

BOOK REVIEWS

The Judicial Process among the Barotse of Northern Rhodesia. By Max Gluckman. Glencoe, Ill.: The Free Press, 1955. Pp. ix, 386. \$6.75.

Is it too soon to speak of the "tradition" of Legal Realism? If not, perhaps we may then say that Professor Gluckman's book is the first anthropology of a primitive law system written in England in the tradition of Legal Realism. It is also the first of the published English studies of primitive law to utilize the case method of investigation.¹ The result is that Gluckman's work is richly founded in behavioral detail. *The Judicial Process among the Barotse* constitutes a major contribution to juridical science at large and African ethnology in particular.

Gluckman's materials derive from two and a half years of field work in Barotseland between 1940 and 1947. The Lozi tribe, whose juridical activities are the subject of his book, has a full-fledged system of courts with appeal courts on a hierarchical level. Although under British control since 1900, the Lozi courts have continued to exercise original jurisdiction for administration of Lozi law in all cases not involving whites, alleged homicide, witchcraft, or not punishable by death or life imprisonment.

In his field investigations Professor Gluckman sat for several months at the side of the heads of Lozi courts, or *kuta*. He had developed high competence in understanding Lozi speech; he recorded the proceedings in full, being privileged to consult with the head of the court for clarification of statements and points as the cases were argued. Sixty-five selected cases are presented, either *in extenso* or briefed, to form the foundation of his analysis. The full feel of the Barotse judicial process is here, as well as the facts of law. And in the feel one gets a clearer insight into the realities of the law in action.

In this volume Professor Gluckman's concern is not so much with the anatomy of Lozi law as with its physiology. He does not commit himself to the old adage that the law is secreted in the interstices of procedure. He is, however, clearly—and rightly—committed to the position that the dynamic nature of law and its functions are to be found in process. Thus he is reserving for the future the writing of a book on his tribe's substantive law (to be called *The Ideas of Barotse Jurisprudence*), and yet another on the functions of courts in the total social system (to be called *The Role of Courts in Barotse Social Life*).

¹ Several other such studies have recently been made, but have not yet been published.

The Lozi is a large tribe, numbering some 70,000 to 80,000 in population, which established suzerainty over some twenty-five alien tribes, thus forging a political state embracing more than a third of a million people. In Africa, politico-legal systems of primitive peoples are frequently complex and "massive."

The Lozi constitution does not separate political and judicial office. The Lozi *kuta* is both a policy council and a court, sitting now as a council and again as a court. The personnel is the same in either event. Membership in the *kuta* is by virtue of holding a particular office, and each office has its fixed location in the seating arrangement of the *kuta*.

Albeit, still a primitive law system, self-help, so-called, is not permitted in Lozi law. A wronged man and his kinsmen do not have the privilege-right of directly punishing a tort-feasor. Disputes may be taken directly to a local official or any prominent man for mediation, but, as briefly stated by Gluckman, the settlements are nonenforceable.² If mediation fails, a plaintiff may initiate action in the *kuta* of his "sector" (a military, jurisdictional, administrative and labor unit that is not wholly territorially based). If the principals to a case are from different sectors, a bi-sector *kuta* is convened. Decisions are referred to a chief and to the king for review on the basis of the "record" of the court. Review leads to confirmation or an order for retrial in the same or a higher court.

What then is the process? What is its significance for our fuller understanding of the nature and function of law in society?

In the pleadings, both plaintiff and defendant speak for themselves in a setting "marked by an elaborate etiquette," each stating his case with "full and seemingly irrelevant detail." Witnesses are heard. Then individual members of the *kuta* enter into direct cross-examination, trying to cut through rationalizations and misrepresentation to arrive at a determination of fact. Their awareness of what they are doing is clear and sophisticated; they separate facts in evidence as things (*litaba*), presumption (*lisupo*), inference (*kuatula*), and judicial knowledge (*zibo vabaatuli*). There is no counsel; the score or so of councillors, or judges, do this job. Conduct is appraised, evaluated, approved or blamed, as the examination proceeds. Clear tests of relevance (*bupaki bobuswanela*, right evidence) are seen to be in operation, leading to determination of admissibility (*bupaki bobukena*, evidence which enters), of cogency (*bupaki bobutiile*, strong evidence), of credibility (*bupaki bobusepehala*), and of corroboration (*bupaki bobuyemela*).³

Of crucial significance in Gluckman's study of Lozi law in his exposition of the breadth of the definition of what is relevant. The Lozi conceive legal process as an instrument for readjusting relations between the disputants;

² P. 13.

³ P. 316.

they recognize that the claim in issue is commonly the ground for the suit but not the cause. The judges work meticulously to get at the causes. The specific issue is taken care of, but care is also taken to get at the roots of the trouble to eradicate them, if possible. Much is elicited in evidence that goes far beyond the immediate issue.

Lawyers who worry about the relative virtues and disadvantages of procedural differences in administrative agencies and judicial courts will find considerable food for thought in examination of Lozi procedure. If the trend is that: "The direction of movement on evidence problems throughout the [United States] legal system, in the judicial process as well as in the administrative process, is toward: (1) replacing rules with discretion; (2) admitting all evidence that seems to the presiding officer relevant and useful; and (3) relying upon the 'kind of evidence on which responsible persons are accustomed to rely in serious affairs'";⁴ then, Barotse practices in evidence and trial process are most relevant to our concern; for Lozi law has accepted as regular practice what is cited as a trend for us.

Space does not allow us to examine Professor Gluckman's penetrating investigation of the Lozi concepts on the sources of law and on the relation of law to custom and usage and to justice. Suffice it to say that he has used the elegant model set forth by Justice Cardozo⁵ and that the Lozi measure up well. Many Lozi rules of law exist as statutes and many more as precedents. In the peripheral area, norms of expectancies as recognized in the presumed conduct of "The Reasonable Man" are given judicial authority. In the view of Professor Gluckman, the concept of "The Reasonable Man" is the major key to the Barotse legal and judicial process, and he devotes an eighty page chapter to it. It is realism in terms of Barotse culture to emphasize the notion. As a concept of juridical science, however, its usefulness strikes this reviewer as limited because of its inherent fuzziness for analytical purposes.

Gluckman also gives considerable attention to "Judicial Logic" among the Lozi. Once again, the sophistication of these peoples shows up in their shrewd evaluation of individual justices in terms of the following attributes:⁶

kutalungusha—"able to classify affairs"

kunyanyama—"clever and prompt of decision"

sishongololi—"relates matters lengthily and correctly"

muswanikisi—"has good reasoning powers and is able to ask searching questions"

And for the bumblers:

kuyungula—"speaks on matters without coming to the point"

kunjongoloka—"wanders away from the subject"

⁴ Davis, Evidence, 30 N.Y.U. L. Rev. 1309, 1319 (1955).

⁵ Cardozo, The Nature of the Judicial Process (1921).

⁶ P. 277.

kubulela siweko—"talk[s] without understanding"
siswasiswa—"gets entangled in words"

It would have been interesting had Gluckman sampled a Lozi evaluation of a number of justices to determine to what extent the Lozi judiciary measures up to Lozi standards of skill in juristic method. Some researchers might someday do the same for our own categories and judges.

A great virtue of Professor Gluckman's work is the consistent and detailed noting of Lozi linguistic concepts relating to all aspects of law. Nothing published in ethnological jurisprudence to date comes close to equalling his achievement in this particular respect; nor, as indicated at the outset of this review has anyone produced such a rich body of fact on process in litigation for a single tribe.

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Problems in Criminal Law. By Curtis Bok. Lincoln, Nebraska: University of Nebraska Press, 1955. Pp. 79. \$2.00.

This small volume contains the lectures delivered in 1955 at the University of Nebraska under the Roscoe Pound Lectureship by Judge Curtis Bok of Philadelphia. The three chapters that constituted the three lectures are, in sequence, "The Trial," "The Substantive Law," and "Penology and Treatment." The author's purpose is to call attention to some of the major problems to be encountered in these areas and to express his view on their solution.

It is difficult to formulate a critical judgment, whether favorable or not, on the performance of such a task. On the favorable side one can say that from the very first page of the book it is apparent that the author not only knows his subject but is deeply sympathetic toward the endless list of tragedies that make it up. He has rapidly, and in the main clearly, sketched the principal problems that must be faced. It will not be necessary to say that in his comments and suggestions he reflects throughout the most enlightened viewpoints. In sum, given the framework within which the book had to be fitted, Judge Bok has done an interesting and provocative piece of work.

It follows, therefore, that to the extent that there may be unfavorable comments these have mainly to do with the kind of task set the author, rather than with his performance of it. The area covered in the three lectures is so vast, and the desire to have at least some look at all parts of it so natural and strong that the treatment at times inevitably descends to a mere kaleidoscope of varying topics, each scarcely raised before it is hastily dropped. Not only does such treatment tantalize the interested reader, but it also necessitates sweeping statements that are often true only in a sharply limited sense.