of legal and other institutions for each other in that setting. If, now, "law" in the new society differs in these and these ways, then it must mean something different to people in relation to somewhat different beliefs and values; legal and other institutions must have somewhat different consequences for each other. One pursues these questions until one is able to give an account of this new system that, again, "makes sense." One is led, then, to the second consequence of the lack of fit: the general concept "law" may be modified to embrace the new data, or new analytic distinctions may be made within it. If the work has been convincing, the next investigator will begin from a somewhat different starting point. Thus, the case-by-case form of comparative inquiry serves both the generalizing and the clinical aspects of social science.8

Today, of course, "law" is far from remaining a folk concept. Both jurisprudential scholars and social scientists have worried and worked over it with more or less penetration and erudition for a very long time. One begins with all this at one's back and one may choose from an array of available concepts of law that which seems most adequate or useful for the task at hand. But any general concept of law is, in any case, only a starting point—an orientational framework within which more particular comparisons may be carried out. In this study, comparisons with other African legal systems are, of course, appropriate, and will be pursued at a number of points. The literature here is unusually rich and there is good reason to believe that many of black Africa's peoples are closely related historically; their institutions, including their legal institutions, may be regarded as variations upon common themes—subjects for what Eggan has called "controlled comparison."9 The common emphasis upon litigation as a means of social control, mentioned earlier, is one manifestation of this.

I shall also make use of still another sort of particular comparison. As will be explained shortly, I shall be particularly concerned with the way in which the Basoga manipulate legal concepts in a system in which the law is uncodified and this suggests comparison with Anglo-American law. There is a rich literature concerned with the ways in which Anglo-American lawyers and judges manipulate normative concepts to arrive at "rules of law." Perhaps more than most developed legal traditions the Anglo-American one, and more especially its American branch, has been particularly concerned with the process of adjudication—in part, one supposes, because of the peculiarly prominent role of uncodified "common law" in this tradition. A system

which so often asks the lawyer and the judge to "discover," rather than merely to "apply," the law has about it a mystery which has attracted inquiry by particularly able minds. When, therefore, one sets out to try to understand the legal process in another tradition, particularly one which makes even less use of authoritative codes, the comparison with what Anglo-American legal scholars have said about that process in their own system is particularly inviting.

There are also historical and practical reasons why the comparison is particularly apt. For seventy years, from 1892 to 1962, the Basoga were under British administration within the political framework of the Uganda Protectorate. During this period, Soga courts, manned by Basoga, continued to administer Soga law, but meanwhile there grew up alongside, and for appellate purposes over, these courts a set of British imposed courts, manned by British judges and lawyers and administering a body of British-inspired law. A group of British-trained African lawyers developed. Thus the Soga legal system, together with those of the other African peoples of Uganda, operates within a legal environment dominated by these men and institutions.

This environment, as will be explained, has exercised a certain influence upon Soga law in the past; but, rather paradoxically, its influence promises to be even more important in the postindependence period. The pattern of legal pluralism inherited from the period of colonial control, in which a national body of law and hierarchy of courts sits atop a welter of local court systems administering diverse bodies of ethnic "customary" law, is one that many African leaders find unsatisfactory. To such leaders, striving to develop in their countrymen a sense of national unity, this fragmentation is simply the legal manifestation of the vexing problem of "tribalism"; and in Uganda, as in the many other African countries where this pattern exists, schemes for the unification of courts and law are presently being developed.10 Whatever form the resulting programs of unification and reform may take, they seem likely to involve a still more intimate contact between African and British-type legal systems, with the latter tending to dominate and absorb the former. For it is the national legal system, with its British-influenced bench and bar, that represents national unity in the struggle with "tribalism."

It is therefore relevant, for quite practical reasons, to examine Soga legal institutions in the light of an Anglo-American model and to raise the question of means by which the two might be made more compatible. The issues here are complex, and I do not intend to offer a

8. Ibid.
prescription for the future. But the present study may, perhaps, contribute to the discussion of these issues by illustrating the rather remarkable efficiency and intelligence with which at least one local court system copes with the problems that modern African life brings before it and by raising some of the questions to which unification schemes, involving drastic modification of the local courts, will have to seek answers: Can unification of law be pursued without destroying the sense of familiarity and confidence that at present recommends the local courts to ordinary Africans? Will more be gained than lost in replacing an amateur bench with a professionalized one and in admitting advocates to courts in which, traditionally, the litigant has been assumed to know his rights and to be competent to argue his own case? Perhaps most important of all, can the local courts be equipped with the tools to enable and encourage them to adapt to changing circumstances, including greater national unity, or must they be simply swept away by wholesale legislated unification?

As these questions indicate, the standpoint from which this study views the practical legal problems of the new African state is that of the "grass roots"—that of the village litigant who is the average consumer of African justice. The legal reformer commonly looks at these problems from a different standpoint, and for good reason. From his position in the legislature, the high court, the attorney general’s office, or the law school, he sees the discontinuities, both in substantive law and in court practice, that legal pluralism brings. He sees the "unequal justice" experienced by differently placed citizens of the same nation, the conflict-of-laws problems created by the persistence of ethnic jurisdictions, the apparent incompetence with which untrained judges sometimes respond to unfamiliar circumstances. These problems are all too real. I wish only to suggest that the reformer, in his pursuit of national legal progress, might well take cognizance of the virtues that the local courts possess in satisfying the ordinary African’s demand for justice.

I begin, then, with certain notions about law in general, African customary law, and Anglo-American law.

Whatever else is true of it, law clearly has to do with social control. Legal institutions are guardians or reformers of moral order—establishers or upholders of what members of a society regard as proper standards of conduct. However, with the possible exception of Malinowski, writers on the subject have rejected the idea that law is simply synonymous with values or customs—that all institutions that uphold moral order are legal institutions. Since the very notion of "institution" involves mutuality of expectation resting upon shared values, such a view would imply that society is simply one great legal institution—a possible view, of course, but one that leaves the inquiry precisely where it was before. Nor will it do to define law as a sphere of custom more serious, or supported by more severe sanctions, than the rest. It would make little sense to say that overtime parking is more serious and more severely punished than cowardice or sacrilege. In Busoga, similarly, one may be taken to court for allowing one’s goats to trample a few of one’s neighbor’s cotton plants, but not for incest—a far more outrageous act. Clearly, the distinctive qualities of law and legal institutions are not to be found along this path.

Bohannan has sought to differentiate law as binding rights and obligations, which have been "doubly institutionalized" and legal institutions as the vehicles for this "reinstitutionalization." Values governing the responsibilities of, for example, parents toward their children and contracting parties toward each other are institutionalized once in the family and the business world respectively and again in the legal system. This is of course quite unexceptionable, as far as it goes, and no useful conception of the subject can ignore it, but it is not only institutions that one feels comfortable calling "legal" that provide for this kind of institutional backstopping. Religious ritual, for example, insofar as it has moral content, also undergirds the normative basis of other institutions, often quite explicitly; so also, of course, does education.

I press this point not in order to belabor Bohannan, for his further discussion of the subject suggests that he recognizes additional differences of law of the sort I want to suggest, but rather to underline a point made earlier: some societies, including that of the Basoga, make a great deal more use of what I would call the legal mode of social control than do others. In relation to Bohannan’s ideas, I should put it that some make more use of the legal mode of re institutionalization. A number of east Asian peoples, for example, whose cultures are rich in quite formal codes of norms or precepts, seem to have an attitude toward litigation which is quite the opposite of that exhibited by most African peoples. Beardsley, Hall, and Ward speak of the Japanese “. . . aversion to judicial process in any form.” Geertz illustrates a similar Balinese attitude with a folk tale in which two

13. Ibid.
villagers are quarreling over a piece of meat. The legal system, in the
guise of a hawk, sweeps down between them and snatches it away,
pointing up the moral that, right or wrong, successful or unsuccessful,
one can only lose by going to court.\textsuperscript{15} Much the same attitude seems to
prevail in China; Schurmann remarks of courts in communist China
that “. . . formal law plays a much smaller role than it does in the
Soviet Union,”\textsuperscript{16} while Fei’s account of precommunist village govern-
ment devotes less than a sentence to anything akin to legal institu-
tions.\textsuperscript{17} Courts, of course, exist in these societies, but ordinary people
make as little use of them as possible. Reinstitutionalization seems,
among these peoples, to be accomplished primarily in other ways.

Another way of differentiating things legal, favored by Nader and
others, makes “dispute-settlement” their central characteristic.\textsuperscript{18} This
view further circumscribes the field, for while the reiteration of moral
ideas in ritual is unquestionably a form of reinstitutionalization, it is
not, or not necessarily, a means of settling disputes. The latter involves
moral reiteration through institutions for applying moral ideas to
social events after the fact—“cleaning up social messes,” or “trouble
cases” as Llewellyn and Hoebel put it.\textsuperscript{19} Now this may, of course, be a
useful topic for comparative study, as indeed may social control and
reinstitutionalization, but I feel that it still casts the net too widely to
serve as an adequate conception of law. Significantly, those who write
on the east Asian societies mentioned earlier often couple their state-
ments about the hostility to “judicial process” or “litigation” with
remarks to the effect that “mediation” or “arbitration” is preferred.\textsuperscript{20}
Disputes occur in these societies, but the writers want to tell us that
these are dealt with, wherever possible, by arbitration or mediation as
contrasted with something else—something which I want to distinguish
as legal process. In part, the attitude reported by these writers seems
to be associated with village solidarity and a desire to avoid drawing
extravillage authorities into local affairs, but it also, I gather, involves
a dislike of litigation and adjudication as such, since if these were
approved means of handling disputes they would be provided for
locally, as they commonly are in Africa.

Again, one might, of course, define “law,” “litigation,” and “adjudic-
ation” broadly enough to embrace “mediation” and “arbitration,” but
these writers sense an important distinction and it seems to me to be

\textsuperscript{15} Personal communication.

\textsuperscript{16} Franz Schurmann, Ideology and Organization in Communist China, p. 188.

\textsuperscript{17} Hao-Chung Fei, Peasant Life in China, p. 108.

\textsuperscript{18} Laura Nader, ed., The Ethnography of Law, p. 23.

\textsuperscript{19} K. N. Llewellyn and E. Adamson Hoebel, The Cheyenne Way, p. 20.

\textsuperscript{20} See especially Boasdale, et al., Village Japan.

one worth preserving. Not all the categories used in comparative
inquiry need apply uniformly to all societies; indeed if they did so,
comparative inquiry would become much simpler (and less instruc-
tive) than it can be. The anthropological study of law has, I think,
suffered from a reluctance to recognize that some societies make little,
if any, use of law, as if this would somehow be a matter for reproach.
But mediation is no less useful a procedure for not being “legal”;
indeed, from some moral standpoints, or for some purposes, it may well
be superior. A familiar strain of critical thought in Western countries
has long held that legal or (more pejoratively) “legalistic” modes of
dispute settlement have been overworked in those countries. The fact
that much of this criticism has been the work of the “legal profession”
does not mean, of course, that the alternatives suggested are, in an
analytical sense, “legal.”

For a view of law more congenial to my purposes, I turn to the work
of H. L. A. Hart. For Hart, law involves the combination of “primary
rules of obligation” with “secondary rules.”\textsuperscript{21} The primary rules are
norms of social life which are supported not only by institutional-
alization and internalization in the society at large—by conscience and
public opinion—but also by institutions which apply secondary rules.
Secondary rules are rules about the primary rules. But the secondary
rules do not merely reiterate primary rules; they “specify the ways in
which the primary rules may be conclusively ascertained, introduced,
eliminated, varied, and the fact of their violation conclusively
determined.”\textsuperscript{22} “Rules of recognition” specify means of determining
which norms will be treated legally; “rules of change” specify the
means by which rules may be introduced, eliminated, or altered; while
“rules of adjudication” specify the means for determining whether or
not a particular rule has been violated on a particular occasion. Hart
has relatively little to say about the institutional embodiment of these
rules, beyond speaking of them as being applied by “officials,” but he
would argue that some organizational structure for their application
is necessary to the specifically legal mode of “double institutional-
zation.”

Now it is important, I think, that Hart talks about rules and rules
for applying rules. The legal mode of social control requires that
values with respect to human conduct be reduced to normative state-
ments which are sufficiently discrete and clear so that it may be
authoritatively determined whether or not in a particular case a
particular rule has been violated. This way of looking at situations of

\textsuperscript{21} H. L. A. Hart, The Concept of Law, pp. 77-96.

\textsuperscript{22} Ibid., p. 92.
social conflict—in terms of violation of rule—may usefully be contrasted with two others. First, such situations may be regarded as conflicts of interest—as what are commonly called “political” conflicts. In this perspective, the parties are not regarded as having violated (or not violated) rules, but rather as pursuing conflicting policy goals. Rules enter, of course, as means of confining conflict to orderly bounds, and values in a more general sense are appealed to in mustering support. Also, legal rules may be the subjects of political conflict. But political conflict is precisely about “open questions”—questions which have not (or not yet) been reduced to rules. Law, of course, does not completely reduce to rules the questions with which it deals. It deals with recurrent, relatively stereotyped conflicts, but because conflicts are never precisely the same, the law always retains a degree of “open texture.” And as Pospiskal and many others have pointed out, there is a range of intermediate phenomena in which the political shades off into the legal; it is within this spectrum that one finds some of the phenomena referred to as “mediation” and “arbitration”—for example in international, labor, and commercial relations. These resemble legal process in that they are precipitated by an event—a “dispute” or “case”; they resemble political process in that justiciable rules are lacking. In connection with industrial arbitration in Australia Goodrich writes: “The choice among rival and conflicting doctrines leaves ample room not only for the ‘equity and good conscience’ which the Commonwealth act commends to its judges but also for expediency and good policy.” 23 And Potter says of international mediation that, even under the best (i.e., most lawlike) conditions, “it still remains nothing more than an attempt to adjust political demands or, even when the demands are allegedly based upon international law, a search for a form of settlement not necessarily cast in terms of accepted law.” 24

Second, the legal mode of assessing situations of conflict may be contrasted with their full moral evaluation. Here common standards may exist, but an attempt is made to take account of the full moral complexity of conflict situations. Morally, human conflict is almost never as simple and straightforward as the phrase “whether or not a rule has been violated” would suggest. A “case” very commonly elicits a substantial period of association between the parties, in the course of which each has done things to the other of which he ought to be ashamed. Even in “atomistic,” “anonymous” modern urban societies, a strikingly large proportion of disputes involve kinsmen, neighbors, friends, or work associates, not total strangers. 25 A legal culture cuts into this complex “objective” moral reality in a highly “arbitrary” way. It is characteristic of the legal mode of social control that rules are used to arrive at simple, dichotomous moral decisions—“yes” or “no” decisions that in other contexts would seem intolerably oversimplified morally. The legal process does not ask: What are all the rights and wrongs of this situation—on both sides? Rather, it asks: Is John Doe guilty as charged? John Doe may be utterly depraved—may be shown to have treated Richard Roe abominably—but if he cannot be shown to have violated the rule as charged, he (as far as the legal process is concerned) goes as free as if he were a saint. It is, I think, significant that even in societies that make extensive use of the legal mode of social control, persons often exhibit a certain ambivalence of attitude toward this aspect of it. On the one hand, my own court-ridden countrymen, for example, are often made uncomfortable by their courts’ necessity to arrive at such “hair-splitting,” “legalistic” (as they say) decisions; on the other hand, they sense that it is, after all, the essence of what they like to call, in admiring moods, the “reign of law” to isolate for adjudication a rather narrow segment of moral reality. They sense that it is really only with respect to such narrow segments that there can be “rules of law.”

Again, there is a range of intermediate phenomena; indeed, the pure case of the uncompromising reign of rules probably cannot exist because it would be morally too painful to bear. Even in legalistic England and America its rigor is tempered by such devices as the “degrees” of homicide and larceny, and by variable penalties—as well as, of course, by the fact that only a small part of society’s normative structure is treated legally. Toward the other end of the continuum, the “mediators” and “arbitrators” who settle intravillage conflicts in China, Japan, and Bali are perhaps best thought of as the agents of a cultural attitude even less sympathetic to the legalistic application of rules. (The terms “mediator” and “arbitrator” thus have, I think, been used to distinguish from legal process two elements which are analytically quite different: on the one hand, the third party who achieves a compromise between conflicting interests; and, on the other, the one who restores amity, or at least peace, by bringing the parties to recognize the justice of each others’ grievances.) The Lozi of Zambia, whose legal institutions have been so ably analyzed by Max Gluckman, exhibit an interesting compromise between legalism and what might be called moral holism. Lozi judges measure conduct against

rules, clearly enough, but for them the "case" involves the evaluation of a substantially greater amount of interpersonal history than is true among the Basoga. (Thus, the "case" is a culturally variable, not a universal, unit.) They feel no necessity to judge only one party to a dispute at a sitting, and they feel free to alter the cause in the course of the trial. During the consideration of one case, both parties may be judged guilty (or liable) in the light of different rules and additional rules may be invoked as the "facts" unfold. This allows them to deal more holistically with social conflict than do Basoga judges who, as will be seen, resemble Anglo-American judges in taking up rules in a more one-at-a-time fashion. If it comes out in the course of a "civil" trial that a defendant has cause for action against the plaintiff or a third party, the most the Soga court will do is to advise him of this fact. A Lozi court, if I understand Glickman correctly, may well proceed, on its own initiative, to charge and try the new defendant. The Basoga (and their neighbors) are, I suspect, unusually legalistic, even among Africans. These comparisons will be taken up in more detail in chapter 8.

I shall, then, following Hart, adopt the view of law as a combination of primary and secondary rules. For past conduct to be measured against rules, there must be rules allocating to some institutional structure the authority to decide what segments of morality are to be embodied in justiciable rules—the violations of what norms are to be regarded as causes of action—and there must be rules for applying these rules to sets of "facts." Law thus accomplishes social control, reinstitutionalization, dispute settlement, through this special mode of moral discourse. Legal institutions are institutions in which this mode—this subculture—is institutionalized. Viewing things legal in this way gives a certain shape to the study of any legal system and suggests certain problems for investigation.

First, it calls attention to the relationship between that system and the society and culture in which it is embedded. The secondary rules form a distinct subculture whose internal logic calls for investigation as such, but the prefix "sub" cuts both ways: If courts of law work with "artificially" narrow moral issues, and with a logic of their own, the issues nevertheless remain moral ones. Their decisions pertain to matters about which the everyday, common-sense morality of the society also has something to say—sometimes something rather different. The legal system, since those who participate in it are also members of the society at large, both draws upon and feeds back into the everyday system of morality. To the degree to which the two reach different moral conclusions about the same events, there exists a tension between law and popular morality that may induce change in either or both. Again, the legal system has its own distinct social organization consisting, at a minimum, of the roles of those who apply the secondary rules, but those who occupy such roles are also members of the larger society, in which they occupy other roles as well. Of course the sociocultural differentiation of legal systems varies enormously. In the Soga courts there is no bar and the bench is only semiprofessional. The legal subculture is much less differentiated from popular culture than in modern Western societies. The consequences of these differences, as well as the fact of differentiation itself, require investigation.

The perspective I have adopted also invites attention to the relationship between the logic of ideas and the exogenies of social relations within the legal system and in the society at large. The notion of "applying rules to sets of 'facts' " to reach "decisions" involves, intrinsically, a conception of interplay between moral ideas and social experience which is quite incompatible with either social or cultural reductionism. If either culture or social relationships were simply a reflection of the other—if either were "determinant" and the other "epiphenomenal," as is sometimes argued—then such a mode of expression, implying deliberate choice between alternative judgments, would make little sense. Adjudication would become a mechanical process. As Hart puts it:

The necessity for such choice is thrust upon us because we are men, not gods. It is a feature of the human predicament (and so of the legislative one) that we labor under two connected handicaps whenever we seek to regulate, unambiguously and in advance, some sphere of conduct by means of general standards to be used without further official direction on particular occasions. The first handicap is our relative ignorance of fact; the second is our relative indeterminacy of aim. If the world in which we live were characterized only by a finite number of features, and these together with all the modes in which they could combine were known to us, then provision could be made in advance for every possibility. We could make rules, the application of which to particular cases never called for further choice... This would be a world fit for mechanical jurisprudence.

There is, of course, a mechanical element in human social life, and even in adjudication, as anyone who has watched a magistrate "process" routine traffic and drunk-and-disorderly cases knows. Much of social life is quite unreflective and repetitive. Even the more self-con-

27. See Zakaliya Yando v. Amadi Shimola.
sicious forms of social action commonly proceed, for the most part, in stereotyped sequences in which mutual expectations are satisfied by interactions based upon common patterns of belief and value—which is, of course, why such terms as "social structure" and "cultural pattern" have their uses in social science. But by no means all of social life is captured by such terms. They are perhaps best regarded as conceptualizations of that routine element in social life that provides persons with a place to stand while they decide what to do next. This, no doubt, overstates men's capacity for creativity; choices are usually made between socially and culturally "given" alternatives. But our entire experience of sociocultural change speaks against a conception of human affairs as being rigidly governed by either patterns of thought or social structural exigencies. Culture is not simply the noise given off by social machines, nor is society simply an automaton guided by cultural computers. Such images are seen to be most inadequate in times of social upheaval when different segments of a society's population march to different drummers, but smaller-scale divergences of a similar sort are common. Human beings, both as marchers and as drummers, are continually experimenting with direction and beat. Systems of thought are therefore most usefully seen as consisting of themes with manifold possibilities for variation, social systems as structures open to reorganization. And, since the same human actors are caught up in both the logic of ideas and social commitments to each other, cultural-thematic and social-organizational variations constantly play upon each other. I find it most revealing to view history as "made" neither by social "interests" nor cultural "ideals" but rather by their interaction through the medium of men's choices.

None of this, of course, is peculiar to legal institutions, but in the study of such institutions a view which recognizes a degree of indeterminacy in relations between the part and the whole and between ideas and organization seems particularly useful. The "cases" with which the legal system works spring from "trouble spots" in sociocultural systems—areas of life in which, because of conflicting social demands, divergent value commitments, or "deviant" character organization, persons choose to evade norms declared by the legal system to be justiciable. Or again, especially in times of rapid change or in situations in which the legal subculture is sharply differentiated from popular culture, they may result from uncertainty concerning the law's requirements. In either case, the legal process is one in which, a nonroutine sequence of events having occurred (I neglect here, as legally uninteresting, routine litigation of the sort mentioned earlier), a special set of persons conducts an explicit inquiry into the normative status of these events, taking the legal subculture into their hands, so to speak, and using it as a tool for this purpose. Here again choice is involved, but now choice involves attention to the law itself. As Hart says, after noting that in any healthy society most people obey the law most of the time, the ordinary person may obey for any of several reasons: conviction, self-interest, or merely habit. But:

[The] merely personal concern with the rules . . . cannot characterize the attitude of the courts to the rules with which they operate as courts . . . . Individual courts of the system though they may, on occasion, deviate from these rules must, in general, be critically concerned with such deviations as lapse from standards, which are essentially common or public. 29

The officials of the legal system are agents of the "rationalization" (as Max Weber would say) of one segment of the culture, as priests and scientists are of others. They are charged with giving self-conscious attention to the coherence of elements of culture that otherwise remain implicit, common-sensical, subject to only ad hoc attention. As Schutz has put it, in contrasting the social scientist's with the participant's perspective on social experience, the events that precipitate a case are not, for the legal official, "the theater of his activities," but "merely the object of his contemplation." 30 The result is not, of course, the pure reign of legal reason, for, as Frank and many others have shown, the legal system has its own sociology and psychology. 31 But the specialized reasonings of legal officials are sufficiently apart from the life to which they are applied that they may serve to sharpen the issues and heighten the tensions between values and social experience, and between different segments of society, that are among the springs of sociocultural change. A crucial problem here, and one which I shall take up in connection with the Soga courts, is that of the relationship between the social role of the judge and the degree of rationalization of the legal subculture. It seems a reasonable hypothesis that the ability of judges to deal with moral issues "legally"—that is, to deal with "artificially" narrow moral issues—will depend to an important degree upon the authority and prestige they enjoy.

**Law with, and without, Precedent**

I have argued that Hart's view of law as an affair of rules about rules implies that legal institutions utilize a mode of normative judgment involving the isolation of rather narrow moral issues for adjudi-

29. Ib., p. 111.
cation. Earlier I suggested that, in attempting to understand how this process works in the Soga courts, a comparison with similar processes in Anglo-American courts is of special relevance. It will be useful, therefore, to examine the process of legal reasoning as seen by a student of Anglo-American jurisprudence in order to gain a clearer understanding of how “rules of law” are handled by judges and advocates in that tradition—how rules of law are “applied” to social events.

In Anglo-American law, much use is made of precedent. In some parts of the law, there are no statutes, the law is entirely case-law, which is to say, precedent-law. Even where statutes exist, a body of case-law develops in the course of their application. How do rules of law come into play in this process? Edward Levi has suggested that, however much judges and advocates wishing to stress the stability of the law may sometimes try to disguise their arguments as some form of deductive reasoning from fixed rules, in fact they reason from case to case, with a moving system of classification, so that the rules are in fact discovered as they are applied. He describes the three-step process as follows: “similarity is seen between cases; next the rule of law inherent in the first case is announced; then the rule of law is made applicable to the second case.” The rule that the judge in the second case draws out of the reasoning of the judge in the first case may be formulated in terms quite different from those the latter himself used, for each judge always faces a somewhat different problem. Cases are never identical. Thus, the doctrine of precedent does not mean, and cannot mean, that general rules, once stated in case decisions, are simply applied mechanically to subsequent cases. Instead it means something closer to the principle that, in deciding particular cases, the judge must have due regard for the coherence and consistency of the law as a whole in the relevant field.

The reason, Levi suggests, why legal reasoning must take this case-by-case form is that it operates in a changing society: “Not only do new situations arise, but in addition peoples’ wants change. The categories used in the legal process must be left ambiguous in order to permit the infusion of new ideas.” By operating with a moving system of classification in which, by means of the comparison of cases, the framework may be reordered as fresh cases are decided, the logic of the law achieves, simultaneously, a tolerable degree of coherence and predictive coheriveness, and a measure of responsiveness to new circumstances. Thus, the stare decisis rule cannot be applied with the

certainty that it is often thought, particularly, it seems, in England, to necessitate. Indeed, since, as Cross indicates, the English rule in its present rigid form is of only late nineteenth or early twentieth-century origin, it would appear to be more in the nature of a cautionary maxim of judicial self-restraint than a rule descriptive or prescriptive of judicial behavior. It is perhaps best interpreted as an ideological statement whose function is to preserve a sense of continuity and certainty in a period when rapid change has made the strain of reconciling fixity with flexibility particularly severe. Thus, a judge in an Anglo-American system does not, strictly speaking, “follow” precedent; rather, he constructs it by formulating a rule that brings the decision in the instant case into logical relation with its predecessors.

Levi is, of course, concerned with the more innovating decisions by appellate courts in difficult cases. The run-of-the-mill “plain” case in the lower courts requires little judicial reflection. Still, the pattern Levi describes is paradigmatic: cases are never exactly the same; the more novel the “facts,” the more obvious becomes the process of precedent construction.

Soga law is also case-law in the sense that it makes little use of statutes, but, unlike Anglo-American law, it contains no explicit doctrine of precedent of any sort. Neither judges nor litigants, at any level, ever refer explicitly to previously decided cases as precedents or to any duty on the part of judges to follow precedents. When asked, they reply that, of course, they decide cases as they have been decided in the past, but they are quite uninterested in, and unable to discuss, the process by which this is accomplished; that it is accomplished, they simply regard as self-evident. There clearly is order and predictability in Soga law. Litigants go to court with the assurance that their cases will be decided in accord with familiar principles; judges confront the cases that come before them with confidence in their ability to reach decisions consistent with their own, and the litigants’, legal experience. Furthermore, in Soga courts, as in Anglo-American courts, litigants and judges reason with the law in a manner that serves to narrow issues to a point at which “rules of law” may be applied to them. If they do not reason in precisely the same way as their Anglo-American counterparts, still they are clearly, on some level, doing the same kind of work—legal work. By comparing the two systems it may be possible to isolate intellectual processes common to both of them, and perhaps even to judges and litigants wherever we find institutions that we can reasonably call “courts of law.”

34. Ibid., p. 3.
35. Rupert Cross, Precedent in English Law, pp. 17-30.
Chapter 1

This is not meant to suggest, it should now be clear, that all societies have such institutions. To be useful for comparative purposes, a concept need not have universal application; it need only define an element of some cross-cultural significance. Clearly many societies outside the Western world do have legal systems in the sense under discussion here, and I am interested in similarities and differences, in terms of intellectual processes, among such systems wherever they exist. Achieving a satisfactory working conceptions of a generic pattern of legal reasoning should make it possible to compare things that are really comparable and to discuss with greater precision the differences between particular systems, their causes and consequences. It should yield a clearer understanding of both the similarities and the differences between legal systems, like that of the Anglo-American world, that have trained judges and advocates, law reports and law schools; and those like the Soga system that lack these facilities but are, nonetheless, engaged in what is, on some level, the same kind of work.

Now in Levi's account of Anglo-American legal reasoning, a key role is played by the “categorizing concept.” 36 Judges, in their search for “precedents” or “rules,” do not look for similarities and differences among raw cases. They conduct the search, rather, with the aid of categorizing concepts which are felt to sum up the essence of the relevant cases—concepts like that of the “inherently dangerous article,” whose development Levi traces in his essay. 37 By means of such concepts, judges, with the help of the arguments of advocates, order the cases that come before them. They are a guide to the relevant cases, without which the law would be a jumble of isolated, ad hoc decisions. They are the tools of “moral oversimplification,” of issue narrowing, the elements in the “moving system of classification” which Levi sees as characteristic of the law. By means of them, the almost infinite complexity of circumstances surrounding a particular case may be reduced, in advocates’ arguments and in judges’ decisions, to problems of inclusion and exclusion. More fundamentally, they make it possible to decide whether or not there is an actionable “case” at all, for unless it can be plausibly argued that the “facts” fall within some existing categorizing concept, the legal process cannot go to work. Law courts require that a man be accused of something more specific than wickedness. To follow Levi’s example, advocates and judges do not have to ask themselves: “Is a storekeeper who sells his customer a defective lamp liable for injuries suffered by the customer’s wife when

37. Ibid., pp. 7-19.

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the lamp explodes?” Rather, they reduce the problem to the questions: “Is the ‘inherently dangerous article’ concept the proper category for this case?” and “Do the circumstances of this case place it inside or outside the concept?” Of course, not all categorizing concepts are the products of precedent construction; many result from legislation, but here, too, meaning must be construed, and precedent develops upon the legislated base. Nor, of course, is only one categorizing concept invoked in each case. In the course of including or excluding a particular set of “facts” in relation to the concept that forms the cause of action, other, subsidiary, concepts may come into play. The process of inclusion and exclusion, however, remains the same.

Now, Basoga judges and litigants also make use of categorizing concepts. They do not handle them in the same way British or American judges and advocates do, even in difficult cases, for there is no explicit doctrine of precedent and no machinery for case reporting to put such a doctrine into systematic practice. The courts keep excellent records, but there is no provision for selecting precedent-setting cases and bringing them to the attention of the judges. In addition, the concepts themselves are somewhat different—less abstract and generalized. But use is quite clearly made of categorizing legal concepts to order the case experience of judges and litigants. Basoga judges do not, any more than Anglo-American ones, approach each case in a tabula rasa frame of mind. The categorizing concept enables them to place it in a framework that indicates the questions that must be asked and answered if a decision is to be reached. It enables them to decide, to begin with, whether or not there is a case. The argument of this study is that the tribunals of the Basoga are in some degree true “courts of law” because they reason legally, with categorizing concepts that narrow and frame the issues for decision; but that, with their lack of a specialized bench and bar trained in the explicit manipulation of legal concepts, their legal reasoning is both relatively implicit—in that reasoning is seldom spelled out by either litigants or judges—and relatively concrete—in that the concepts used are closely tied to the concrete, stereotyped social situations which commonly give rise to disputes in Soga society. It will be argued that these courts are impressively efficient legal institutions, whose administration of justice in the context of village society gains them the respect and confidence of the Basoga, but that today they are increasingly faced with processes of social change to whose accompanying legal problems their organization and mode of work is inadequate. It will be suggested that, if they are to continue to have a place in the legal structure of the new Uganda nation, they must be given the tools and the personnel to
enable them to adapt and apply their law to changing circumstances.

These themes will run through the analyses of the several bodies of case material which form the heart of this study. Before this material can be presented, however, a good deal of groundwork must be laid. I must describe the setting in which the Soga courts work—the society and culture in which they are embedded and with whose problems they must deal. I must describe the courts themselves, their personnel, their place in the total judicial organization of Uganda, and the sources of the law they administer. These are necessary preliminaries, but they inevitably postpone a confrontation with the data upon which this study is based: the arguments of litigants and the questionings and decisions of judges in actual cases. To make these preliminary discussions somewhat more meaningful, it may be helpful to look in on a local court in Busoga as it hears and decides an actual case.

**AN EXAMPLE**

The courthouse is a long, low, thatched building with whitewashed mud-and-wattle walls, open all around at window level so that those unable to find seats on the rows of wooden benches inside can stand outside and watch. Although the court is not yet in session, dozens of bicycles are stacked against the outer walls, and the room itself is already crowded, for litigation is a preeminently public activity and a popular one, providing ample scope for the people's love of intricate and eloquent rhetoric. Among the majority who have come not to participate but simply to form an appreciative audience are gray-haired elders, who through years of attendance at court have become connoisseurs of the litigious art; wide-eyed boys eager to further their legal education; and nursing mothers for whose infants such days in court will be among their earliest remembered experiences. Chickens wander, chucking, in and out of doorways; and a passing herdsman stops to listen to the proceedings, leaning against a tree while his cattle graze on the courthouse lawn.

For everyone present, the experience will be not merely enjoyable but also instructive, for in this court every man is his own advocate. The judges do most of the questioning, but each of the principals makes an initial statement, setting forth his view of the case, and may question both his adversary and the witnesses, who are summoned at the initiative of the principals. And, since something like one in every ten adult males is likely to appear in court as a principal ("accused" or "accuser," as the Basoga call the litigants) every year, the lessons learned today will find ready application. The audience is therefore attentive as the sub-county chief and his fellow judges, formally attired in their long white gowns and tailored, Western-style jackets, file in and take their places at the table on the dais at the end of the hall. As each speaker—litigant or witness—addresses the bench, he bows respectfully to the judges and speaks with as much gravity and eloquence as he can muster. The frequent vehemence of the arguments is tempered by great politeness and formality; "My friend," a litigant may say, "has lied!"

**Yoweri Kibiri v. Yowabu Kabwire: narrowing issues**

Today, May 15, 1959, there come before the court a middle-aged peasant, Yoweri Kibiri, the accuser, who lives in the village of Bwanyuza; and his father-in-law, Yowabu Kabwire, of nearby Nabintu village, who stands accused. The case opens as the court clerk, who will laboriously record the proceedings in longhand, reads out Yoweri's charge, laid a few days before in the subcounty chief's office:

You are accused of harboring my wife, Kolosina Toko, for six months without giving me a reason for harboring her.

"Harboring a wife" (kutuusa omukazi, literally: "causing a wife to settle") is an important Soga legal concept and one whose application I shall explore in some detail in a later chapter. A bit of explanation is required here, however, to make this illustrative case intelligible. Marriage, in Busoga, transfers authority over a woman from her father or guardian to her husband. A consideration, which I shall call "bridewealth," is almost always given in exchange and this is refundable upon dissolution of the marriage. Much litigation arises from marriage contracts, for the relationship between husband and wife is a tension-ridden one. Very often a woman becomes unhappy in her husband's home and runs away, usually taking refuge in the home of her father or guardian. If the latter allows her to stay, he invites a charge of "harboring," for the husband has, through his payment of bridewealth, acquired a right to her presence in his home. It is this offense—a serious one, for which the penalties may be quite severe—with which Yoweri charges Yowabu. As the latter rises to answer it, the chairman of the court asks:

Do you agree to contest this case, in which Yoweri charges you? Do you think you will win?

Following directly upon the clerk's reading of the charge, this formula formally notifies the accused that he must now answer that charge and gives him an opportunity to acknowledge his guilt or

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38. A table of cases cited is provided at the end of the book.
liability. Yowabu, however, wishes to contest and so he launches into a circumstantial account of how it was that Kolositina Toko came to leave her husband, the burden being that she did not leave voluntarily but was driven out:

I was at home about eight o’clock one evening when I saw this wife of Yowari’s coming to me and saying: “My husband has sent me away.” So I asked her why and she answered: “He had sent us to dig sweet potatoes, but we left off doing that and dug yams instead. Because of that, he accused me of taking his other wife, Jeneti, into the bush so my brother Fudu could lie with her. That’s why he sent me away.” So I told her to call Esau (Yowari’s brother) and he came. I said: “Take this daughter of yours back to her home. There’s some trouble there; you go look into it.” So the four of them went—Fudu and Katono and Esau, as well as Yowari’s wife. They returned during the night and reported: “Matters are confused there; our in-law is disturbed and he has sent the girl away for good.”

Next morning, I saw that Kolositina had also returned. She said: “My husband has sent me away for good. He wouldn’t allow me to sleep in the house, so I slept in the kitchen.” So then I sent two of my children to call Yowari so that we might investigate whether or not that boy [Fudu] had attacked Yowari’s wives. ... Next morning he came and they [husband and wife] argued about their troubles [literally: “litigated their case”]. I gave him his wife, but he refused to take her. So after he left, I sent two children ... to escort her to his place, but they met Zakaliya, who shouted: “Don’t stay here! Go away!” and in the afternoon they came back. Again, I sent her sister to escort her back, but when Yowari saw them he took up a stick, intending to beat them. Then they all went to the sub-village headman, who was acting for the village headman. Then Yowari said: “I don’t want that woman now. I want my bride wealth.” For that reason—since Yowari wanted his bride wealth repaid—I went to the parish chief and told him all that had happened.

Some further explanations are now in order. First, these cases, like Russian novels, are frequently difficult to follow because they contain many characters with unfamiliar names. Since it will be necessary to follow the testimony in some detail, I shall, therefore, whenever it seems appropriate, provide a diagram of the following sort showing the genealogical and other relations among the principal characters (see fig. 1).

In this and later diagrams, circles indicate women, triangles men. Deceased persons are indicated by shading. The double line represents marriage, while the order of marriages is shown by superscript numbers. Vertical and horizontal lines indicate parent-child and sibling relationships, respectively.

Two basic institutional features—these will be described in much greater detail later on—must also be explained. On the one hand, the Basoga are divided among patrilineal, or agnatic, descent groups or patrilineages. In certain respects, marriage is a contract not between individuals, but between patrilineages. When the father of the wife dies, for example, his responsibilities under the marriage contract pass to other males in his patrilineage; similarly, when a husband dies, certain of his rights in the wife pass to his lineage mates. Lineages also hold certain rights in land corporately and their members tend to be neighbors. All this explains why, although the litigants here are the husband and the wife’s father, one has the sense of two patrilineages in conflict. Esau is Yowari’s “brother,” while Zakaliya is Yowari’s “father.” I am not certain whether or not these are “real” (in the English sense) brother-brother and father-son relationships, since the Lusoga terms are extended collateral to patrilineal uncles, cousins,
are used throughout the hierarchy of tribunals, from the family to the highest courts.

To return now to Yoweri Kibiri v. Yowabu Kabure: Yowabu has defended himself against the charge of harboring his daughter Kolostina, Yoweri’s wife, by asserting that he, Yowabu, has done everything in his power to return the woman to her husband, but that Yoweri has refused to take her back. Both he and the headman have “adjudicated” between husband and wife, found Kolostina guilty (or Yoweri innocent—it is not entirely clear who accused whom of what), and tried, unsuccessfully, to reconcile the couple. Finally, Yowabu has reported all this to the parish chief. Notice, now, the preoccupation of the court as it questions Yowabu:

Q: But what evidence is there that Yoweri wanted his bridewealth and not his wife?
A: The headman has the evidence.
Q: At the headman’s place, Yoweri said he wanted his bridewealth, but did you make a written agreement with him confirming that?
A: No . . . .
Q: Do you refer to the headman for testimony?
A: Yes . . . .
Q: Besides the headman, do you have any other evidence from Yoweri that he wanted his bridewealth?
A: He himself came to ask for his things and when he met Esawu he said: “Why does your brother continue to struggle with his daughter? Why doesn’t he just . . . find another man for her and give me any things?”
Q: But when he agreed in that way to wanting his bridewealth, did you give it to him?
A: I didn’t . . . because I didn’t have it. When he came back later, I told him: “Your wife hasn’t yet found another man . . . When she has found a man to pay the bridewealth, I’ll give it to you.”

In this exchange, the court repeatedly returns to the same questions: Has Yoweri asked for the return of his bridewealth? Has Yowabu repaid it? Evidently the answers will be crucial, for as Yoweri rises to testify the court pursues the same theme:

Q: Why did your wife stay at her father’s place for six months?
A: Because . . . whenever I went there they refused to give her to me. I went five times, but they just abused me for losing their daughter’s amulet.
Q: When you had gone there five times and they didn’t give you your wife, what did you do?
A: . . . I came here to accuse him.
Q: You have heard your in-law say that you sent your wife away and that you wanted your bridewealth back?
A: Yes, I’ve heard, but it’s not true.
Q: Do you call upon the headman for testimony?
A: Yes, I call upon him for evidence concerning the dispute with my wife about the amulet. We litigated and I won.

Evidence accumulates that this marriage has been disintegrating for some time in a manner which is classical for Basoga. Yowabu’s testimony has suggested that Yoweri is jealous of his wives, suspecting them of meeting lovers and of assisting each other in doing so. Yoweri’s own testimony reinforces this suggestion: The amulet likely was, or likely was thought by Yoweri to be, a love amulet of the sort worn by young women to increase their sexual attractiveness. Soga marriage is unstable. Especially when, as in this case, the wife is a good deal younger than her husband, she is likely to become lonely and unhappy and to flee to her father. Whether or not she is unfaithful, her husband suspects her of it and abuses her. This in turn increases the likelihood that she will in fact run away, take a lover, or both—and so on, in a vicious circle of deepening estrangement. The sociocultural roots of this pattern will be discussed in chapter 4, but something broadly similar is not unfamiliar in Western societies—the principal difference being, of course, that in Busoga the deteriorating husband-wife relationship involves not just two people, but two descent-groups.

In any case, the point I wish to make is simply that a dispute of this sort does not arise from a single isolated act, but rather represents the culmination of a long history of mutual misbehavior. A “case” is precipitated when one party or the other does or can be alleged to have done something “actionable”—something which Soga law defines as sufficient cause for one to haul the other into court. As was noted earlier, societies differ both in the precision with which their dispute-settling tribunals define causes of action and in the range of moral reality with which, once a case is precipitated, they will deal. Soga courts are relatively legalistic in both respects. The tribunals held by household heads and headmen are more permissive, but the courts of record operate with a limited repertory of causes of action and once a case has been opened under one of these rubrics, the judges concentrate
upon finding a yes-or-no answer in terms of that rubric. This is why, in questioning both principals in Yoweri Kibir v. Yowabu Kabwir, they keep returning to the question of whether or not Yoweri has asked for his bridewealth. This, it seems, is crucial to the problem of Yowabu’s guilt or innocence of the charge of harboring—one of Soga’s actionable offenses. The principals, too, know pretty clearly what the crucial questions are, but they—like advocates in Western courts—often clothe their arguments on these questions in terms of moral recrimination and self-justification, in the process bringing in events with no legal bearing on the case. This is one manifestation of the tension between legal institutions and their moral environment: each litigant wants the advantages of both narrow legalism and moral holism. Each tends to argue legalistically when he thinks he has a good case and moralistically when he does not.

The relative economy of Yoweri’s argument reflects the far sounder quality of his case. Before going into that, however, it will be well to examine, briefly, the evidence given by the litigants’ witnesses, who are now called. Bulaizi, the headman, and Kakungulu, a neighbor, appear for Yowabu:

*Bulaizi:*. . . . the wife of Yoweri came to my place to accuse her husband of losing her amulet. Yoweri won the case. Then Yowabu told his daughter to return to her husband. But Yoweri didn’t agree to this; he said: “I don’t want the woman. I want my bridewealth.”

Q: When Yoweri rejected his wife, what did you do?
A: I told Yowabu to go home with his daughter and collect the bridewealth and give it to Yoweri. That was in March [two months earlier].

*Kakungulu:*. . . . I went to Yowabu’s to fetch my fish eaves and I found him working in the millet field. When Yoweri came, he found me there. . . . When Yowabu had greeted his in-law, Yoweri said: “Eder, what brought me here is that I want my bridewealth.” Yowabu answered: “I don’t have it because your wife has not yet remarried.” That’s all I know.

Q: Do you remember the date . . . ?
A: No . . .

Yoweri then calls Mukama, Erifazi Byenzala, his “father,” Zaka-liya, and Jeneti Mpindi, another of his wives. Since their testimony is nearly identical, Mukama may stand for all of them:

The testimony I give concerns the tribunal held by the headman when Yoweri and his wife litigated. The case concerned an amulet. Kolostina said that Yowabu had taken it and Yoweri denied it. The headman decided the case for Yoweri . . . and that finished it. Yowabu asked for his bridewealth. He did not have it because of the amulet. When it is found, she will return.”

Nothing new has been added; the witnesses of both sides have simply supported the stories of their principals. Yoweri, however, is confident of victory and indicates this in a final exchange with Yowabu:

Q: Besides Kakungulu, whom you have brought to say that I asked for my bridewealth, and not my wife, do you have any other evidence . . . ?
A: [no reply]
Q: Do you agree with what your witnesses have said . . . ?
A: Yes . . .

Yoweri’s confidence is well founded. The case is a plain one, and the court’s decision is brief:

It has gone against the accused, Yowabu Kabwir, for harboring Kolostina Tako, wife of Yoweri Kibir, for a period of six months. He has no evidence to take away the fault, although he makes the false excuse that Yoweri sent his wife away. Therefore he must pay twenty-five shillings compensation and ten shillings fine, or two weeks in jail in lieu of the fine. He has thirty days in which to appeal.

The case is plain because Yowabu has brought forward nothing approaching a plausible defense. The language of the decision (“he has no evidence to take away the fault . . .”) does not mean that in Soga courts a man is guilty until proven innocent. But Yowabu does not deny that his daughter has been in his home for six months and this, in Soga law, places upon him the burden of justification; for as father of the wife he is responsible to her husband for her continued presence in the husband’s household. If she is not there, he must convince the court that his action does not constitute harboring. The decision means that there is a case to answer, and he has not answered it.

He has, of course, offered a defense of sorts: He argues that Yoweri repudiated Kolostina and asked for the return of his bridewealth. If he could satisfy the court that this occurred, it might protect him, which is why the court keeps returning to the point. The judges want to offer Yowabu every opportunity to establish the one point that might save him. However, as will be seen in chapter 5, the law is heavily weighted on the side of the husband in these matters. The father must have very strong evidence indeed if he is to succeed. The testimony of Kakungulu and of Bulaizi, the headman, that they had heard Yoweri ask for his bridewealth is not enough, especially in the face of contrary testimony by Yoweri’s army of witnesses. Did Yowabu obtain a written agreement to that effect from Yoweri? He did.

40. In 1952 one East African shilling was equal to fourteen United States cents. The annual cash income of the average Musoga taxpayer was about four hundred shillings.
not. Worst of all, he has, by his own admission, made no attempt to repay the bridewealth during the six months since Kolositina left her husband. A prudent father, in these circumstances, would press the bridewealth upon the husband and then, if he refused to accept it, would sue him for refusal, citing the wife’s grounds for leaving her husband. This is the Soga procedure for divorce on the initiative of the wife. But Kolositina’s grievance against her husband, losing her amulet, is trivial—so trivial that Yowabu does not even mention it in his argument. His assertion that he intended to return the bridewealth as soon as he found for Kolositina a new husband who would pay it has a certain plausibility. This sometimes happens when a marriage is dissolved by mutual consent, but it depends entirely upon the husband’s acquiescence. As a defense against harboring, when the husband wishes to maintain the marriage, Yowabu’s argument is pitiful.

Legally, therefore, Yowabu stands quite naked. Morally, on the other hand, the affair is clearly a great deal less one-sided. Many of those present will have had a good deal of sympathy for Kolositina and her father. The fact that the law strongly protects husbands’ authority over their wives does not mean that Basoga approve of inhumane husbands; and there is evidence that Yoweri has been, by Soga standards, difficult to live with. That he is suspicious and jealous has already been suggested, but there is more. Yowabu, who is clearly guilty in law, accepts the decision, but Yoweri, who has won the case and had his wife returned to him, appeals on the ground that Yowabu’s fine and the award of compensation are inadequate in view of his loss of Kolositina’s labor for six months! In his letter of appeal to the county court he writes:

I appeal because the punishment is very light for my having been cheated for six months. [Yowabu] was fined ten shillings and I was given twenty-five shillings compensation, but I have lost the following: a field of millet yielding twelve bags, each worth twelve shillings; a field of groundnuts which yields nine bags at nine shillings each; a field of sweet potatoes forty-five by sixty yards; a field of cassava thirty by thirty-five yards and some sesame, marrows, and maize . . . . Because of this I place my appeal before you so that you will understand the [lower court’s] mistake in this case.

Soga marriage is not, even ideally, a companionate love-match, but neither is it a mere labor contract. This Scrooge-like argument, read out before the county court, will have offended the judges, who now are dealing not with the strictly legal problem of guilt or innocence, but rather with the more moral one of fit punishment and compensation.

41. See chapter 5.
42. See the decision in Mikairi Magino v. Ntumba.

Yoweri’s appeal is quite unique among the many records of harboring cases I have examined. However they may have felt, I found no other aggrieved husband who was mercenary enough to try to measure his loss in terms of agricultural production. The argument was always: “I still love my wife; I want her back.” Compensation is thought of, at least publicly, as balm for wounded feelings. The county court is therefore unsympathetic: “It seems that [the compensation awarded by the lower court] is quite enough. It suits the case.” Significantly, the chairman, county chief Samwiri Walangula, is a traditionalist in marriage matters, with little sympathy for such modern ideas as the right of a woman to reject an arranged marriage. He speaks here for a unanimous court with the voice of conservative morality; even by his standards, Yoweri has received all that was due him.

The account of this rather simple case will, I hope, help to make clear in a preliminary way the sense in which, and the manner in which, the Soga courts make use of legal concepts. Yoweri does not simply accuse Yowabu of wrongdoing; he accuses him of harboring. And it is in similar terms that Yowabu frames his defense. He cannot be a harbinger because Yoweri has repudiated his marriage. The rights against which harboring is an offense, he argues, no longer exist. Again, when the court finds Yowabu guilty, it is in terms of harboring; in their questions and decision, the judges stick closely to what is legally relevant to that charge, ignoring the moral complexities until the amount of the fine and the compensation are at issue.

I have indicated some of the issues—sufficient reason, existence of a valid marriage—that may arise in the application of the concept “harboring.” In chapter 5, I shall go on to compare other cases in order to determine the other elements that may enter into the meaning of the concept as used by the courts. It is, however, only by such comparison of cases that an outside observer can determine the meaning of this and other Soga legal concepts. Never do the courts themselves attempt to spell out the meanings of these concepts. Never do they refer to previous decisions as sources for these meanings—though they keep excellent records, which are used when cases go up on appeal and to establish res judicata. Nor do the courts even spell out in any detail their reasoning in the case at hand. Their decisions consist, not of a ratio decidendi, but simply of a brief statement of conclusions, usually in quite factual terms, with no reference to legal rules. As cases become more difficult, there is some tendency for both litigants’ and judges’ reasoning to become more explicit, but for the most part one can only
follow their reasoning inferentially by observing the way in which they question witnesses and by linking this questioning to the conclusions reached.

And yet the Soga courts engage in legal reasoning—amateur (in the sense of not based upon specialized training), rather concrete, and often implicit legal reasoning, perhaps, but legal reasoning, nevertheless. Legal reasoning, in the sense in which I am using the term, means the application to the settlement of disputes of categorizing concepts that define justiciable normative issues. Where legal reasoning is in use, an accuser must lay his case in terms of one or more such concepts and the court must decide the issue in such terms, by inclusion or exclusion. It cannot concern itself with moral questions irrelevant to the concepts—in harboring cases like that of Yoweri Kibiri v. Youwu Kabwine, for example, with the question of whether Yoweri had treated his wife so abominably that she found life with him unbearable. (A mistreated wife has a remedy in Soga law, as I have noted, but she may never simply return to her guardian without exposing him to a charge of harboring.) In contrast, where tribunals do not make use of legal concepts, the judge is faced with a welter of blame and counter-blame—with all the moral ambiguity that is present in any situation of interpersonal conflict. "To classify," Karl Llewellyn once wrote, "is to disturb." 44 The legal concept disturbs in order to define an issue that may then be decided simply in terms of inclusion or exclusion.

I have defined logical reasoning rather more broadly than Levi did in his essay. He was concerned to emphasize the role of precedent in the process and to show how it can be that a regard for precedent is reconciled in Anglo-American law with constant change. This is where explicit reasoning by example, from case to case, comes into his argument. By carefully reworking previous decisions in the light of the instant case, the Anglo-American judge may preserve the conceptual framework of the law while making the minimum changes necessary to deal with the matter at hand. Basoga litigants and judges have not needed, and have not been equipped, to do this kind of reworking because the situations that come before the courts have been relatively stereotyped and the legal conceptual system has been relatively simple and stable. The judges have been able, consequently, to reason directly from concept to instant case, without referring back to earlier cases in which the concept has been applied. The Musoga judge, of course, remembers previous cases of a similar kind, but under these conditions, I suggest, he assimilates each case directly to a set of concepts which he carries in his mind. A formal doctrine of precedent, together with a reporting system for putting it into practice, externalizes this process—makes it explicit and a matter of record. When change is rapid, this becomes essential. Precedent becomes the guideline that allows the law to follow a consistent course as it changes. Soga law, on the other hand, has until recently operated under conditions of much more gradual sociocultural, and hence legal, change. Under such conditions, the judge need not talk or think explicitly about precedent. He need only act upon past experience encapsulated in a repertory of legal concepts. How far, and in what way, this repertory constitutes a system of ideas, and not simply a collection, it is one of the objects of this study to discover.

The Case Materials and the Case Method

The analysis in the following chapters of the work of the Soga courts is based in large part upon the written records kept by Basoga court clerks. The account of Yoweri Kibiri v. Youwu Kabwine given above is essentially a translation of one such case record. Since this reliance upon the written records of actual cases, supplemented by observation and interviewing, is fundamental to the nature of this study, the remainder of this chapter will be devoted to a discussion of its methodological implications and to a description of the body of material from which the cases to be discussed are drawn.

"Sociologically," Max Weber has written, "the statement that someone has a [legal] right... means [that] he has a chance, factually guaranteed to him by the consensually accepted interpretation of a legal norm, of invoking in favor of his ideal or material interests the aid of a coercive apparatus which is in special readiness for the purpose." 45 In this definition, two elements are brought together, of which one is the courtroom encounter, with its acceptance of a cause of action, its litigation and judgment. But to say that the law involves judicial acts is not to say that it is only a series of isolated judicial acts. The second element in Weber's definition—what "factually guarantees" the litigant's "chance" of obtaining a favorable judgment—is the "consensually accepted interpretation of a legal norm"—by which, I take it, he means roughly what Hart would call a rule rendered justiciable by a "rule of recognition." 46 Judges and litigants (or their advocates) think about and with the law; with the aid of legal thought-categories, they knit together their experience of what courts

44. Karl Llewellyn, Jurisprudence, p. 27.
45. Max Weber on Law in Economy and Society, p. 15.
actually do to produce intellectual guides to litigation and judgment and—by no means least important—to the avoidance of litigation. Most lawyers, nowadays, spend most of their time helping their clients so arrange their affairs that the legality of their actions will be less likely to be challenged. In a society like that of Busoga, where there are no professional lawyers, ordinary men perform such services for themselves. Still, litigation is the test; what distinguishes law from other forms of moral culture is the potentiality for measuring actions against its norms through some institutionalized process to determine their legitimacy or illegitimacy. It is with the possibility of litigation in mind that the law user, professional or amateur, thinks and acts.

Thus the analysis of a legal system must stand on two feet: one, the study of litigation; the other, the study of extracourtroom experience which the participants in litigation bring with them. For the first, the requisite data are good case materials—detailed accounts of the exchanges in the courtroom that eventuate in judicial decision. Of course in a larger sense the case does not begin and end in the courtroom. I have already noted the obvious fact that legal systems cut into the full “objective” complexity of social relations in highly “arbitrary” ways. It is only when one party finally decides to sue or complain, and when he can do so in terms of a concept acceptable to the legal system, that a case in the narrow sense is precipitated; but it would be useful to a fuller understanding of the legal institution’s place in the larger society to know what took place before and afterward. Is the system really open to the conflicts that plague the society’s members? Does it generally deal with them to people’s satisfaction? Such questions can only be answered by investigation of the events leading up to the courtroom encounter and of its aftermath, and by the study of conflicts which are never litigated. Again, even within the restricted segment of interpersonal history with which the courtroom case deals, the “facts” to which judges apply legal concepts are not “what really happened” but rather the “facts as found”—the “facts” as presented by the litigants and witnesses and evaluated by the judges. Of course “what really happened” is ultimately undiscoverable—indeed, some would consider it a meaningless notion—but, setting aside such deeper epistemological questions, it is possible, through interviewing, to learn more than the courtroom arguments tell. The notorious conspiracies in untruth which have been so common in Anglo-American jurisdictions in which adultery has been a principal ground for divorce provide an excellent illustration. To take at face value the “facts as found” in these cases would be misleading indeed. Legal fictions, of varying degrees of self-consciousness, probably play a role in most legal sys-

tems, as they do in that of Busoga, and only extracourtroom investigation can reveal their existence and significance.

For the experience brought by litigants and judges into the courtroom, the potentially relevant data are almost limitless. Quite apart from idiosyncratic elements, the whole of the common culture provides material for legal discourse. The repertory of justiciable norms is not co-extensive with everyday morality, but the interplay between them is continuous in the courtroom encounter and becomes especially conspicuous when change accelerates. Nonmoral culture, too, enters intimately into the legal process, especially in the ascertainment of the “facts”—which, of course, is why “absolute truth” is meaningless in this context. Litigants and judges come to court with common assumptions about the physical, biological, and social world, as Gluckman has shown so well for the Lozi, and such common understandings are the ground against which the courtroom argument takes place. Sometimes they may emerge as critical elements in argument and decision, as when a Soga court is required to decide the probable age of the saplings planted on a property boundary or the public symptoms of adultery. The entire sociocultural environment of the courts is full of such “sources of law” whose ethnographic study is relevant to an understanding of the legal process.

Of course not all parts of the extracourtroom environment are equally, and in the same manner, sources of law. In the legal systems most familiar to lawyers, there is an elaborate institutional machinery which mediates between the courts and the rest of the sociocultural system, shaping the interaction between them. Reporters collect, analyze, and publish important cases. Scholars organize legal ideas and legislative and judicial acts into coherent “fields.” Philosophers reconsider the moral and intellectual bases of legal thought. Legislatures and appellate judges, from time to time, tidy up sections of the law. Politicians and publicists debate legal principles in the public forum. From all this, one may learn a great deal about the legal process without entering a courtroom or examining a case record. Indeed, this torrent of words and activities about the law becomes so vast that Llewellyn feels it necessary to remind the legal profession that “... at the very heart [of law] is the behavior of judges.” But for the student of a legal system that lacks all this machinery for collect-

47. See Sebastian Osawalodana v. Bumali Mwaas.
49. See Annelis Waimea v. Sajabi Kibba.
50. See Bulubulu v. Kun'o Nyongi.
often knows in advance relatively little about the society in which he plans to work. This very lack of information is often among the reasons that lead him to visit that society, for anthropologists generally see it as one of their special tasks within social science to extend the range of comparative inquiry by working in little-known places. One consequence, however, is that the fieldworker often encounters, and becomes interested in, problems for which he is intellectually not well prepared. It is often scientifically justifiable for him—even incumbent upon him—to go ahead anyway and do the best he can with such problems, for he has traveled far and invested in the fieldwork a good deal of other people's money and his own intellectual labor—including the labor of learning a difficult language. No other anthropologist is likely to pass that way again soon. He therefore often works by what a scientifically minded psychologist colleague once scornfully called the "vacuum cleaner method": Besides pursuing the interest with which he came, he also collects such other kinds of data as seem to him scientifically important. Since his anthropological training—in recognition of these very conditions of work—has made of him something of a social scientific jack-of-all-trades, he probably knows something about previous work in these other areas. When he returns to the university to write up his material for publication, he fills in the relevant weaknesses in his intellectual background. If the data are, in spite of the inevitable gaps, sufficient to sustain an analysis that contributes something to understanding of the subject, he publishes one.

As the world becomes better known, of course, anthropological fieldwork tends to become more narrowly focused and more closely guided by prior intellectual preparation, but until we know far more than we know today about the world's cultures, this sort of serendipity will remain an inevitable, and useful, characteristic of anthropological inquiry. And reflection upon the resulting imperfections may serve, on the methodological level, the dialogue, mentioned earlier, that seems to characterize comparative inquiry generally: The flaws in one's serendipitous explorations of a subject in the field may prove enlightening to those who follow.

Legal "realists," by critically examining some of the myths of jurisprudence, have helped others to understand how legal institutions "really work." I have here tried to return the compliment by being "realistic" about anthropological fieldwork. As I noted earlier, I went to Busoga in 1950 with the intention of studying politics and administration in a colonial context, and had prepared myself accordingly. It was clear from the literature that the customary law courts were a
feature of the Soga political system, but I was quite unprepared to find them so prominent in Soga life and was astonished to discover the treasure house of data that lay in the court records. I had read, somewhat casually, the then classics in the anthropological study of law, but was quite innocent of the literature of jurisprudence. Nevertheless, the subject seemed too important, and too accessible, to neglect; and so lacking mechanical copying equipment, I hired assistants to hand-copy selected case records. I also attended court on many occasions and followed up some cases by interviewing litigants. As I became more aware of the importance of legal work in the life of the chiefs, whom I was studying anyhow in connection with my major subject, I interviewed some of them about particular cases. All this was accompanied, of course, by a good deal of general ethnographic inquiry on Soga society and culture, which previously had not been well described in the literature. Over a period of some twenty-one months, I studied intensively two groups of villages in different parts of the district and made shorter visits to other areas. Soon after finishing the fieldwork I reported briefly on the courts in my study of Soga politics and administration and in a short article, but it was not until several years later—around 1961—that I began to think seriously about the nature of law and to undertake the analysis that follows.

As a result there are certain gaps. The case records (these are described in Appendix B) provide, I believe, excellent data on what takes place in Soga courtrooms, and my ethnographic inquiries make it possible to relate these data to their general sociocultural setting. But for far too many cases, I know only what the case records tell and what I can infer from my knowledge of the society. In too few cases do I know what happened before and after and I have too few interviews with judges and litigants about particular cases and about law in general. More of such material would have made possible a richer analysis of Soga legal culture and of the relationship between the legal institution and society than I am able to provide.

This study, therefore, focuses upon the courtroom encounter, in which litigants and judges frame legal issues and decide them. Through the analysis and comparison of cases, I try to show that the participants in the encounter work upon recurrent kinds of social disputes with a coherent system of legal concepts. The reader may judge whether the data are adequate to sustain the analysis and whether, together, data and analysis yield a convincing account of the Soga courts at work.

If you want an order to be obeyed, give it in Luganda.
—A subcounty chief

A native court shall administer and enforce ... native law and custom in the area of the jurisdiction of the court, so far as it is applicable and is not repugnant to natural justice and morality.
—Uganda Native Courts Ordinance, 1941

2 The Setting:
The Basoga and Their Courts

This study is not concerned with a purely indigenous African legal system. The Soga courts and the society and culture in which they operate are important respects products of seventy years of British colonial rule, a rule whose attitude toward indigenous institutions combined, in varying proportions, a respect for tradition and local autonomy with a zeal for modernizing reform. In addition, the Basoga have been strongly influenced by the neighboring kingdom of Buganda, which for at least a century prior to the establishment of British administration was the dominant political force in the area to the north of Lake Victoria and which, by virtue of size, wealth, and a special political relationship with the British, continued throughout the colonial period to set the pattern for African life in much of Uganda. These statements should not, however, lead the reader to think of Soga society and culture as a patchwork of ill-combined elements, for it was one of my firmest impressions, after living and working in Busoga for almost two years, that I had been observing a way of life with a great deal of unity and integrity. Elements of thought and action that one knew must have come from the great kingdom to the west of the Nile or from British administrators and

missionaries seemed to have been worked into the texture of Soga life with astonishing ease and effectiveness. The result is a social and cultural synthesis perhaps best described as “neotraditional.” Basoga have accepted a great deal from the outside, but they have retained a strong sense of identity, unity, and continuity with the past.

The present tense as used in this study refers to the years 1950–52, the period of my observations. Many things have happened in the subsequent fifteen years to challenge the neotraditional synthesis that seemed to have been achieved at midcentury and to make this study, strictly speaking, out of date. The more rapid political evolution of the late 1950s—an evolution that, of course, involved the courts as well as other governmental institutions—was climax ed in October 1962 by the emergence of an independent Uganda state. While the course of social change may be expected to be quite different under these new conditions, it is still too early to see clearly just what the difference will be. The more obvious changes that have taken place, particularly in the legal sphere, will be summarized in the final chapter of this book, but I shall make no serious attempt to assess them. To do so would require an additional period of on-the-spot study—study which will be far more profitable a few years hence when the pattern of postcolonial life in Uganda will have become clearer.

Thus, what I shall describe here is an African legal system at that point in its history when the impact of British rule had been quite thoroughly absorbed and when the new conditions of self-government loomed on the horizon. What is described here is the baseline for a new period of legal development in which the Basoga themselves and their fellow-citizens of independent Uganda will decide what use to make of their neotraditional legal heritage.

Soga Society and Culture at Midcentury

The Basoga are overwhelmingly a rural people, both by circumstance and by choice. Busoga contains only one substantial urban area—the town of Jinja, located in the southwest corner of the district at the point where Lake Victoria spills into the Nile. The site of the Owen Falls dam and hydroelectric plant, Jinja is the administrative and commercial center of the district and contains most of such industry as it possesses. It is not, however, a Soga town. Of the approximately 20,800 residents in 1950, nearly 6,000 were non-African, and of the African population only some 30 percent were born within the district.

1. The development of neotraditional society and culture in Busoga and Buganda is discussed in my Bantu Bureaucracy, especially chapters 2 and 6, and in my "Ideology and Culture in Uganda Nationalism."

2. Cyril and Rhoda Sofer, Jinja Transformed, p. 15.


4. Fallers, Bantu Bureaucracy, chap. 2.


Jinja is largely the creation of its Indian and European residents, the former owning and managing most of its commercial and light industrial establishments, the latter administering its political life and public services and managing its larger industrial enterprises. To the Basoga, Jinja is an “alien town,” as are the numerous smaller trading centers which lie scattered about the district at intervals of fifteen to twenty miles. Basoga come to Jinja to work and shop and to do business with Uganda government officials, but the only institution in the urban area with which they really identify themselves is the headquarters of the African Local Government—a Soga government, manned by Basoga—at Bugembe, a few miles outside the town.

The focus of Soga life is in the countryside where the vast majority of the half-million Basoga make their homes and earn their livelihood. Unlike many West African peoples, the interlacustrine Bantu—the Bantu-speaking peoples of the lake region of east-central Africa among whom linguists and ethnologists classify the Basoga—have no indigenous urban tradition. They are in fact anturban, and not only in the contemporary context in which the towns are the places of foreigners. In Buganda and Bunyoro, the largest of the interlacustrine kingdoms, the king’s palace might be surrounded by some dozens, or even hundreds, of dwellings occupied by his subordinates and retainers; but these agglomerations were not true towns, for they lacked any continuous, self-conscious community identity and were highly transitory. They were more in the nature of royal camps than permanent towns. In the Soga kingdoms, which were much smaller, these court agglomerations were even less townlike. Even the nucleated rural settlements of the sort called to mind by the English word “village” were lacking. I shall, to be sure, use the word, for lack of a better one and because it is current in the literature of the area, to denote the dispersed rural communities of Busoga. These communities are real enough socially and politically, but they are never clusters of dwellings along a street or around a clearing. The Busoga, like other interlacustrine Bantu peoples, prefer to build nearer the soil they cultivate. It is on the kibanja, the family landholding with its dwellings surrounded by banana gardens and fields for annual crops, that the Musoga prefers to live. Even elite Basoga, wealthy, well-educated men with high positions in the civil service, whose work may require them to live tempo-
rarily in town, maintain *kibanja* holdings which they value highly, visit on weekends, and consider their real homes. Urban manual and white-collar workers often do the same.

It is their prosperous agriculture that has enabled Basoga to reconcile their preference for rural life with economic progress. Blessed with ample rainfall and fertile soil, they had developed in precolonial times a subsistence economy based upon the cultivation of the banana, which provides both the staple food, *mutoka*—a steamed mash of the green fruit—and the standard beverage, *mvenge*—a beer made from the juice of the ripe fruit. The banana is a perennial, requiring constant care by the women of the household; the *lusuku*, the banana garden, commonly surrounds the courtyard and dwelling houses and forms the spatial and sentimental core of the family holding. On its margins lie the fields for annual crops—sweet potatoes, millet, maize, and sim sim. Cattle, sheep, goats, and chickens provide meat and milk. The district does not provide a uniformly favorable environment for this pattern of farming. In the north and east, which are drier, the emphasis is more upon livestock and the annual crops; banana gardens are fewer and less productive; population is sparser. In the south and west, where bananas thrive, the gardens leave less room for fields of annuals and population densities reach four hundred to the square mile. Over all, however, this agricultural system provides security and abundance. While there are occasional droughts and famines—the fruit of the banana is difficult to store against a lean season—it remains true that the Basoga had, and have, one of Africa’s richest subsistence economies.

To it have been added during the decades of British rule three valuable cash crops: cotton, peanuts (ground nuts), and coffee. All three had been introduced in precolonial times, but it was the new cash economy and facilities for export that encouraged their extensive cultivation. In general, the Basoga have been able to add these crops to their subsistence agriculture without serious detriment to food-crop cultivation. Cash income, though small by world standards, has therefore been free for allocation to the new, imported items of consumption that have become standard in Soga households—cotton clothing (replacing the traditional barkcloth), bicycles, factory-made utensils, tea, soap, school fees, and, increasingly, corrugated iron or aluminum roofing (replacing the traditional thatch). With the opportunity to achieve

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6. There are, in fact, many varieties of banana, often in the same garden. Some are eaten fresh, some go into beer, while the bulk—the varieties sometimes called “plantains”—are cooked. I shall follow Allan in calling them all “bananas.” See William Allan, *The African Husbandman*, p. 101.

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43. The Setting

a steadily rising standard of living while remaining within the familiar context of rural life, the Basoga have been reluctant to enter wage labor, even in their own district; and when they have done so, they have generally tried to maintain a footing on the land—a small holding near the town from which they might commute to work, or a more substantial one farther away to which they might retire in later life.

The neotraditional society, therefore, remains a rural society, a society of village communities. I have said that the village is spatially indistinct, since homesteads are scattered over the holdings that make up the village area rather than being clustered. Most villages, however, are at least partially bounded by one or more of the swampy valleys that crisscross Busoga. The word for village (*mutala*), in fact, also means “a piece of high ground between swamps”; one lives “on” (*ku*) a mutala, not “in” (*mu*) it. Each village has its headman, whose position is hereditary within his lineage, and each is divided into subvillages (*bisoiko*, singular: *kisoko*), each with its own hereditary headman. In a later chapter, when considering cases in Soga land law, I shall have to discuss in some detail the position of these headmen vis-à-vis their people. Here it is sufficient to say that they are the political heads, and their homesteads the social centers, of their communities.

In addition to being members of these local communities, Basoga are divided among more than 150 patrilineal clans (*bika*, singular: *kitka*), each of which is in turn divided and subdivided into patrilineal lineages (*nda*, singular: *nda*). Members of a clan are united by “respect” or “fear” for a common totem—usually a plant or animal species—and are forbidden to intermarry. Both clans and lineages are named for founding ancestors; one says, for example, in declaring one’s clan membership: “I am a Mwiseigaga”: literally, “of the father Igabe.” The clan name is nearly always made up in this way, by joining the personal prefix *mu* to the word for father, *ise*, and the name of the ancestor. In speaking of one’s lineage, on the other hand, one says: “I am of the lineage of Idhoba” (*nda ya Idhoba*). Clans are large and dispersed over Busoga; often members of the same clan in different parts of the country will be unable to trace the kinship links between them, or will be unable to agree about the nature of these links. The lineage is a more intimate and more localized group, among whose members the links are, in principle, known. The term *nda* may be used in speaking of any level of group segmentation within the clan.

The word also means "womb" or, in a sexless sense, "the interior of the body." In discussions of lineage, however, the implication is always male, rather as, in the King James Bible, children come from a man's "loins." The other principal meaning of kika (clan), on the other hand, is "kind" or "class" or, in a modern commercial context, "brand." The phrase "nda ya so-and-so" is often used to indicate the male agnicline ancestor, descent from whom links any two persons or groups. The most important lineage unit for social (and legal) purposes, however, is that which unites members of a clan living in a group of neighboring villages—the group that can come together to engage in corporate action. Somewhat confusingly, the Basoga often speak of such a lineage as "the clan," or use the clan name in referring to it. Thus, when a Musoga speaks of "the Baiseiga," he usually means the Baiseiga who live nearby and act together. It is this "local chapter" of his clan that is of greatest interest and importance to a Musoga.

This local unit I shall call the "succession lineage," for it is in connection with matters of succession that the group is most commonly mobilized. When a man dies, the group comes together under the leadership of its hereditary head to choose two successors: one, the "successor of the belt," who assumes responsibility for the deceased's wife and children and in general takes over his kinship responsibilities; and another, the "successor who takes the things," who becomes the heir to the deceased's land and, if he holds one, to his hereditary office. The first is usually a brother or paternal cousin, the latter a son or brother's son. These selections rest with the group in law, as will be seen, as well as in custom, and they are made at the funeral feast that follows a period of mourning for the dead. It is said that such decisions, if they are contested, may be "appealed" to the hereditary heads of lineages of wider span, or even to the clan head, but this rarely happens. In the life of the average Musoga villager, including those matters that most often bring him to court, it is the local succession lineage and its head—usually spoken of in local contexts as the "head of the clan"—that represent institutionalized patrilineal descent-group solidarity and authority.

Village community and patrilineal descent are distinct modes of organization in Busoga, crosscutting one another to form the two principal axes of rural society. As a resident of one's village and subvillage, one is the political subordinate and tenant of one's headman; as a clan member, one is linked in corporate solidarity with other members, descended from a common ancestor, who live in one's own and neighboring villages. But the two modes of organization do not coincide; they are not simply the territorial and genealogical dimensions, respectively, of the same social groupings. The village or subvillage seldom consists entirely of the households of members of a single lineage or clan. Thus, one's headman is usually not one's lineage head, or even a member of one's lineage. Both village and subvillage normally contain members of several lineages of several clans, and the headman's lineage is often not even the largest.

These features of kinship and local organization are traditional institutions that have survived almost unchanged in the neotraditional society of the colonial period; and their persistence, facilitated by a relatively productive agriculture, has been a major factor in maintaining the continuity of Soga life and law. In the religious sphere, continuity has been less marked. Missionary endeavor on behalf of both Christianity and Islam preceded British administration and in both cases struck deep roots in Soga society. Today the Christian and Muslim communities include all Basoga leaders of any significance and a large majority of the population at large. For example, of a total of 481 married men in the five villages in which I carried out complete surveys in 1954–55, 390 (almost 80 percent) claimed to be Christians or Muslims. Of these, 102 (21 percent) were Muslims, 100 (20 percent) were Roman Catholics, and 185 (38 percent) were adherents of the Anglican communion. Both Muslim and Christian communities are largely served by African clergy. Furthermore, the new religions' organizational success has been paralleled by a cultural conquest: religion, along with education, modern medicine, and economic progress, is one of the "good things" of the modern world to which the Basoga have committed themselves; and ddi, the word for it, introduced from Arabic via Swahili, the East African lingua franca, applies only to Islam and Christianity, not to the traditional faith. Those who are not Christians or Muslims are now, pejoratively, bakafr (Arab-Swahili: "pagans"). At the annual national celebration at Bugembe of Kyabazinga's Day, the Soga national holiday, leading Christian and Muslim clergy are given places of honor; no dignitary, however, represents the old religion.

Religion, in the minds of Basoga, is closely associated with edu-

8. See chapter 6. In this, as in many other ways, Basoga tend to treat Ganda patterns as ideals for Busoga. The Ganda clan system is much more hierarchical. See Fallers, The King's Men, chapter 2.

9. See chapter 6; and Fallers, Bantu Bureaucracy, chapter 4.

10. The villages surveyed were Budini and Buyodi in the county of Bulamogi, and Bumyama, Wairuma, and Bukwaya in the county of Kigulu. Bulamogi is in the drier, less densely populated north of the district, Kigulu in the more fertile and heavily populated south.
tion, for the missions created the educational system and at the time of
my observations were still, with the help of government grants, respon-
sible for operating it. The high value which Basoga place upon educa-
tion is perhaps most clearly demonstrated by the fact that it is the one
purpose for which they are always ready to pay more taxes. In
1950-52, the school system was not yet large enough to satisfy the
popular demand for a primary education for every Musoga child. Still,
the district was at that time served by sixty-four “vernacular primary
schools” (schools offering three years of education in the Luganda
language), thirty full (six-year) primary schools, four junior (three-
year) secondary schools, and one full (six-year) secondary school.
There was one teacher-training institution. For a few fortunate Basoga
students, higher education was available at Makerere College, the
University College of East Africa, in nearby Kampala. Much of this
represented recent growth in educational facilities, growth which was
not yet reflected in the educational level of the adult population of
Busoga. However, in the five villages surveyed, 41 percent of the
married men and 14 percent of their wives were literate.

This ready acceptance of the monotheistic religions and western
education does not, however, mean that traditional religion has left no
trace in contemporary Soga society and culture. There are, first of all,
important elements of syncretism in the local expressions of both
Islam and Christianity, centering particularly, as one would expect,
upon those aspects of belief most closely associated with the continuity
and solidarity of the patrilineal descent group. Since this institutional
complex underlies many of the legal ideas to be discussed in later
chapters, a brief account of its religious side is in order.

In traditional belief, the descent group comprised both the living
(balamu) and the spirits (misimu) of the dead. The spirits maintained
an active interest in the well-being of the group and might express
their displeasure by visiting illness or misfortune upon living members.
The latter, therefore, acted to secure the good will of the spirits by
making offerings of food and beer at shrines built in the family
courtyard, and most importantly, by assuring at the death of a mem-
ber a satisfactory passage from the living to the spirit state. This was
achieved through a series of ritual acts making up the funeral complex
known as kwabuya olumbe, “dismantling death.” This began with the
preparation of the body by a sister’s son—a kinsman whose relation-
ship to the deceased was close and affectionate, but disinterested and
safe, since he was not a member of the patrilineage and hence not
involved in any potential disputes over succession. The sorcerer who, it
was assumed, had caused the death was cured; the successors were
chosen by the assembled lineage mates and were made to spear a cow
sacrifically beside the grave, usually dug in the banana garden, which
thereby took on a sacred character. The spirit was then “released” by
the senior widow, who, throwing a handful of soil from the grave into
the air, called upon it to “rise up.” For a period of several months, the
widows, children, and successors mourned by allowing their hair to
grow long. Finally, a shrine was built, offerings were made, a funeral
feast was held, and the senior widow spent a ritual first night with the
“successor of the belt,” whose wife she usually became. The damage
done to the social fabric of the lineage by death was thus repaired, it
was hoped, and harmony between its living and dead members
assured.

This complex of ritual acts survives, in some degree, in the lives of
most Basoga today although the mourning period is much briefer and
the selection of successors and the funeral feast have been combined.
For almost all, it is safe to say, the ancestors remain objects of
veneration. Even for the majority who no longer build shrines or make
offerings, the ancestors’ graves in the banana garden give land a sacred
quality, as well as conferring important rights in law. And most
Basoga Muslims and Christians today take part, without any feeling
of contradiction, in funeral ceremonies that involve some combination
of kwabuya olumbe rites with those of the new faiths. Similarly, most
find it possible to reconcile Islam and Christianity with features of the
traditional kinship system that to an outside observer might seem
incompatible with them. Few Basoga Muslims, for example, follow the
rules of the sharia with respect to succession, most preferring instead
to follow general Soga custom; while few Christians, in spite of fre-
frequent sermons on behalf of monogamy, feel that it is wrong to have
more than one wife. In the five villages surveyed, 24 percent of the
Christian men were polygamous, as compared with 34 percent of the
Muslims, and only 14 percent of the “pagans,” whose lower rate is
explained by their relative poverty. Both Christians and Muslims, on
the whole, continue to regard women as minors, under the authority of
their fathers before marriage and that of their husbands afterward.
Thus, the major social institutions that form the matrix for much of
Soga law have retained the allegiance of Basoga of all faiths.

There were, of course, other aspects of traditional Soga religion
besides the ancestor cult. For nineteenth-century Basoga, the spirit
world was intricately differentiated: every prominent feature of the
landscape—every river, large tree, or prominent hill—harbored a spirit

11. A pavilion is erected to shelter the mourners during the ceremonies. It is
the dismantling of this structure upon their completion to which the term refers.
Chapter 2

(musambwa) with which living men might communicate and by whom their welfare might be affected. At the head of this pantheon were a series of powerful anthropomorphic spirit figures: Waïtambogwe, Walumbo, Mukama, and many others—several of whom are common to neighboring Bantu peoples. All were capable of causing illnesses which could be cured only by yielding to possession by the spirit. Many Basoga Christians and Muslims believe in the power of these spirits, as they do in the eflucy of amulets, fetishes, and sorcery, though they may reinterpret them in terms of Christian and Muslim theology as manifestations of the devil (sitaani). A remnant of organized “paganism” exists in the form of local cult groups of basalwezi—devotees of musambwa spirits who meet regularly for seances. Only regular membership in such a seance group is popularly regarded as incompatable with Islam and Christianity.

To summarize then, the average Musoga villager and the average litigant in the Soga courts is a relatively prosperous peasant farmer with an assured food supply and a bit of money to spend. He is a Christian or Muslim with little formal education, though quite possibly literate and anxious that his children should be better educated than himself. He is closely bound, both by complex social ties and by traditional religious conceptions, to his lineage, his village, and the land. All this, however, describes only the village level of Soga society. In addition, there are the governmental institutions through which this average villager is related to a larger political order; these also represent an amalgam of indigenous elements with features resulting from external influences.

FROM KINGDOM TO LOCAL GOVERNMENT

In the latter half of the nineteenth century, the earliest period for which the combination of written records and old men’s memories makes it possible to form a reasonably clear picture of political arrangements, the territory of the present Busoga District was occupied by a dozen or more small kingdoms, ranging in population from a few thousand to perhaps one hundred thousand. Although the area lacked political unity, and although at least two distinct dialects were spoken by its people, it was regarded both by them and by their neighbors as forming a distinct cultural entity with a common pattern of political institutions.

Each of the kingdoms was headed by a dynasty, a descent group of princes which formed a lineage within a royal clan. Although then, as now, most clans were dispersed over Busoga, the same clan was not royal in every kingdom. In Bugabula, Bulamogi, Bukono, Luuka, Kiguli, and Bukoli, the rulers were Baisengobi, while the Baisigaga ruled in Busiki and Busambira and the Baisemenya in Bugweri. In the many small kingdoms of the south, there were still others. Each dynasty possessed regalia—drums, stools, and spears—which were the inherited symbols of royal authority. Court bards sang of the great deeds of kings and recited their genealogies. In each kingdom, the royal ancestors were the objects of a “national” cult similar to, but more elaborate than, the one practiced by ordinary Basoga in relation to their own ancestors. Government in the kingdom was not, however, clan or lineage government. Only the ruler’s position was, in principle, hereditary; subordinate officials held office at his pleasure, a pattern that served both to centralize authority in the ruler’s hands and to open the ranks of the political hierarchy to able commoners. A ruler might appoint his son chief of a section of the kingdom, but it was recognized that this practice amounted to storing up trouble for the future; the prince, sharing the royal blood, might be tempted to assert his autonomy or to usurp the rulership. Even if he himself remained loyal, his descendants might claim independent hereditary authority. Incidents of this kind are recounted in the traditional histories of several of the kingdoms. To strengthen his hand, therefore, a ruler was always careful to balance any princely appointments with able and loyal commoner chiefs, often men related to him by marriage. Such chiefs were entirely dependent upon his favor and were the subordinates upon whom he mainly relied in the exercise of his authority.

The complexity of the chiefly hierarchy varied with the size of the kingdom. In Bulamogi, for example, which was one of the larger states in the north, it consisted of a palace staff headed by a prime minister, the katikkiko. A series of chiefs, some princes and other commoners, were in charge of major divisions of the kingdom, while at the local level there were village and subvillage headmen, some of whom were royal appointees, while others were hereditary. In the little southern kingdom of Busambira, on the other hand, the ruler’s immediate subordinates, apart from his katikkiko and his household servants, were the village and subvillage headmen, some of whom were fellow princes while others were commoners. Everywhere, however, the basic principles were the same: rulership, hereditary within a royal lineage, was exercised through what a mixed hierarchy of princely and commoner chiefs headed by a katikkiko, who seems always to have been a

12. The cult is widespread in the interlacustrine Bantu region, though in other areas it is the spirits, and not their votaries, who are called baswezi or bazwezi.

13. “Katikkiko” is probably a Ganda title borrowed, like so much else, by Basoga.
commoner. Each chief was responsible for the collection of tribute and the organization of a militia unit in his area, and each held court as a judge in the disputes that arose among his people.

These little kingdoms were not politically isolated, either from each other or from states outside the borders of Busoga. In their external relations, they were among the smaller units in a regional system of international politics that stretched around the northern and western shores of Lake Victoria from Kavirondo, in what is now the Nyanza Province of Kenya, to Bukoba, in present-day northwestern Tanzania. This whole area was occupied by states broadly similar in structure, all struggling to increase their wealth and extend their territory at the expense of their neighbors. Raids and wars were frequent. The larger kingdoms endeavored to absorb the smaller, both through direct military operations and by intervention in princely struggles over succession, secession, and usurpation. The Soga kingdoms used these tactics against each other, but in the larger struggle for domination over the whole area, none of them was large enough to be a major competitor. Instead, they tended to participate as satellites of the two major contending powers: Bunyoro, which lay to the northwest beyond Lake Kyoga; and Buganda, which bordered Busoga to the west beyond the Victoria Nile. At an earlier period, traditional histories suggest, when Bunyoro was the more powerful of her neighbors, Busoga had been under strong Nyoro influence. The dynasties in several of the northern Soga kingdoms claim descent from the Nyoro royal line. By the middle of the nineteenth century, however, it is clear that Buganda had begun to win out, both in the larger struggle and in dominance over Busoga in particular. By the 1860s and 1870s, when the first written accounts of the area became available, much of Busoga had become tributary to the Kabaka (king) of Buganda, whose authority over the area was exercised through the Seekiboobo, the chief of the neighboring Ganda county of Kyaggwe. Captain W. H. Williams, representing the Imperial British East Africa Company, which had been chartered in 1888 to look after Britain's interests in the area, wrote to his superiors in January, 1893, characterizing the Seekiboobo as the “paramount chief” of Busoga.14

The British had concluded that Buganda held the key to control of the whole region; during the 1890s, therefore, British officers concentrated upon increasing their influence there in order to establish control of surrounding peoples. In 1894, a formal British protectorate succeeded the administration of the chartered company, and in 1900 an agreement was signed, recognizing the Kabaka as “native ruler of the Province of Uganda, under Her Majesty’s protection and over-rule.” 25 The word “Uganda,” as used then, referred only to the Kabaka’s kingdom; it was simply the Swahili form of “Buganda.” Gradually, however, “Uganda” came to be used for the larger area under British protection, “Buganda” being reserved for the Ganda kingdom itself. Under the agreement, Buganda relinquished all claims to Busoga and other tributary areas outside her boundaries, but the method of administration thereafter adopted in these areas served to perpetuate, and even deepen, Ganda influence.

Even before Britain achieved political domination over Buganda, the Christian missionaries had concentrated their efforts there. As a result, by the turn of the century there was available in Buganda a substantial corps of young men with a modicum of western education and a knowledge of British ways, ready to serve in surrounding areas as chiefs, teachers, and missionaries. Such men were the principal architects of the neotraditional social order which took shape in Busoga during the first two decades of the present century and they are largely responsible for the strongly Ganda flavor that still characterizes it.26

Chief among the Baganda agents of British administration was Semel Kakunguru, an able young man who was made “paramount chief,” presiding over a unified council of Basoga rulers. A number of other Ganda chiefs were made “advisers” to Basoga rulers, and through them the political structure of the country, now an administrative district of the eastern province of the Uganda Protectorate, was reorganized on a Ganda model. The larger kingdoms became “counties” (saza), while the smaller kingdoms and the major divisions of the larger ones were made “subcounties” (gyombolo). These latter, in turn, were divided into miruka (singular: mutuka), or “parishes.” Each of these territorial units was governed by a chief, who now owed his appointment, ultimately, to the protectorate government. Within each county and subcounty, heads of subordinate units were given ranked Ganda titles: Mumyuka, Ssaahaddu, Ssaabagabo, Ssabawaali, Mutuba. The senior subcounty chief within a county became Mumyuka, as did his senior parish chief. These titles are still used in referring to chiefs and to the courts they chair.

In practice, the rulers of areas that had in the past been independent kingdoms were retained at first, but as these men died or reached retirement age, they were replaced by others without hereditary claims, chosen for their ability and education. Similarly, the means by

15. The Uganda Agreement, 1900.
which the chiefly hierarchy was remunerated were gradually modern-
ized. At the beginning of the colonial period, the chiefs were supported
through an adaptation and regularization of the traditional tribute
system. Each chief's area was divided into butongole, the "official"
part, which he ruled and taxed on behalf of the protectorate govern-
ment; and bweasegane, the "benefice," from which he collected tax and
tribute labor for himself. Between 1926 and 1936, however, personal
tribute was abolished and replaced by a system of taxation, from
which chiefs were paid regular salaries. Thus, during the twenties and
thirties, the traditional hierarchy of hereditary rulers, princes, and
their client-chiefs was gradually replaced by a corps of civil-servant
chiefs, appointed on the basis of personal qualifications and serving on
civil service terms.

An important element of continuity was provided by the tendency
for the chiefly lineages and their kinsmen to fill the schools with their
children. The "bright young men" with the best "personal qualifications"
turned out in very many cases to be sons or sister's sons of
traditional rulers and princes and thus what had been a series of local
dynasties, each with its penumbra of officials and matrilateral kins-
men, became a Busoga-wide oligarchy or "establishment," adding to
its traditional ascriptive position the new symbols of formal education
and money wealth. The chain of legitimacy was never broken.

During the 1930s and 1940s, as Britain began to think more seri-
ously in terms of a future self-governing Uganda, it became the policy
to develop these institutions for "indirect rule" into modern local
governments. To the administrative bureaucracy, therefore, was
added, beginning in 1938, a hierarchy of parish, subcounty, county,
and district councils, which gradually became less official and more
elective in composition. An ordinance enacted in 1938 gave this local
government the right to incorporate. Finally, the African Local Gov-
ernments Ordinance of 1949 gave the structure the form it exhibited at
the time of my observations. With more than one thousand full-time
employees and a budget of a quarter of a million pounds, it was served
by, in addition to the hierarchy of chiefs and councils, an elected
Kyabazinga (President), a central secretariat, a treasury office, an
agriculture and forestry department, a police department, and a public
works department. Upon these departments of the A.L.G. were gradu-
ally devolved many functions formerly performed by central govern-
ment departments. The county and subcounty chiefs tended to become
the coordinators for their areas of these specialist services. At the


lowest level of political organization, the village and subvillage head-
men remained little affected by all this reorganization. Forbidden to
collect tribute and unwilling to accept salaries that would, they felt,
makes them subject to transfer and dismissal by the protectorate
government, they formally remained aloof from the official Busoga
African Local Government structure and became uniformly heredi-
tary, although, as will be seen, they continued to do much of the work
of the local government, including important aspects of its judicial
work.

Busoga was not ruled throughout this period of evolution by Ba-
ganda chiefs. Kakungure, the Muganda "paramount," was removed in
1914, and by 1918 all Baganda chiefs had departed. The long period of
Ganda influence, however, had left a permanent mark on the district.
The Luganda language was doubtless widely used in Busoga in the
period of Ganda domination before the coming of the British; it is, in
any case, very similar to, in fact mutually intelligible with, the Lusoga
dialects. The missionaries, therefore, made their Luganda translations
of Bible, prayerbook, catechism, and hymnal the instruments for the
evangelization of Busoga, and the close link between religion and
education meant that Luganda became the written language of the
district. Attempts have been made to develop a standard orthography
for Lusoga, but there seems to be little popular demand for this. Ba-
soga quite happily correspond with one another in Luganda and a
substantial Luganda press provides them with reading matter. The
court clerk, like other officials, works in Luganda quite easily, "trans-
lating" as he goes along from the testimony of those—usually the
elderly and uneducated—who prefer to address the court in Lusoga,
and retaining, in Luganda orthography, the Lusoga words that have no
exact Luganda counterparts. "Omuwadha ona akobyde nti ow'ekisoko
aishye ewaaffe," an old man may say ("This man said that the
subvillage headman had come to our home"), and the clerk, without
thinking, writes: "Omunjiwa ona agomye nti ow'ekisoko azze ewaafe."

This cultural "imperialism" seems to encounter remarkably little
resistance. Unlike some other peoples of Uganda, who resent the
Ganda domination of much of the country's life, the Basoga tend to
identify themselves with Ganda culture and even with Ganda political
interests. Particularly at the upper levels of society, where friendships
formed at the elite boarding schools in Buganda are reinforced by a
good deal of intermarriage, Basoga have been quite thoroughly "Gan-
da-ized." At the village level, of course, this is less true. But through-
out, Ganda influence has been so pervasive that it is often difficult to
distinguish Ganda from indigenous elements in Soga life.
The British influence is, of course, more easily distinguished. The Busoga African Local Government is the end product of a quite explicit policy of building upon, and reforming, indigenous political institutions to produce an English-model local government. The process has been gradual enough, and the rewards to those most directly affected substantial enough, that the reforms have been quite generally accepted. Perhaps the most important factor in this success has been the combination of firmness and restraint with which British officers have dealt with Soga institutions and officials. The district has been administered throughout the colonial period by a handful of British officials headed by a district commissioner. On paper, their authority has been very nearly absolute: "Whenever a provincial commissioner or district commissioner shall consider that, for the proper administration and good government of the area within which any chief has jurisdiction, it is necessary or desirable that any order or orders should be issued . . . he may direct the chief to issue and enforce or may himself issue and enforce such order or orders." 18

In practice, the policy has been to devolve the maximum responsibility upon Basoga. Basoga officials have generally been treated with respect. In the absence of the racial tensions produced in some other colonial areas by the presence of a European settler population (alienation of land to foreigners was never substantial in Uganda and was halted entirely around 1910 in favor of a policy of developing peasant agriculture), the relationship has been essentially a tutorial one, often carried on over friendly cups of tea. The pupil has often enough felt that the pace of advancement was insufficiently rapid, but the relationship has been amicable enough, and resentment sufficiently offset by admiration, that the innovations introduced have been quite thoroughly institutionalized.

The above sketch will give the reader sufficient initial information concerning the social and cultural context in which the Soga courts operate. These courts, to summarize, form the judicial arm of the Busoga African Local Government, administering Soga customary law and certain statutes in the adjudication of the disputes which arise in the neotraditional society I have described, under the general supervision of a British colonial administration. It will be necessary to enlarge upon some aspects of Soga ethnography from time to time as the analysis proceeds, but for the present I turn to matters more specifically legal: the development of the court system and the sources of the law it administers.

18. African Authority Ordinances, 1919, 8 (1).
The memories of men still living in 1950–52 tell a little more. All rulers, chiefs, and headmen, I was told, acted as judges, sitting with their subordinates to hear cases. One man recalled that a litigant might keep track of the main points of his argument by holding a bundle of sticks in his hand and throwing them down, one by one, before the bench to mark each point. Very difficult cases, it was said, were settled by resort to an ordeal by intoxicating drug. Some said that certain types of cases—assault and homicide were mentioned—were settled by retaliation or composition between lineages, while others—such as land and bridewealth cases—were tried before a chief. Legal heads were said to hold judicial proceedings to decide inheritance disputes and to try offenders against the norms governing behavior among lineage mates—as indeed they still do today. The picture that emerges from these memories is very like the descriptions of Ganda legal institutions given by turn-of-the-century Baganda and European writers.22

I shall not, however, attempt to repeat for Busoga the remarkable achievement of Llewellyn and Hoebel in reconstructing the indigenous legal order of the Cheyenne Indians from memory data.23 One reason is that the task seems impossible to accomplish. Soga memories seem to yield less adequate data on these matters than do Cheyenne memories. While the two peoples came under regular European administration about the same period prior to the two studies—some sixty years—the circumstances and consequences of alien administration in the two cases were quite different. For the Cheyenne, conquest and confinement on a reservation represented a catastrophic end to their former nomadic hunting and warring way of life, but little effort seems to have been made by United States agents, at least during the early years, to influence their legal institutions. In Busoga, the British assumption of control was both less catastrophic in its effects upon life in general and more immediately consequential for legal institutions. There was no military conquest—the British acquired Busoga as a by-product of their ascendancy in Buganda—and the village way of life remained intact, changing only gradually over the years with the development of mission religion and education and a cash economy. Political and legal institutions were guided from the first in accord with British notions of just administration, but this process, too, was gradual, and a deliberate effort was made to preserve the fabric of “customary law.” The new political and legal order was sufficiently

22. John Rocque, The Baganda, chapter 8; Sir Apolo Kagwa, Ekitaabo kayi M'pisa so Baganda, chapter 23.

like the old so that Basoga have little sense of discontinuity in their recent history. In consequence, they think about their precolonial political and legal order as little different from their present one and their memory of the former is heavily contaminated by their experience of the latter. Thus, while I was able to collect some case material remembered from the precolonial phase, I often felt that this material was being filtered through a screen of present-day experience of the African Local Government courts.

A more important reason for not dwelling unduly upon the exceedingly difficult task of reconstructing precolonial Soga legal life is that, particularly for the kind of analysis I am attempting, present-day case material is so much more rewarding. My central interest is the use made by the courts of legal concepts and an understanding of this process requires the close analysis of bodies of related cases.24 To assemble such material for the precolonial period would be quite impossible. This sketch of the growth of the court system should therefore be regarded as merely introductory to the central task of analyzing present-day litigation and adjudication.

For these purposes, it is sufficient to know that at the beginning of the colonial period Basoga were familiar with tribunals in which litigants argued their cases before judges and that they readily accepted the jurisdiction of the British-supervised courts over cases of all kinds. This is not to say that Basoga were always enthusiastic about British overrule, but simply that they regarded British supervision over the courts as a natural and inevitable consequence of it. I found no trace in the reports of administrative officers of resistance to the courts’ jurisdiction and none was recalled by any Musega with whom I spoke. On the contrary, administrative officers’ reports, which from 1913 include returns of all cases in the “native courts,” attest to the positive enthusiasm of Basoga for litigation before judges who were, after all, their familiar chiefly authorities in an only slightly changed guise. In 1913 the county, subcounty, and district courts heard 2,415 cases, or about one for every 85 Basoga. The per capita frequency of litigation subsequently rose slowly over the years to one case for every 45 souls in 1950,25 but this rise probably reflects an increase in the frequency of certain types of disputes (principally land disputes, as

24. Llewellyn and Hoebel did not attempt this sort of analysis, and probably could not have done so with the sort of data they could obtain.
25. The case returns are taken from the quarterly and annual reports of provincial and district commissioners, on file in the Central Offices, Jinja. Population figures are from the 1911 and 1945 censuses, summarized by Margaret O. Pullor in The Eastern Locustine Bantu, pp. 20–21.
will be seen) rather than in the legitimacy of the courts. All evidence suggests that courts of law, in the sense developed in the previous chapter, were familiar to Basoga from precolonial times and that the “new” courts represented for them no radical departure.

The structure of the court system seems to have changed relatively little since the early years of the British protectorate. Rulers and their client-chiefs gradually became civil servants, as I have said, but the territorial units, especially at the top and bottom of the hierarchy, remained quite stable; the larger kingdoms, that is to say, became “counties,” while the villages and subvillages remained villages and subvillages. At intermediate levels, many “subcounties” represented traditional units, either kingdoms or traditional divisions of kingdoms. And each continued to have its chief or headman, who was also its judge. Through all the changes that transformed the loose collection of autonomous kingdoms into a single, relatively modernized local government, courts continued to be held at most of the same places, and in a recognizably similar manner.

At the beginning, British officers simply assumed supervisory authority and appellate jurisdiction over the judicial functions of the rulers, chiefs, and headmen. It was probably at this time, in the first few years of the present century, that the most important changes in court practice—whatever these were—were instituted. Practices felt by British officers to be, in the words of the Native Courts Ordinance, “repugnant to natural justice and morality,” were probably eliminated at this time, before there had been any formal legislation to this effect. Thus, one hears no more of the ordeal, and the punishments a court might inflict were limited to fining, imprisonment, forfeiture, and whipping (though it is interesting to note that the last form of punishment seems to have been more repugnant to Basoga than to their British mentors; though still provided for in legislation in force in 1950–52, I found no recent case in which a Soga court had imposed it). It was perhaps also at this time that such elements as the conventional charge to the parties at the opening of an action and the rule of res judicata, both of which sounded British-inspired, were introduced—though there is no way of knowing for certain that these did not exist in traditional court practice. One element that clearly was introduced at this time, perhaps the most important single contribution of British administration to Soga court procedure, was the practice of keeping written records. By 1904, the British officer in charge was keeping a book of “native court cases” which recorded the names of the litigants, a statement of the charge, and an abstract of the testimony in cases appealed to him. By at least 1920, and probably earlier, each subcounty court was keeping such a case book. Thus the courts now had a new and important kind of servant, the clerk.

As the colonial regime began to take on the attributes of a full-scale modern government, these arrangements were formalized through the legislative authority granted, first to the governor and then to the legislative council, by the Uganda Orders in Council of 1902 and 1920 respectively. Beginning in 1905, a series of native courts ordinances recognized and regulated the courts of the county and subcounty chiefs and established a “district native court.” At first, the bench was exclusively official; a county chief sat with a group of his subordinate subcounty chiefs, a subcounty chief with his subordinate parish chiefs. Under the ordinance of 1941, however, half the bench at each level was made elective. These “unofficial” members are chosen by the subcounty, county, and district councils, which are themselves largely popularly elected. Decisions are arrived at by majority vote, but the chief-chairman tends to dominate the proceedings. The “courts” held by parish chiefs, by village and subvillage headmen, and by lineage heads have never received legislative recognition, but the official courts have recognized their usefulness and in practice have acted to maintain them. A subcounty chief, for example, usually insists that an accused first take his case to the headman and the parish chief so that they may attempt to settle it “out of court.” A good many disputes are settled this way. The subcounty courts also recognize the jurisdiction of the lineage gatherings over internal lineage disputes—principally disputes over succession—and will enforce their decisions. From the point of view of the average villager, all these tribunals are part of a single judicial system; all are nkuiko, with the authority to “out cases.”

This Soga judicial system, manned entirely by Basoga, stands beside, and within, another system, manned by British officials. Legislation, beginning with the Subordinate Courts Ordinance of 1902, has created a series of magistrates’ courts and a high court and has provided for appeal to a court of appeal for eastern Africa and to the

27. In subcounty Ssabawendi, Kigulu, I found a casebook for 1920–23. These must have existed at least from 1913, when district commissioners began including judicial statistics in their reports.
privy council. In general, the allocation of jurisdictions between the two systems is such that the great majority of cases in which both parties are Africans or, in criminal cases, in which the accused is an African, go to the Soga courts (or to similar courts in other districts), while cases involving Europeans and Indians go to the British magistrates' courts. The racial division is not, however, complete. Persons of any race accused of homicide or rape are tried by the high court, while non-Africans "who, having regard to their general mode of life

Privy Council  

[Diagram of the court system]

The sources of law: British colonial legislation

In this study, I have adopted a court-centered, case-centered view of law; the law is what judges with the authority to do so say it is when they make decisions with respect to the cases that come before them. By thus centering my attention upon adjudication—upon the judicial act—I do not, as I have indicated, mean to suggest that events occurring outside the courtroom and unrelated to particular cases are irrelevant to law. From the standpoint adopted here, such events—legislative enactments, customary moral and cognitive categories acquired by judges and litigants in the course of growing up, religious injunctions, previous judges' decisions—all these phenomena, and perhaps others, may be sources of law. They are sources of the legal concepts employed by judges in the adjudicatory process. The court-centered, case-centered view implies no more than that it is in the courtroom, in the adjudication of actual cases, that these concepts, whose sources may be found in all sorts of extracourtroom social and cultural processes, are made use of for truly legal purposes—are woven into the fabric of law by legal reasoning.

At the time of my observations, the overriding source of law for the Soga courts was, in one sense, the commands of the British sovereign, exercised through the governor-in-council. This was the ultimate "rule of recognition," in terms of Hart's scheme. The legislative council has regularly legislated for the national courts, presided over by British judges, and it has the authority to do the same for the Soga and other local African courts. In practice, however, the national legislature has by ordinance severely limited its own legislative functions vis-à-vis the African Local Government courts and has left wide areas of law to be supplied from other sources. The principal such source is "native law and custom," which according to the Native Courts Ordinance of

29. Native Courts Ordinance, 1941, 8 (1-2).

30. I follow here Rupert Cross's discussion in his Precedent in English Law, pp. 147-56.
1941 should govern both the substance and the procedure of adjudication, with certain specified exceptions and limitations.

By "native law and custom," the legislators presumably meant the bodies of legal concepts and procedures in use in the Soga and other African courts prior to the establishment of British rule, but it would be a mistake to think of the law applied by the courts in 1950-52 as a simple persistence of precolonial elements, modified only by the limitations imposed by the national legislature. There has indeed been a continuous Soga legal tradition, but it is quite apparent, from the situation as I have described it, that any attempt to isolate a "purely indigenous" Soga strain in the present practice of the courts would be fruitless. If life for Basoga has not changed catastrophically, as it has for Llewellyn and Hoebel's Cheyenne, it has nevertheless changed very greatly in ways that might be expected to influence legal ideas. The great majority of Basoga have become quite serious Christians or Muslims; almost half the men have become literate. A money economy has come into being and the population of the district has doubled. A dozen warring petty kingdoms have been pacified and incorporated into a much larger political community. The smoothness with which all these changes have been accomplished and the fact that one could still, in 1950, meet an old gentleman who could plausibly claim to have seen "Sipiki" (J. H. Speke), the very first European to enter the district, should not blind one to the magnitude of the legal transformation that must have accompanied them.

Undoubtedly that body of legal ideas and procedures identified by present-day European administrators, and indeed by Basoga themselves, as "Soga customary law" is the product of a process of development in which whatever system of legal concepts that existed in, say, 1890 has been continuously molded by changing conditions. The absence in Busoga of a formal system of precedent and of machinery for ease reporting makes it difficult to trace (and, indeed, to discipline) this process, but it quite clearly has occurred. Basoga judges have obviously been faced by substantially changing sets of "facts" which must, inevitably, have induced them to make new distinctions as they applied their received systems of legal concepts. And the judges, being themselves members of a changing society with a changing culture, must have come to look at old sets of "facts" in new ways. Sometimes one can discern at least the outlines of what must have happened. In those aspects of customary law that bear upon the status of women, in and out of marriage, Christian teaching and female education and employment seem both to exert a constant pressure toward emancipation of women and to induce a conscious reaction in men, whose dominance seems threatened. In the field of land tenure, population increase and the resulting appropriation of reserves of unused land, together with the growth of a cash economy, have tended to make land a commodity in a sense in which it was not so before, and this appears to have resulted in an efflorescence of "customary" land law. In both fields, the arguments in present-day cases exhibit ranges of opinion which must reflect these processes of change—or so I shall argue.

"Native law and custom" or, as I call it here, "customary law," is thus best identified simply with that part of the Soga courts' adjudicatory activity that is unencumbered by superordinate legislative authority, that in which the "rule of recognition" is that the courts have the authority to find law. It is the part of Soga law that, whatever its ultimate sources in ancient custom, old and new religion, and new forms of social experience, has been able to evolve freely out of the adjudicatory activity of the courts themselves. While it is with this part of Soga law that the body of this study will be mainly concerned, it is by no means the only source of law administered by the Soga courts. To give an adequate picture of the framework within which the courts work, I must briefly outline the other sources.

First of all, national legislation places certain restrictions upon the application of customary law. The racial limitations upon the courts' jurisdiction and the exclusion of capital offenses from their consideration have already been mentioned. In addition, they are forbidden to apply any customary law which is "repugnant to natural justice or morality" or "in conflict with the provisions of any law in force in the protectorate." The "repugnancy clause" has long since done whatever work was expected of it and has ceased to be a source of legal issues. The "conflict clause" simply states the overriding authority of legislation and creates a potentially shifting borderline between customary and statute law. At the time of my observations, this borderline had for many years been relatively stable. It had been settled policy for the national legislature to refrain from legislating for Africans in a number of fields, while others had been subjected to legislative regulation. A brief outline of the provisions of the Native Courts Ordinance of 1941, the legislation under which the Soga courts were operating in 1950-52, will indicate the extent to which they were controlled by statute.

1. The courts were given the authority to enforce certain statutes,

31. Section 11(a).
32. Section 18.
33. See chapters 5 and 7.
34. Native Courts Ordinance, 1941, 11 (a).
such as the tax ordinances affecting Africans, parts of the Witchcraft Ordinance, and ordinances controlling the marketing of certain kinds of produce. In addition, the African Authority Ordinance of 1919, from time to time amended, gave chiefs the authority to issue for certain purposes, orders having the force of law, and the courts were given the authority to try cases arising out of disobedience to such orders. Finally, the African Local Government Ordinance of 1949 gave the District Council subordinate legislative authority. However, this authority, though it had existed in some form under earlier legislation since 1919, had not been made use of by Basoga and hence had resulted in no contribution to the law administered by Basoga judges. The district council had discussed much legislation, but had not enacted any.

2. At the same time, the Soga courts were expressly forbidden to apply any other legislation and in particular were forbidden to hear cases concerning matters governed by national land and marriage legislation. These provisions are interesting and worthy of brief comment. Land law has been a subject of much controversy in Uganda. In neighboring Buganda, much of the land was, at an early date, surveyed and allotted to Baganda chiefs under legislation providing for freehold title. Whether, and to what extent, such provisions should be extended to other districts was hotly debated. Basoga chiefs, envious of their Baganda counterparts, were anxious that this should be done in Busoga, while the protectorate administration resisted it. In the event, only a very small area of Busoga was surveyed and registered, the remaining land being left under customary tenure. The express removal of registered titles from the local courts' jurisdiction reflects the desire of the British administration to restrict and control the area of noncustomary tenure. The provisions regarding marriage legislation are designed to prevent a conflict of statute and customary laws. Probably most Basoga are today married by clergymen or Muslim bawatimu (from Arabic: adim), who are licensed marriage officers, and their marriages are thus regulated by the various national marriage and divorce ordinances. But, in order to prevent the complete suppression of customary law in this field, the Native Courts Ordinance provides that "a claim arising only in regard to bride-price or adultery and founded only on native law and custom"—which is pretty much the only sort of question about which Basoga litigate in this field—is adjudicable in the local courts and without reference to national legislation. Cases involving this curious dual jurisdiction will be encountered in chapter 4.

3. Finally, the Native Courts Ordinance regulates the procedure of the courts in various ways. It lists the penalties and remedies that may be imposed, provides for the power to summon witnesses and to try for contempt of court, forbids the appearance of advocates, and regulates appeals. It also provides that "no proceedings in a native court and no summons, warrant, process, order, or decree issued or made thereby shall be varied or declared void upon appeal or revision solely by reason of any defect in procedure or want of form" and directs all judges to "decide all matters according to substantial justice without undue regard to technicalities." This last provision is, of course, meant to protect the courts and their law from the intrusion of inappropriate British procedural niceties.

These limitations and injunctions are known and used by Soga judges with little attention to written sources. Many chiefs have one or more volumes of the Laws of Uganda in their offices, but they make little use of them. The small part of these volumes' content that concerns them—as judges—has been quite thoroughly absorbed into Soga legal culture and is applied almost as implicitly as are customary law notions.

It would, of course, be naïve to think that the influence of the British-type legal system that envelops the local courts has been limited to formal legislation. Basoga have contact with this system as litigants and witnesses. More importantly, chiefs are often called to serve as assessors in the national courts, where they observe with the keen interest of fellow law-users the work of British judges and advocates. It is, of course, extremely difficult to assess the influence of such experiences upon the work of the Soga courts, but my conversations with chiefs suggest that they deserve to be listed among the, at least potential, sources of contemporary Soga "customary" law.

THE INDIGENOUS SOURCE: LAW IN SOGA CULTURE

Under the British colonial legislation and administrative practice which applies to the Soga courts, then, much is left to "native law and custom." Marriage and land tenure, the two substantive fields with

35. Section 12.
36. Native Courts Ordinance 11 (b); African Authority Ordinance, 1919, 5, 7.
37. Section 5 (4).
38. Native Courts Ordinance, 1941, 10 (b).
40. Section 19 (b).
42. Section 27.
which this study is concerned, are very largely governed by law from this source. Actually, as I suggested in chapter 1, one might distinguish here two sources in interaction. Saying that custom is a source of law is not the same as saying that custom is law. It is not the whole complex of rules of obligation with respect to marriage and land tenure that the courts apply as "native law and custom," but rather a selection from this complex embodied in the legal concepts, such as "harboring," which make up the legal subculture. Some of the rules which are institutionalized in the mutual expectations of everyday life, in the ordinary business of marrying and carrying on family life, taking up and using land are again institutionalized in the courts. Of course where everyone pleads for himself and where judging is only a part-time specialty, the barrier between the general culture and the legal subculture is thin. Competence in the legal subculture is widespread; the judges are only somewhat more expert in it than the litigants who come before them. All parties come to court equipped with both popular moral ideas and the legal subculture and the interaction between them is continuous.

The sociocultural setting of marriage and land tenure and the legal concepts with which disputes in these fields are litigated and adjudicated will be the subject of the chapters that follow. It would be inappropriate to attempt to summarize them here. But in introducing the courts, it is appropriate to say a bit about the place of law and courts in Soga culture.

I have said that the Basoga value highly the legal mode of dispute settlement and the skills which it employs. Perhaps the most telling manifestation of this is the fact that the "rule of law" seems to be indigenous to Soga life. I use the term here to mean not simply the application of legal rules—the appropriateness of that notion to the Soga situation has already been discussed—but rather in the narrower, Anglo-American lawyer's sense: "... the judiciary, in ordinary legal proceedings, may pronounce upon the legal validity of the acts of the king's ministers and servants..." In the Soga context, this means that the chiefs and headmen are subject to the same courts and law as other Basoga and that when they shirk their duties or exceed their authority they may, upon complaint by an ordinary citizen, be tried by the regular courts, rather than being simply disciplined administratively.\footnote{Pound, "Rule of Law," p. 463.}

\footnote{As Pound notes, this principle is, in the Anglo-American tradition, both ancient and modern. It existed prior to the late medieval development of strong royal administrative organs and then, somewhat later, was reasserted as a check upon these organs. Ibid.}

\footnote{43. This principle has, of course, been embodied in British colonial practice. A provincial commissioner, who valued administrative "discretion," complained in 1919: "The knowledge that came to the natives through the issue of circular no. 1 of 1919 of the High Court that there were more limitations to the powers of district commissioners than the natives had imagined has had a serious effect on the native mind and, as he has seen that the district commissioners have been unwilling to carry out administrative punishments for offenses that do not come within the letter of the law... a decidedly retrograde tendency in administration has resulted which is deplorable." Basoga may well have been surprised (and pleased) to discover that British administrators were subject to judicial restraint. They cannot, however, have found the idea novel, for there is every indication that they and their ancestors shared it. The early casebooks, as well as present-day ones, are full of cases in which Basoga officials have been brought to trial for malfeasance. In the first such case of which I have a good account, one Azedi Bwami, parish chief Musaale of sub-county Sasabwaali, Kigulu, was charged with an offense recalling that of King David against Uriah the Hittite: 44 Zibairi Muwaniaka v. Azedi Bwami: the rule of law

Zibairi Muwaniaka brought his case in which he accused Azedi Bwami of Busowoooblu of having chosen him to do corvee labor on the road, and when he returned he found Azedi Bwami in his [Zibairi's'] house, sleeping with his [Zibairi's] wife. The name of the wife is Asya Nabirye, for whom he paid one cow and one goat as bridewealth. On August 9, 1920, the case was judged and it went against the accused, who was fined thirty-five rupees and assessed fifteen rupees compensation to Zibairi. (Rupees were then the local currency unit.) He was discharged from his chiefship and given ten strokes. During 1923, in the same court, various chiefs and headmen were tried and convicted for failure to suppress rats, for neglecting the roads, and for wrongfully beating a peasant who had been slow in paying his taxes. King David, of course, being sovereign, could receive justice only from the hands of the Lord, and presumably Soga rulers were in a similar position. But Azedi Bwami and the others were mere public servants, whose acts were subject to judicial scrutiny. Actually, the courts of Busoga and Buganda carried the notion of the rule of law a step beyond anything known to the Anglo-American tradition by holding judges personally responsible for the correctness of their decisions. A decision found, upon appeal, to be incorrect became an offense


46 2 Samuel, 11-12.}
on the part of the judge. The procedure for appeal, in pre-British times, was for the unsuccessful litigant to accuse the trial court judge in these terms and to litigate with him, rather than with the unsuccessful litigant, before the appellate judge:

But if the unsuccessful party in the action was not satisfied with the decision, he would not pay the debt or the court charges but instead would go to the next higher chief having authority over the chief who had decided the action against him and complain as follows: "Such and such a chief has decided my case badly and I complain against him." The chief who decided the case would be called in so that the appellant could plead [against him].

If the appeal were successful, Basoga elders told me, the accused trial court judge might be fined. Although judges whose decisions are overturned are no longer punished, this view of things is retained in the way in which appellate cases are still commonly recorded in casebooks. As in the example shown in Appendix B, the "defendant" is recorded as the trial court, together with what Anglo-American law would call the "respondent." The "cause of action" is "wrongfully finding the appellant liable or guilty"—in this case of adultery.

It may seem paradoxical in view of this rooted attachment to legal process and to the notion that there is an objectively correct solution to every case, that the Lusoga and Luganda languages contain no word corresponding at all closely with the English word "law" and its Indo-European relatives. The compilers of the English-Luganda dictionary list three words: etseeka, mpisa, and Ttavuleeti. The first, however, means only "enacted rules" or "legislation." It applies in ordinary speech to the rules a man lays down for members of his household as well as to those a political superior issues with respect to his subordinates. The noun is related to the verb kuteeka ("to put" or "to place"). Thus, the various councils which in present-day Uganda are empowered to legislate are spoken of as lukiko eteeka amateeka: "council that enacts rules" or "laws." The word is, however, seldom used in the Soga courts. Curiously, its commonest use is in cases in which a litigant loses because he fails to appear in court and the matter cannot therefore be adjudicated on its merits. In such a case, a litigant is said to lose the case "mu mateeka" ("in law"). Basoga would agree that the various national ordinances and orders they are empowered to enforce are mateeka, but the word is almost never mentioned in cases in which offences against such enactments are alleged. Judges usually do not cite statutes or orders in their judg-

47. Kakwa, Ekloko bwe Mrisa on Baganda, p. 238.

ments in such cases, just as they do not cite customary rules in the abstract in cases in which those sources of law are involved. A man is simply accused, for example, of not paying his poll tax on time and the court goes on from there. "Everyone knows" what the relevant legislation requires.

Ttavuletti is simply a Bantuization of Torah and is the work of the missionary translators of the Bible. Its addition to the vocabulary of Baganda and Basoga indicates only that the missionaries, too, who in this part of Africa were often quite scholarly men, were at a loss for a Luganda equivalent of "law."

Mpisa means "custom" in the broad sense. That is to say, it covers morally relatively neutral regularities of behavior and the habitual conduct of individuals, as well as morally sanctioned group norms. Occasionally it may even be extended in conversation to the properties and behavior of nonhuman objects. Thus: "It is the custom of the rain to fall in the afternoon at this time of year." The idea of mpisa thus embraces a body of assumptions about the nature of man and the world, assumptions upon which the courts constantly draw in applying their legal concepts to the cases that come before them, but its meaning is far too broad for a satisfactory translation of the English "law." Still, when, very occasionally, litigants and judges do talk about rules, this is the term they most often use.

This absence of a clear-cut concept of law as the rules or concepts applied by courts is, perhaps, precisely what one would expect, given the inexplicitness of Basoga about the process by which they manipulate legal concepts. The judges shun the clearly stated ratio decidendi in their judgments. They have no machinery for collecting precedent-setting decisions from other courts and do not even refer in judgments to their own personal experience of previous cases. The statutes which they apply are few and well known. Unlike Jews and Muslims, they lack a body of religious scripture from which specialists are enjoined to derive a "law" for the guidance of judges (I neglect here the community of Muslim Basoga, who are of course familiar with the idea of Sharia, but who do not make courtroom use of it). Thus it is perhaps not surprising that the product of the central activity in which the courts engage—the result of their work of applying legal concepts to isolate issues for authoritative judgment—has no name in the language of the courts. I shall return to the possible significance of this in chapter 8; in any case, the words "law" and "legal" as used in this study are analyst's words, brought to the study from an external, comparative perspective: they are not native to So ga thought.

There is, however, a rich vocabulary for speaking about what goes
Chapter 2

on in court—apart from the specifically legal product that results from it. That which brings litigants to court is a musango, which means both “case” or “cause” and “fault.” A case file is the record of “musango number so-and-so, in such-and-such a court, for such-and-such a year.” At the same time, one “commits” (kuzza) a musango. In court, one “departs” (kwasonga) or “is defeated by” (kusingibwa) a musango, depending upon whether one wins or loses. A legal concept which embodies a cause of action, like “harcouring,” is an ngeri yomusango—a “type of case.”

In court the “accuser” (musaabi) and the “accused” (musaabiriwa) “plead” or “litigate” (kuwoosa) by stating “reasons” (nsonga) and by giving “evidence” or “testimony” (bujulizi). Nsonga also means “grievance”; a complainant goes to the chief with an nsonga and the latter decides whether or not it forms a plausible ground for action—an ngeri yomusango. A witness called to give testimony (kujulirwa) is mujulizi. The judges who meanwhile listen and ask questions are said to “adjudicate” (kulamula), a verbal form related to the noun mulamu, “judge.” When all arguments have been heard, they “end the case” (kusala omusango) by delivering their decision, nsala: literally, “the cutting.”

This whole vocabulary is used for what is, in Soga minds, a special kind of activity. Its use calls forth a clear and well-known image: the standing litigants—passionate, eloquent, and self-righteous—addressing with elaborate politeness the impassive, seated judges; the judges, questioning the litigants and witnesses, with penetrating astuteness; the successful litigant, kneeling before the judges and thanking them effusively while cutting the air with palms pressed together in the customary gesture of gratitude. This vocabulary goes with this activity, but it is not, as I have said, a full-time specialist’s activity for either pleaders or judges. Professional advocates are absent and the judges are judges not because they are specialist jurists, but because they are chiefs. In precolonial times, the judicial function was—as it to a great extent remained in 1959–52—simply one aspect of general administrative authority (bujusi). All rulers, chiefs, and headmen were ex officio judges and hence it was natural that the Kabaka of Buganda, and later the British officer in charge of the district, should also judge.

Indeed, this association between judicial and general administrative authority extends beyond the realm of government proper into every social situation in which authority is exercised. A father “cuts cases” among his children, a master among his household servants, a priest among his parishioners, an employer among his employees. I once

observed a subcounty chief and his daughter “pleading” before their priest; the girl was due for confirmation, but she had lost her baptismal certificate and this was regarded as an offense. She was “convicted” and the fee charged for a new certificate was treated as a “fine.” I myself, as an employer of servants and assistants, was occasionally called upon to fill the role of judge and was expected to know the requirements of the role. All these situations are spoken of in the idiom, and acted out with the gestures, of the courtroom. The Soga courts thus exist in a cultural environment pervaded by a belief in authority and in adjudication as the concomitant of authority.

An analysis of the meaning of the word for “court” makes the same point. In the letter quoted above, the British officer, Grant, says that he “held a lukiiko to settle cases.” The verb kukiiko means “to attend upon one’s superior,” for whatever purpose. The precolonial lukiiko was, it seems, a “court” in the old English sense of an assembly before a ruler to transact a mixture of legislative, executive, and judicial business. To be sure, the language recognized quite clearly that adjudication was a special kind of activity for a chief and his lukiiko; “cutting cases” was an activity quite different from issuing administrative orders (kulagira: “ordering” a specific course of action) or legislating (kuteeka amateeka: “laying down general rules”);[46] but just as the ruler or chief was a generalized authority as well as a judge, so the assembly that attended him was structurally undifferentiated with respect to the three classical functions of government.

Today this differentiation has partly taken place. The county or subcounty chief, at the time of my observations, met with his subordinate chiefs to discuss administrative matters, such as tax collection; he met with other groups of differing composition to hear law cases and to discuss local government legislation. The language had developed compounds of the word lukiiko to denote these various bodies, but all were still called, simply, “lukiiko” in ordinary speech and the chief was still chairman of all of them. One interesting linguistic development was a tendency to use “lukiiko” also to denote the Busoga African Local Government as a whole, as a corporate entity. (The British protectorate government was always “gavumenti.”) Thus, A.L.G. property was “lukiiko property”; a messenger was sent on “lukiiko business”; the accuser in a criminal case was “the lukiiko” or “the lukiiko, together
with the complainant." Generalized authority, which traditionally had resided in the person of the ruler or chief, had come to reside in a corporate abstraction. Authority was less personalized, but it was still highly generalized.

The place of adjudication in all this may be summed up by saying that, throughout the period under discussion, it was a distinct and highly valued art, with its own vocabulary and techniques, but an art widely diffused through the society and practiced by men who were not specialist jurists, but rather holders of generalized authority and responsibility.

Two more introductory tasks remain before I turn to an analysis of the use made by the courts of legal concepts. First, since the success of the courts in adjudicating disputes depends in large measure upon the character and status of the chief-judges who guide them, I shall say something more about these men. Second, I shall indicate the range of disputes that Soga society presents to its courts for adjudication—a range from which the case data to be discussed represent only a limited selection. Chapter 3 will be devoted to these matters.

I take judge-made law as one of the existing realities of life. . . .
Not a judge on the bench but has had a hand in the making.
—Benjamin Cardozo

The dynamic tensions which lead to law-stuff, feed it and give it material to work on, show up particularly in claims—claims repudiated or resisted or merely unfulfilled; claims asserted as "right" or "rightful" in the going order of some particular group or entirety.
—Karl Llewellyn

3 Judges and Dockets

My principal concern in this study is with Soga law and its application to the conflicts that bring the Soga to their courts. But law, like any cultural system, any system of ideas, is not a disembodied force; its influence in human affairs depends entirely upon its capacity to inspire and direct the intelligent action of individual men. More than this, law is a special set of conceptual tools which, though rooted in moral conceptions common to the community at large, is nevertheless, because of its necessity for "legalistic" moral oversimplification, always to some degree in tension with popular morality. If it is to retain both its intellectual integrity and its relevance to the problems of the society, it must be managed by men of ability who enjoy a good deal of legitimate authority in the eyes of their fellows. Basoga judges are not full-time specialist jurists, but they are serious amateur jurists, proud of their skill. The chief whom I knew best, for example, once boasted: "Thirty cases so far this year, and not a single one appealed!" The success of the Soga courts in maintaining and developing their law during a period of profound change and foreign domination is due in great measure to the fact that they have been presided over by men who have earned for themselves, and hence for