

PROFESSOR GLUCKMAN'S CONTRIBUTION TO LEGAL THEORY

PROFESSOR Goodhart concludes his foreword to *The Judicial Process among the Barotse of Northern Rhodesia* with the observation that the book makes a major contribution to legal philosophy by showing the basic identity between primitive law and modern legal systems.¹ Professor Gluckman himself constantly stressed (and defended) the value of "comparing" developed and tribal law. In discussing his contribution to legal theory I have thought it appropriate to concentrate upon what may be termed the comparative aspect of his work. This may be discussed under two heads: (i) the "basic identity" alleged to exist between tribal and developed law, (ii) the help which is to be obtained from tribal law for a better understanding of developed law and vice versa.²

The terminology "tribal" and "developed" requires caution. "Developed" is used to describe the legal system of a modern industrialised state such as Britain; "tribal" is used to describe the agricultural and pastoral societies of colonial Africa. The point is that such "tribal" societies varied enormously in the complexity of their organisation. Some lacked any type of governmental institution, while others possessed a full range of judicial and executive organs. Professor Gluckman's own data are obtained from the Lozi,³ one of the most highly organised of the African peoples, though certain of his findings he held applicable to more simply organised societies. He takes Western society, in particular English and American, as furnishing the best examples of developed legal systems.

Much of the theoretical discussion in the first edition of *The Judicial Process* is devoted to showing similarities between the British, American and Lozi legal systems. When replying, in the second edition, to some of the critical points made in reviews of

¹ Professor Goodhart's enthusiasm stems, perhaps, from the fact that Professor Gluckman appeared to have provided evidence in support of the approach to law outlined by Goodhart in an article published a few years before *The Judicial Process—The Importance of a Definition of Law*, in *Journal of African Administration* 3 (1951), p. 106.

² I have confined myself to Professor Gluckman's comparative treatment of the judicial process and not attempted to assess his discussion of substantive law contained principally in *The Ideas in Barotse Jurisprudence* (1965).

³ The Lozi are the ruling tribe of a group of peoples known collectively as the Barotse.

the first edition Professor Gluckman admitted that he may have conveyed a misleading impression. His approach had been to suggest that the Lozi system was essentially similar to the British or American system. What he should have done was to content himself with a list of the similarities and the differences between the systems and leave the reader to draw his own conclusion.⁴ This admission, guarded though it is, expresses the dilemma in which Professor Gluckman found himself. On the one hand he did wish to bring out the essential similarity between the developed and the tribal systems; yet, on the other, he was also aware that some crucial differences existed. In particular he attributed a great significance to the presence of writing as a factor in the development of a society's law. From this point of view he saw an essential difference between a written and an unwritten system.

In *The Judicial Process* the subject-matter of Professor Gluckman's comparison is the manner in which judges operate. The techniques adopted by Lozi judges for the settlement of disputes are, he considers, in essence the same as those adopted by Western judges. They draw upon the same range of material and employ the same methods of reasoning in their application of the rules to the facts. It is not quite clear how far beyond this point Professor Gluckman intended to press the similarity between developed and tribal law. Yet it may certainly be inferred from his discussion of the various meanings of the word "law" that he was offering a "theory of law" applicable both to tribal and to developed societies. Consequently there are two different sorts of similarity that require to be considered; that existing between the "judicial process" in a tribal and developed society and that existing between the way in which "law" generally is understood in these societies.

The problem of the "judicial process" may be taken first. As a guide to the interpretation of the Lozi data Professor Gluckman selected the writings of Cardozo, in particular *The Nature of the Judicial Process*. He is, however, careful to state that he had discerned in his material the sort of scheme expressed by Cardozo even before he became acquainted with the latter's work.⁵ The two aspects of Cardozo's analysis which Professor Gluckman found most useful were the description of the "sources" upon which

⁴ Gluckman, *The Judicial Process among the Barotse of Northern Rhodesia*, 2nd ed. (1967), p. 375.

⁵ *Id.* at p. 326.

judges drew when required to formulate rules for the settlement of disputes and the description of the methods by which judges chose to follow one source rather than another. This is not the place for a critique of Cardozo. It is enough to note that Professor Gluckman found his account of the functioning of American judges relevant to, and helpful for, an understanding of the functioning of Lozi judges.

Cardozo argues that although judges were often constrained to apply a particular rule found in a statute or a previous judicial decision, there were occasions on which it was uncertain whether a rule was applicable to the facts or not. On such an occasion the judge may take an existing rule of law and reason by analogy, *i.e.* he may construct a logical argument under which the facts of the present case are held to be sufficiently similar to facts already brought within the scope of the rule to warrant the application of the rule in a new situation. Other factors which may determine the application of a rule are the force of history or the existence of a custom. A judge may find that the way in which the law has developed historically in the past suggests a solution to a particular case or that one solution better accords with customary behaviour than other competing solutions. Most important of all is the case where the judge finds no rule which he might extend by analogy and can derive no help from history or custom. Here he applies what Cardozo terms the "method of sociology" and looks to considerations of morality and social welfare. From these considerations the judge fashions a new rule, or gives a new interpretation to an old, and so is able to use the law for the betterment of social conditions.⁶

Lozi judges, Professor Gluckman finds, use the same sources and the same methods of reasoning as those attributed by Cardozo to American judges. But there is one significant difference in emphasis. The two principal Western sources, legislation and judicial precedent, play a minor role in Lozi law. In certain areas Lozi judges apply legislation of the British government and there are some decrees of Barotse kings in force, but many cases which arise do not involve either type of legislation.⁷ Although there appears to be some theoretical recognition of the "binding force of precedent,"⁸ what occurs in fact is very different from the hand-

⁶ Cardozo, *The Nature of the Judicial Process* (1921), esp. Lectures I-III.

⁷ Gluckman, *Judicial Process*, pp. 246 *et seq.*

⁸ *Id.* at p. 253.

ling of previous decisions by British or American judges. Lozi judges, who have no written records to assist them, cite the moral principles which have been applied in previous cases or the moral behaviour of individuals known to them. They do not cite and apply specific rulings laid down by previous decisions. The scope for the exercise of Cardozo's method of sociology is thus more considerable than in a Western legal system. A Lozi judge is relatively free to allow his decision to be guided by a notion of what in the circumstances was the right, proper or appropriate conduct on the part of a litigant.⁹

Western and tribal systems also attribute different degrees of relevance to custom. In English law custom operates technically as a source of law in a highly limited area and is of very little importance.¹⁰ It seems to be of even less importance in American law.¹¹ Among the Lozi the position is different. Professor Gluckman distinguishes between three types of custom: customs practised by the ruling tribe, the Lozi, customs practised by subject tribes and customs which are common to all tribes.¹² The courts do not treat these customs in the same way. General customs common to the whole of the nation and the customs of the Lozi appear to have been treated as law unless they conflicted with a statute or were deemed by the judges to be totally out of keeping with modern conditions. Customs of subject tribes were not treated as law if they conflicted with the law of the ruling Lozi tribe even though they were not disqualified under the other conditions.¹³ Although one is not entitled to conclude that what is customary among the Lozi or their subject peoples is the law, one does have the impression from Professor Gluckman's discussion that the courts will *normally* treat as law the customary practices of the Barotse nation or groups within it.¹⁴

It is true, however, that in a somewhat different sense, the role of "custom" in a developed system resembles its role in a tribal system.¹⁵ In deciding whether a person has behaved in such a way as to bring himself within the scope of a rule (for example that imposing liability for negligence) a British or American judge may

⁹ *Id.* at pp. 256 *et seq.*, 291 *et seq.*

¹⁰ Allen, *Law in the Making*, 7th ed. (1964), Chaps. 1, 2: the work principally relied upon by Professor Goodhart.

¹¹ *Cf.* Patterson, *Jurisprudence* (1953), pp. 223 *et seq.*

¹² Gluckman, *Judicial Process*, pp. 236 *et seq.*

¹³ *Id.* at pp. 239 *et seq.*

¹⁴ Professor Gluckman understands custom as "usual practice," but it is not quite clear whether he includes both behaviour practised as a matter of habit and behaviour practised in the belief that it is prescribed by a rule. He suggests obliquely that habitual behaviour carries with it the connotation that it ought to be followed. *Cf.* *Judicial Process*, pp. 236 *et seq.*

¹⁵ Gluckman, *Judicial Process*, p. 246.

have to measure his behaviour against that which is customarily observed in a similar situation. A Lozi judge is constantly having to decide whether a litigant has behaved in a manner which accords with usual practice. Again one should not press the resemblance too far. A British or American judge considers customary behaviour in the context of the application of a specific rule. On the other hand a Lozi judge is probably not applying a specific rule but attempting to make up his mind on the general merits of the litigant's behaviour.

Professor Gluckman does not himself dwell on the differences between Western and tribal legal systems since he is more concerned to demonstrate the similarities. Differences are mentioned from time to time, almost incidentally, in the course of his treatment. Some of the more specific have already emerged in the discussion of the similarities between the Anglo-American and the Lozi judicial process. Such differences relating, for example, to the importance accorded the various "sources of law" and to the freedom of the judges in utilising them are, perhaps, to be considered as arising from two rather more basic differences: the absence of writing in tribal societies and the complexity of social relationships between litigants in these societies, described by Professor Gluckman as "the dominance of relationships of status."¹⁶

Writing is a necessary condition for the enactment of laws on a large scale by a legislator, for the operation of a system of judicial precedent, and for the growth of a class of professional lawyers. Of course, knowledge and use of writing do not entail the production of legislation, the recording of precedents and so on, but without writing these activities cannot be achieved. One may, however, be able to say that once a society has accustomed itself to the use of writing, the operation of its legal system is likely to change. There is likely to be a production of codes, the use of written formulae in legal proceedings, the recording of cases, the growth of a class of persons specialising in knowledge and interpretation of the written laws and formulae. Some, if not all, of these consequences will certainly follow a widespread use of writing.

Writing is relevant to Professor Gluckman's comparison between Western and tribal systems in the following way. A judge in the West is largely concerned with the interpretation of written formulae whether these be statutory rules or observations of judges.

¹⁶ *Id.* at p. 384 and *cf.* p. 257.

Rules established by statute or judges follow a fixed form which imposes limits upon the scope of permissible interpretation. A judge has to make sure that his decision can be accommodated to the wording of the rule which he proposes to apply. In the case of statutes there is a whole body of law concerned precisely with the effect to be attributed to the manner of wording. A judge in a tribal society is not subjected to the same limitations. He is not faced with the application of a rule whose wording is fixed, unless it be a highly general maxim or principle. The judge may word the rule as he wishes and his very choice of words may reflect a decision he has reached concerning the content of the rule. Not only does he have this freedom in the wording of a rule which he deems already to be in existence, but it will be easy for him to create a rule specially for the case which he has to decide. Indeed the distinction between the application of an existing rule and the creation of a new rule may become blurred in the judge's own mind.

The impact of writing may be related to the question of the general relationship between the parties to a dispute. In a Western society a judge has to consider whether the issues formulated by the parties can be brought within the scope of a rule whose wording has been fixed by writing. The result is that the judge is able to look only at that aspect of the relationship between the parties which he holds relevant to the issues competent to be decided under the rule. Frequently the only relationship between the parties will be that which is directly relevant to the issue. But even where, as in a dispute between relatives or neighbours, there is a relationship which transcends the particular state of affairs giving rise to the dispute the judge will confine himself to this state of affairs and not go into the previous history of the relationship between the parties.¹⁷

A judge in a tribal society is faced with a different sort of problem. The litigants before him will almost always be related by blood or marriage. As a consequence of this relationship they will have been associated over a long period of time in a large number of dealings, undertakings and transactions. The judge knows that

¹⁷ Not all modern industrialised nations employ such strict criteria of relevance in their judicial proceedings. George Leifer in *Justice in Moscow* (1964) states that Soviet courts "tend to judge the 'whole man,' not just carefully selected evidence pertaining to an isolated period in his life." He refers also to a similar practice adopted by Swiss courts (pp. 17-18). I am grateful to Professor F. Lyall for drawing my attention to this work.

the particular quarrel which has finally brought the parties before him is only part of an involved series of incidents in the course of which there has accumulated a host of resentments and grievances. His task is to go behind the facts of the incident which has brought the parties into court, disentangle the underlying grievances, and find a solution which will allow them to conduct their relationship for the future on a more amicable basis. Although the judge tries to promote a reconciliation of the parties he does not wish to sacrifice regard for the question of fault. The solution to the dispute which he suggests is based upon a consideration of the rightful or wrongful nature of the parties' conduct and an apportionment of blame. In making this assessment the judge ranges over the whole history of the relationship between the parties and he is able to do this because he is not forced to confine himself to issues falling within the scope of some particular rule. There are really two points here. The judge knows that he can achieve a satisfactory solution only by looking at the whole relationship of the parties. He is able to conduct so unrestricted an inquiry because he is not confined by the limits of a particular rule, and one reason for the absence of restraint is the absence of writing.

One may leave for the moment the judicial process and turn to the more general question of the way in which "law" is to be understood in tribal and Western societies. The question often appears in the form: what is the relationship between law and morality, in the sense, how is the boundary to be drawn between the two fields of normative behaviour? Although Professor Gluckman does not phrase the terms of his theoretical investigation quite in this way, he has so much to say of law and morality among the Lozi, that a discussion of his material in the framework of the relationship between law and morality does not seem to be distorting.

In his theoretical approach Professor Gluckman appears to have been influenced by the school of American realism. He does not adopt the views of any one member of the school and, indeed, accepts Cardozo's strictures of some of the more extreme expressions of realist opinion.¹⁸ But in delimiting the area covered by

¹⁸ *Id.* at p. 226 where Cardozo's characterisation of the American realist position on law as a series of "isolated dooms" is quoted. *Cf.* also "Limitations of the Case-Method in the Study of Tribal Law," *Law and Society Review* 7 (1973) at p. 611, esp. at pp. 614 *et seq.*

law he places the emphasis squarely upon "rules enunciated by judges." He recognises that the critical problem in the use of the word "law" is the enormous variety in the subject-matter to which it may be referred. Hence he suggests that investigation can best proceed with the use of a specialised vocabulary. In working out this vocabulary Professor Gluckman reserves the adjective "legal" for the rules established by judges in the course of the process of adjudication.

There is one unfortunate, perhaps significant, ambiguity in Professor Gluckman's use of the term "legal rules." Sometimes he defines them as those rules which judges ought to apply in the adjudication of disputes¹⁹ and sometimes he uses language implying that they are those rules actually applied by the judge. For example, on one occasion he writes: "The judges state that such and such legal rules will be enforced in this dispute: by their very statement they make those rules legal."²⁰ Any writer may be excused some imprecision or looseness of language; the reader is able to make allowances and can often gather what is really meant. In this particular case, however, the imprecision is grave and the reader cannot be sure whether the writer has adequately considered the implications of his position. There is a very great difference between a definition of law predicated upon rules which are actually applied by judges and one predicated upon rules which they ought to apply. "Actual application" supplies, on the face of it, a straightforward criterion for the identification of "legal rules." The notion of "ought to be applied" is anything but straightforward and introduces an unknown quantity which requires further specification if it is to be intelligible.

Even the notion of "actual application" is only straightforward on a superficial level. Consider, for example, the statement that a judge by his enunciation of a rule makes it a rule of law. What is the force of the word "enunciation"? Does it refer just to the rule framed by the judge for the decision of the case or does it refer also to any rule invoked by a judge in the course of his judgment irrespective of whether he treats it as directly relevant to the case in hand? The members of a Lozi court may refer to numerous rules in the course of their opinions: are all these to be deemed "legal rules"?

In order to distinguish the body of rules generally accepted by

¹⁹ *Id.* at pp. 164, 230.

²⁰ *Id.* at p. 231.

the community from those rules made "legal" through their enunciation by a judge, Professor Gluckman uses the phrase "corpus juris."²¹ Included in this body of rules are what may be termed rules of behaviour established by custom, even customary practices which are not strictly rules at all, rules established by morality and enactments of kings. Professor Gluckman's statement that the corpus juris constitutes a reservoir of rules upon which judges draw in working out a solution to a dispute²² suggests that "corpus juris" and "legal rules" should not be seen as mutually exclusive collections of rules. A judge in a particular case might draw upon a rule established, or at least referred to, in a previous case. Such a "legal rule" from the point of view of the judge in the later case would constitute part of the corpus juris. The word "law" itself may be used to cover both "corpus juris" and "legal rules."²³

Certain passages of *The Judicial Process* look at the notion of law specifically in relation to the notion of morality. These inject an element of confusion into the account which treats "law" as embracing corpus juris and legal rules. Professor Gluckman writes²⁴: "That is the Lozi have law as a set of rules accepted by all normal members of the society as defining right and reasonable ways in which persons ought to behave in relation to each other and to things, including ways of obtaining protection for one's rights. I apply this definition to morality save that I substitute 'generous ways' for 'reasonable ways'." A strict construction of this passage yields the conclusion that "law" and "morality" designate different sets of rules. If this conclusion were right it would be difficult to see the basis for the classification of both "law" and "morality" under the head "corpus juris." Probably, again, some looseness of language is responsible for the confusion and a more beneficial construction should be applied. Professor Gluckman's meaning is, perhaps, that the field of law in one sense of the word, the corpus juris, comprises both rules concerning the right and reasonable way to behave (law in a more narrow sense) and rules concerning the generous way to behave (morality).

The real issue concerns the accuracy of the relationship established by Professor Gluckman between law and morality. This

²¹ *Id.* at p. 227.

²² *Id.* at p. 164.

²³ *Id.* at pp. 164, 227, 231.

²⁴ *Id.* at p. 229.

issue may be further subdivided: are the criteria "reasonableness" and "generosity" satisfactory as means of marking off legal from moral behaviour, and, is it satisfactory to classify the Lozi material in terms of a contrast between legal and moral rules or indeed to apply to it the term "moral" at all? Even if one were prepared to accept that rules requiring people to deal generously with each other were moral rules, one would find it difficult to accept that these were the only or even the most important class of moral rules. For example, whatever else one called them, one might want to call "moral" rules prohibiting people from killing and injuring each other. These are rules which specify behaviour regarded in the strongest possible way as mandatory. They cannot be classified as examples of rules prescribing "generous" behaviour.²⁵

If one were discussing morality in Western society one might wish to distinguish between an essential or necessary morality and an optional morality.²⁶ Such a distinction cannot be understood in isolation. It becomes intelligible only when placed in the context of Western thought on the nature of man and society. Hence it is questionable not only whether a distinction of this type but even the notion of morality itself may usefully be applied in the description of a non-Western society. There seems to be an obvious danger in imprinting a highly complex Western notion on material to which it cannot naturally be accommodated. By "naturally" I mean "in accordance with the values, beliefs, modes of classification, held by the society under examination."

One of the most important tasks which a person seeking to describe the "customs and manners" of a society other than his own has to undertake is the uncovering of whatever indigenous scheme of classification is applied to normative behaviour. The investigator is concerned to understand how the members of the society themselves compartmentalise the whole area of rule-governed behaviour. It will not be helpful if the matter is prejudged through the application of the terms "morality" or "moral rules" to the society. Of course an investigator in describing the classification adopted by the members of another society has to use words from the language of his own society which may carry an inbuilt meaning. But with sufficient care the risk of importing

²⁵ Professor Gluckman is himself not consistent in his approach. He describes the maxim "respect your old people" as a moral rule, *id.* at p. 241. This is not a dimension of generous behaviour.

²⁶ Cf. the distinction between "morality of duty" and "morality of aspiration" made by Professor Fuller in *The Morality of Law*, Revised edition (1969), Chap. 1.

modes of thought characteristic of the investigator's society into the society investigated may at least be kept minimal. Possibly the best course for the investigator to adopt is to familiarise himself thoroughly with the language of the society and consider the implications of the various terms which are used to refer to rule-governed behaviour.

Professor Gluckman himself provides an illustration of this approach. He finds that certain Lozi terms may be translated as "right," "duty," "wrong" in a very general sense, some terms indeed being applied both to "right" and to "duty." But there are other terms which refer more specifically to what is required by good manners or by decency or by God.²⁷ Although Professor Gluckman sketches the meaning of a number of Lozi words which describe rule-governed behaviour, one suspects that he has by no means exhausted the possibilities furnished by a consideration of Barotse normative vocabulary. He recognises that the Barotse have no word by which the "moral" is distinguished from the "legal,"²⁸ and one can only conclude that a more intensive investigation of the range of meaning covered by the separate Barotse terms would have yielded more satisfactory results than the attempt to classify their rules as "moral" or "legal."

It does not follow that the words "moral" and "morality" should never be used in the description of rule-governed behaviour in tribal societies. But even greater care is needed than in the use of the words "law" and "legal." This is partly because the words "morality" and "moral" possess even less of a "core" meaning in Western society than the words "law" and "legal" and partly because the uncritical application of "morality" and "moral" to tribal data is likely to obscure the ways in which the members of the society under investigation classify their rules. To revert to Professor Gluckman's treatment: his definition of morality among the Lozi in terms of "behaving generously" does appear to conceal differences in the attitudes exhibited by the Lozi to rules prescribing behaviour, and, further, it is not clear that generous behaviour would in the West be classified as moral behaviour even though it is to be distinguished from behaviour required by rules of law.

Has Professor Gluckman shown that there is a "basic identity" between the way in which law is understood among the Lozi and

²⁷ Gluckman, *Judicial Process*, at pp. 166 *et seq.* and *cf.* at p. 259.

²⁸ *Id.* at p. 169.

the way in which it is understood in Britain and America? If one accepts his distinction between "corpus juris" and "legal rules" one may appreciate the significance which this has for the understanding of the Lozi data. It draws attention to the closeness of the relationship between the decision given by a judge in the settlement of a dispute, the rules which he employs in arriving at the decision and the habitual behaviour and normal expectations of the members of the society. But this very point shows that the same classification cannot be assumed to hold true of British or American society. On the face of it the relationship in these societies between rules used by judges in the framing of decisions and general social practices and expectations is far less close than is the relationship among the Lozi. Of course the systems of legal rules in Britain and America are not closed in the sense that they are completely insulated from general social conditions. Rules have an "open-texture"²⁹ and judges in the course of interpretation utilise the practices and expectations current in the society. Yet the fact remains that British and American judges have far fewer opportunities of utilising this material than their Lozi counterparts. Hence one is scarcely justified in asserting that the British, American and Lozi societies yield the same notion of "law."

One may now turn to a further aspect of the comparison drawn by Professor Gluckman between Western and tribal legal systems, namely the extent to which either system may be illuminated with the help of data derived from the other. First, one may look at the use of Western concepts in the interpretation of tribal systems. Professor Gluckman's account suggests that he found two characteristics of Western systems particularly useful as an aid to the understanding of the Lozi material: the variety of "sources" available to a judge in the formulation of a rule to be applied to a dispute, and the concept of the reasonable man.

Something has been said already on the suitability of Cardozo's account of the Western judicial process as a guide to the interpretation of tribal data. The main point, perhaps, is that there is a great difference between each of the sources distinguished by Cardozo and their apparent counterparts among the Lozi. Hence the utility of the Western judicial process as a help in understanding the tribal must be highly questionable. Custom, precedent and legislation, at least in Anglo-American law, possess a precise and

²⁹ Cf. Hart, *The Concept of Law* (1961) at pp. 124 *et seq.*

technical signification. They cannot be approximated even roughly to specific "sources" available to the Barotse judge. So far from being useful it is positively misleading to divide the Barotse material into "custom," "precedent" and "legislation," where the implication is that such sources may be correlated in some way to Anglo-American equivalents.

Professor Gluckman considers that the notion of the reasonable man, well known, for example, from the English tort of negligence, furnishes a particularly valuable guide for the interpretation of Lozi decisions. Indeed he treats the figure of the reasonable man as a central feature of Lozi law. There are two ways in which Professor Gluckman's use of the "reasonable man" may be viewed. If it is assumed that the Lozi have a counterpart of the "reasonable man" who supplies a measure for the standard of care in the tort of negligence, objection should be taken. In English law the notion of the reasonable man is bound up with the notions of "duty of care" and "foreseeability" which appear to be foreign to Lozi law. If, on the other hand, what is meant is that Lozi judges frequently determine questions of fact, relating, for example, to behaviour which is alleged to have occurred, or issues of liability, relating, for example, to behaviour which ought to have been followed, by reference to behaviour which might reasonably in the circumstances have occurred or have been followed, no exception needs to be taken. But on the latter view, as has been noted by reviewers of *The Judicial Process*,³⁰ it becomes difficult to see the precise significance of the comparison between Western and Lozi law. Any judge, whether operating within a Western or a tribal system, will necessarily have to take into account the usual ways in which things are done in his society. By so doing he is importing a reference to "reasonable behaviour" or "the reasonable man."

In one respect Professor Gluckman considers that students of Western legal systems may draw a useful lesson from the study of Lozi judicial decisions. In Anglo-American jurisprudence there has been a tendency to uphold the "certainty of law" as a virtue whose existence is sometimes threatened by a proliferation of ambiguous concepts and rules. The "open texture" of words used

³⁰ See, for example, Anderson, *M.L.R.* 18 (1955), p. 644; Nadel, *Africa* 26 (1956), p. 166; March, *Stanford Law Review* 8 (1956), pp. 525, 772; Hoebel, *Stanford Law Review* 13 (1961), p. 437. *Cf.*, however, the remarks of Hooker in *Legal Pluralism* (1975), pp. 39 *et seq.*

in rules allows judges such freedom that the application and development of the law in a "certain" fashion becomes difficult. In the opinion of some writers of the American realist school the difficulties are so great that the "certainty of law" is reduced to an illusion or myth.³¹

Professor Gluckman's argument is that the perspective gained from a study of legal reasoning in Lozi judgments should induce a reconsideration of Western attitudes to the problem of "certainty of law." On the one hand it is a mistake to exaggerate the dangers posed by the ambiguity of legal concepts and rules: on the other hand the development of the law can be seen to possess more "certainty" than that allowed by the more extreme American realists. Lozi judges work with a wide range of highly general and flexible concepts. These concepts are well known both to judges and litigants; their content does not change and hence their constant citation and application ensure certainty in the following sense. All decisions given by judges can be seen as applications to concrete circumstances of one or more of these concepts. However, precisely because the concepts are general they can be applied without obvious distortion to an infinite variety of factual situations. Judges, in deciding whether to bring a particular state of affairs within the ambit of a concept, are able to take into account contemporary attitudes on the appropriate ways for people in defined relationships to behave. In so doing the judges inject an element of "uncertainty" into the law since it cannot always be clear in advance whether a general concept will be held applicable in a particular situation or not. Professor Gluckman's point is that, so far from being unfortunate, this is a highly desirable state of affairs. It allows judges to draw upon contemporary attitudes and expectations in framing their decisions and thus to keep the development of the law in line with changing social attitudes. At the same time the governing concepts, although general in formulation and scope, provide limits to judicial discretion and minimise arbitrary decision-making by judges.³²

Professor Gluckman finds that Lozi legal concepts may be organised in a hierarchy based upon the degree of generality which they exhibit. At the top of the hierarchy stand the most general concepts, at the bottom the most specific. He appears to mean that

³¹ Such writers are concerned with many factors, not just the ambiguous use of language.

³² Gluckman, *Judicial Process*, pp. 291 *et seq.*

the Lozi judges themselves think in terms of a hierarchy of concepts. It is the existence of this hierarchy that allows the process of changing the law to be disguised. Thus a concept standing high in the hierarchy is that of "ownership" denoting the existence of an enormous variety of rights in respect of persons or things. At the bottom of the hierarchy are rights to use or control specific items of property held by individuals in specific positions. If the judges assert in a particular case that one of the parties is owner they are invoking a general concept which is known to entail the holding of rights. Hence they do not appear to be changing the law even though in fact they decide for the first time that the particular social position occupied by the litigant entails some particular right of use or control.³³

Western judges at least in the British and American systems work in a not dissimilar fashion. Recently, as Professor Gluckman notes, attention has been drawn to the hierarchical ordering of the legal concepts which judges deploy.³⁴ In particular, attention has been drawn to the way in which judges use general principles or maxims to control the interpretation and application of more specific rules.³⁵ Principles themselves may be of varying degrees of generality and weight. A judge faced with a number of competing principles may assign a greater or less degree of weight to each in relation to the others; there may be a correlation between weight and generality in that the more general the principle, the greater the weight attached to it. But a more important point is the judge's estimation of the relevance of the principle to the case he is deciding. Principles do not possess "absolute" weight in the sense that there exists a generally recognised hierarchy of all known principles based upon the criterion of weight. A judge decides which principles may possibly have a bearing on the issue before him and attributes "weight" according to his view of the relevance which they possess for the issue.

It thus becomes possible to construct a hierarchy of principles in relation to a particular case based on the criterion of weight. The weightiest principle will stand at the top of the hierarchy followed by the less weighty principles in appropriate order. At the bottom of the hierarchy will stand the rules which are displaced, or whose interpretation is controlled, by the principles held to be applicable. What should be emphasised is that the hierarchy

³³ *Id.* at pp. 301 *et seq.* and *cf. Ideas*, p. xxxii.

³⁴ Gluckman, *Ideas*, p. xlvi, n. 26.

³⁵ *Cf.* Raz, "Legal Principles and the Limits of Law," *Yale L.J.* 81 (1972), p. 823.

of principles and rules is the result of an analysis made by an observer of judicial reasoning. It may also be a description of the way judges think about principles and rules. But it is at least doubtful whether American or British judges construct for themselves a hierarchy of principles and rules.

Whether judges think in terms of hierarchies or not is perhaps unimportant. A student of judicial reasoning finds illuminating the detection of a pattern in the way the law is developed by means of judicial decisions. In particular cases it is possible to see how judges use principles to displace the operation of a rule that would normally be applicable and how, when faced with a series of principles, they will in relation to the case before them determine the weight of each principle and hence the degree to which it will influence the decision. Clear examples of both processes are supplied by Professor Dworkin in his well-known article, "Is Law a System of Rules?"³⁶

It is also possible to see how, on a larger scale, the law is developed through the application of principles in a manner which allows a variety of arguably inconsistent approaches to be subsumed under one controlling principle. For example Scots law in the 19th century had to work out solutions to problems of liability caused by the advent of the industrial revolution. The courts had to determine the circumstances under which employers would be liable for accidents in factories, railway companies for accidents involving trains, and proprietors of houses for the dangerous state of their premises caused by the presence of gas. The main criterion adopted by the courts for the solution of these problems was the principle that there should be no liability without culpa. Through the application of this principle the development of the law was made to appear both consistent and certain. The appearance of consistency and certainty is in fact an illusion. Judges subsumed under the principle of culpa cases in which the actual criteria of liability were widely different. In particular both cases where the person made liable had been actually at fault and cases where the defender was made strictly liable irrespective of actual fault were treated as examples of the principle.³⁷

³⁶ This article first appeared in the *University of Chicago Law Review* 35 (1967), p. 14. It has been reprinted in Summers (ed.), *Essays in Legal Philosophy* (1968), p. 25, and in Hughes (ed.), *Reason, Law and Justice* (1969), 3, under the title "The Model of Rules."

³⁷ I have said more about the principle of culpa in "Culpa in the Scots Law of Reparation," 1974 J.R. 13. Cf. also N. McCormick "Principles of Law," 1974 J.R. 217.

The use of the principle of culpa by Scottish courts may be seen as an illustration of Professor Gluckman's thesis. There is evidence that judges have attempted to present the law as certain in that all or practically all instances of delictual liability can be treated as applications of the principle of culpa. Since the instances of delictual liability involve a wide range of faults and include cases where there is no personal fault, use of the principle conceals the differences which have developed between various types of delictual liability.

Having admitted the cogency of Professor Gluckman's comparison of the ways in which judges in the Anglo-American and Lozi systems manipulate hierarchies of concepts (principles and rules) in order to achieve an appearance of certainty and consistency in the development of the law, I should add a caveat. From the cases reported in *The Judicial Process*, detailed though the records of the judgments often are, it is not easy to see the logic of the reasoning adopted by the judges. At least it is not easy to see that they reason in the way described by Professor Gluckman. This is because a number of the premises in their argument are not as such articulated but left to be understood from their remarks. These premises form an implied background to such reasoning as the judges do make explicit. Professor Gluckman with his unrivalled knowledge of Lozi judicial procedures may have been able to make a successful reconstruction of both the implicit and the explicit stages of a judge's reasoning but the reader has to take a great deal on trust.³⁸

Professor Gluckman's comparison is primarily between Western and tribal judicial systems. He is concerned with peoples like the Lozi who have a system of courts in which judges give decisions binding on the parties. But, almost by way of an aside, he does suggest that his main conclusions are equally applicable to societies which lack judicial systems. The Nuer, for example, have no courts; nor do they have any formal and regular procedure for the adjudication of disputes. The details of the manner in which disputes were settled among the Nuer are not clear. If a quarrel resulted in a killing, compensation was payable by the killer and his kin to the kin of the person slain. Settlements were achieved through the mediation of a leopard-skin chief. The authorities on the subject state that in no sense does the leopard-skin chief act as a

³⁸ Cf. the remarks of Professor Allott, L.Q.R. 72 (1956), p. 146 and Professor Gluckman's reply, *Judicial Process*, pp. 406-408.

judge. He does not determine the merits of the case, or settle issues of right and wrong. He provides a channel through whom the bodies of disputing kin can conduct negotiations and come to terms. At the most he exercises pressure through threats or persuasion to bring about a settlement.³⁹ Where no killing is involved disputes might be settled by recourse to a leopard-skin chief. More usually it appears settlement depended upon self-help and the involvement of kin. A Nuer might attempt to take cattle from another where he had a grievance; success would depend upon the degree of support obtained from his own kin and the amount of resistance offered by the kin of the offender. Or there might be a settlement agreed without resort to self-help achieved through the intervention of kin. The important points are that either self-help or settlement depends upon support from kin, and that the strength of the support will itself depend upon the rightness or wrongness of the case. Kin will support a kinsman whom they believe to be in the right; they will be less eager to support him where he is in the wrong.⁴⁰ All this implies that there must be some discussion among the kin of the persons disputing as to whose actions have best accorded with conduct deemed to be rightful, or whose actions have been most obviously wrong.⁴¹

How do Professor Gluckman's conclusions derived principally from the far more complex Lozi data fit the Nuer material? He himself suggests that the Nuer have "law" in both the senses which he has distinguished. They have law as a series of decisions or judgments established by third parties as settlements for disputes and they also have law in the sense of a *corpus juris*, "a body of interconnected rights and duties"⁴² which provides those engaged in the settlement of disputes with the "sources" for their decisions.⁴³ However it does seem that there is some distortion in this way of looking at the Nuer material. One may certainly admit that the Nuer have well-defined ideas about right and wrong, and rules prescribing the correct behaviour in a variety of situations. Leopard-skin chiefs and the kin of those in dispute are aware

³⁹ Evans-Pritchard, *The Nuer* (1940), pp. 152-154, 163-164, 172-175; Howell, *A Manual of Nuer Law* (1954), pp. 27-28.

⁴⁰ Evans-Pritchard, *The Nuer*, pp. 162-168, 170-172.

⁴¹ Cf. Evans-Pritchard's statement on disputes about bridewealth, *The Nuer*, p. 168: "Such matters are easily settled within a village and among people who share a common dry season camp because everyone realises that some agreement must be reached by discussion and that it must accord with justice."

⁴² Gluckman, *Judicial Process*, p. 262.

⁴³ *Id.* at pp. 262-263.

of these rules and of the more general notions of right and wrong; and no doubt urge the disputants to adopt a course of behaviour which accords with the accepted Nuer standards of proper behaviour. But it does not seem possible to extract from this a distinction between law as a series of decisions given by "judges" as settlements for disputes and law as a *corpus juris*, a body of rules upon which the judges draw in framing their decisions.

Professor Gluckman also wishes to distinguish, within the Nuer *corpus juris*, moral from other rules. He states: "Nuer morality seems to be a set of general rules such as, respect your father, help your kin, observe your obligations, obey Nuer custom."⁴⁴ These examples are interesting because it does look as if the precepts mentioned differ in some way from the rules regarding the settlement of feuds before the leopard-skin chief and rules regulating property to be paid as compensation for various offences. But what is not permissible is to designate these precepts as "moral," at least where the designation rests upon an unstated assumption concerning the nature of morality. The important task is to discern the attitudes of the Nuer themselves towards various rules and work out a classification based on the results. To apply a pre-determined classification is to exclude the possibility of a proper understanding of the society under investigation.

Professor Gluckman is at pains to argue that the Nuer, like the Lozi, have the concept of the reasonable man.⁴⁵ The argument is sound if one assumes him to mean that leopard-skin chiefs or kin take into account the behaviour normally and customarily to be expected of a person when they have to deal with an issue of right and wrong. But it appears very doubtful whether the Nuer have adopted a general standard of "the behaviour to be expected of the reasonable man" which they consciously apply in the assessment of behaviour by individuals in particular cases.

From time to time in the preceding pages I have stated the conclusions which seem to me to follow from Professor Gluckman's comparison between Anglo-American and tribal "law." Generally the results have been negative. The "basic identity" alleged to exist between the two "laws" is difficult to grasp and on a close scrutiny appears to vanish. Nor does it seem that there is as much to be learnt as Professor Gluckman suggests from the application

⁴⁴ *Id.* at p. 263.

⁴⁵ See esp. "Reasonableness and Responsibility in the Law of Segmentary Societies," in Kuper and Kuper (eds.), *African Law: Adaptation and Development* (1965), p. 120.

of insights gained from the study of one type of society to the other. Yet there is one interesting lesson to be learnt. This concerns the problem of classification of rules.

In our own society we may seek, with more or less success, to distinguish between legal and moral rules. Members of other societies may also seek to draw distinctions of various kinds between the rules which they observe. For the investigator the important task is to ascertain and describe the criteria used by the people of the society investigated in the classification of their rules. He should avoid the imposition of a classification drawn from his own society; or, if he does use such a classification, he should explain its relevance or utility in the context of the society under investigation. Although Professor Gluckman's own investigation makes the mistake of applying, without apparent justification, Anglo-American criteria of classification to data obtained from tribal societies, he has at the same time offered an occasional, brilliant remark on the criteria employed by the people of the tribal society themselves. In so doing he marked but did not develop the correct method of investigation.

G. MACCORMACK