

RADCLIFFE-BROWN LECTURE IN SOCIAL ANTHROPOLOGY

AFRICAN TRADITIONAL LAW IN
HISTORICAL PERSPECTIVE

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I AM honoured by the invitation from this Academy and the Association of Social Anthropologists of the Commonwealth to deliver the second Radcliffe-Brown Lecture.¹ I profited greatly from Radcliffe-Brown's writings, with their clear orientation to approaching all cultural problems from social context; and my personal debt to him was increased during a year at Oxford in 1938-9, when he was Professor of Social Anthropology, and during his tenure of two periods as Simon Visiting Professor at Manchester University in 1950 and 1951. Then we often discussed the problems with which I am going to deal this evening.

Radcliffe-Brown reacted strongly against what he called 'the conjectural history',² in the evolutionary and diffusionist theories of his predecessors. He stated clearly that his 'objection to conjectural history is not that it is historical, but that it is conjectural'; and, as he said, his position here 'has often been misunderstood' (*loc. cit.*, p. 50). The accusation against him by younger anthropologists that he was a-historical or even

¹ I am grateful to the Dean, Professor Abraham S. Goldstein, and the Faculty of the Yale School of Law for an invitation to be a Visiting Professor in the School where I wrote this Lecture, and where, as on previous visits, I found the milieu most exciting. Ms. Barbara Arenstein Black, legal historian in the Yale Department of History, kindly helped me with penetrating and pertinent comments on a first draft. My wife Mary Gluckman's aid in developing comparative theoretical points and in generally clarifying my presentation has, as always, been invaluable. I am also grateful to the Nuffield Foundation for a Special Fellowship which set me free for research, and to my own University of Manchester for helping me take up that Fellowship.

² A. R. Radcliffe-Brown, 'The Study of Kinship Systems', Presidential Address to the Royal Anthropological Institute, 1941, reprinted from the *Journal of the Royal Anthropological Institute* (1941), in his collected essays, *Structure and Function in Primitive Society: Essays and Addresses* (London, 1952), pp. 49 f.

anti-historical is therefore false. He objected to historical reconstructions of the development of institutions in so-called primitive societies, of whose actual history we knew nothing. He considered that to understand historical developments we required knowledge of *social* process, changes in patterns of social relationships, outside of which we could not understand how cultural institutions have changed. As he stressed of colonial regimes, 'the population now includes a certain number of Europeans—government officials, missionaries, traders and in some instances settlers . . . There grows up a new political and economic structure in which the Europeans, even though few in numbers, exercise dominating influence . . .'. Hence he criticized Malinowski's view that in Africa there was occurring a process in which two or more cultures were 'interacting'. He argued instead that what was happening 'in a . . . [South African] tribe, for example, can only be described by recognizing that the tribe has been incorporated into a wide political and economic system'.¹ Unfortunately, he published on this theme only some articles in a newspaper (*The Cape Times*), when he was at the University of Cape Town. But his first pupil, Professor I. Schapera, in an article on 'Economic Changes in South African Native Life', which was published in the first volume (1928) of the new journal *Africa* (p. 171), acknowledged the help of a course of lectures given in 1924 by Radcliffe-Brown, on 'The Native Problem from the Economic Point of View'.²

In his reaction against conjectures and speculation about the history of what I shall call the simpler societies (defined thus

¹ A. R. Radcliffe-Brown, 'On Social Structure', Presidential Address to the Royal Anthropological Institute, 1940, reprinted from the *Journal of the Royal Anthropological Institute in Structure and Function in Primitive Society*, op. cit., p. 202. The criticism is of B. Malinowski's 'Introduction' to L. Mair, editor, *Methods of Study of Culture Contact in Africa* (London, 1938), reprinted in Malinowski, *The Dynamics of Culture Change, An Enquiry into Race Relations in Africa*, edited with an introduction by P. M. Kaberry (New Haven, 1946). I expanded on Radcliffe-Brown's approach in a critical essay, 'Malinowski's "Functional" Analysis of Social Change', *Africa*, xvii, 2 (1947), reprinted as part of Rhodes-Livingstone Paper No. 16, *An Analysis of the Sociological Theories of Bronislaw Malinowski* (1948), and in my collected essays, *Order and Rebellion in Tribal Africa* (London, 1963), pp. 207–34.

² Schapera was to go on to help produce a new approach in anthropology to the study of the present-day conditions of the indigenous social systems of South Africa, and some fine historical studies (see M. Gluckman, 'Apartheid and Some South African Anthropologists', in M. Fortes and S. Patterson, editors, *Studies in African Social Anthropology, Presented to Isaac Schapera*, London, due from press 1975).

by the relative simplicity of their tools, their consumables, their methods of transport, and their weapons),¹ Radcliffe-Brown urged and illustrated that anthropologists could make a far greater contribution to developing a 'comparative science of society' by studying the structures of social systems as ordered arrangements of parts within postulated wholes, either by making observations in the here and now, or by working on authentic historical material.² He propagated the importance of this approach to the end of his life. He also argued that our duty, both to the people themselves and to the 'science', was to record the diversity of social forms found among the simpler societies, before they were swallowed by industrialization. These were his intellectual justifications for not writing on historical changes occurring in these societies, though they may have been rationalizations for a temperamental bias. Hence he wrote little, as I have said, on social change in detail, though he used to discourse learnedly on European history.

He also wrote little to fill in his adjuration that studies of social systems would have to be fitted into a morphology of

¹ There are obvious objections to the use of the designation 'primitive', and some anthropologists have been critical of the word 'tribal' which seems accurate to me in the light of European history and language. I stress that my designation 'simpler' applies only to technological equipment, and that it is relative to the equipment of classical Asian, African, American, and European societies, and to later developments in Asia and Europe. For the effect of these four sets of simpler equipment see my *Politics, Law and Ritual in Tribal Society* (Oxford, 1965). I stress too that despite their *relatively* simpler technology, social organization may be very complicated.

² See especially his already cited addresses 'On Social Structure' and on 'The Study of Kinship Systems'. Radcliffe-Brown elaborated this view in lectures at Oxford in 1938, which I had the privilege of attending. His own brief statement is in the 'Introduction' to his collected essays, *Structure and Function in Primitive Society* (Oxford, 1952), p. 9. I set out his view in an essay, 'Analysis of a Social Situation in Modern Zululand', *Bantu Studies*, xiv (1940), and *African Studies*, i (1942) (republished together under the same title, as Rhodes-Livingstone Paper No. 28, 1958), and, with Professor Ely Devons, in 'Introduction' and 'Conclusion' to *Closed Systems and Open Minds* (Chicago, 1964). Professor Sir Raymond Firth emphasized this contribution of Radcliffe-Brown's in his Inaugural Radcliffe-Brown Lecture to the Academy, 'The Sceptical Anthropologist? Social Anthropology and the Marxist View of Society', *The Proceedings of the British Academy* (London, 1972), pp. 177-214. Radcliffe-Brown's essay on 'The Mother's Brother in South Africa', (*South African Journal of Science*, xxi (1924), reprinted in *Structure and Function in Primitive Society*, op. cit., pp. 15-31), was particularly clarifying and influential, as Professor Meyer Fortes has brought out in his *Kinship and the Social Order* (Chicago, 1969), p. 47.

social types.¹ But implicit in his writings, and stated explicitly in lectures I had the privilege of hearing at Oxford in 1938–9, was a view that social systems contained layers of principles of organization and their associated ideas. He believed that certain ideas and institutions would be found to be so widely distributed that they could be taken to arise from the basic conditions of social life. Other elements would be found to be more specific to certain social types, and yet others still more specific to particular societies, possibly to the point of uniqueness. I address myself this evening to the application of this view to African traditional law. I shall first show that certain conceptions and principles of law seem to be shared by all legal systems. I shall then take some examples to show that even common conceptions or institutions, shared by African law and our law, have special attributes in Africa, which were also attributes of law in earlier phases of European history. I shall argue that therefore students of African law have much to learn from jurists and historians working on the history and functioning of European law. Finally, I shall analyse recent work by anthropologists on societies where the feud still exists, to suggest that we in turn have much to give to students of the history and functioning of Western law.

Universal legal principles

Indeed, if one studies law and morality in the simpler societies, and applies some knowledge of Western law, one finds quite startlingly the presence of similar principles of law and ethics and of similar modes of reasoning, often where there are different procedures for dealing with disputes and breaches of rule. But I begin with a process in a situation familiar to us, the judicial process, whose fundamental character is well defined in a graphic Tswana maxim: 'Roosters must crow face to face'. Schapera² explains it thus: 'People cannot be judged in their absence, it is essential that both parties to a dispute should appear together at court . . . [and it is] used also to mean that

¹ *Structure and Function in Primitive Society*, pp. 8, 177, 180, 203–4.

² 'Tswana Legal Maxims', *Africa*, xxxvi (1966), 121–34, esp. 127. Sir William Mansfield Cooper, our former Professor of Industrial Law and Vice-Chancellor at Manchester University, quoted to me, after I cited this maxim in the Lecture, a comment by a rural old-age pensioner on the costs of litigation: 'A winning cock loses some feathers' (quoted with the kind permission of Dr. Pauline Morris from p. 44 of the unpublished report of The Hereford Enquiry by the Legal Advice Research Unit of the Nuffield Foundation).

witnesses must be produced when people are accused of doing wrong.' The Barotse of Zambia also state that a councillor or a judge must not come to a decision after hearing only the complainant:¹ we say, with the ancient Romans, *audi alteram partem*, hear the other side: and we and the Barotse call for the evidence of witnesses. Indeed, once even a proto-judicial process has developed, where outsiders are present in a public arena, there is a similar insistence on hearing both sides and the evidence of witnesses. This is clear, for example, in what Professor P. H. Gulliver has called 'negotiations in conclaves and moots' among the Arusha and the Ndendeuli of Tanzania. I would prefer to call these proto-judicial processes; though bargaining is important in them, and it is the element on which Gulliver lays weight, I consider that they show a clear judicial aspect.²

Again, when the Barotse say 'it is hard [or difficult], but it is the law', they exhort a judge to have the courage to follow the law even when he thinks it is supporting the person who is morally in the wrong. It is equivalent to our 'hard cases make bad law'; and the Barotse defend the principle by the same arguments that we use, viz. that law should be certain, and that to make a concession on one occasion may in practice later penalize other unfortunates.³

I give one illustration of a more complex principle which the Barotse share with early and modern European law. The Barotse say that 'if you are invited to a meal and a fishbone sticks in your throat, you cannot sue your host'.⁴ They thus express—again more graphically—the same rule as the Roman *volenti non fit*

¹ M. Gluckman, *The Judicial Process among the Barotse of Northern Rhodesia (Zambia)* (Manchester, 1955 (enlarged edition, 1967)). See also K. N. Llewellyn and E. A. Hoebel, *The Cheyenne Way: Conflict and Case-law in Primitive Jurisprudence* (Norman, 1941), pp. 223 *et passim*, for a study of less formal adjudicatory processes, and also L. Pospisil, *Anthropology of Law: A Comparative Theory* (New York, 1971), pp. 237–8, for general discussion, and special reference to Kapauku Papuans who did not have developed courts.

² See respectively Gulliver's *Social Control of an African Society: A Study of the Arusha—Agricultural Masai of Northern Tanganyika* (London, 1963), and *Neighbours and Networks: The Idiom of Kinship among the Ndendeuli of Tanzania* (Berkeley, 1971), chapter 5. For comment on the Arusha, and re-analysis of one of their cases, see M. Gluckman, 'Cross-examination and the Substantive Law in African Traditional Courts', *The Juridical Review* (1973), part 3, pp. 235 f.

³ See Gluckman, *The Judicial Process among the Barotse*, op. cit., pp. 178 f.

⁴ See my *Judicial Process among the Barotse*, op. cit., pp. 206, 221.

injuria, that you cannot sue if you voluntarily expose yourself to injury: here in Central Africa is a rule of law that was applied in suits in ancient Rome, and is applied in modern Europe. The Barotse, for your information, exclude under this rule for a suit for damages if a man is struck with a fish-spear when he goes with many others to throw spears for fish buried in the mud of confined waters.¹ The success of each depends on there being many fishermen, and all are at risk. I could give other examples, but these must suffice to show that when we approach the study of very different legal systems, we are likely to find some similar principles.

Other legal maxims seem more specific to particular social types. Thus the Tswana, 'A wrong does not decay, it is meat that decays', states that there is no period of prescription to stop suit for a debt or wrong, whereas in our system there is prescription on debts and on some offences, as well as positive prescription establishing proprietary claims. Thus at another level we find principles which are restricted to certain types of legal systems.

There are also principles which are typical of only certain forms of societies. Then legal maxims are tied to their specific forms of social relationships, with their cultural concomitants,² though even here there may be common elements of principle within very different systems. Thus the Zulu, who have to give cattle as marriage-payment for a bride, say 'cattle beget children': under this rule all the children born to a woman, whosoever may have begotten them, have as their pater, or social father, the person in whose name cattle were given for the woman. This may be an ordinary husband, or a deceased husband, or an already dead man in whose name the cattle were given, or a woman acting as a husband, or, in the case of the wife of a chief or village headman, a group whose members subscribed to the cattle of the marriage-payment to marry the mother of the future heir.³ (Since many social anthropologists

¹ *Judicial Process among the Barotse*, op. cit., photograph facing p. 296.

² For many examples see Schapera, 'Tswana Legal Maxims', op. cit.

³ See M. Gluckman, 'Kinship and Marriage among the Lozi of Northern Rhodesia and the Zulu of Natal' in A. R. Radcliffe-Brown and C. D. Forde, editors, *African Systems of Kinship and Marriage* (London, 1950). For these rules in other South African societies see, e.g., H. Kuper, *An African Aristocracy: Rank among the Swazi of the Protectorate* (London, 1947), and A. M. R. Ramolefe, 'Sesotho Marriage, Guardianship, and the Customary-Law Heir' in M. Gluckman, editor, *Ideas and Procedures in African Customary Law* (London, 1969).

now argue that rules are unimportant, and social life is entirely a process of manipulation to serve self-interest, the internal logic of these rules is most significant.) In some African societies the principle is so rigidly applied that a man who marries a previously unmarried mother can claim her 'illegitimate' children, and a man who marries a divorcee can claim the children of her previous marriage.¹ Yet, in a quite different context, the principle of law is the same as the Roman maxim that *pater est quem nuptiae demonstrant*—'the pater is he who is shown by the marriage ceremony'—a rule that appears in another form in the old Dutch rule that 'een moeder maakt geen bastaardt' ('a woman cannot give evidence to bastardize her child').

Finally, of course, we come to rules and institutions that are peculiar, and seemingly unique, to a single society—though even there, I believe, we can often connect them with the specific social type into which the society falls.

This multiplicity of levels of similarity and difference informs any worthwhile study of African traditional law; and I ask you to bear it in mind throughout this lecture when I discuss similarities and differences. If this approach is correct, it must profit us in seeking to understand the structure of African traditional law, if we use the knowledge which historians, both general and legal, can give us of the development of European law; and one can hope in turn that our work may profit those who are trying to solve mysteries in the history of European law, where, in Sir Paul Vinogradoff's words, 'most important links . . . are missing through the caprice of time [because] . . . whole periods and whole problems are plunged in entire darkness . . .'²

I illustrate the complicated layers of ideas by discussing some conceptions which are common to African societies and to ourselves. But the layers may have to be exposed, one after another, from their covering in a single conception. It is now fashionable for some anthropologists to cry out the differences between the cultural beliefs of various peoples, and to

¹ This kind of rule was strongly stressed by E. E. Evans-Pritchard in his 'Some Aspects of Marriage and the Family among the Nuer', first published in the *Zeitschrift für Vergleichende Rechtswissenschaft* (1938), republished as Rhodes-Livingstone Paper No. 11 (1943). See also his *Kinship and Marriage among the Nuer* (London, 1951). P. P. Howell also deals with these rules in his *A Manual of Nuer Law* (London, 1954). The last rule is cited by J. Peristiany in his *The Social Institutions of the Kipsigis* (London, 1939).

² 'The Teachings of Sir Henry Maine', Inaugural Lecture in the University of Oxford, reprinted from *Law Quarterly Review* (April 1904), in *The Collected Papers of Paul Vinogradoff*, 2 (1928), 173 f.

concentrate on the difficulties of translation from one cultural system to another—and the difficulties are great. A leading protagonist of this view in the field of law has been Professor P. J. Bohannan in his study of *Justice and Judgment among the Tiv* of Central Nigeria (London, 1957).¹ I therefore take my examples from his work, since he tends to insist on uniqueness, and on how markedly Tiv conceptions differ from those of Western law, while it appears to me that the central concepts of 'law' (law itself, right and duty or obligation, guilt and innocence, injury [tort], offence [crime], care and negligence and accident, contract, debt, responsibility and liability, and so forth) are found in most legal systems, even though, as I shall show below, their attributes vary around the central idea. There is, of course, much greater variation in religious ideas and ritual symbols—but even then within certain limits, in my opinion.

The layers of associations which may be contained in a single idea are brought out in Bohannan's account of what the Tiv mean by the phrase *vanger gbilin*, which was translated literally in an earlier book² on the Tiv, as 'empty-chested'. Bohannan comments that this 'is indeed correct, but that the flavour is not conveyed. *Vanger gbilin* means two things:' (says Bohannan) 'a man of no talent or consequence, if he is alive and healthy. Applied to a dead man, it means a person who died for some reason other than his evil propensity. It resembles our word "innocent" in that it has connotations of good, but in other usages the derogatory connotations of lack of experience are dominant' (p. 199, fn. 1). But clearly our own word 'innocent' also has these sets of connotations. It means free of guilt, or without evil propensity (as Tiv put it—I shall shortly explain why they apply this to a dead man). It also means having no talent and lacking experience: as we say, artless, naïve, foolish, simple or being a simpleton, guileless. Etymological argument is treacherous: but it is surely suggestive that this last synonym for

¹ There has been a long debate between Bohannan and myself on the question of how far anthropologists can use the analyses of Western jurisprudence to analyse the law of simpler societies. I note this here because Schapera in a recent Hobhouse Memorial Lecture ('Some Anthropological Concepts of "Crime"', *The British Journal of Sociology*, xxiii, 4 (1972), 383) described the debate as 'rather tiresome'. With all respect, I consider that it is one of the crucial problems in studying law comparatively, a view shared by Pospisil (*Anthropology of Law*, op. cit., pp. 15 f.), since Bohannan and I represent two groups of scholars with radically differing orientations, most important theoretically.

² R. East, *Akiga's Story* (London, 1939).

'innocent'—'guileless', comes through Old French from Anglo-Saxon 'wile', 'wicle', which was connected in the distant past with divination and sorcery. So the Latin-derived 'innocent' was in English made into 'guileless', without sorcery.¹ Among the Tiv it is this association that is contained in the full significance of 'empty-chested'—the phrase is applied to a dead man who, when his chest is opened, has not differently coloured sacs of blood around his heart to show that he gained power illegitimately by killing his kin by witchcraft in order to secure his own advancement. It thus means 'free from witchcraft'. Alternatively, if a sac of blood of single colour is found in the chest of an influential elder, it is evidence that as a leader of the group of agnatic kin he had to take some of their lives for the fertility and prosperity of the group.² Beliefs of this kind are found in societies where people are dependent on their kin and there is conflict between the egalitarianism of the kin and the fact that some do better than others: it is a type of social system in which people largely both co-operate and compete with their own kinsfolk over limited resources and social prestige, and hence in reality make good at the expense of their kinsfolk. Any success in securing influence and power may be at their expense and possibly to gain authority over them.³ This situation is epitomized clearly in a Barotse song:

¹ I found this etymology in a number of dictionaries but not *S.O.E.D.* Nor does W. W. Skeat have it in his *An Etymological Dictionary of the English Language* (Oxford, 1910), which gives *wile*, 'a trick, a sly artifice'. He states that Modern English *wile* is rather a shortened form of Anglo-Saxon *wigl*, 'divination'. He gives too Anglo-Saxon *wiling* (from *wigling*) divination, and states that 'divination was regarded as heathen, and a deceit of the devil'. The verb is *wiglian*, 'to divine, practise augury'. But he mentions that *wiling* occurs in the Kentish Glosses, A.D. 554, and refers to A. S. Napier's *Old English Glosses* (Oxford, 1900). There at p. 159, line 165: 'This wig(e)l occurs in ME. We find it not only in the OE sense (cp. Laz. 1925) *Merlines wigel* (Merlin's magic art), but also in that of "guile, deceit". . . . E. Klein, *A Comprehensive Etymological Dictionary of the English Language* (London, 1967), has in vol. ii, p. 1744: '**wile** n. — ME *wile*, fr. OE *wil*, "trick", fr. ONF *wile* (corresponding to OF *guile*), prob. fr. OE *wigle*, which is rel[ated] to OE *wicca*, "wizard", *wicce*, "witch". See **witch**, "sorceress"; and cp. **guile**, which is doublet of *wile*'. At p. 1748: '*witch* relation to *wigle* divination'.

² See also P. J. and L. Bohannan, 'The Tiv of Central Nigeria', *Ethnographic Survey of Africa*, edited by C. D. Forde, *Western Africa*, part viii, (London, 1953).

³ For a general discussion of this problem, and references, see M. Gluckman, 'Moral Crises: Magical and Secular Solutions' in M. Gluckman, editor, *The Allocation of Responsibility* (Manchester, 1972). See also M. Douglas, editor, *Witchcraft Accusations and Confessions* (London, 1970).

He who kills me, who will it be but my kinsman;
 He who succours me, who will it be but my kinsman.¹

In this type of social system the ethic is marked by the demand that people reach, but do not exceed, the golden mean of achievement.

In short, at one level we have to understand the one aspect of innocence among the Tiv in terms of their beliefs in witchcraft and of the occult securing of success or fertility: they believe that people kill and, in occult feasts, eat their kin. This may have been true of the ancient Anglo-Saxons when their society was more similar in type. That we continue to think of an innocent as a simpleton, may be an historical survival in our language, since clearly, save perhaps in very isolated parts of our society, there is no occult association in the comparison. But it suggests that we do indeed, without the occult association, still regard someone who is completely innocent as rather simple.

I have not traced the specific ambiguous connotations contained in the Tiv term *vanger gbilin*, and the English 'innocent' and 'guileless', in other languages. The compression of these almost contrary ideas into a single term may indeed be rare; but I have used this example because it illustrates more vividly than any other I know, that if one scrutinizes carefully apparently completely disparate moral and legal conceptions, one may find similarity. And the general identification of lack of guilt and simplicity, even if not compressed into a single term, is more widely spread. For there is some kind of general social tendency to think of the guilty who can get away with their ill-doings as somewhat smart and clever. This appears for ourselves in the continuing of the ambiguity in the use of the word 'clever' and its synonyms, 'sharp' and 'adroit', as these are used in social relationships. The ambiguity exists too in Africa. The Barotse distinguish clearly between what they call *butali*, a word which is used for a sharp knife, and which describes also a sharp, wise, clever, and cunning person; and what they call *ngana*, which we can translate both as 'reason' and 'sense'. *Mutu wangana*, a person with *ngana*, is thus a reasonable person, or a sensible person, a person of sense or principle (as Jane Austen immediately introduces Mr. Knightley in *Emma*, and uses the word in the title of her other novel, *Sense and Sensibility*). A person can have *ngana*, sense, but lack *butali*, wisdom and cleverness. A judge

¹ M. Gluckman, *The Judicial Process among the Barotse*, op. cit., p. 154, cited for its general significance in M. Fortes, *Kinship and the Social Order*, op. cit., p. 238, n. 17.

should have both qualities. But wrongdoers have only *butali*, cunning and sharpness, they are without *ngana*, sense or reason, which requires that one observe the law, conform with custom, and respect the rights of one's fellows.¹

I have shown in a detailed study of the Barotse judicial process that the conception of a reasonable person is central to their law.² It is used by judges in a number of different ways. It is used in cross-examination to test the truth of accounts of action given in evidence. In substantive decision it is used to assess whether a litigant has discharged his duties adequately in running his private economy in terms of his wealth or poverty; for he has to meet from his limited resources the multiple demands of his kin, and of his wife or wives and kin, and of his political superiors.³ It is also used to bring evidence to bear on the probable motives which inspire action. For us, this conception is somewhat abstract in, at least, our legal texts; but perhaps it is less abstract in juries' decisions.⁴ In societies based largely on kinship and affinal relationships it is highly specific and concrete for each social position and role. The reasonable person forms for each social position the nucleus of rights and duties which are the core of the law, since it sets both the minimum demands on which the law insists and the maximum of permissible deviation.⁵ It differs from the conception of an upright person (*mutu yalukile*: straight or upright, as of a stick planted in the ground—they have the same metaphor as we). The upright man does more than conform with the minimum demands of the law: he conforms with the higher demands of ethics and morality; by these, a person should be generous, and not insist on what he or she is entitled to by law, but yield to the moral claims of others.

Most importantly, the conception of a reasonable person of sense is highly flexible. New modes of action and new standards, resulting from British protection and then Zambian rule and the

¹ Gluckman, *The Judicial Process among the Barotse*, op. cit., *passim*.

² Ibid.

³ Ibid., 2nd enlarged edn., pp. 410–11, and succeeding discussion.

⁴ See E. Devons, 'Serving as a Juryman in Britain', first published in *The Modern Law Review* (September 1965), pp. 561–70; republished in E. Devons, *Papers on Planning and Economic Management*, edited by A. Cairncross (Manchester, 1970), pp. 251–62.

⁵ Cf. B. N. Cardozo, in *Paradoxes of Legal Science* (1928), pp. 73–4: 'On the other hand, if one acts at one's peril when one falls below the common standard, one may have protection at the other extreme; one may not need to go beyond it' (cited from *Selected Writings of Benjamin Nathan Cardozo* (New York, 1947), p. 298).

entry of Barotse into a modern economy, were brought under the rubric of persisting Barotse laws despite substantial changes in Barotse modes of life. When judges were confronted with a new reaction to some new contingency resulting from the changed situation, e.g. in how a husband should nowadays look after his wife, they consider whether the change is justified by the standards of current living, and they may conclude: *Kwautwahala*, it is hearable, understandable, reasonable.¹ The conception thus enables the Barotse to adapt laws which developed in quite different circumstances to new conditions. Though the law is adaptable, it remains certain, in the sense that it is stated in the same rules: as, a husband must look after his wife properly as by: (1) clothing her adequately, but no longer in a skin dress to last almost her life, but in clothes brought in by European traders; (2) giving her enough utensils and household goods—again, not a few clay and wooden utensils, but a reasonable amount of the goods now available from European traders; (3) sleeping with her a reasonable number of nights (set now by his necessity to earn money from Europeans, which may involve his going to work at a distance. By statute, the allowed period of absence was set first at seven years, then reduced to four, and then further reduced to two years).

Here then is a complex set of legal and moral conceptions which are clearly akin to conceptions which are important in our own legal and moral philosophies. They arise, I believe (as did Radcliffe-Brown), from the fundamental conditions of social life, in which there is always the problem of relating legal and moral rules which it is believed should be certain, to the variety of actual situations. The importance of the conceptions is enhanced when the pattern of life begins to change, and judges have continually 'to make law'. I have elsewhere demonstrated in detail that the same conceptions exist in the moral and legal sets of ideas of other African peoples, even where this has been denied to some extent by the anthropologists who studied them.²

¹ See 'The Case of the Prudish Wife' in Gluckman, *The Judicial Process among the Barotse*, op. cit., pp. 145 f. In that book I concentrated as a social anthropologist on the term for reasonable incumbent of a social position: *mutu wangana*. I should also have given this verbal form, *kwautwahala*, for describing the reasonableness of action.

² Gluckman, 'Reasonableness and Responsibility in the Law of Segmentary Societies' in H. Kuper and L. Kuper, editors, *African Law: Adaptation and Development* (Berkeley, 1965), pp. 120–48, and 'Cross-examination and the Substantive Law in African Traditional Courts', *The Juridical Review* (1973), part 3, pp. 221–53.

In his general book on *Anthropology of Law: A Comparative Theory* (p. 244), Professor Pospisil agrees that the set exists among the varied peoples he has studied: Papuan Kapauku, certain Eskimo, and Austrian Tyrolese peasants. But of course neither of us would assert that the ideas of reasonableness, of uprightness or goodness, of innocence and guilt, and the procedures for establishing them, are always identical. Some indeed are. But often they vary with their specific social context, connected in turn with types of technology, economy, and social organization; and it would be gravely misleading to think that there are not these variations. It would also, I judge, be misleading to proceed as if there were not a considerable overlap in their significance, and in the manner in which they are manipulated in specific social situations. In short, we have to recognize that there are in very varied societies fundamental similarities within the processes of maintaining some conformity with morality and law; and perhaps also we have to recognize that there are fundamental similarities in the manner in which members of those varied societies approach the problems involved in the relationships between people, and the standards demanded by the social code of values—however inconsistent be the set of values, and however much values may vary from society to society.

I illustrate this again by a comparison with the Tiv. Bohannan states¹ that Tiv ideas of 'truth' vary from those used in Western judicial systems. In Western courts, he says, the '“truth”' means the verifiable "facts" of what took place . . . Western jurists have a single standard of "truth"—verifiability . . .'. This truth is demanded of all who appear in court. But the Tiv do not set these same standards. The Tiv concentrate, he alleges, more on the effect that a statement may have on social relationships. They use one word to state that one tells the 'truth' when one's statements, even if inaccurate, do not disturb social relationships; and that is the correct, the *right*, thing to do, with some of the ambiguity with which we use 'right' in English. But Bohannan starts his exposition with a case which illustrates the opposite. One wife of a polygamist was called on to give evidence about the alleged adultery of her fellow-wife, and tried to avoid doing so. Finally the court of Tiv judges (established by the British) compelled her to take an oath on a fetish and tell the 'truth' (as we would say, and described by a different Tiv word from the word for discreet truth) about what she had seen: viz., that her fellow-wife had gone into a hut

¹ *Justice and Judgment among the Tiv*, pp. 47-51.

with a man other than their husband and shut the door. We ourselves make the same distinction that the Tiv do, though we do so in terms of two kinds of lies rather than two kinds of truth: we speak of 'white lies' which aim to avoid disturbing social relationships, and of 'black lies' which aim to serve some selfish end. Implicit in this distinction is the Tiv kind of 'truth' (our 'white lies') which tempers with discretion the facts of what happened, and a truth which by inappropriate frankness and accuracy disturbs social relationships. We speak of two kinds of lies in social intercourse outside of courts; but we sympathize with those persons who are closely involved with a fellow against whom they have to give evidence in court, and therefore temporize. As the Tiv wife was excused because her oath on a fetish compelled her to speak the truth about the alleged adultery, so we consider people are excused since they give evidence under oath or affirmation, founding a possible charge of perjury. Among the Tiv—as doubtless with some under our oath—it was believed that telling 'white lies', the one kind of truth, in these circumstances, would bring occult, supernatural retribution. Despite this obvious similarity it is important to remember that our courts are highly differentiated and specialized institutions, whose judges may not be intimately involved with litigants (if they are, they recuse themselves), while Tiv courts, only shortly before established by the British, were presided over by judges who were often related to, and who mixed in daily life with, many of those who came before them.

Again, I have not seen a report on another African language which has two words to describe these kinds of 'truth', so skilfully analysed by Bohannan. In the societies I know, Barotse and Zulu and our own, the conceptions involved are expressed by longer phrases—but they exist. They must surely do so, because the situations requiring accurate narration and discretion so as to preserve social relationships are clearly common to all human societies.

Conceptions of reason and sense, of guilt and innocence, of truth and lies, were used by judges in traditional African courts and in courts created by the British in Africa, in many respects in the same way as they are used in the judicial process in Anglo-American courts. I showed in my detailed study of Barotse courts how judges used the flexibility of the multivocal terms 'reasonable' and 'the reasonable person' to adjust their rules to varied and changing situations, and I then proceeded to examine how similarities and differences appeared through

a series of related problems, all set by Western jurists: how ethics and personal prejudices feed into and control the development of the law; how judges selected from the varied rules available to them and then used the multiple and elastic characteristics of the terms in legal and ethical rules to enable them to find the right decision, as they saw it, for each case. To handle this problem, one had to work out a theory about the nature of the terms that make up the rules; and among Barotse it proved necessary to arrange legal concepts and rules in hierarchies.¹ The problems are the same as those handled by jurists and legal philosophers in studying our law.² This approach enabled me to apply to the cases I recorded among Barotse the four methods of filling 'gaps in the law' which were detected in Anglo-American courts by Mr. Justice Cardozo in his *The Nature of the Judicial Process* (New Haven, 1921): viz. the method of logical progression by rule of analogy; the method of evolution along the line of historical development; the method of tradition based on the customs of the community; the method of sociology which works along the lines of justice, social welfare, good morals, and public policy. There may be more methods, but I took Cardozo's analysis as my model, and I found that it illuminated the manner in which Barotse judges were coping with new problems.³ But there is perhaps a sense in which the method of analogy is used differently, or at least much more often, in Africa—perhaps it should be called the method of metaphor or simile. Cardozo's example of analogy, in his *The Growth of the Law* (New Haven, 1924), is drawn from counsel's arguments in a case where a boy, bathing in public waters, was electrocuted by electric wires which fell on him when he was about to dive from a springboard attached to the land of the

¹ I used the term 'multiple' to refer to legal concepts (such as law, right, duty, property, etc.) which have numerous referents, and the term 'elastic' to refer to opposed pairs of concepts, forming an elastic stretch along which action could be assessed (e.g. guilt and innocence, negligence and due care). I further suggested that legal concepts were 'absorbent' in that they could absorb the evidence of varied situations, and 'permeable' in that they were permeated with changing values and standards: see my *The Judicial Process among the Barotse*, chapter 6. I further suggested that concepts could be arranged in hierarchies with the most important at the top, and that judges manipulated the higher-level concepts to cover their assessment of where justice lay on their judgment of actions covered by lower-level concepts.

² e.g. on the hierarchies of concepts and rules see R. Dworkin, 'Is Law a System of Rules?' 35 *University of Chicago Law Review* (1967), 14; reprinted in R. Summers, editor, *Essays in Legal Philosophy* (Oxford, 1970), pp. 25–60.

³ *The Judicial Process among the Barotse*, chapter 5.

company owning the electrified railway. Counsel for the boy's mother 'found the analogy that suited her in the position of travellers on a highway. The boy was a bather in navigable waters; his rights were not lessened because his feet were on the board. The owner found the analogy to its liking in the position of a trespasser on land. The springboard, though it projected into the water, was, none the less, a fixture, and as a fixture it was constructively a part of the land to which it was annexed. The boy was thus a trespasser upon land in private ownership; the only duty of the owner was to refrain from wanton and malicious injury; if these elements were lacking, the death must go without requital. Now, the truth is that, as a mere bit of dialectics, these analogies would bring a judge to an impasse. No process of merely logical deduction could determine the choice between them. Neither analogy is precise, though each is apposite. There had arisen a new situation which could not force itself without mutilation into any of the existing moulds. When we find a situation of this kind, the choice that will approve itself to this judge or that will be determined largely by his conception of the end of the law, the function of legal liability; and this question of ends and functions is a question of philosophy.' Cardozo was part of the bench that heard this case on appeal by the mother, and he gave the opinion of the majority of four justices who found for the appellant, with two justices dissenting, but not recording their judgments. Cardozo in his judgment used other analogies (boys walking past private property on the highway, one resting on the ground, the other on a bough a few inches above the ground; boys jumping from a boat; an aeroplane proceeding above the river) to justify the opinion of himself and his colleagues.¹ Thus, while accepting the dictates of their feeling where justice lies,² Anglo-American judges justify or rationalize their arguments by drawing not only on analogical legal situations, but also by drawing through metaphor and simile on everyday life in the world around them. This latter method is much more frequently used in Africa, perhaps because like all rural people they can draw on animal and bird life, as well as human life, as I have shown with legal maxims.

¹ Op. cit., pp. 100-1, cited from *Selected Writings of Benjamin Cardozo* (New York, 1947), p. 229. The case was *Hynes v. N.Y.C.R. Co.*, 231 N.Y. pp. 229-36. B. N. Cardozo, *The Paradoxes of Legal Science* (New York, 1928), cited from *ibid.*, p. 263, discusses the analogies by which the principles of an employer's liability for the acts of his servants were developed in English law.

² *Ibid.*, pp. 61-2 in the original, pp. 286-7 in *Selected Writings*, *ibid.*

The best example of analogical reasoning from one legal situation to another I recorded among the Barotse was in a case I called 'The Case of the Barren Widow'. In Barotseland, when a man married a woman who was believed to be a virgin, he was required to pay to her guardian two beasts, one for the marriage, and one for her untouched virginal fertility. (If he married a woman who had been married before, or who was considered too grown to be still a virgin, he paid only the first beast.) Should they divorce without the bride conceiving, the second beast had to be returned to the husband (hence it is paid for virginal fertility). A miscarried conception was enough to bar the claim. In one such marriage the husband died before his wife conceived, and his kin sued for the return of 'the beast of the child' (as it was called). They argued by analogy that dissolution of marriage by death is the same as dissolution of marriage by divorce. The Barotse supreme court upheld this argument, though they disapproved strongly of the suit; but the king, who has power to endorse or reject verdicts, rejected this judgment on the ground that it was indecent for people to sue after a death, when they should be mourning together, even though in the past when either spouse died, the survivor had to give a beast to the deceased's kin as mourning payment,¹ i.e. he held the suit to be barred by public policy and good morals.

But the Barotse judges also in the interstices of judgments, drew continually on social life and the natural world for analogies to emphasize their arguments, by a method which I did add to Cardozo's four methods, and which I called 'moral exemplification'.² Perhaps this is part of the same cultural milieu in which folk-tales are important, and animals and birds figure graphically in proverbs and maxims, as I have cited above. They constantly compare, as stated below, wrongdoers with animals. But the clearest example of this kind of method, which involved the use of simile and metaphor, used a combination of reference to physiological processes and social institutions. I recorded it in Zululand.

In the past, Zulu used to kill one of, or both, twins. When this

¹ Discussed in full in my *Judicial Process among the Barotse*, p. 174 f. The case and my discussion also illustrate how Barotse judges distinguish between rights which are enforceable in the courts even when regarded as immoral, as covered by their maxim (cited above) 'it is hard, but it is the law' (on this see also 'The Case of the Ungenerous Husband', *ibid.*, p. 172).

² *Ibid.*, pp. 93, 173-4, 185, 239, 256-7.

was forbidden by the British and South African Governments, in the early 1900s, the question arose, which of two male twins was the older, and hence entitled to be the main heir. Mankhulmane Ndwandwe, chief councillor of the lineal heir to the great Zulu kings,¹ held that the second-born twin was the elder, on the grounds that he entered his mother's womb first, by the analogy that if one sees two men coming out of a house, one knows that the one who went in first must come out second. The analogy involved the following steps:

1. The Zulu call the womb a house, as each wife is called a house (*indlu*);
2. There is a narrow entrance to the womb, as there is a narrow entrance to the Zulu beehive-shaped house, so that a person has to crawl in on his or her knees;
3. The right-hand side of the house is where males sit, while females sit on the left-hand side; as males should not normally go to the female side, men must either squeeze past one another to get to the back, or sit in the order in which they entered;
4. The ancestral spirits are at the back of the house, and hence seniors sit at the back, and juniors at the entrance, where they can also get out easily and quickly if enemies attack;
5. Therefore the first-born twin out of the womb must be junior, and the second-born must be senior, because he must have entered first and sat further back.

To complete this analogy, I give the Ganda solution by analogy of the same problem, as reported to me by Dr. Martin Southwold; a Ganda judge compared the twins to people walking on a path, when the senior goes in front, so the judge held that the first-born twin was the elder. The difference in the analogies of these judges may have arisen from differences in their systems of holding property. Among the Zulu, each wife is the nucleus of property allocated to her by her husband and this property is inheritable only by her own sons as against her

¹ The British Government broke the Zulu kingdom into three parts after the Anglo-Zulu War of 1879–80; and broke it up further after Dinuzulu's fighting against a rival, supported by the British, in 1887–8. After his release from imprisonment, he ruled a small county, but he (and later his heirs) were still recognized by most Zulu as 'their king' (see my *Analysis of a Social Situation in Modern Zululand*, Rhodes-Livingstone Paper No. 28 (1958), republished from *Bantu Studies*, xiv (1940)).

husband's sons by other wives.¹ Therefore, though the Zulu system is strongly patrilineal, property passes to sons through their own mothers, and interest focuses on the womb and the property of the house of each wife. Among the Ganda, property passes patrilineally without this focus on the separateness of each wife's womb and house.

I have thus far tried to bring out some common elements in certain fundamental conceptions in traditional African law and our own: these may have to be disentangled, but we find them in ideas of innocence and guilt, of truth, and of reason and sense. Reason and sense are seen by African judges and people as being the characteristics which distinguish humankind from animals, and they frequently, like ourselves, compare wrongdoers with animals.² I have shown that to these common elements are added certain specific characteristics which vary because the socio-economic contexts are different, and I have suggested that here we can find similarities with earlier phases of English law and morality. I have argued too, and demonstrated at length elsewhere,³ as have Llewellyn and Hoebel,⁴ and Pospisil,⁵ among others, that there are great similarities, despite certain important differences, in methods of adjudication in African tribunals and ours, into modern times. This is true even where the tribunals are in effect public arenas in which the disputing parties meet in order to negotiate a settlement. Gulliver has contended in his study of such negotiations among the Arusha of Tanzania⁶ that the bargaining power of the parties determines the outcome and that little attention is paid to rules or ideas of reasonableness. But he cites cases in which a man's supporters in effect compel him to admit he is in the wrong, and only if he does so will they support him to the extent of trying to secure that he pays lighter compensation: and surely to admit guilt is to concede that there are rules which have been broken. And I have re-analysed in detail one of his cases to bring out that the moots which hear the cases of the disputants allow both parties to speak freely,

¹ See M. Gluckman, 'Kinship and Marriage among the Lozi of Northern Rhodesia and the Zulu of Natal', and H. Kuper, *An African Aristocracy: Rank among the Swazi*, op. cit.

² See, e.g., A. L. Epstein, 'Injury and Liability in African Customary Law in Zambia' in M. Gluckman, editor, *Ideas and Procedures in African Customary Law*, op. cit.

³ M. Gluckman, *The Judicial Process among the Barotse*, op. cit.

⁴ *The Cheyenne Way*, op. cit.

⁵ *Anthropology of Law*, op. cit.

⁶ *Social Control in an African Society*, op. cit.

without interruptions, and to call witnesses, before they adjust claims by selecting from the variety of rules which comprise Arusha law, and by applying these rules by standards of reasonableness, under which they also assess the actions and needs of the parties in terms of reasonable standards set by Arusha life,¹ in which most people presumably conform with the law.²

More specific legal relationships

I have stated above that we find in African law most of the conceptions that are central in our own law—law itself, right and duty or obligation, guilt and innocence, injury [tort], offence [crime], care and negligence and accident, contract, debt, responsibility and liability, etc. But, therefore, though some of the legal relationships which African tribunals examine are widely distributed in many societies, they have additionally in Africa more particular attributes that are characteristic of certain types of socio-economic context. For example, the African law of contract, and the law of contract in other simple societies, resembles markedly contract in earlier phases of our law, up to the end of the sixteenth century³—presumably

¹ 'Cross-examination and the Substantive Law in African Traditional Courts', op. cit., p. 235 f. I acknowledge greatly the stimulus of an M.A. thesis written under my supervision by Ms. K. Lange (now Stone) at Manchester in 1967: she re-analysed a number of Gulliver's cases reported from the Arusha.

² A number of anthropologists and at least one lawyer, working on the law of the simpler societies, have contended that 'disputes' alone are the key to law. I have argued that, as Malinowski emphasized in his *Crime and Custom in Savage Society* (London, 1926), the law observed is obviously of crucial importance: it forms a source for judgments on disputes, aside from the fact that it keeps social life going (see my 'Limitations of the Case-method in the Study of Tribal Law' in the special issue of *Law and Society Review* to honour E. A. Hoebel (Summer 1973), pp. 611-41).

³ The general principles of African contract and contract in other simpler societies were discussed by me in *The Ideas in Barotse Jurisprudence* (New Haven, 1965), chapter 6, and further data are presented in the 'Preface' to the 2nd edition of this book (Manchester, 1973). There is also a general discussion in A. N. Allott, A. L. Epstein, and M. Gluckman, 'Introduction' to *Ideas and Procedures in African Customary Law*, op. cit., pp. 71 f. See Y. P. Ghai, 'Customary Contracts and Transactions in Kenya', in that book, pp. 333-46. There is a brilliant and pithy summary of the history of English law of contract in B. N. Cardozo, *Selected Writings*, op. cit., from his *Growth of the Law*, pp. 202 f., 262 f. It is noteworthy that Cardozo saw no scope for development to meet new conditions in early English law of contract, since this was the conclusion reached at the Seminar on *Ideas and Procedures in*

because all these systems lacked a highly developed commerce.¹

Sir Henry Maine said in his *Ancient Law* (London, 1861, p. 326), 'Neither Ancient Law nor any source of evidence discloses to us society entirely destitute of the conception of Contract'.² But he also pointed out that ancient contracts differed markedly from contracts in modern Britain: and the characteristics which he ascribed to early Roman contract are found in Africa, as they were largely in early English contract. Maine in effect stated that for the early Romans a contract was a reciprocal conveyance of property.³ The passing of some property was necessary to establish an obligation at law. This is true of Africa; and it is equally true of African law, and the law of all simpler societies I know of, that no contract was recognized which was executory—involving a promise to perform in the future—on either side. African courts neither ordered specific performance of an unfulfilled contract, nor did they levy consequential or indirect damages on its breach.⁴ If a Barotse fisherman paid a netmaker to make a net for him, and no net was made, he could not sue to have it made, nor could he sue for his loss of a season's fishing: he could only sue

African Customary Law, op. cit. See also M. Gluckman, 'Problems and Research arising from the Study of Traditional Systems of Law' in A. Tunc, editor, *Legal Aspects of Economic Development* (Paris, 1966), pp. 59–74. Also on history of English law of contract, and the crucial development at the end of the sixteenth century, see S. F. C. Milsom, *Historical Foundations of the Common Law* (London, 1969), pp. 271 f.

¹ Most exchanges of goods and services in the simpler societies took and take place in established familial, kinship, and affinal relationships, and many in such relationships as 'best friendships', blood-brotherhood, or ceremonial trading partnerships: the significance of this situation is discussed below (pp. 323–4) when feuding is considered.

² I cite from the 1909 edition, which has Sir Frederick Pollock's notes. I stress that Maine was aware that the conception of contract, and of treaties, existed in all societies on which reports were available (and this is confirmed by later reports), because he has been sadly misinterpreted on this point. He did imply that at a stage of society nowhere known to us, because it no longer existed, there may have been no contracts.

³ His actual words were: '... a Contract was long regarded as an *incomplete Conveyance*. . .', *Ancient Law*, op. cit., p. 334.

⁴ Schapera has argued that he has found cases of Tswana courts ordering specific performance in 'Contract in Tswana Case Law', *Journal of African Law*, ix, 3 (1965), 142–53, and in 'Contract in Tswana Case Law' in M. Gluckman, editor, *Ideas and Procedures in African Customary Law*, op. cit., pp. 318–32; but the cases are not clear in the opinion of A. N. Allott, A. L. Epstein, and M. Gluckman, 'Introduction' to the same book, p. 73.

for the return of his money.¹ Dr. J. O. Ibik also found that in Malawi a disappointed purchaser has his money refunded if the seller sells elsewhere, and a farmworker who neglects his work is not sued for damages caused by loss of crops but has to return money and other perquisites given him.² Thus not even what Professor S. F. C. Milsom said of early English law, viz. that 'Misefeasance, the ill performance of an undertaking was remediable: non-feasance was not', was always true of African law.³

Mr. Justice Ollennu of Ghana and Mr. Justice Coker of Nigeria⁴ have stressed that an African contract was based on the passing of property, and the creation of a debt,⁵ and not on agreement, even though a contract was vitiated by mistake, and by fraud and misrepresentation. But I found among the Barotse and elsewhere in the literature,⁶ that once a contract is set up, it becomes like the quasi-kinship relationships typical of the society: the stress is on obligation and the contract is of the utmost good faith. A very extensive warranty is given by each party, and risk remains for an extended period with the seller—a fact that is characteristic of simple societies, even if modern legal systems solve this problem in varied ways. The dominant maxim is *caveat vendor*, let the seller take care.⁷ Correspondingly, there was a doctrine of fair price. Modern societies also differ in solving the problem whether property can be pursued to an

¹ See case reported in M. Gluckman, *The Ideas in Barotse Jurisprudence*, op. cit., pp. 178 f.

² 'The Customary Law of Wrongs and Injuries in Malawi' in M. Gluckman, editor, *Ideas and Procedures in African Customary Law*, op. cit., p. 308.

³ Op. cit., p. 275.

⁴ Cited in Allott *et al.*, pp. 71 f.

⁵ Bohannan, *Justice and Judgment among the Tiv*, op. cit., pp. 103 f., argues that Tiv law is a law of debt and not of contract and tort, seemingly without knowing that English law might once have been so described, and other systems of early and archaic law. I discuss the general problem in *The Ideas in Barotse Jurisprudence*, op. cit., pp. 245–50, and also in the Preface to the 2nd edn. thereof (1973) where I add further clarifying data. I have re-analysed the case on which Bohannan bases the statement that Tiv do not think in terms of contract, and I have shown that they do, in 'Cross-examination and the Substantive Law in African Traditional Courts', op. cit., pp. 244 f.

⁶ *The Ideas in Barotse Jurisprudence*, op. cit., chapter 6.

⁷ W. H. Hamilton, 'The Ancient Maxim Caveat Emptor', *Yale Law Journal*, 40 (8), (1931), 1133–87, is a brilliant exposition of the shift in English law from *caveat vendor* to *caveat emptor*, with the suggestion that cases at that time were beginning to show a shift back, in view of the inability of purchasers to test the complex products of modern industry.

innocent third party: in the law of simple societies, as far as I know, it can always be so pursued. Finally, a principal was not responsible for the acts of his agent. Clearly, therefore, it is unlikely that a modern law of contract can develop out of traditional African law. For that law allowed no action solely on the basis of considered agreement, i.e. there was no general theory of contract, based on offer and agreement, with consensus, but vitiated by fraud, misrepresentation, contrariety to public policy and good morals, etc. (This is not surprising, since not even late Roman law had developed such a theory, and it only began to emerge in England in the seventeenth century.) There were examples in Africa of similar individual contracts to those we know or knew—sale, loan, hire, employment, pledge, pawning, partnership, agistment, etc.¹ It seems therefore that we have to seek for similar factors to explain why the law of contract in traditional African law, and in early European law, were so much the same. Presumably these factors were the relatively small amount of commerce and employment and the simple nature of the goods involved in that commerce.

I take as a second example of the great similarity between African traditional law and English law earlier in our history, the *law* of treason (not necessarily the practice of dealing with alleged treason).² It is probable that in almost all societies there is some idea of a person being a traitor to his own group, and attacking its security and unity, perhaps even going over to the enemy. To begin with, making war on the monarch in England was only partially made into a high treason in 1352—and then not enforced, for example, against the Earl of Northumberland in 1403, after the Battle of Shrewsbury (though I ought to note that that part of the law of treason is also not being applied in some present troubles of the United Kingdom). And it was only in the reign of Queen Anne that our present law of treason took form, and it became treason to hinder the succession to the Crown of the person entitled thereto under the Act of Settlement, or to maintain in writing the invalidity of the line of succession to the Crown established by the Act of Settlement. Unfortunately few of my anthropological colleagues have been interested in the law of treason, and hence they have neglected to discuss this problem for African law. I have been

¹ See discussion in my 'Cross-examination and the Substantive Law in African Traditional Courts', *op. cit.*, pp. 244 f.

² The following discussion is summarized from my *The Ideas in Barotse Jurisprudence*, *op. cit.*, pp. 32 f., where detailed references are given.

working on it for many years, in the light of a theory¹ that in underdeveloped economies the various sections of a larger political unit are united not by economic interdependence, but are held together either by forceful power or by sets of customary allegiance.² The simple mode of production leads to a dispersal of population, and hence a ruler has to confide power to subordinates in local areas. The inhabitants of these local areas may, since there are only simple weapons which every man can own, become private armies for local leaders, and help them in essays at power. I have not time here to repeat the complexity of the whole argument, but it seems to result in a situation in which armed civil strife is endemic; but this strife takes the form of attempts at rebellion to seize power within the existing system rather than at revolutions to alter the structure of power. Princes may be put forward to lead, or may themselves lead, insurrections which are fought in the name of the true heir against an alleged usurper, or to dispose of an alleged tyrant, in terms of the values attached to the kingship. Members of the royal family in thus leading revolts actually validate their family's title to the kingship. I found among the two African peoples I studied, the Barotse and the Zulu, that it was not an offence in law thus to fight behind one's prince or chief against the king: it was indeed a duty to support the man to whom one owed immediate allegiance. A man thus following his prince into a rebellious battle might be killed in the fighting, but should not be prosecuted after peace was re-established. The law of these African states on treason was thus in strict parallel with the law of England, and of France, in the early Middle Ages. Maitland, Bloch, Jolliffe, and other historians have stressed that it was 'virtuous' for a knight to fight for his liege lord against the king, and that, especially in England, no

¹ The theory, and references to the work of other anthropologists, is presented in my 'Autobiographical Introduction' to my *Order and Rebellion in Tribal Society* (London, 1963), and essays therein. It is further developed in chapter 4 of my *Politics, Law and Ritual in Tribal Society*, op. cit.

² The theory is referred to approvingly by P. Laslett, *The World We Have Lost* (London, 1965), p. 171: 'Professor Gluckman's examination of African communities shows how a fight over the dynastic succession is a permanent feature of political life. Far from weakening or destroying the whole, conflict actually confirms its solidarity. This fits some of the features of political life in England aptly enough, from Tudor, to Stuart, to Hanoverian and even to Victorian times. The segmented characteristics of the political community of our country in pre-industrial times, its division into a network of small county communities which were also conflict arenas, will concern us in the next chapter.'

magnate attempted to usurp the throne from the royal family. Only in Edward III's Statute of Treasons of 1352, among other matters covered, was it made a treason to levy war against the king. It thus seemed that one could attempt to ascribe similarities in the law on treason in such different places and times to similar political conditions. I was much emboldened when I was about to deliver a set of Storrs Lectures at the Yale Law School in 1963, and I put my view of the similarity to Professor Charles L. Black, Jr., one of the School's most learned and perceptive constitutional lawyers. He immediately turned to his bookshelf, took out Dowling's *Cases on Constitutional Law* (Brooklyn, 1954, fifth edition), and said to me: 'I am sure there is something about that in the first version of Magna Carta, the one that King John signed.' And there indeed it was, in Chapter 61:¹ King John empowered the Barons to elect twenty-five of their number who were further empowered, if the King or any of his Justiciary, or other bailiffs, should injure anyone in anything, to petition that the excess be remedied without delay. Failing such remedy, the King empowered a committee of the Barons to distress and harass him by taking of his castles, lands and possessions, 'saving harmless' his own person, and the persons of his Queen and children. The King further gave leave to all in the land to swear to join the Barons, and ultimately agreed he would 'compel them by [his] . . . command to swear' to the Barons. That is, in this first version the King agreed to compel his own subjects to revolt against him should he or his officers commit an unremedied injustice. Professor Black pointed out to me that this particular Chapter of Magna Carta was not repeated in later versions: King John died in the following year and was succeeded by the nine-year-old King Henry III.

Black's quick response to this apparently oft-forgotten Chapter in Magna Carta made me feel I could pursue the parallel, and even suggest that the Statute of Treasons of 1352 was connected with the ravages of the Black Death when a decline in numbers of artisans, labourers, and serfs changed their relationships with their superiors. I have set out this argument in full elsewhere, and since I did so Professor J. G. Bellamy has written a detailed analysis of charges brought under the Statute,² which

¹ I cite chapter 61 of Magna Carta in full from Dowling, *op. cit.*, in *The Ideas of Barotse Jurisprudence*, *op. cit.*, pp. 54 f.

² *The Law of Treason in England in the Later Middle Ages* (Cambridge, 1970). I discuss his findings in the 'Preface' to the 2nd edn. of *The Ideas in Barotse Jurisprudence*, *op. cit.*

brings in question part of my suggestion. But it does seem to me still that this kind of example shows how studies of African traditional law, and of the history of development of law in Europe, and perhaps Asia, can mutually fructify one another.

There are yet other examples of this similarity, within differences, in the central conceptions of African traditional law and our own law, particularly in its earlier phases. I shall be discussing below how ideas of responsibility and liability, and even criminality, are common, though they vary in the ranges of social relationships within which they are applied.¹ Professor J. Finkelstein has brought out, as the best example I know of this kind of variation, how the case of an ox which gored a person was treated in Biblical law and in the law of ancient Mesopotamia: in the Bible it was an insurrection against a being higher in the hierarchy established by God, and was therefore a blasphemy punished by stoning of the ox and avoidance of its carcase; in Mesopotamia, with a different cosmology, it was a straightforward tort.²

The biggest differences lay in the law of persons and the law of things, those branches of the law of which Maine said of our early law (and which anthropologists have shown in African law) to be inextricably mixed together so that they could scarcely be distinguished.³

There are of course unique conceptions and institutions in

¹ Problems of collective, as against individual, responsibility and liability are discussed below, to show that they coexist. The central cores of the ideas have many elements in common, as we shall see, though they also have varying attributes; but they have to be seen in contexts of social relationships. I consider that African conceptions are more similar to those current in early English law (see my *The Ideas in Barotse Jurisprudence*, op. cit., chapter 7, and 'Magical Crises: Magical and Secular Solutions', op. cit., in both of which I cite authorities on English law, including H. L. A. Hart, *Punishment and Responsibility* (Oxford, 1968)). My views are commented on, and to some extent criticized, by S. F. Moore, 'Legal Liability and Evolutionary Interpretation: Some Aspects of Strict Liability, Self-help and Collective Responsibility' in M. Gluckman, editor, *The Allocation of Responsibility* (Manchester, 1972). Since I have discussed above the implications of single words having diverse, indeed to some extent contrary, significance, I note here that French has one word, 'la responsabilité', to cover the meanings we can distinguish by specializing the words 'responsibility' and 'liability' (see my *The Ideas in Barotse Jurisprudence*, loc. cit., chapter 7). The influence on jurisprudential reasoning of having single or dual terms for similar concepts is of course well known (e.g. J. Salmond, *Jurisprudence* (London, 1920), 6th edn., pp. 9 f., chapter 2).

² *Temple University Law Quarterly*, vol. 46 (1973), pp. 169-290.

³ *Ancient Law*, op. cit., pp. 271 f.

each legal system, but I have not time to deal with those which occur in various African tribes. I have given enough examples, I hope, to make clear that it profits students of African traditional law to see that law in the historical perspective of the development of European law. Anthropological research in Africa and elsewhere can correspondingly illuminate understanding of earlier, and perhaps even present-day, Western law. Nowhere is this more applicable than in such matters as comprehending how the feud, and oaths and ordeals, worked in earlier periods of our history. A few anthropologists have been able to study feuding situations, or at least, where colonial administrations have stopped feuding, to get at the mechanisms which operated in such situations. Historians, like Professor J. M. Wallace-Hadrill, have already turned for help to these studies.¹ They have particularly found illumination in how social relationships may operate to move to settlement of disputes.

The feud and collective liability

The influence of these social relationships is perhaps well known; but in recent years anthropologists have produced further researches and insight into these problems. I conclude by examining their analyses. First, for those who do not know the earlier studies, I have to summarize how anthropologists worked out in the field the details of the networks of relationships between men and women which linked together members of independent political units where there was not a superordinate sovereign authority invested with power to command the settling of quarrels. As part of their obligations, members of these independent units were under an obligation to avenge the death of a fellow member killed by an outsider. It was found that in several ways there were established cross-linkages between the members of each of these units. Most importantly, these cross-linkages in many situations broke into the ostensibly solid loyalty of each vengeance-group.² One of the principal

¹ 'The Bloodfeud of the Franks', *Bulletin of the John Rylands Library*, 41 (2) (March 1959), 459-87. See also R. V. Colman, 'Reason and Unreason in Early Medieval Law', *Journal of Interdisciplinary History*, iv (4) (Spring 1974), 571-91, among others.

² I examined this situation as reported on by many of my colleagues in *Custom and Conflict in Africa* (Oxford, 1955), chapter 1, and *Politics, Law and Ritual in Tribal Society*, op. cit., chapter 3. In the first I re-analysed E. E. Evans-Pritchard's *The Nuer* (Oxford, 1940), and in the second E. Colson, *The Plateau Tonga of Northern Rhodesia: Social and Religious Studies* (Manchester, 1962). In the latter I also cited other studies, from Africa and elsewhere, and much later research has confirmed the general argument.

mechanisms achieving this result was the rule of exogamy, which commanded that spouses have to marry into some different descent-group; and there might also be restrictions on marrying the kin of the other parent, or even the kin of the wife of brother or cousin. Ties of marriage which became links to other sets of kin could be spread very widely. Men and women, as individuals, thus had relationships with relatives-in-law, and therefore some relationships of descent, that differed from the corresponding relationships of fellow-members of their vengeance-group. They had special interests in settling disputes with those others. One of these interests was to avoid killing close relatives or in-laws, on whom they were obliged to take vengeance under the rules of collective duty. These links were not merely sentimental: in a patrilineal society, one relied for help in many situations on one's own maternal kin, or one's wife's kin, and so forth. For example, if one were struck by famine due to drought or an invasion of locusts, social insurance was with relatives and in-laws residing elsewhere,¹ not with differentiated insuring institutions, such as we have. Or if one quarrelled with one's vengeance-kin, one could go to others. Such moves implied for the vengeance-group that a member might be living among 'enemies' and thus be vulnerable. Often the power of cursing, or other forms of ritual power, were vested in senior kin outside the vengeance-group.² Thus besides involving material interests, these cross-links were supported by belief in occult powers. The wider the bans of exogamy, the greater the number of cross-links, and hence the greater the probability that disputes would be settled.

Among the ancient Anglo-Saxons, the 'peace in the feud' emerged in a different way. The obligation to take revenge for a killing, or to accept compensation, fell not on a group, but on all cognatic kin reaching out from an individual through all lines of descent. Such a party could hardly assemble to take vengeance; and in an area where people had intermarried, individuals might be members both of the sib who had lost a fellow, and had to take revenge, and of the sib liable to have

¹ In African societies with chiefs and kings, these were expected to assist the needy or those struck by famine. I am speaking here of societies without these leaders, though even where there were chiefs much social insurance was with relatives and friends.

² For the power of cursing of the mother's brother in a patrilineal society, see E. E. Evans-Pritchard, *The Nuer*, op. cit., *passim*, and for the power of the spirits of the father's side in a matrilineal society, E. Colson, *The Plateau Tonga of Northern Rhodesia*, op. cit.

revenge taken on it.¹ On the other hand, where, as among some Bedouin, the group bearing collective liability intermarried within itself, these cross-linkages and cross-memberships did not appear so markedly.²

Secondly, or in other circumstances, cross-linkages cutting into the loyalty of vengeance-units were established by ceremonial trade and partnerships. In discussing the law of contract, I have dealt with transactions between previously unrelated persons. But in simple societies most exchanges of goods and services took place between relatives and relatives-in-law, or in relationships of a permanent kind deliberately established. In Africa, persons entered into compacts of 'best friendship', or some other kind of similar association for this purpose, and they might even become blood-brothers by ritual, which made them into quasi-kinsmen. Elsewhere in the world, there were links of special trading-partnership, or ceremonial trade.³ The latter is best known from Malinowski's classic account in the *Argonauts of the Western Pacific* (London, 1922), where he analysed the *kula* trade, in which shell armbands and necklaces passed in opposite directions round a ring of islands off the south-eastern tip of New Guinea. These articles had only their own intrinsic value, and no utilitarian use. They were exchanged between set partners who had to strive to outdo each other in generosity and not to secure a good bargain (an ethos which marked the other relationships I have listed). Partners did not trade with each other in utilitarian articles; but they traded in these articles with other persons during expeditions to obtain the *kula* jewellery itself.⁴ The trade in this jewellery, since travellers engaged in it should not be attacked, established a veritable

¹ See article on 'The Bloodfeud among the Franks' by J. M. Wallace-Hadrill, *op. cit.* In my *Politics, Law and Ritual in Tribal Society*, *op. cit.*, pp. 111 f., I cited Marc Bloch, and in *Custom and Conflict in Africa*, *op. cit.*, pp. 21-2, cite societies similarly organized to the Anglo-Saxons to suggest that very eminent authorities misinterpreted how often the feud could be waged. See also R. V. Colson, 'Reason and Unreason in Early Medieval Law', *op. cit.*

² See E. L. Peters, 'Some Structural Aspects of the Feud among the Camel-herding Bedouin of Cyrenaica', *Africa*, xxxvii, 3 (1967), 261-82, and E. Marx, *Bedouin of the Negev* (Manchester, 1967).

³ The situation, and the effects on internal politics within groups, as reported by several anthropologists are analysed in my *Politics, Law and Ritual in Tribal Society*, *op. cit.*, chapters 2 and 3.

⁴ This element is only touched on at the end of an otherwise vivid Japanese film about a *kula* expedition from the Trobriand Islands to other islands (seen on BBC television, 1974).

'peace of the market' (like the crosses in English market-squares in other times). Moreover, persons in each society whose prominence in the ceremonial trade was the basis of their internal power had a vested interest in maintaining and establishing peace with other groups so that the trade could continue. Hence they used their influence over their fellows to have disputes settled.

Thirdly, when groups lived close together, they required some peace with their neighbours to go about their ordinary business, and there was therefore pressure to settle quarrels unless relationships were very strained or one group wished to acquire land from the other. This need for neighbourly peace might also be represented in a set of ritual land-shrines, or ritual personages connected with the land on which people made their living.¹

The obligation to take vengeance defined permanent states of potentially hostile relations between feuding groups. But where there were differentiated ties cross-linking members of the groups, these cross-links made this obligation into a matter of internal politics within each group. If there had been a homicide, someone who was linked to the victim's kin had an interest in persuading his fellows to pay compensation; and someone in the injured group might have an interest in urging it to accept compensation. This is how much of self-help, also in matters other than homicide, worked. If a man in one group owed a beast to an outsider and refused to pay it, the creditor consulted his kin and then, if they approved of his claim, he did not take a beast from his debtor, but from one of his debtor's fellows—possibly one with whom his group had some tie. He sent a message why he had done so. If the man whose beast had been seized accepted that there had been a debt, he and his kin would not attempt to recover the abstracted beast. There are numerous and widespread examples which show that both in feuding situations and in situations where groups begin to negotiate or accept conciliation, a man required the support of his kin or age-mates or others, and they would often not support him if he were in the wrong. Instead, they might force him to admit his wrongdoing or debt before they strove to lighten the

¹ For an example of these land shrines, see E. Colson, *The Plateau Tonga of N. Rhodesia*, op. cit., and for a society showing typical emphasis on the 'sanctity' of the earth in West Africa, M. Fortes, *The Dynamics of Clanship among the Tallensi* (London, 1945).

compensation he was required to pay.¹ They might have to continue dealings with the others, and want to be known as honourable people who fulfilled their obligations.

The example of the working of self-help, and the importance of divisions within independent vengeance-groups, has recently been pushed further to bring out what may sensibly be called 'law' in these situations. Is the unlimited vendetta law? Or the limited vendetta? It depends on the perspective. To answer these questions I leave Africa and turn to the Eskimo among whom, according to Professor E. A. Hoebel, the doyen of American juristic anthropologists, we find the very bare bones of what can be called law. Among, for example, the Nunamiut Eskimo, as reported by Pospisil,² agnatic groups are vengeance-groups; after killing of one member, the other agnates are expected to kill the murderer or one of his agnatic kin, and there is a further reply, and a reply to that, plus preventive killings. I agree with Pospisil against Hoebel that this unlimited vendetta is not sensibly called law; it is rather war between vengeance-groups. However, the duty to avenge the killing of one's kinsman is part of the 'law' internal to one's own vengeance-group, and failure to discharge this duty may be met by intrinsic and other sanctions. Hence, argues Pospisil, we have to think of several systems of law existing at several levels in several social groups³—he considers, only in corporate groups. For most of the Nunamiut year, when they break up into smaller units, each man exercises rule and applies law within his family, and a head of an extended family does so within its limits. The tribe comes together only for the annual caribou hunt; and its headman then exercises rule and applies law for that hunting season only, and only for the hunt. There are records⁴ from

¹ This is made clear in both classic studies on African situations of this kind—E. E. Evans-Pritchard, *The Nuer*, op. cit., and M. Fortes, *The Dynamics of Clanship among the Tallensi*, op. cit. It is marked in P. H. Gulliver, *Social Control in an African Society*, op. cit., particularly since he tends to cry down the significance of this factor (see esp. cases 8, p. 193; 11, p. 199; 20, p. 235; and generally pp. 136, 180, 190, 220, 241).

² 'Law and Social Structure among the Nunamiut Eskimo' in W. H. Goodenough, *Explorations in Cultural Anthropology: Essays in Honor of George Peter Murdock* (New York, 1964), pp. 395–431, and his discussion of the problem in his general book, *Anthropology of Law*, op. cit., pp. 3 f.

³ This view was first put forward in his *Kapauku Papuans and Their Law* (New Haven, 1958), and is developed in his *Anthropology of Law*, op. cit., chapter 4.

⁴ Considered by E. A. Hoebel, in *The Law of Primitive Man* (Cambridge, Mass., 1954), chapter 5, and in general chapters.

other Eskimo tribes of headmen of bands stopping the unlimited vendetta by consulting all the community, including the kin of an inveterate recidivist killer, and getting their approval for executing him. (I note here that Radcliffe-Brown listed as one universal crime, being 'a bad lot'.) It may be—we lack background information—that a headman thus executes the inveterate killer because the raging of the unlimited vendetta makes it impossible for people to come together to handle big seasonal hunts or trading enterprises. On this sort of occasion there is law within the tribe, a law which also applies to the bad lot who commits repeated breaches of taboos which are believed to hazard the tribe's chance of prospering. The persistent ritual wrongdoer may be exiled.

That is, to understand law in societies without chiefly government and without what I call forensic institutions, such as courts with authoritative judges, anthropologists like Professor Pospisil, and also Professor Michael G. Smith, have argued for a more flexible, shifting point of view, in which they adopt the perspective of different groups within what appears to be a single 'tribe'. We have even to look for different fields of law at different seasons. This argument has been developed further by Professor S. F. Moore in a fine essay on 'Legal Liability and Evolutionary Interpretation: Some Aspects of Strict Liability, Self-Help and Collective Responsibility' (op. cit.). She starts by criticizing earlier attacks on a problem which has become standard: did 'public' or 'private' law develop first? (p. 58). Moore contends that if one is going to talk of these forms of law, one must first define what one means by 'a public'. All societies have some form of social norms and these are applicable to sets of social relationships, i.e. they exist in, and are enforceable within, a framework of social groups, categories, networks, and the like. A public must therefore be defined in this context. Here she states that Pospisil and Smith, starting from different points, independently more or less agree that one has to see political structure as existing in a set of durable, internally organized social units: families, lineages, villages, bands, and the like. They are, in Smith's definition, 'enduring, presumably perpetual groups with determined boundaries and membership, having an internal organization and a unitary set of external relations, an exclusive body of common affairs, and autonomy and procedures adequate to regulate them'.¹ Some

¹ 'A Structural Approach to Comparative Politics', in D. Easton, editor, *Varieties of Political Theory* (Englewood Cliffs, N.J., 1966). Moore suggests that

societies consist of sets of identical corporations meeting these requirements; in other societies, memberships of corporations may overlap. These corporations provide for Pospisil and Smith the framework of law.

Moore argues that the key point about differences between legal systems, or in other frameworks of analysis what determines the development of law, is the degree to which 'private' disputes between individuals have potential political (or structural) importance. That is, every dispute, we may say, has both a private and a public aspect; this has been found in trying to use these criteria to distinguish crime from tort (as indeed Radcliffe-Brown found when he tried to define public and private delicts.¹ Therefore, as C. S. Kenny concluded his attempt to define 'a crime' in English law, it can only be done in terms of procedure).² In a system with forensic institutions (i.e. with courts in an hierarchical structure), a private dispute becomes political when it comes to court, since it involves the power of the state; and the power of the state in this public arena brings in interests other than those of the immediate disputants.³ But armed struggles are not normally produced. In my own opinion a negotiation between parties,⁴ even in lawyers' offices, cannot therefore in our society sensibly be called a process at law, though it may be carried out within a background of law support by political bodies—the courts law could also be found within non-corporate groups, a conclusion with which I agree in terms of the whole argument of multiple 'levels' or 'fields' of laws as within the Anglo-Saxon sibs (see above).

¹ See his 'Social Sanctions' and 'Primitive Law', in *Structure and Function in Primitive Society*, op. cit., pp. 205 f., esp. 212 f., reprinted from *Encyclopaedia of the Social Sciences* (New York, 1933), vols. ix and xiii respectively.

² *Outlines of Criminal Law* (Cambridge, 1929), chapter 1.

³ S. F. Moore criticized ('Politics, Procedures and Norms in Changing Chagga Law', *Africa*, xl (1969), 321 f.) an argument by P. H. Gulliver in his *Social Control in an African Society*, op. cit., that one could distinguish situations such as negotiations between parties among the Arusha, which he called 'political', from judicial procedures as among the Barotse. Moore pointed out that judicial action is clearly political. See also Gulliver's 'Introduction: Case Studies of Law in Non-Western Societies' in L. Nader, editor, *Law in Culture and Society* (Chicago, 1969). Gulliver has amended his position, without referring explicitly to Moore's essay, in 'Negotiations as a Mode of Dispute Settlement', *Law and Society Review* (to honour E. A. Hoebel), 7 (1973), 667 f.

⁴ See, e.g., S. Macaulay, 'Non-contractual Relations in Business: A Preliminary Study', *American Sociological Review*, xxviii, 55 f., republished in L. Freedman and S. Macaulay, editors, *Law and the Behavioral Sciences* (Indianapolis, 1963), pp. 145–64.

and the police. No more is a negotiation between two parties in Africa, who do not come to some public arena where some new procedural control, representing wider interests than theirs, is involved.¹

Moore points out that corporate groups in a society without authoritative government have a choice when a private dispute between two of their members cannot be settled by themselves through mutual adjustment of claims. One of the groups to which they belong may seize the opportunity to force a confrontation, or, perhaps by putting pressure on their erring member, try to re-establish peace, i.e. either group may expand the dispute into a show of force and even a battle, or the wrongdoing group may, alternatively, agree to pay compensation, possibly by compromise, and the victims to accept payment. Conciliation is the other face of confrontation. The decision between these courses of action is a political decision. What decision each group takes will depend on the history of relations between the two groups, and their present state of relationships. Their relative strengths may be significant: the stronger may wish to seize land or water rights from the weaker.² The decision may depend on how far they have to foregather, or to co-operate, in pursuing their general aims. The decision will be affected by the extent to which their members, and which members, are related to one another by marriage and other kinship ties, or by trading partnerships, and so forth. The central problem to investigate is, therefore, in what circumstances do such groups mobilize? Characteristic of this situation is the possibility that a dispute over rights between two individuals may become the occasion for political conciliation or confrontation. Legal wrongs may trigger off hostilities in what is a long-term struggle, based on conflicts over resources (Moore, pp. 76-7).

Self-help, referred to earlier, has to be seen in these terms. It is exercised not as robbery, but in the name of 'right' under an accepted code of rules, and it presumes long-term pressures for conciliation and adjustment between the groups involved. The creditor who seizes the goods from a kinsman of his debtor must secure the backing of his fellows; if the debtor's people

¹ It is important to consider the variations in public arenas between mediation, conciliation, arbitration, and adjudication—defined in Allott *et al.*, op. cit., p. 31.

² The point is made in many studies, notably in E. L. Peters, 'Structural Aspects of the Feud among the Camel-owning Bedouin of Cyrenaica', op. cit. Numerous references on this, and other points, are given in Moore's essay.

consider the debtor is in the wrong, then (for whatever reasons) they restrict their support for him, and his debt now becomes a debt under the law of his group, and subject to the 'intrinsic penalties' which his group can inflict on him. And there is a very heavy moral obligation on him to repay his fellow whose goods have been seized in lieu of his own.¹ Here a debt is shifted from an area of social relationships where there is no law, into an area of social relationships where there is law.

One has to see similarly the collective liability of a group: viz. that any of its members may be killed in retaliation or it has to combine to pay compensation. The vendetta is likely to be unlimited where there are no social mechanisms to bring the disputing parties (the kin of the victim and the kin of the killer) to a public arena, where a public negotiator or mediator can stress that they should strive for conciliation, i.e. that the killers should offer to pay compensation, and the victim's kin agree to accept compensation rather than to insist on intransigent retaliation. These public arenas are constituted in different ways in various feuding societies: among the Nuer there is a ritual mediator, who is connected in occult manner with the earth on which men make their living and their lives, and who can curse the intransigent by the Earth so that it is believed that they cannot prosper upon it. In other societies, neutral elders can compel a gathering. Or a neutral linked to both may propose mediation. Even the death of someone who is caught in the links between the groups, can by divination be ascribed to wrath of the spirits and bring about a meeting. Once there is such a public arena new forces begin to operate. What the Eskimo lack is such an arena. (I am speaking here of the morphology of law where central government does not exist. In a quite other context, the unlimited vendetta can occur in parts of a large-scale centrally governed society where the writ of the government is not accepted—or lacks power to be enforced—e.g. in the criminal 'underworld' and in provinces such as Sardinia.)

Collective liability in this way defines the relationships between political units. But liability is only collective as one unit looks at another; and the wronged unit can inflict retaliatory injury indiscriminately on members of the wrongdoing unit. Internally there is differentiation within each

¹ See, e.g., M. Fortes, *The Dynamics of Clanship among the Tallensi*, op. cit., pp. 245 f.; J. O. Ibik, 'The Customary Law of Wrongs and Injuries in Malawi', op. cit., pp. 321 f.

group: the actual wrongdoer may have to provide the bulk of compensation himself, and often his nearer relatives contribute more than distantly related members of the unit. And he may be required to repay these contributions. The recidivist wrongdoer may involve the unit in too many fights or payments so that they waste their manpower and their capital, which they need for other purposes. He is, I repeat, what Radcliffe-Brown called 'a bad lot'; and they can hand him over to those he wronged, to be killed or made a slave, or they can outlaw him by expulsion. Expulsion, Moore points out, is a corollary of collective liability, and always accompanies collective liability.¹ The wrongdoer who is covered from sight in external relations, may, in internal relations within the law of the group, be held liable—and even if payment is made on his behalf, he may incur a heavy debt to his own fellows. In internal law he may be judged to be a criminal, and killed or expelled.

It is with this kind of approach that we can understand the reaction of members of a group or set of people to a malefactor in their own ranks, or to a man who defaults in discharging his duties; and I cannot see why this type of analysis should be confined, as Pospisil and Smith argue it should be confined, to corporate groups. Associations of men or women for some specific purpose have their own rules, often standardized from the wider socio-cultural system, which define their expectations about one another; and they have both rewarding and punishing sanctions for and against those who meet or do not meet, respectively, those expectations. These sanctions may be intrinsic to the relationships involved, since by withdrawing from the relationships a party can punish his or her *alter*, or the offender may be expelled, or his or her expectations in turn not be met. Or sanctions may be more direct. Most of our information is about such matters as the inability of members of a co-liaible² corporate group to secure damages from an offending fellow-member, since to some extent they hold property in common with him. But as Peters has shown for the camel-herding Bedouin of Cyrenaica, the situation is more complicated, and sanctions on such offenders vary greatly.³

What is clear in societies of this kind, without superordinate

¹ See also Moore's 'Descent and Legal Position' in L. Nader, editor, *Law in Culture and Society*, op. cit., p. 394.

² 'Co-liaible' is a useful term suggested by E. Marx in his *Bedouin of the Negev*, op. cit., to get around the length of 'group bearing collective liability'.

³ 'Structural Aspects of the Feud . . .', op. cit.

political authorities, is that there is a social range of offences, in the sense that an act which is an offence within one field of social relationships is not an offence in another range of social relationships. And hence the ability of persons to secure redress depends on what E. E. Evans-Pritchard, in his path-breaking classic study of *The Nuer*, called the 'structural distance' between them. The same point was made subsequently by Professor S. F. Nadel in his study of four groups among *The Nuba* (London, 1947), and it has been made by many other anthropologists since then. Given this varying range of fields of law, men are expected to use different weapons and to vary their actions according to the relationships in which they stand. Under Nuer 'rules of war' men of the same village fight one another with clubs, not spears. Men of different villages fight one another with the spear. There should be no raiding for cattle within what Evans-Pritchard calls a tribe, and it is recognized that a man ought to pay cattle as compensation for killing a fellow-tribesman, though Evans-Pritchard says this is rarely done. Nuer tribes raid one another for cattle, but not for women and children who must not be killed; nor should granaries be destroyed. When Nuer raid foreign peoples, women and children and even men can be captured, women and children may be killed, and granaries may be destroyed.¹

Here, I consider, we have a series of ideas which open for us a better understanding of the morphology of law in societies with different kinds of polity—hopefully, it provides a morphology for discussing the development of effective sanctions, including courts of law. Fewer and fewer disputes are likely to, or are allowed to, provoke armed confrontation. As collective and individual responsibility and liability are seen to operate at different social levels (Moore, p. 93), so we have what Pospisil called 'a multiplicity of systems of law' at multiple 'legal levels', or, I would phrase it, a series of fields of law, some at varied levels. In a highly developed authoritative polity, the state tries to control, ultimately, what happens in the law of all its constituent groups with their own by-laws, and in relationships between them. In societies without this apparatus corporate groups may meet without this superordinate possibility of control, but still have their own internal law. The key factor

¹ There is a similar range of 'rules of war' among the head-hunting Ifugao of the Philippines: see R. F. Barton, *Ifugao Law*, University of California Publications in American Archaeology and Ethnology (1919, republished Berkeley, 1969).

in this situation, obviously enough, is whether mechanisms exist to bring the parties into a public arena where interests other than their own narrow and selfish interests may control the processes of negotiation, or conciliation, or mediation, or championing, or testing by oaths and ordeals. In all these processes, except possibly those of oath and ordeal, in the public arena argument and reasonable compromise in terms of a code of rules can be introduced and become relevant.¹ As Moore has phrased it in another essay, in a public arena a dispute between two individuals undergoes a 'transformation', and then other parties express more general interests and societal law, and can try to insist on cognizance being taken of them.²

This 'transformation' is present also in a state with forensic institutions: persons who are theoretically neutral and impartial come into action, and they bring in wider societal interests and rules of law. It is for this reason, I repeat, that I do not consider negotiations in lawyers' offices to be processes at law, in any way parallel to trials in court. But also present in some of these 'transformations' may be the element of confrontation, implying some kind of political struggle. In African states, most of such confrontations took place in councils debating administrative matters or legislation, or broke out in armed struggles, as reported above, when I discussed the law of treason. But occasionally there also came before courts (possibly consisting of the same persons who were administrators or legislators, but here acting in a judicial capacity), cases which had a powerful political component. Such were disputed successions. Again, though the first two Zulu kings were tyrants, acting often capriciously and whimsically, the Zulu theory of the constitution still held that the king was bound by the law. The clearest case I recorded in this context occurred during the reign of King Mpande (1840-72). When the Zulu finally established their rule over the region, they defeated the Ndwandwe, many of whom fled to seek refuge among the Swazi. One who

¹ See, e.g., J. G. Peristiany, 'Pokot Sanctions and Structure', *Africa* (1) (1954), 17-25, for a case in which neutral elders tried to get the kin of a man, killed by a member of another clan 'accidentally' in a fight against a common enemy raiding at night, to agree to reduced compensation, and failed to do so. I have suggested that a long-term history of dissatisfaction might have accounted for this 'unreasonable' intransigence (in *The Ideas of Barotse Jurisprudence*, op. cit., chapter 7, where I discuss other similar cases).

² See essay on 'Ritual Concord and Fraternal Strife, Kilimanjaro 1968-69' in S. Moore and B. Myerhoff, *Communal Ideologies and the Management of Disputes*, Ithaca, N.Y., in press.

remained with the Zulu was allowed to keep many cattle, because he became a favourite of the king. Later his nephew, the true heir in his family, returned to make allegiance to Mpande, and he sued for his family cattle. The uncle protested to the king that if he lost the cattle, he would be 'killed', and the king replied he had no choice, since he was bound by the law. He then planned to send a troop of men to kill the nephew and all his part of the family so that the uncle would become the true heir. The plan was overheard by the king's son, Cetshwayo, who warned the nephew to flee into hiding, while he remonstrated with the king, his father. The king denied all knowledge of the plot. But the nephew escaped being killed, and settled down with his cattle.

The Barotse material I have on this point is richer. Barotse insisted that the king was bound by the law: he could not, for example, just take land from a man, he had to beg for it. The king was required not to take any action on his own: all action should be done by his stewards or attendants or councillors. There was a rule that no-one could plead in his defence that he was acting on the king's orders: to do so was itself an offence, 'spoiling the king's name'. Hence the steward or other man working for the king could always be sued for exceeding his powers, and was liable to be discharged by the court. One Barotse king, who was strongly against the drinking of beer, once broke some pots of beer he found in his capital. The court (council) had him off his throne, seated on the bare ground, and threatened to discharge him, and to give him a policeman's uniform, since he was acting like a policeman, and not like a king. He was saved by the intervention of the British Government, but warned by the council that if he repeated his offence, he would be made into a policeman. I recorded other cases of such confrontations between court and councillors or stewards of the king when commoners sued one of the latter for using force, an action regarded as incompatible with the role of councillor and stewards, who were also judges.¹

The analyses I have reported this evening are more complex and dynamic than were Radcliffe-Brown's writings which fell specifically in the field of law: his were mainly classificatory of sanctions and procedures, since they were written for an encyclopaedia.² But these fruitful ideas developed from his contention

¹ See my *The Ideas in Barotse Jurisprudence*, op. cit., chapter 2, and pp. 178 f., and *The Judicial Process among the Barotse*, op. cit., pp. 83-91.

² 'Primitive Law' and 'Social Sanctions', op. cit.

that the first task of social science is to examine the interdependence of institutions within a working social system: to do this, we have to set them comparatively in the kind of frame of morphological types he envisaged. Only thereafter, he argued, would we be able to investigate how one institutional structure had developed out of another. I consider that though his view of the structures of social systems has become, so to speak, part of the very air that social anthropologists breathe, our better analyses of African law owe as much to jurisprudence and legal historians. Personally I am doubly conscious of this debt, because on top of my association with lawyers at Manchester, I have had on several occasions the privilege of working at the Yale Law School. There I profited greatly from discussion with both faculty and students—indeed, I wrote this lecture there. Notably I found that they always approached the problems of law by analysing how it operated in the very complex and heterogeneous social system of the United States. I have recently drawn much on a series of lectures in memoriam Chief Justice White, delivered at Louisiana State University in 1968 by Professor Charles L. Black, Jr., of Yale, on *Structure and Relationship in Constitutional Law* (Baton Rouge, 1969).¹ They impressed lawyers; and they opened new vistas for me as a social anthropologist, ignorant in the law, but able to see how they ran along the lines certain of my colleagues and I were attempting to march on.

The courts of the U.S.A., and above all the Supreme Court, are one of the several components of government, as that organizes the total polity. As in the Barotse state, the several components of government—king, various councils, various sub-councils of the main council, the councils acting as courts, and so forth—may come into conflict and face one another in confrontations, so this may happen in the United States. Where feuding groups form the polity of a social region, they confront one another in political struggle, and such struggles may be precipitated by disputes between individuals. I have cited such examples from the Barotse. Confrontations occur too in the United States, not only in elections, lobbying of interest-groups, strikes, and so forth, but also within courts, and between courts and the other components of government. Professor Black stresses—as against

¹ See also his 'The Supreme Court, 1966 Term—Foreword: "State Action", Equal Protection and California's Proposition 13', *Harvard Law Review*, 81 (1) (1967), 69–109.

a common misunderstanding—that the full Congress is supreme in the U.S.A., and in effect delegates power to the Supreme Court and other courts. But ‘judges are in perpetual confrontation with the authority they are institutionally bound to obey’ (p. 68). Black—with full acknowledgement to others—discusses the kinds of confrontation in which the Supreme Court is involved: ‘Whose action is the Court annulling? Whom is the Court second-guessing? Who, before the Court acts, has made the critical determination which the Court is asked to reverse?’ It is impossible for me to summarize the learned pithiness with which Black answers these questions. For my purposes, it is sufficient to say that confrontations with the full Congress (as constituted by the House of Representatives, the Senate, and the President) have been few. There were a dozen such confrontations in the 30 years between 1937 and 1967 (p. 75). The Court (or subordinate courts) mostly confront sections of Congress (or its Committees and their sub-committees); the constituent States, when they have allegedly legislated in conflict with the Constitution or federal law; higher and lower officers of the U.S. Government; but most often minor officials or police of the constituent States of the Union or their municipalities. In these confrontations, the Court ‘represents the whole nation, and therefore the whole nation’s interest in seeing . . . guarantees prevail, in their spirit and in their entirety. The Court is in all practical effect the delegate of Congress to do this work’ (p. 75). For example, Black argues that it requires an ‘active judgment by the legislative branch [Congress], rather than a police chief, on how much of our personal liberty and security we must surrender in the interests of a practicable administration of the criminal law’ (p. 90). That is, the court, as part of government, confronts usually some police or other official who, the appellant alleges, has trespassed beyond the law of the land.

Some of these confrontations were clearly political struggles between groups, sections, and categories of the nation. This has appeared most notably in the series of judicial decisions since the Brown case in 1954 opened the way for a series of desegregating decisions by the court. It has appeared in decisions on the delimitation of voting districts. And so forth. Here we have cases in which a suit, apparently between two individuals, or between individual(s) and official(s), is fought in a public forensic arena, rather than in the ballot box, and in legislature. This is possible because, Black stresses, there is an overriding body of

rules of laws, particularly of the Constitution, in terms of which this political forensic struggle can take place.

Black underpins this approach by suggesting that American lawyers should develop a new method of argument in these key constitutional cases, '... the method of inference from structure, status, and relationships [which] is relatively little attended to in ... [American] legal culture' (p. 93), when compared with the scanning of precedents and textual exegesis. He contends that the method of approach from structure, status, and relationships could yield more sense and more satisfactory results in some cases. I cannot summarize his complicated argument with its wealth of illustration: a couple of key examples must suffice. Black argued that certain basic privileges and immunities could be shown to accrue from the very conception of the United States as a single nation of free and equal citizens: on this basis there could always have been guaranteed to all citizens (irrespective of certain Amendments to the Constitution) such rights as freedom of political speech and freedom to travel in the country, as consequences of nationhood. There was no need to stretch such conceptions as federal rights and rights of citizens under such doctrines as freedom of interstate commerce. It would also have been clearer, and morally unquestionable, if a similar set of rights and immunities for people, irrespective of race, creed, etc., had been derived from such citizenship, rather than from enforcement of immunities under interstate commerce.¹

Of course, outside the realm of jurisprudential logic, it is changes in basic economic and social relationships which presumably produce changes in judicial interpretation of constitutional rules; and courts may therefore have to rely on applying technical doctrines, instead of on this kind of interpretation of structure and relationships. As Black says, opinions on the court's decision in 'political' cases will vary with the commentators' own political opinions; and to insist on '... the robust clarity, the received authority of right law, could make no greater symbolic contribution to the theory of our race relations than by using this concept of citizenship as its chief building material'. It would also be a useful corrective to the concept of 'brotherhood' which is bound to invite disappoint-

¹ Moore, as a lawyer trained in America, is well aware of this (see her essay on 'Legal Liability ...', *op. cit.*, p. 78, and her 'Law and Social Change: The Semi-Autonomous Social Field as an Appropriate Subject of Study', *Law and Society Review*, vii (Summer 1973), in honour of E. A. Hoebel).

ment: 'brotherly love may stand somewhere in the shadow of time, waiting. There is not very much that the law can do about that. But fellow-citizenship is for now, for the day before yesterday' (p. 60). Black admits proudly that it is his political views, tempered by his recognition of the limits of the law, that leads him to argue for the new method.

This searching analysis brings together problems of political struggle and confrontations in forensic arenas, where the suits appear to be between individuals, with basic doctrines in the structure of social relationships. Such analyses perhaps emerge more clearly in studying the processes at law within the United States than they do in Britain. But we too have cases where political struggles are fought out in the courts. Some years after the war, a British court rejected an attempt to charge the leaders of striking dockers with treason under a statute of Richard III, as incompatible with an industrial civilization. The Industrial Relations Court was an attempt to move industrial disputes into a forensic arena, and it became a major focus of a deep political struggle. These considerations raise in general form similar problems. The nature of the legal process may be different, as are some of the issues that are fought over. But clearly the analytic approach is the same. We have to see societies not as entirely different in kind, but as varying in the kinds of disputes between individuals, related in some specific way, which provoke major confrontations in the wider polity, and in the extent to which battles *vi et armis*, and what kinds of battles, are likely in each society. We have also to analyse types of public arenas in which battles can be fought without recourse to arms. In the United States, confrontations take place in an accredited public arena where the principles of the American Constitution and law have a chance of being applied to disputes seemingly between individuals. Even in feuding societies, on the studies I have presented above, it is in such public arenas that the seeds of the rule of law lie.