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# NATURAL JUSTICE IN AFRICA\*

Max Gluckman

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THIS ESSAY presents evidence which shows that Africans always had some idea of natural justice, and of a rule of law that bound their kings, even if they had not developed these indigenous conceptions in abstract terms.<sup>1</sup> Their failure to do so is accounted for by their lack of writing; a written language is to a large extent necessary if people are to elaborate conceptions into some kind of theory.

## I

UP UNTIL the end of the eighteenth century there existed in the present area of Natal, in South Africa, several hundred small tribes, living in some degree of peace with one another and waging only periodical wars which did not lead to conquest of one by the other. Towards the year 1800 some of the more powerful tribes, for reasons into which I need not enter, began to conquer their neighbors and to build small kingdoms. After 1816 the pace of

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\* This article is based on a lecture delivered to a public audience at the University of Aberdeen, by invitation of the Principal, the late Sir Tom Taylor, a distinguished student of natural law in Scots law. A helpful bibliography: PAUL BOHANNAN, *JUSTICE AND JUDGMENT AMONG THE TIV* (London: Oxford University Press for the International African Institute, 1957); BENJAMIN CARDOZO, *NATURE OF THE JUDICIAL PROCESS* (New Haven: Yale University Press, 1928); EDWARD EVAN EVANS-PRITCHARD, *THE NUER* (Oxford: Clarendon Press, 1940); Max Gluckman, *The Kingdom of the Zulu of South Africa*, in MEYER FORTES & EDWARD EVAN EVANS-PRITCHARD (eds.), *AFRICAN POLITICAL SYSTEMS* (London: Oxford University Press for the International African Institute, 1940); GLUCKMAN, *ESSAYS ON LOZI LAND AND ROYAL PROPERTY* (Rhodes-Livingstone Paper No. 10, 1943); GLUCKMAN, *CUSTOM AND CONFLICT IN AFRICA* (Oxford: Blackwell, 1954, 1963); GLUCKMAN, *THE JUDICIAL PROCESS AMONG THE BAROTSE OF NORTHERN RHODESIA* (Manchester: Manchester University Press; New York: Humanities Press; Glencoe, Illinois: Free Press, 1955); Gluckman, *The Technical Vocabulary of Barotse Jurisprudence*, 61 *AMERICAN ANTHROPOLOGIST* 743-59 (1959); GLUCKMAN, *ORDER AND REBELLION IN TRIBAL AFRICA* (London: Cohen and West; Glencoe, Illinois: The Free Press, 1963); GLUCKMAN, *THE IDEAS OF BAROTSE JURISPRUDENCE: STORRS LECTURES AT THE YALE LAW SCHOOL, 1963* (New Haven and London: Yale University Press [in press, 1964]); GLUCKMAN, *RULE, LAW AND RITUAL IN TRIBAL SOCIETIES* (Oxford: Blackwell; New York: New American Library; Chicago: Aldine Press [in press, 1964]); KARL LLEWELLYN & E. ADAMSON HOEBEL, *THE CHEYENNE WAY* (Norman: University of Oklahoma Press, 1941); John G. Peristiany, *Pokot Sanctions and Social Structure*, 24 *AFRICA* 17-25 (1954); VICTOR W. TURNER, *SCHISM AND CONTINUITY IN AN AFRICAN SOCIETY: A STUDY OF NDEMBU VILLAGE LIFE* (Manchester: Manchester University Press, 1957).

1. This essay is devoted, as far as possible, to indigenous African conceptions. On the rule of law in the new states of Africa, see *AFRICAN CONFERENCE ON THE RULE OF LAW* (Proceedings published by the International Commission of Jurists, 1961).

these wars of domination accelerated, and a certain chief Shaka, head of the small Zulu tribe, emerged as ruler over the whole region of Natal, while his armies were raiding far beyond his own borders. The Zulu achieved fame during their war against the British in 1879, particularly by their defeat of a British corps at the Battle of Isandlwana, which opened the campaign; and their then king Cetshwayo became a byword for savage tyranny. Their first king, Shaka himself, was, in my opinion rightly, regarded by whites as a monstrous tyrant. This is how he acted when the first party of English traders came to visit him. Shaka had assembled tens of thousands of warriors and dancing girls to stage a great exhibition for his visitors. After an exchange of gifts and of welcoming speeches, the English began to converse with him. Suddenly, Shaka made a signal, and a man standing by was seized by his neighbors and executed. This happened to several men; and the English could not find out what offense these men had committed. I am myself inclined to think that Shaka was impressing on the English that he could have them killed as easily as his own people; if so, he succeeded only in scaring one elderly trader who became so fearful (the wonder is that all did not!) that he fell ill and had to leave. Nonetheless, this eyewitness account shows us the picture of a tyrant, killing men at his personal whim; and elsewhere we are told of his ordering the execution of men and their families, and of his confiscating their property.<sup>2</sup>

At its inception, therefore, it appears that there was no rule of law above the king in the Zulu kingdom. Yet Zulu history, even while it exhibits the extent to which the ruler could act outside the law, also gives the best example of how an African king was bound by law — in a legend which at the same time illustrates his power to behave tyrannically. One of the tribes defeated by the Zulu was the Ndwandwe — indeed the Ndwandwe were Shaka's greatest rivals on his road to supreme hegemony in the region. The defeated Ndwandwe fled in many directions: some sections drove northwards to establish their own distant kingdoms by conquest. The main chief of the Ndwandwe founded an independent state nearby, whence a great army returned to attack the Zulu, who defeated it. I give these details to emphasize the acute enmity between Zulu and Ndwandwe. Some Ndwandwe settled among the Swazi, to the north of Zululand. The son of one of these returned many years later to Zululand, in the reign of King Mpande, and was welcomed back. He found that his father's brother, who had remained behind after the tribe's defeat, had taken over his father's cattle; and he sued for these cattle

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2. The rise of the Zulu state, and the following legend, are briefly analyzed in Max Gluckman, *The Kingdom of the Zulu of South Africa*, in M. FORTES & E. E. EVANS-PRITCHARD (eds.), *AFRICAN POLITICAL SYSTEMS* 25f. (1940).

and their offspring. His uncle was by that time a favorite of the king, and he pleaded that if the cattle were awarded to his nephew he would be ruined. The king told his favorite that he had no choice; he was bound by the law and had to award the cattle to the rightful owner. But — or so the story goes — that night the king sent a troop of warriors to kill the successful litigant and all his family, so that the favorite might become rightful heir under the law to the cattle. The king's senior son heard of the order, and warned the nephew, who then fled and escaped; and when challenged by his son, the king said he knew nothing of the order to kill, which must have been issued by his councillors. Zulu frequently told me this story to illustrate that the laws of the nation bound the king, as well as his subjects, and that the king could not alter or apply the law to meet his own wishes, or the nation would fall into ruins. They also pointed out that kings could find ways around the law, and were always likely to do so.

This legend — if legend it be — brings out dramatically that even in a recently established African nation there was a conception of "law" as such, of a body of rules which were binding on rulers and subjects alike. Belief in, and adherence to, this body of rules persisted despite the frequent occasions on which some ruler might break the rules. For it was clear to the people that the ruler was acting in a wrongful way, and that he was acting in breach of the law when he committed some capricious action outside the procedure and the scope of the law. The actions of kings were constantly assessed against these procedures and rules; and if they broke the law too frequently, rivals for the kingly power might genuinely raise rebellion against the king to defend the rules, or at least might exploit subjects' grievances to lead an attack on the king for his lawless and tyrannical behavior. Or a section of the nation might for this reason move away into independence from the king. We can only understand the course of African tribal history if we see that men were moved to fight in the name of law and justice against a tyrant. Even the great king Shaka, founder of the nation, was eventually assassinated by two of his brothers and his closest body servant, egged on by his aunt, who was revolted by his constant executions. They justified their action to the nation by pointing to Shaka's tyrannies; and they promised to stop these arbitrary executions and to amend his harsh laws. The assassins even felt compelled to justify their murder, and their future course of action, by messages to this effect to the English traders who had settled where Durban now stands.

I could give examples from the histories of many African tribes to show that they likewise constantly exhibit these contradictory tendencies — belief in a rule of law and justice which bound the king, kings acting tyrannously

in disregard of the law and thus provoking rebellion against themselves or their advisers. In these respects African history is not unlike the history of Europe. But I propose now to take this for granted, and to concentrate on the doctrines of the laws, rather than on the practice of kings. When I do this, we shall have an idealistic picture of the situation: for men lived up to the law as little in Africa as elsewhere — and as much.

## II

BEFORE WE examine the doctrines of African law, we must first appreciate the general social and economic background within which that law operated. African tribesmen lived mainly in association with their kinsmen of one kind or another, and they fulfilled most of their purposes in life by cooperating with the same sets of fellows. In these small communities they bred, reared, and educated their children; they made their living; they formed a political group, and a religious congregation attending on the same spirits. Hence, any breach of rules in one set of activities provoked disturbance in wide ranges of activity. If a man defaulted in his obligations to his brother, this might affect the production of crops and the herding of cattle; conversely, a quarrel over ownership of land or a cow within this kind of group might lead to severe disruption of general social relationships, and even ultimately to the breakup of the group. Thus, when a case came to be argued before the judges, they conceived their task to be not only detecting who was in the wrong and who in the right, but also the readjustment of the generally disturbed social relationships, so that these might be saved and persist. They had to give a judgment on the matter in dispute, but they had also, if possible, to reconcile the parties, while maintaining the general principles of law. It is in this process of achieving reconciliation, while abiding by the law, that I believe we can see most clearly the doctrine of natural justice present in Africa. It is thus best exhibited in trial cases, and unfortunately few anthropologists or lawyers have recorded these in detail. Perhaps I may then be forgiven if I begin with citations of cases I myself heard tried in the courts of the Barotse of Northwestern Rhodesia.<sup>3</sup>

The dominant tribe of the Barotse dwells in a great flood plain on the Upper Zambezi; and they exploit a variety of arable soils, pastures, and fishing sites from villages built on small islands in the plain. When I asked them for the laws of land tenure, they told me again and again that under their law a man had to live in a village to use the land resources

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3. I have cited numerous cases with an analysis of each in MAX GLUCKMAN, *THE JUDICIAL PROCESS AMONG THE BAROTSE OF NORTHERN RHODESIA* (1955).

attached to it: if he left the village, he lost his rights to the land in it.<sup>4</sup> Here are two contrasting cases arising out of this situation. In the first case,<sup>5</sup> three nephews of the headman of the village sued for their rights to work gardens which belonged to the village. They had left the village and built new homes nearby. They argued that trouble for them in the village had begun when their cousin, the headman's son, had seduced the wife of one of them, and then failed to pay the damages awarded by a court. When his cuckolded cousin complained, the adulterer insulted him; and when the cuckold and his brothers went on to complain to the headman, they alleged that he told them to get out of the village. They left the village. They now found that their cousin was working their land and taking the fruits of their trees. The cousin's defense was an admission that he had committed the adultery, but he counterpleaded in excuse that the eldest of the three plaintiffs had himself also committed adultery with the wife of a kinsman. He denied that they were driven out of the village, but asserted that they left it in the night. He then complained of a long series of actions by the plaintiffs in which they stunted his father, who had been their guardian since their own father's death. He then went on:

After they left, they told me that they had put magical substances against thieves on the mangoes, so the children should not enter [lest they get bitten by snakes]. Can you do this, get your child bitten by a snake? . . . [And] how can a man who has moved work gardens that he has left? There is the law of the Whitemen, about cleaning the village of weeds: will they be clearing in the village, or my wives? Is it fair for them to have gardens there, and live elsewhere? My hens and children and calves will enter their gardens. If they live in the village it balances out, for theirs will enter my gardens. But it is not the same if they live elsewhere.

The headman began his own evidence with a diatribe against the wickedness and irresponsibility of modern youth. He described how he had raised his nephews after his brother's death, complained that they stunted him of many things and of help, and denied that he had driven them out of the village.

After some attempt to get at the truth of these various allegations (which I have shortened considerably), both through witnesses and through cross-

4. Full data on land tenure are given in MAX GLUCKMAN, *ESSAYS ON LOZI LAND AND ROYAL PROPERTY* (1943), while I analyze Barotse relations of property holding in *The Technical Vocabulary of Barotse Jurisprudence*, 61 *AMERICAN ANTHROPOLOGIST* 743-59 (1959). This essay is to be published shortly, with others dealing with Barotse juristic conceptions, in *THE IDEAS OF BAROTSE JURISPRUDENCE: STORRS LECTURES AT THE YALE LAW SCHOOL*, 1963.

5. This case is reported fully in GLUCKMAN, *op. cit. supra* note 3, at 37-45.

examination, one judge asked the headman: "Do you want your nephews back?" He said he did; and they then affirmed they wanted to return. Their cousin also said he wanted them back. The judges got the old man to admit that his son was in the wrong, as well as his nephews. On this basis, the various judges all entered judgment that the nephews lost their gardens unless they returned to the village; but they accompanied this clear statement of the law with homilies to all the parties: to the old headman that he should not favor his own son against his nephews instead of enquiring impartially into disputes between them; to the headman's son for committing adultery with his kinsman's wife and for trying to treat his kinsmen as serfs, on the possibly unwarranted assumption that he would succeed his father as headman; to the three plaintiffs for not being generous and helpful to their uncle. Around the main judgment there were therefore woven sermons on living together in parental, filial, and brotherly love, and on taking the chances of the depredations of each other's stock and children and crops in mutual tolerance. The nephews were ordered home, and all were warned they would be fined if they started quarrelling again.

In this case, we see the court applying the law that you cannot work gardens unless you live in a village, in such a way as to bring about a reconciliation between kinsmen who were in danger of quarrelling irremediably. They did so in terms of a rule of law, clearly stated. In another case, the court applied the same rule of law in a quite different way.

This second case<sup>6</sup> also involves the rights of persons, not resident in a village, to use its resources, which are vested in the title of the village headman. There was a certain village headman named Mahalihali, who was so quarrelsome that his bad temper drove many people out of the village. He personally expelled one of his daughters, whom he had accused of sorcery. Eventually he died and his son inherited his position, and took his title as Mahalihali the Second. He found himself with a village, and few villagers. His nephew, son of his sister expelled from the village by their father as a sorceress, was using some of the trap sites in a fish dam belonging to the village, but was living with his widowed mother in her mother's village. Another sister of the new headman had married into a nearby village, and her sons were using a fish dam which her father had let her have. The new headman brought suit that his sisters and their sons must stop using the fish dam unless they moved into his village. The judges satisfied themselves that the one sister, accused of sorcery, had been badly wronged when she was driven out of the village. Since then she and her son had behaved with

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6. This case is fully reported in *id.* at 178-187.

proper respect to their kinsman, the headman. Hence the judges found themselves in a dilemma. The law was clear: if you do not live in the village, you lose your rights in its land. By this rule the headman was right in his claim that the others join his village or cease to use its fish dams. But the defendants had not done him any wrong, and the headman was behaving unjustly — like the dog in the manger in our fable. The resident villagers had more fishing sites than they could use. How did the judges solve this dilemma?

In Barotse courts when the judges come to give their decision, the most junior judge speaks, and then his seniors in turn, until the head of the court gives judgment. This is the binding decision — as in our courts-martial — even if it contradicts the verdicts of all other judges, though it is referred to the king in his palace for confirmation. The first three judges felt themselves to be bound by the basic premise of their land-tenure law: the dog-in-the-manger headman was entitled to expel his sisters and their sons from the dams unless they moved into his village. But they all stressed that he ought not to treat his relatives in this niggardly way since there was more land than his villagers could use; being rich, he ought to help his relatives. Nevertheless, the dams were his. The next set of judges were reluctant to apply the letter of the law in favor of the headman, against people who, in their words, had “done nothing wrong.” Many judges told the headman, “If they had done wrong, you would have a case.” Most judges therefore contented themselves with stating the moral issue, that he ought to let his relatives fish. One said that the fish dams had passed out of his control, though this opinion broke with the basic law of Barotse landholding. But the senior judge sitting in court returned to this basic law: the dams were the headman Mahalihali’s. He too exhorted the headman to be generous and let his kin fish them; but he insisted that “We cannot change the law against Mahalihali.” Like us the Barotse consider that “hard cases make bad law.” They say, “It is hard, but it is the law.” As it happened, the head of the court was busy on administrative business elsewhere. Next day he came to deliver his decision on the basis of reports of evidence and judgments made to him by other judges. He found the headman still insisting on his right to take the dams unless the others moved to join him, as laid down in the last decision. In this dilemma the head of the court found a brilliant solution. The dams clearly belonged to the title Mahalihali; but if the present incumbent of that title were not upright and generous to his kin who did not live with him, the court would discharge him from the headmanship and appoint a more generous successor.

What happened here was that the judge achieved a just and equitable



solution by stressing a new kind of sanction. He invoked the administrative powers of the court to discharge unsatisfactory headmen, in order to compel a headman to be generous in exercising his rights. In this way, the judge enforced standards of generosity on the headman in favor of defendants who had done no wrong, while he maintained the basic law of land tenure. The fish dams remained vested in the headman's title.

I have argued<sup>7</sup> that we can understand the rebellions against tyrants which were frequent in African kingdoms, only if we understand that the people thought that those who are powerful should be just and merciful, fair as well as law-abiding: thus they had general standards for assessing royal actions. Similarly, I maintain that we cannot understand how judges come to a decision on a case unless we recognize that they operate with certain values which enable them to take a moral position on the issues, and that they then try to state the law in terms of those issues. Only in this way can we explain why in the first dispute over resources the judges should unanimously have insisted on the imposition of the rule that a man cannot work land of a village and live elsewhere; they had come to the conclusion that all the litigants, including the headman, had defaulted from the standards required of them, but that a statement of the law in favor of the headman could be used to induce the departed young men to return, while they brought pressure on the headman to receive them. In the second case, they were faced by a real dilemma: enforcement of the rule would have entailed inflicting loss on people who had done nothing wrong; but not to enforce the rule would have been going against a fundamental part of the land-tenure system and the social relations based upon it. To vary the law to meet hard cases is recognized as leading to uncertainty and insecurity in social life. Happily, the head of the court saw a just way out, in which the righteous would be defended while the law would be maintained. This kind of "hunch" of where the moral merits of a case lie, and the manner in which judges follow this hunch to choose between the alternatives open to them, embody those ideas of justice which are current in a particular society at a particular time.

We must start by recognizing that the rules and custom of a society — its body of law — do not form an internally consistent and logically interdependent set of principles. The whole trend of recent research on tribal societies by social anthropologists is to emphasize the independence of social rules and principles of grouping, and to analyze the manner in which they

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7. The argument is set out more fully, with reference to the works of other anthropologists, in MAX GLUCKMAN, *ORDER AND REBELLION IN TRIBAL AFRICA* (1963) and in *RULE, LAW AND RITUAL IN TRIBAL SOCIETIES* (in press, 1964), where it is applied to a greater variety of states.

set discrepant and even conflicting processes of action at work.<sup>8</sup> Tribal society is no longer seen as structured by harmoniously balanced principles; instead, the customs and values which associate persons in the pursuit of their goal are also seen to produce conflicts of interest between them. This is something that is inherent in the very nature of social life; and we can see it more clearly in tribal cultures than in our own, because the tribes have a higher development of custom which creates and exaggerates differences between people as well as the links between them. For example, there are in tribal societies a whole series of customs which exaggerate the biological difference between sexes, by rigidly defining the division of labor between men and women and tabooing any breach of this division. Beyond this, beliefs such as those of some tribes in an inherent antagonism, yet essential interdependence, between the sexes with femininity containing the polluting evil of menstruation and witchcraft as well as the good of fertility, stress the conflict as well as complementariness that resides in so basic a social group as the family.

These beliefs emphasize for us that the roles of persons and groups in any society force upon them independent action under various rules. Hence we should not expect the laws of any tribe to form a consistent logical system, any more than do the laws of England. Lord Halsbury said of English law:

A case is only an authority for what it actually decides. I entirely deny that it can be quoted for a proposition that may seem logically to follow from it. Such a mode of reasoning assumes that the law is necessarily a logical code, whereas every lawyer must acknowledge that the law is not logical at all.<sup>9</sup>

Given the variety of rules of law, and the fact that many of them are independent of another, how do judges select what rules to apply in a particular case? In the Barotse cases I have just cited, there is no logical association between the rules involved. One rule states that the resources of a village are vested in the title of its headman; another that a man should live in a village if he is to use its resources; another that any kinsman is entitled to use the wealth of one of his ancestral villages; another that a person who leaves a village loses his rights to resources in it; another that when a woman leaves a village to marry she is going to what Barotse call "her work"; another that a woman expelled for alleged sorcery is driven from

8. This view has been developed by many anthropologists, and has been applied to a variety of problems in popular exposition by MAX GLUCKMAN, *CUSTOM AND CONFLICT IN AFRICA* (1954, 1963) and also *RULE, LAW AND RITUAL IN TRIBAL SOCIETIES*. The fullest development in analysis of an African society in these terms is in VICTOR TURNER, *SCHISM AND CONTINUITY IN AN AFRICAN SOCIETY* (1957).

9. In *Quinn v. Leatham*, [1901] A. C. 495, 506, as quoted by BENJAMIN CARDOZO, *NATURE OF THE JUDICIAL PROCESS* 32 (1928).

the village, and does not leave it; another that the law must not be altered to meet the circumstances of a hard case; another that the court may discharge an unsatisfactory headman; and still another that a person should not be penalized unless he has committed some wrong. The judges had to select which of these rules they would apply in a particular dispute, and how they would combine those selected. The dominant factor influencing their choice was their judgment of who was in the right and who in the wrong. The rules were therefore arranged in a hierarchy of a kind, and in the cases here the supreme rule was that no one should be penalized unless he has done wrong.<sup>10</sup>

### III

IN THE VOLUMINOUS literature on the law of nature, the law of nature is divorced from the process by which judges apply law to particular situations of dispute: the main discussion is on the rules of law extant at any time, and whether these can be assessed against any general law. This discussion raises problems of the relation between state and law; and it shows how in different eras the law of nature has been invoked by various protagonists to argue for preservation of the status quo or for the revolution of society. I am here not concerned with these important problems, since I am discussing relatively stable societies and their law. Perforce I concentrate on the problem of how far the systems of African law embody general principles of ethics which Africans themselves conceive of in the way that Europe's tradition spoke of as natural law. As far as this aspect of the problem is concerned, I wonder why more attention has not been paid to the judicial process by at least Anglo-American lawyers in discussions of natural law. It is true that the idea of natural law seems to be an importation into English law from Roman law, canon law, and in recent centuries continental jurisprudence; and the indigenous English parallel conception is that of "equality."

The long tradition of writing about the fundamental nature of law in Europe has been divorced from the application of law to specific disputes, perhaps because the writings that survive are the books of ethical and legal philosophers, and treatises on the rules of law, rather than detailed records of how decisions were taken in particular disputes. When judgments survive, from ancient and medieval times, they are usually the bare bones of decisions. Moreover, it may have required the development of a highly hetero-

10. On this hierarchy see GLUCKMAN, *op. cit. supra* note 3, at 295f. The same impression emerges from KARL LLEWELLYN & E. ADAMSON HOEBEL, *THE CHEYENNE WAY* (1941).

geneous society, with widespread acknowledgment of varied social interests and values, to focus investigation on the nature of the judicial process — on what judges actually do in court with the law. This kind of investigation is a comparatively recent line of full-blown research; and significantly it has produced, particularly in the United States, highly iconoclastic studies of law, many of which seem to throw out the idea of certainty of law. As an anthropologist, I made it my duty to sit in African courts and record the full details of cases, from the point before they came to court, through pleas and evidence, to final judgment. This experience made me concentrate on how far in judgments on particular disputes Africans were influenced by general principles of ethics. Among the Barotse at least this influence seemed a marked feature. Judges — good judges — were moved to come down on one side rather than the other by what they call *ngana*, which can be translated as “sense” or “reason”; and they explained to me the principles which guided their reason as *milao yabutu*, the laws of humankind, which I think are fairly equivalent to the law of nature in our tradition.<sup>11</sup>

I may, therefore, be using natural law and natural justice in a rather heterodox sense. I have some authority for doing this. Justice Cardozo in his analysis of the nature of the judicial process pointed out that it is in decision making that the sense of natural justice comes into its own. The sense of justice, he says, moves a judge so that, in the words of a French jurist whom Cardozo quotes, “One wills at the beginning the result; one finds the principle afterwards; such is the genesis of all juridical construction. Once accepted, the construction presents itself, doubtless, in the ensemble of legal doctrine. . . .” It is true that the ability of the judge to follow his sense of justice may be restricted by legal rules, and may be influenced, to quote Cardozo himself, by his own “likes and . . . dislikes . . . predilections and prejudices, the complex of instincts and emotions and habits, which make the man, whether he be litigant or judge.”<sup>12</sup> But there is in every judgment a balancing of decisions, and a choice between alternatives, in which judicial creativity comes to the fore; and it is here that certain wide principles of morality enter into the law. I consider that they enter even in those cases where the judge feels compelled by the rules of law to find for a litigant even against what he feels to be justice in the particular case. He is here obeying the moral principle that the law must not be altered to meet the hard facts of a particular case; and a good judge in these circumstances will take care to point this out to the successful litigant, and to deliver an exhortation on the moral merits of the case. In the Barotse case of the headman who reclaimed

11. See, for a fuller exposition, GLUCKMAN, *op. cit. supra* note 3, ch. IV.

12. BENJAMIN CARDOZO, NATURE OF THE JUDICIAL PROCESS 178, 179 (1928).

his fish dams from his sisters, even those judges who said the dams were his, emphasized that he ought not to take them; the genius of the last judge was that he saw the court had lawful power to compel the headman not to insist on his rights against justice.

I am not arguing that all laws are in every sense just, and that every case in all lands is solved in such a way as to achieve a just result, in terms of some ultimate discoverable body of ethical rules common to all mankind. In many systems of law, both simple and complex, certain rules have a rigidity that constrain judges to apply them in all circumstances. Most systems of law have rules which appear to inflict constant hardship on certain categories of persons, in defiance even of their own principles of ethics — such as the laws about slavery, or about the position of women. Usually societies with these laws also evolve elaborate arguments to justify the special positions of such persons, by reconciling, often in terms of a pseudoscientific theory, their special position with a society's own general principles of ethics; and many of these principles of ethics are indeed common to all societies of men. Nevertheless the rules operate within a specific type of social organization, which controls what Kohler has called the “jural postulates” of a system of law — the principles and pre-suppositions of that system.

#### IV

THESE OFTEN contradictory tendencies can be further illustrated by another African society, very different in type from the Barotse. Dr. Peristiany has reported a vendetta which developed among the Pokot of East Africa. The Pokot are a tribe which has not developed any administrative system or governmental apparatus, so that they do not have judges who can sit on disputes and give enforceable decisions. The tribe contains a number of clans which have themselves to redress wrongs done to their members; and each clan is required, under a duty of blood vengeance, to demand compensation for the killing of one of its members. Each killing is liable to start a vendetta. The best account of a vendetta which Peristiany collected began some sixty years earlier when a man of one clan killed a member of another clan during night fighting against foreign invaders. The killer's clan admitted guilt and liability; and they offered a minimum of compensation as a gesture, maintaining that since the murder occurred by accident in a fight against common foes, the full payment should not be claimed. The dead man's clan insisted on full compensation, though they were adjured by neutral elders to take much less. The killer's kin paid in full; but this event started a rankling state of hostility which lasted over sixty years, with each side seizing the slightest excuse to

make demands on the other.<sup>13</sup> Since this was the best account of a vendetta which Peristiany obtained, sixty years later, under pax Britannica, clearly unusual circumstances have sharpened the attention paid to it: and these circumstances were that a man who had not done wrong, had been threatened as if he had. Notice that the killer's clan did not deny guilt and liability to pay compensation: that is, they did not attempt to deny the law, or its requirement that compensation be paid. This had to be met; but they felt that the innocence from murderous intent of their man and the fact that he killed by accident while defending a joint homeland against hostile invaders, should be recognized by acceptance of token payment. And neutral elders affirmed that this was just.

There is a folk tale which Professor Evans-Pritchard tells me is current over the whole of Northeast Africa and the Middle East which summarizes the manner in which a sense of justice may be outraged by the rigid application of the law of vengeance — the demand of an eye for an eye and a tooth for a tooth. A man once fell out of a tree on top of a member of a different clan, who was killed. The killer's clan offered compensation of blood money, but the victim's kin insisted on their claim to kill the killer. They persisted in this claim before the judge, who then ordered that they were entitled to do this; but the law required that the killer be killed in exactly the same way as his victim. Hence he ordered the killer to walk to and fro under the tree while the victim's kin took turns in falling on him until he was killed. Indeed, here was a Daniel come to judgment. Those demanding blood of vengeance said they would now prefer to take blood money; but the judge said they had lost their opportunity to do this. Those who have refused mercy under one alternative in the law cannot then expect, when this turns to their disadvantage, to avail themselves of other remedies.

Barotse would call the reasons which guided this judge of the folk tale, "wisdom" and "sense"<sup>14</sup> — just as when I asked them why they thought the final judgment that the dog-in-the-manger headman must be generous or he would be discharged, was a good judgment, they said because the judge decided by "truth" and "reason" and "wisdom." My own attendants explained to me that everyone could see that the headman was wrong, the defendants in the right: those judges who held therefore that the dams belonged to the headman's kin were weak judges, lacking the courage to face the consequences of maintaining the rules of law through hard cases; those judges who said the dams were the headman's had this courage, an essential attribute of the good judge, but they lacked the wisdom of the judge who saw how the law could

13. John G. Peristiany, *Pokot Sanctions and Social Structure*, 24 AFRICA 17-25 (1954).

14. GLUCKMAN, *op. cit. supra* note 3, ch. III.

be maintained while truth and right was served. This "truth," my informants told me, was that a man who had done no harm should not be penalized; and when I asked them where they got this, they said it was a law of God, and a law of mankind. Furthermore, they said that all peoples recognized that this was right, even the Whites; hence they also called it a "law of nations." It was to them a self-evident proposition, and they could not see why I bothered to try to work out how they arrived at it. Was it not obviously just? Similarly, how could I expect them to justify to me the proposition that "if you are invited to a meal and a fishbone sticks in your throat, you cannot sue your host"? — the equivalent of the Roman Law maxim, *volenti non fit injuria*.<sup>15</sup> Again, they thought this came from the very *ngana*, the reason, of men. In their own activities, this meant that if a man went on one of those fishing parties where crowds of men enter a pool and throw bundles of spears blindly into the bottom to get mudfish, he could not sue if he got a spear in the foot — unless he could prove malice. If a man goes in a dugout on the waters, to fish or to travel, he is doubly debarred from suing for injury, for in addition to the voluntary risk taken, the Barotse hold that it is self-evident that "fire and water are other lords," i.e., the dangers of river and fire are so swift and terrible that no action can be founded on accidents arising from them.

I could give other examples of fundamental ethical rules which the Barotse hold to arise from the very reason of men, from the fact that they are human beings and not animals. Not all these rules are found in all African tribes: for example, in Central Africa only the Barotse bar suits arising from accidents caused by fire and river. Many rules are common to large areas of Africa; and like the rule on assumption of risk, some are common to other systems of law. The Barotse, for instance, say in effect,<sup>16</sup> again like the Romans, that *ex turpi causa non oritur actio* (no action arises from an immoral agreement), and *in pari delicto potior est conditio defendentis* (in equal guilt the position of the defendant is stronger). But in suits involving this kind of judgment, Barotse judges are likely to fine all the parties; in their unspecialized courts, a civil suit can be converted by the judges into a criminal action. If wrongdoers have been foolish enough to appeal to the law to protect them in their wrongdoing, they run the risk of punishment.

Besides this body of rules, springing from reason itself, the Barotse think that certain kinds of social institutions are necessarily common to all mankind, in all societies. All men, they say, must have laws enforcing respect for chiefs and elders, controlling marriage, tabooing sexual relations between certain kinds of kin though these may vary from tribe to tribe, ordaining respect to

15. *Id.* at 206, 252n., 325.

16. *Id.* at 204f.

and avoidance of senior in-laws. Without these institutions, men would not be men, but animals. I once heard a group of Barotse men discuss whether the Bushmen hunters who live in Western Barotseland were human beings. One man said they were not, for they neither cultivated nor tended cattle. As soon as I described Bushman marriage and taboos on marriage to near kin, and their funeral rites, he said: "They are indeed men, with laws of humankind." Similarly when this point was discussed in the king's palace, the king said: "They are men. Once in Liuwa I shot a giraffe. The Bushmen came and hovered on the edge of the forest. We offered them meat: they came running, crouched before us as chiefs, cut up the meat and cooked it for us. They know kingship, and so they are of humankind."

The Barotse to a large extent use the phrases "law of humankind" and "law of nations" interchangeably in many contexts — as the Romans used *ius naturale* and *ius gentium*. These phrases cover both this generality of certain basic human institutions which all men must have, and certain principles of ethics which Barotse believe all men must see. If anyone lacks these institutions and does not see the ethical principles, then he is not of humankind. But they distinguish between rules of ethics and institutions, by referring also to the rules of ethics as "laws of God." Unfortunately, the early missionaries who recorded Barotse ideas in the last century did not cover these ideas: it may well be that these formulations are influenced by Christian doctrines which have been preached among Barotse and widely accepted by them. The Barotse say that after God had created the world and begotten men, He was so horrified and indeed frightened by the cunning of the first man and his way of murdering animals that He withdrew into heaven and ceased to take an active interest in the affairs of men. This story may well have been held together with the belief that God gave reason and perception of morality to men: the Barotse would not be the first people to hold inconsistent ideas. Nevertheless, it is possible that we are here dealing with an association of morality with God that was influenced by Christianity, though the evidence indicates that the idea of laws of humankind is genuinely indigenous.

Barotse talk today about their widest conceptions of morality as "laws of God," and they use the same phrase to cover both the regularities of the natural environment in which they live and the physiological and psychological processes of men and women. For them too, as for the ancient world, there is a close similarity between what we think of as the physical laws of nature and the fundamental rules of social morality. It is worth emphasizing that the physical laws of nature, insofar as their knowledge goes, provide a framework within which their judges make decisions on evidence: they assess facts against their knowledge of the growth of crops, the rise and fall of the flood, the



periods of gestation and "normal" fertility rates of women and animals, their presumptions about the psychology of men and women, fathers, spouses, mistresses and their lovers.<sup>17</sup>

Though all mankind that they know have the same basic social institutions, the Barotse, dominating as they do over twenty-five tribes of alien culture, recognize that there is considerable variation in the form of these institutions. Their own secular and ritual customs and beliefs differ in many respects from those of other tribes, and there is no wrong in most of the practices of those tribes. Thus while Barotse favor succession through males, though succession through females is frequent, they recognize that under the law of other tribes succession is only in the female line; and they will adjudicate these tribes' cases in terms of this law. Again, some tribes marry the daughters of a father's sister, and of a mother's brother, women who rank as "sisters" in Barotse law and are tabooed as spouses; but they do not deny the validity of such marriages among these tribes. As the head of a court once said to a foreign litigant: "There is no path of slavery in this court. . . . A foreigner sues by the customs of the foreigner; a Barotse sues by the customs of the Barotse."<sup>18</sup> Some alien practices, like wife-lending, they forbid, as against public morals.

The morality and institutions of the Barotse nevertheless embody certain inequalities. In theory, all persons who come to court are equal before the law, in that they will be listened to carefully and allowed to lead evidence for their case without interruption. A judge should not take a decision after hearing only one side of a case; and he must judge impartially. Indeed, if he has an interest in the case, he should excuse himself. But each litigant comes before the court in terms of the inequalities which are involved in his or her social position. Thus, under the divorce laws, a man who tires of his wife can divorce her simply by sending her home to her people under escort of one of his kin. A woman has to sue in court and establish grounds for divorce, if she wishes to break with her husband. After all, he paid cattle to gain rights over her, and some rights over her children; and while he can abandon these rights himself, she is subject in some respects to his demands. I have heard many wives claim that their husbands neglected them and did not treat them properly, and that therefore they were entitled to divorce, but they had their suits rejected. Yet the husband must convince the court that he regards the woman as his wife and will treat her as such. Thus, when a husband refused to appear in court to answer his wife's suit, the court heard her evidence and held that he no longer cared for her, but was holding on to her so that he could secure cattle as damages if she committed adultery. Judgment was

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17. *Id.* at 268f.

18. *Id.* at 211.

given against him in default, on the grounds that "no one shall place [a woman] in slavery, to make her a trap, in order to get cattle from people."<sup>19</sup>

There were serfs — prisoners of war — in Barotse land, till they were freed under pressure from the British. In general, serfs were regarded as quasi-kinsmen, and were supposed to be treated as children by their master. One of their disabilities was that they could not leave their master's village, and theoretically their master also held power of life and death over them, and could treat them as he pleased. But I met serfs whose masters had treated them so badly that they ran to the palace to claim the king's protection; and after hearing the case, the king had ruled that the master was unfit to own serfs and would never again be allowed to do so, because serfs were entitled to be treated as human beings. The king took the abused serfs under his own protection.

## V

WHEN I DISCUSS the general principles which pervade Barotse law, and cite certain key cases to illustrate these, I necessarily give an idyllic picture of Barotse law, whereas their life was full of hardship and often of cruelty. Kings dealt with their enemies severely; and accusations of witchcraft and sorcery to account for people's misfortunes led to many executions. Some rich and powerful persons would in need try to pillage the poor and escape the consequences of their actions. But we must remember that Barotse law was applied in circumstances where commercial traffic had developed little, and where rich and poor lived at approximately the same standard, since there were neither luxuries nor other means for the rich to elevate their own standard of living. Hence they distributed their land to acquire dependents, and they dispensed of their plenty to acquire social power. In this situation, the main grounds for tyranny and caprice on the part of kings lay in the exercise of power itself, and arose from fears, real and fancied, of intrigues against their persons. Even the most tyrannical kings had reputations for great generosity with their goods. Meanwhile, as far as judges were concerned, their central task was, as we have seen, to adjust disputes between closely related people; and their judgments were — and in this kind of case still are — veritable sermons on the importance of living together in generous loving kindness, sharing the vicissitudes of life in a spirit of mutual helpfulness and give-and-take.

19. Many of the cases cited in MAX GLUCKMAN, *THE JUDICIAL PROCESS AMONG THE BAROTSE OF NORTHERN RHODESIA*, deal with these problems. The position of women, in inequality, is summarized at 216f.

Bohannan, who studied the judgments of the Tiv of Nigeria, has shown that this situation produced a somewhat complex evaluation of the concept of "truth," a point that I missed among the Barotse. To get to the heart of a dispute, at what the Barotse described as its *niti*, a word which also means "truth" in our sense, is to see the solution that establishes and proclaims settled law and achieves justice, yet at the same time reconciles the disputing parties and prevents the breaking-up of their relationship. In this sense, the head of the court saw "the truth" of the dispute in the case of the headman's fish dams.

The Tiv whom Bohannan studied are a tribe that had no instituted governmental system before the coming of the British who established courts. Bohannan tells us that they have a word *yii*, which can mean a "lie" or a "broken promise." But to tell a *yii* is also "to say something or make a remark which disturbs the even flow of social relationships." "It make no difference," Bohannan says, "whether the remark is true or false, in the sense that we use these words in English, *unless* it be to someone's detriment, in which case it is worse to tell a false *yii* than a true one." Set against *yii*, are two words. One of them, *mimi* in Tiv, is used in contexts where we speak of morally good things, and means to tell that version of the story which does least damage to social relationships from one's own point of view. In this version each litigant is likely to be doing damage to the relationships from his opponent's point of view. But the Tiv also use the word *vough*, which describes a truly straight row in making a farm mound or setting something upright, to cover a statement of the precise facts in a story. A witness, as against a litigant, should speak *vough*, i.e., straightforwardly. Bohannan states, however, that no one would blame a witness if he did not tell the precise facts, and indeed told untruths, if by so doing he smoothed social relationships and enabled judges to give a verdict in which both litigants could concur. Hence Bohannan concludes from this that "truth" in Tivland is an

elusive matter because smooth social relationships are deemed of higher cultural value than mere precision of fact. We must not judge Tiv litigants or witnesses by our standards. They are not liars, as they are sometimes called: their truth has other referents than has European truth.<sup>20</sup>

I consider that Bohannan here raises an important problem in understanding the process of reconciliation — the idea of avoiding the rupture of social relationships — which is one of the dominant moral principles that should guide a good African judge. Among the Barotse, a judge who, in a lawsuit between kin, rushes into cross-examination and judgment on the apparent issue of dispute, without drawing out the parties so as to try to

20. PAUL BOHANNAN, JUSTICE AND JUDGMENT AMONG THE TIV 50 (1957).

reconcile them, is a bad judge, so estimated by the people. In order to reconcile, a judge must be cautious, discreet, and tactful; and a witness may well exercise considerable discretion and tact so as not to exacerbate disturbed relations between the parties. For this, the Barotse would approve him, even while they demand from him the precise truth or facts. I would suggest that Bohannan has been misled in his comparison, because while he has worked with the several contexts in which the Tiv words are used, he has contrasted them with only two English concepts — truth and untruth. But other concepts in English deal with the same phenomena as he finds in Tivland: the white lie, tact, and discretion are but three. I wish to insist on this equivalence as against Bohannan, because he represents a school which stresses mainly the differences between African law and European law, and overlooks similarities. I think that on this point he has gone astray. Moreover, he has compared Tiv acting in courts established by the British with witnesses and litigants in our own courts. I wonder what standards a lawyer sets for those who are acting as witnesses when he attempts to achieve a family settlement, or an arbitrator trying to settle an industrial dispute. Here too I suspect that truth is often advisedly tempered with discretion, if a settlement is to be achieved. There are ways of stating facts so as to exacerbate relationships, and ways of stating facts so that these relationships are smoothed. We have to take lawyers and arbitrators into account as part of our whole system of law, and not insist on studying courts of law alone. And African courts are in some respects like family councils, even though the judges lay down authoritative decisions — which does make them courts.

I have said that I would like to insist on making a comparison of the Tiv concepts with the full range of our own concepts, because only then do we arrive at the heart, the truth, of what is involved in processes of law in Africa. I consider that there we find certain principles of morality which arise from the very fact that men live together, cooperating and conflicting. Their cooperation demands that men be discreet, that society aim at not penalizing those who have done no wrong and attempt to assist those judged to be in the right, that when a dispute is heard truth tempered by discretion is valued. Institutions and inequalities vary from society to society, and the study of these differences is most important. In some societies, people may not even be aware of hardships falling on certain classes of people, though often there is an explicit attempt to reconcile this unequal treatment with another theory which holds all people equal before the law. They may be foreigners, not neighbors, for all peoples say, "love thy neighbor as thyself"; or there may be a myth to justify their position — as among the warlike Masai, who hold blacksmiths in despite because they make the weapons which kill men. History

is full of injustice and cruel afflictions perpetrated by men on men; and African history is no less full of these than is the history of the rest of the world. Yet I think that our studies of African law demonstrate that all men, because they live in society, have some theory of rules of justice which they believe arise from reason itself; and my own evidence on the Barotse — the only evidence we have — suggests that Africans may well have formulated, in embryonic form at least, a theory of natural justice, coming from human-kindness itself.<sup>21</sup>

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21. E. E. Evans-Pritchard, in his study of the Nuer, whose fierceness and quarrelsomeness he has described vividly, also writes (THE NUER 171 [1940]):

The Nuer has a keen sense of personal dignity and rights. The notion of right, *cuong*, is strong. It is recognized that a man ought to obtain redress for certain wrongs. This is not a contradiction of the statement that threat of violence is the main sanction for payment of compensation, but is in accord with it, for a man's kinsmen will only support him if he is right. It is doubtless true that if a man is weak it is unlikely that his being in the right will enable him to obtain satisfaction, but if he is in the right he will have the support of his kin and his opponent will not, and to resort to violence or to meet it the support of one's kin and the approval of one's community are necessary. One may say that if a man has right on his side and, in virtue of that, the support of his kinsmen and they are prepared to use force, he stands a good chance of obtaining what is due to him, so long as the parties to the dispute live near one another. I.e., so long as they are neighbors. Even in waging the vendetta, and in enforcing rights by self-help, a judgment of right and wrong guides alignments and judgments.