THE REASONABLE MAN REVISITED: SOME PROBLEMS IN THE ANTHROPOLOGY OF LAW

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"The reasonable man is recognized as the central figure in all developed systems of law, but his presence in simpler legal systems has not been noticed." With this two-pronged assertion Max Gluckman (1955: 83) introduces a major theme of his analysis of the judicial process in Barotseland. The book in which he attempts this task has been widely and deservedly acclaimed, not only as a landmark in the study of primitive law, but also as an important contribution in the field of comparative jurisprudence. It has also been a work fruitful of controversy; in this paper I do not enter into the wider aspects of these controversies, but confine myself to discussion of the concept of the reasonable man. Gluckman's use of this idea is central to his description and analysis of the Lozi material, but it has had a rather mixed reception among anthropologists and lawyers alike. Thus Nadel (1956: 167), for example, while expressing certain reservations, approved on the whole and found the emphasis on reasonableness seemingly consistent with certain typical features of Lozi jurisdiction, but doubted whether this would help much in understanding practice in, say, Moslem courts. By contrast, Hoebel (1961: 437), in an otherwise favourable review, found himself unable to share Gluckman's hopes that the concept would find wide methodological use because "as an analytic concept the reasonable man is not an effective tool for the job." Among lawyers and jurists the response was equally varied. Thus Anderson (1955: 644) considered that the standard of the

reasonable man represented a canon which is basic to human thinking, asking in effect what all the fuss was about. Diamond (1956: 627-8), on the other hand, took a more positively hostile line: "The present reviewer has come to the firm conclusion that the word 'reasonable,' which has become so common in English legal parlance during the last century, ought never to be used again. The word is convenient because it can be made to connote anything between, on the one hand, the whole of the relevant law, and, on the other hand, nothing." In somewhat similar vein March (1956: 535) suggests that Gluckman's frequent use of the term "reasonable man" is simply rhetoric, and that the extension of the concept to many types of reasoning not ordinarily considered part of the concept in Western law simply confuses the issue. Yet March adds almost immediately: "Gluckman's analysis points to three ways in which social norms enter into the reasoning (considered abstractly) of judges in the Lozi courts . . . . I know of no other study in which these processes are delimited so neatly or in which the operation of norms through them in a particular instance is indicated so clearly." Gluckman has replied to many of the criticisms which his initial formulation evoked, and has sought to clarify his position in a chapter entitled "Reappraisal" in the second edition of the *Judicial Process* (1967) as well as in his contribution to the symposium edited by Nader (1969). Even so, it is plain that the notion of the reasonable man has not had the impact that Gluckman clearly hoped it would have. Given then the many diverse and sometimes conflicting views on it, the present occasion would seem to offer a suitable opportunity for a fresh look at the status of the concept and its utility in the anthropology of law, even at the risk of repeating points and arguments already familiar in the literature. The aim of this paper then is threefold. My first task will be to examine critically Gluckman's use of the term "reasonable man." I then go on to consider some of the contexts in which, it seems to me, the concept, strictly defined, may be legitimately and usefully applied. Finally, I turn to some wider methodological issues in the anthropology of law which use of the concept suggests.

I

It may be useful to begin by setting Gluckman's handling of the concept within the context of the aims of his study. *The Judicial Process among the Barotse* carries detailed reports of disputes heard and adjudicated in various Lozi kutas.

From an analysis of these cases he has sought to extract the way in which the judges approach their task, how they assess evidence, what sources they draw on for their decisions, the logic of their arguments, and how they apply legal rules to the varied and changing circumstances of social life. Such an analysis shows, he claims, that the Lozi judicial process "faithfully depicts modes of reasoning which are probably found wherever men apply norms to varied disputes" (1955: 33). Central to this contention is the role of the reasonable man. Taking as his point of departure the distinction between "fact" and "law," Gluckman seeks first to show how the kuta deploys this notion as a means of attacking the evidence of the litigants in order to establish "what happened." He then goes on to argue that the same notion also serves as a yardstick for evaluating how far their behaviour in certain cases has deviated from acceptable social standards — often, he shows, this may be the crux of the matter.

An immediate difficulty here is that the term reasonable is highly polysemous or, as Gluckman has called it, multivocal and permeable.[1] If then it is to be used as it is ordinarily defined in the standard dictionaries, there is a very real danger that its meaning will shift from one context to another so that all we have is a blanket word obscuring rather than advancing the analysis. We may accept Gluckman's view that the flexibility of the basic terms in a "folk" system has important social functions, but such flexibility is completely out of place where the terms are being used as tools of analysis.[2] As a number of his critics indicate, Gluckman has not always been successful in avoiding this pitfall. His use of the word "reasonable" in fact discloses a number of different senses of the term, which are not always clearly distinguished in analysis. By way of illustration, and in order to open up the discussion, let us look briefly at the *Case of the Allegedly Pregnant Bride*. This was a suit for divorce based on the husband's claim that his wife was pregnant when she came to him. At the time of the hearing the child she subsequently bore was about 15 months old. After considering a number of factors the kuta eventually decided that the wife had given birth about 8 months after the marriage, and this was *reasonable* (my italics) since the period of gestation for a normal child varied from six-and-a-half months to a year. Here we see the judges reasoning in the sense of drawing inferences from a set of premises which in this instance are of a "statistical"

kind: that is, they relate to perceived regularities in the process of gestation. "Reasonable" in this context carries the meaning of falling within allowable limits; it involves no reference to a standard of reasonable behaviour. Proceeding thus, the kuta was able to hold that the child should be regarded as having been born in lawful wedlock;[3] it also held that since the husband should have been able to detect the signs of pregnancy shortly after marriage, he should have reported it at once to the appropriate persons so that his wife could be examined. In fact, he delayed bringing suit until more than a year after the child's birth, and his case was thrown out, in the words of Gluckman's summary, on the grounds that the whole plea was *unreasonable*. There was nothing irrational[4] in the husband's argument, it was simply spurious, and the kuta had no difficulty in seeing through it. But what is curious here is the use of the term "unreasonable." If the word has any meaning in this context, it can only be in reference to a standard of behaviour, normatively defined, which the husband could have been expected to meet in the particular circumstances. In speaking of a standard, one implies a situation in which some degree of leeway is involved, the fixing of a point between some set of boundaries or proportions to fit the circumstances of a given case. In the present instance, the question of what constitutes a reasonable delay might perhaps have been legitimately raised had the period been a matter of weeks or even a few months after the marriage. But as far as one can judge from the record, this was not a consideration that weighed with the kuta; the simple fact seems to have been that the plaintiff ruled himself out of court by not reporting the matter as soon as his suspicions were aroused, as is customarily required. In short, Gluckman appears to have missed here the logical distinction between rules and standards, a point to which I shall return later.[5]

In my own work on the Copperbelt of what was then Northern Rhodesia (Epstein, 1954), I followed Gluckman in seeking to show how the African judges of the urban courts there made use of the standard of reasonable expectation; but I was also careful to point out the limits of its operation, for, when the device had been pushed as far as it would go, other techniques and procedures had to be invoked. By importing the flexibility of the "folk" conception into his analytic usage, Gluckman confuses a number of distinct procedures by lumping them together under a single rubric defined in terms of

reasonableness. This is seen very clearly, I believe, in his discussion of presumptions. Those he describes relate in the main to a variety of ideas held by Lozi males, and, indeed, by men of most of the tribes in this part of Africa, about the character and habits of women. Such presumptions enter into many court hearings and influence decisions there in the sense that, in the absence of other direct evidence, they are made the basis for inferences which are taken as tantamount to proof. As an example, referring back to the *Case of the Schoolboy Adulterer,* Gluckman mentions that for one judge it was reasonable for a woman to accuse an innocent man of being her lover in order to protect her true lover, since this is what men believe the women are taught during their puberty seclusion. There are two sources of ambiguity here. The first concerns the concept of norm implicit in this stage of the argument. If, for example, a Lozi woman behaves in the way described, can we regard this as conforming to the norm of behaviour to be expected of a reasonable woman? The answer must be: it depends. If norm is used in its purely "statistical" sense (Hoebel, 1954: 14), that is in terms of the way women are regularly perceived to behave in this society, the answer may very well be "yes." But if norm is used in the sense of indicating how a woman ought to behave, then the answer must clearly be "no." The blurring of this distinction at once pushes Gluckman into further confusion where he is asserting in almost the same breath that, on the one hand, "the kuta assesses evidence by the standard of how a reasonable man or woman would have behaved, meticulously according to custom" (1955: 138) and, on the other, that "we might speak of the existence of the reasonable adulterer or the reasonable thief" (1955: 137). Admittedly, Gluckman refers to this last as a "false paradox" (1955: 135; cf. 1967: 398), but it could only have been conceived as a paradox in the first place, false or otherwise, on the basis of an equation of custom and habit. The important point here is that when he talks of the "reasonable and customary" adulterer or adulteress he is, as he acknowledges, referring to the "certain standardized ways" of lovers and their mistresses, and these fall within the realm of the presumption, not of the reasonable man. For while not all presumptions will necessarily flout the canons of normative expectation, the presumption is based essentially on what people are actually deemed to do rather than on what they ought to do, and the two procedures ought therefore to be kept analytically distinct.

Thus far the discussion has been concerned with the importance of the concept of the reasonable man chiefly in the context of the examination of the litigants and their witnesses and the evaluation of their evidence. But for Gluckman its significance goes far beyond this and he is able to show, over a range of cases, how the issue before the kuta may turn from a narrow legally enforceable claim into an inquiry whether the parties had observed the obligations due to each other. In what is for me one of the most illuminating aspects of the whole study, Gluckman develops the thesis that since Lozi courts are largely concerned with the behaviour of parties occupying positions of status, each party should have conformed to the customary usages, etiquette and conventions appropriate to his social position in a specific relationship. Hence, he argues, the reasonable man of Lozi law might be more accurately described as the reasonable and customary occupier of a specific position (1955: 155).

Nadel (1956: 167) has observed that, since Gluckman's material does not deal with grave crimes such as homicide or witchcraft, we learn nothing about the judicial process appropriate to problems in the case of which reasonableness must prove a very inadequate if not altogether meaningless standard. Nadel continues: "If I am right, the Lozi would in these situations discard their guiding fiction of the reasonable man for a sharper dichotomy of things simply lawful and unlawful, permitted and forbidden." But in fact one does not need to go outside the material that Gluckman himself provides to show that he frequently equates what is reasonable with what is right and lawful. To point the distinction: Lozi courts, for example, recognize that witnesses will frequently "perjure" themselves in support of litigants to whom they are kin. Their behaviour may be understandable, but the fact that it is prompted by the obligations of kinship does not thereby make it acceptable; how a person may reasonably be expected to behave in given circumstances may not coincide with what the kuta may actually demand of him. The fact that what is wrongful, and what is unreasonable, behaviour so often coincide only serves to emphasize the need for most careful discrimination. How easy it is to slip, perhaps unwittingly, into this equation seems to me to be well illustrated in the *Case of the Violent Councillor*. Gluckman stresses here that the Councillor, Saywa, was convicted "because the kuta was able to show that when his actions as he described them were measured against the

ways in which a reasonable man would have behaved in the situation in question, they were the actions of an unreasonable man" (1955: 93). I suggest that this formulation obscures the issue, and in doing so deprives the concept of much of its cutting edge. For Saywa was convicted not because the kuta was able to show that his actions were those of an unreasonable man but because on all the evidence before it, including Saywa's own, it was satisfied that he had breached the rules that govern the behaviour of a headman. As Gluckman himself points out, Saywa was guilty of wrongful behaviour as an *nduna*.

Gluckman, of course, is perfectly aware of the difference between a case where there has been a clear breach of custom, and the more complex dispute where the court has to assess how far the parties have fulfilled their respective obligations (1955: 140), but he does not always follow the distinction through consistently. The more important point, however, is that where the question of obligation is at issue, we really need to distinguish not two, but three situations, which may be regarded as falling along a continuum. At the one end, duty is strictly defined in law, and once breach is shown the offender must pay the appropriate penalty for his guilt. At the other end, the law recognizes no obligation at all; a moral obligation may be involved, but breach is not subject to legal liability. In both these situations the question whether one has behaved as a reasonable man is irrelevant.[6] We are here in the realm of rules as these are defined by Paton (1964: 205): precepts laying down a definite consequence as the results of certain facts. But rules of this kind cannot make up the whole of the law for they cannot provide for all situations. In particular, some problems call not so much for rigidity as for fluidity in their solution; in this event, the legal precept in its application is dependent upon a legal standard or, as Paton (1964: 209) puts it, the standard becomes the appropriate medium of legal expression. We are here in the central range of the continuum where the rules have an "open texture," and where there is therefore likely to be wider scope for the play of custom, morality or notions of reasonableness.

Standards may vary not only in regard to the level of achievement they demand, but also in the ways they are set or formulated. On the latter score, they may specify in direct though abstract terms the conduct which will satisfy the normative requirement, or they may simply set up some illustrative

standard of conduct. The plain advantage of the latter is that it introduces implicity a method that can handle problems posed by varied circumstances or changing times. From this point of view, it is no accident that most of Gluckman's cases should fall in this middle range of the continuum, the realm of standards, where legal duties are acknowledged, but are formulated only in general terms. The task of the kuta in these cases is to define the duties owed in the context of the circumstances before it and to establish how far the duties so defined have been discharged. I have mentioned that legal standards may vary in their nature; insofar as a legal system has a place for the reasonable man, this is pre-eminently where we may expect to find his domain.

Gluckman speaks of the reasonable man not only as a figure prominent in all legal systems but also as basic in all branches of jurisprudence (1955: 224). In this way he exposes himself to the frequently levelled charge of emphasizing the similarities between different legal systems at the expense of their dissimilarities; no less important is the fact that he also obscures the differences that may exist within the various parts of the same legal system. Arguing against Gluckman, Hoebel (1961: 438) makes the point that the reasonable man is in fact marginal in the Anglo-American system; the concept is a special one devised to establish some sort of workable norms in areas of negligence wherein particular facts may be highly variable and specific to particular situations. In the analysis I have presented above we can see clearly why the domain of the reasonable man in Barotseland is likely to be so much more extensive than that of his Anglo-American counterpart. As Gluckman argues convincingly, most of the disputes he reports concern persons who are involved in often long-established sets of multiplex social relationships; they are tied together therefore in a complex maze of rights and obligations where duty frequently can only be defined in a general way, and behaviour has more frequently to be assessed against standards of normative expectation rather than in terms of simple breach of what Paton (1964: 209) refers to as "unfructuous" rules. By contrast, litigants in the Anglo-American system are more likely to be involved in uniplex or single-stranded relationships. The range of the reasonable man accordingly becomes much more circumscribed.

Hoebel is not of course strictly accurate in confining the operation of the concept of the reasonable man in common

law systems to the field of negligence. Nevertheless, his point does draw attention to an interesting problem which, had Gluckman considered it, might have greatly clarified his whole analysis. For, given the importance of the concept in cases of negligence in Anglo-American law, it might have seemed pertinent to ask what was the role of the reasonable man in similar contexts in Barotseland. How far negligence is a category of Lozi law is not wholly clear, for few cases which would have enabled Gluckman to explore the matter more fully seem to have come his way. He does state, however, that Lozi hold that if one man acts negligently or purposefully so as to harm another, he must pay damages to his victim. The standard of care demanded, he adds, is indeed so high that it appears as if their law does not recognize moral guilt in assessing liability. On the other hand, they employ the maxim "fire and water are other lords" so that no suit lies for damages by fire or through the overturning of a canoe, *however negligent the originator of the accident may have been* (my italics). Similarly, they invoke the maxim "if you are invited to a meal and a fishbone sticks in your throat, you cannot sue your host" (*volenti non fit injuria*) to explain why damages are not awarded to a man who has been stabbed with a fish-spear at a communal fishing-battue.

But while in some circumstances the application of these maxims may seem self-evident, for the most part their bare citation leaves unresolved what is really the crucial issue: What, for example, constitutes *volenti?* If I am a guest in my neighbour's hut, is he under a duty to exercise reasonable care to see that I come to no harm or do I have to accept all the consequences of my visit including injuries sustained which might have been avoided had my neighbour shown due care? Gluckman speaks of the few illustrations he gives in this section (1955: 205-6) as "examples of responsibility for negligent action." Quite to the contrary, what the examples show, if they are taken at face value, is non-liability for what we would regard as negligence; the law simply imposes in these instances no duty to take care. If this is a correct statement of Lozi law, it becomes a matter of curiosity that it is precisely here, in the field of negligence, where the concept figures so prominently in Anglo-American law, and where what is centrally at issue is the duty to take care, that Lozi law seem to have little or no room for the reasonable man.[7] Clearly, in arguing for the presence of the reasonable man

in all legal systems, one needs to delineate carefully the particular contexts in which the concept operates. But equally important is the need to be sure that in talking of the reasonable man in different legal systems or in different parts of the same system we are really considering the same concepts. In English law, at least in the field of negligence, the duty to take care seems to be grounded in the assumed capacity of the ordinary man to foresee the probable and likely consequences of his actions. By contrast, Lozi law appears to lay singularly little stress on this aspect, and measures reasonableness rather in terms of conformity to the norms of behaviour appropriate to one's status.

II

Thus far I have been discussing the reasonable man chiefly in the context of Gluckman's analysis of the Lozi judicial process. I want to turn now to consider the possible wider applications of the concept. But before doing so I have to refer to one issue which has given rise to much misunderstanding. This is the question raised repeatedly by Gluckman's critics whether, in talking of the reasonable man, he is reporting an indigenous Lozi conception, or whether he is using the concept as a tool of analysis. The simple answer would appear to be, as Gluckman (1967: 390) himself acknowledges, that he was doing both, though without full awareness of the way he slipped from one usage to the other. For my own part I am satisfied that Gluckman is reporting accurately a Lozi conception, but since one reviewer of the original edition of the *Judicial Process* goes so far as to claim that *mutu yangana* is not correctly translated as "reasonable man" (Diamond, 1956: 628), the point seems worth pursuing further. My own study of the urban courts, like Gluckman's of Lozi kutas, was based on fairly detailed records of cases actually heard. From these records, and in particular from the questioning by the judges of the parties and their witnesses, it emerges very clearly, I believe, that the African judges (some of them Lozi) in these courts did operate from time to time with a quite explicit notion of the reasonable man. They expressed the idea in Bemba, the *lingua franca* of the Copperbelt, by speaking of *umuntu wa mano* or sometimes more simply of *uwa mano,* an expression which seems to me to be an exact equivalent of the Lozi *mutu yangana.* The White Fathers' Bemba dictionary translates *mano* as intelligence, brains, wit, commonsense. Thus to possess *mano* is to have the "power to rea-

son," and it is this attribute which chiefly distinguishes humankind from the animal creation. Yet reason here, as noted earlier, implies much more than a faculty for rational thinking or cerebration; in the African usage it involves importantly the capacity to recognize that to be human is to be bound by rules of behaviour, and that in particular one must display towards one's fellows what the Bemba call *mucinshi,* proper manners and respect (cf. Epstein, 1967: 379). We are talking here then of a "folk" concept. However, the fact that Bemba or Lozi have these notions in no way implies that, as Ayoub (1964: 127) puts it, "any Lozi judge or 'student' of jurisprudence could have laid bare the mechanisms operating in the trial system as Gluckman has done." The distinction to which Ayoub points is between etic and emic conceptions. Perhaps for the future some of the confusion could be avoided if we reserved the term "the reasonable man" for the "folk" usage, implicit or explicit, and the expression "standard of normative expectation" for the analytical concept employed by the outside observer.

But the more important question is not so much the "analytical" as distinct from the "folk" status of the concept as whether or not it has heuristic value. As we saw at the outset, Hoebel has stated his views on this quite unequivocally. The concept of the reasonable man, he says, is of little assistance in jurisprudential analysis. "It is not an effective tool for the job to be done." I find this last statement somewhat puzzling insofar as it suggests that there is *a* job to be done. As I see it, there is rather a whole series of jobs to be done or problems to be tackled, the limits of which are set only by the reach of our imagination. The utility of a concept lies therefore in the assistance it offers in shedding light on particular problems and the way in which it poses further questions for analysis. Let me try to illustrate this point by reference to the use I made of the standard of reasonable expectation, normatively defined, in my own study of African urban courts on the Copperbelt.

The terms of reference for that study were to investigate the problems of the adaptation of African customary law to the very different conditions prevailing in the new urban centres. After spending some considerable time attending regularly the hearings in these courts I found myself increasingly puzzled by a number of features. Probably because of my own earlier training in law, I had expected — perhaps naively — that

cases would mostly be argued in terms of rules of law, particularly as the litigants often came from different tribes and presumably acknowledged different "personal" laws. Thus I found myself asking time and time again at the conclusion of a case: What rule of law has been stated or exemplified in this dispute? It gradually dawned on me that a more profitable approach was to ask what was the nature of the process I was observing, and how did the judges arrive at decisions that were apparently satisfactory to most of the litigants? Once the focus shifted to procedure, the matter began to appear in quite a different light. As Gluckman and I were to argue subsequently, the whole system rested on the central premise that litigants and judges alike were operating with the same norms and standards of behaviour. In this way the judges were provided with a means of attacking the claims of parties and their witnesses. This contention seems sometimes to have been misunderstood. Kerr (1956: 143), for example, reads it as an assertion that judgment depends on the standards set by the litigants. The claim however is not that the litigants set the standards which then become binding on the judges, but rather that they invoke standards that are already sanctioned in law, custom and convention. What is happening is that the litigants describe their behaviour and evaluate it themselves in terms of commonly accepted norms, and they manipulate these norms to justify the propriety of their conduct and at the same time to denigrate their opponents. In this way, as I have described elsewhere (Epstein, 1958: 211), they provide the court with a kind of juridical tuning-fork which enables it to assess the behaviour or testimony of the parties against the very norms they have themselves invoked. In other words, in those cases where guilt or the clear violation of some legal duty is not immediately apparent, the judicial process becomes a form of dialectic in which the litigants are led to see for themselves, as the case progresses, the error of their ways. To this end the judges employ a number of distinct techniques, but the one which seems to have central significance in these contexts is the standard of reasonable expectation, defined normatively. Once I had achieved this insight, which owed a great deal to a reading of Gluckman's book when it was still in the manuscript stage, a number of those features in the work of the urban courts which had previously puzzled me began to fall into place: why the number of cases taken on appeal was relatively insignificant, why cases in "conflict of law" did not pose for the judges the kinds of difficulty I had been advised I

might expect, and how in certain situations the law could be adapted to take account of the changing circumstances of Copperbelt social life (Epstein, 1958: 211-217). At each of these points analysis moves increasingly from the narrower concern with the judicial process itself to aspects of the wider question of the relations of law and society.

Some of Gluckman's critics have reserved their severest strictures for what March (1956: 509) calls his claim for a basic isomorphism between the Lozi judicial process and that of Western societies. Gluckman (1967: 379) has defended himself against these charges by noting that he was as much concerned to indicate the differences as to stress the similarities between these systems. Achieving a proper balance in the pursuit of both these aims is a notoriously difficult task, and plainly Gluckman has left many of his readers unconvinced that he has carried out this aspect of his task successfully. But the more interesting point is that in certain crucial contexts he has not followed through consistently the methodological principles he himself advocates. Thus a fundamental assumption underlying all of his work in the field of law is that the form legal ideas take, and the reasons they are held, can be explained by relating them to other aspects of economic and social life (Gluckman, 1965a: xiv). This is seen very plainly, for example, in his discussion of the Lozi notion of precedent, which differs significantly from the concept of precedent in Anglo-American law. Here he argues convincingly that the mainspring of the ethical citation of precedent by Lozi lies in the fact that litigation occurs between persons involved in multiplex relationships who have to be reconciled. In the same way, and for fundamentally the same reasons, he shows that the approach of Lozi courts to the problem of relevance differs in important respects from that of Western law. It is therefore a matter for regret that he did not pursue this line of attack consistently to show, for example, that the structural differences between a traditional tribal society and a modern industrial one are also likely to produce differing profiles of the reasonable man in their respective legal systems. Be that as it may, the comparison of legal ideas in a "primitive" and "modern" setting represents only one aspect of the problem. It is also important to ask how widespread the presence of the reasonable man is in those societies which anthropologists conventionally study, many of which share the same characteristic of multiplexity ascribed to the Barotse.

As noted at the outset, Nadel acknowledged the precept of reasonableness in the Lozi setting, but doubted if it would have a place in Moslem courts. More recently, Gulliver (1963: 300) has stated that he did not find it empirically or analytically valid to adopt Gluckman's hypothesis of the reasonable man to handle his material on the Arusha of Tanzania, who have a non-centralized policy. Gluckman takes up this issue in his article *Reasonableness and Responsibility in the Law of Segmentary Societies* (1965b), but, as might be expected in studies addressed to other aims, the evidence is inconclusive on the crucial issue of how far the mode of hearing and settling disputes in these societies is predicated on the notion of the reasonable man. However, having myself made use of this idea in my own work in Africa, it may be of some interest to consider how far it proved relevant and helpful in more recent fieldwork in a Melanesian community on the Gazelle Peninsula of New Britain. In the course of about a year's stay on Matupit, a small island, adjoining the town of Rabaul, with a total population in 1960 of 1400 I obtained records, in greater or lesser detail, of more than 60 disputes dealt with in this period at public hearings in one or other of the three villages found on the island. About a third of these were land-disputes, another quarter concerned matrimonial or domestic troubles, while the remainder included cases of theft, debt, breach of kinship obligation and so forth. The full body of this material still awaits analysis, but a fair number of land and other cases have been considered at length in two publications (Epstein, 1969; 1971), and these provide the background for the following discussion.

A land dispute at Matupit was triggered off when a man discovered another making preparations to build a house, planting or removing a crop, or in some other way appearing to assert a claim to land that the complainant regarded as his own. He would report the matter to the appropriate village Councillor and the case would then come up at the next village assembly. The Councillor presided on these occasions, and he was assisted by a "committee" of two or three elders, who were seated before him on a mat. The parties sat on separate mats, and the rest of the villagers were gathered around. The setting thus was that of a properly constituted forum, but in a number of respects the conduct of disputes differed markedly from that given in several of Gluckman's reports of land-cases in Barotseland. The hearings themselves were often protracted,

and, to the observer seeking to follow what was going on, often presented a bewildering complexity. The parties would recite the history of the plot in question at great length, detailing what people had been associated with it or how claims in it were affected by various transactions, and the names of often long-deceased ancestors were bandied back and forth — all to substantiate one's own claims to proprietary rights and to refute those of one's opponent. Evidence about such "facts" was supplemented by evidence of other events from which inferences could be drawn favourable to one side or the other: for example, the bones of an ancestor of the lineage rested on the site, and a great mortuary ceremony had been held there many years ago when a number of the present elders had participated as young men in a *kulao* dance — clear testimony that the land had always vested in the lineage to which the complainant belonged! However, the really important point here is that these disputes almost invariably turned around the application of rules, not the question of standards of behaviour; despite the great variation in detail as between one case and another they all revealed the same basic structure of legal argument. There was, on the one hand, a claim as of aboriginal right based on the fact that the land had always vested in the complainant's matrilineage; on the other, a denial of this assertion and a counter-claim that the ancestors of the complainant had only worked the land because they were the "sons" of the defendant's lineage and they were only there as a matter of grace, not as of matrilineal right. Since both arguments represented equally valid principles of the customary law of this area, it was not always easy to adjudicate between the contestants, and not infrequently the hearings broke up in the early hours of the morning with the matter still unresolved. It is clear that in these cases there was much "rational" argument, but at no point did the proceedings ever "turn from a narrow legally enforceable claim into an examination of whether the parties observed the obligations due to each other" as Gluckman has described for a number of land-disputes in Barotseland. The reasonable man was conspicuous by his absence.

The procedure I have just outlined was not characteristic of all disputes heard at Matupit. A case, discussed in detail elsewhere, which turns more directly on the mutual obligations due between close kin, offers an interesting contrast in this regard. In matters of this kind, among Tolai as among Lozi,

the dispute often tends to take the form of a recital of a series of grievances and counter-grievances; the evidence points not so much to a specific wrong or breach or entitlement for which there is an appropriate penalty or remedy, but rather to the tension that has developed in a set of social relationships. So it was here. The matter was introduced by a young woman, IaBaiai, who explained that when she had gone into hospital recently she had left her children in the care of her mother-in-law, IaTaunia. On her return to the village, she learned that IaTaunia had been complaining about the behaviour of the children and had told them they should go and stay with their own maternal kin, who would look after them. She also discovered that her mother-in-law had been complaining about IaBaiai's use of IaTaunia's canoe, charging that she took it to bring back food from the gardens just for herself and the children. As the hearing progressed it emerged that IaBaiai had told her husband Esau of these complaints about the use of the canoe, whereupon Esau grew angry and told IaTaunia that when she left his house he would give her back her canoe. Esau was asked what he had to say in the matter. He replied that the way IaTaunia was behaving it was as though some entirely different woman had borne him. Now he wanted her to leave his house. This at once drew an angry outburst from Esau's mother's brother, the head of the matrilineage and one of the most prominent elders in the whole community, who declared that Esau should be taken before the Administrative Officer's court, there to be properly dealt with for treating his mother with such contempt. At length, ToPirit, sitting on this occasion as a member of the "committee," intervened. He addressed IaTaunia first, and then turned to Esau: "Esau, let us think a little of those who bore us. We are not wild animals that live in the bush. When an animal gives birth the offspring scatter and never return again to help their mother . . . . If IaTaunia behaves ill towards you nevertheless you should continue to help her . . . . Now then, what do you say about the house? A house means a family, it means a mother and her children, but a canoe is just a piece of wood, of no importance. Will you look after IaTaunia?"

Esau remained silent, and ToPirit continued: "Do not spit upon her, for you came forth from her, not from a canoe. A canoe is one thing, a person something quite different. IaTaunia is now very old, she has again become like a child. Do not hurt her feelings with your talk. If a canoe should be damaged

or lost, that is no matter, but if IaTaunia dies it does matter. Now you, IaTaunia, do not distress yourself about the house. If it falls into disrepair, Esau will build another for you. If he does not, he will stand before the village assembly again. As for your grandchildren, you should care for them properly, you should call for them to stay with you and give them things as you did before."

The case finished quickly. Esau capitulated, and agreed that IaTaunia should stay in the house. A few days later the canoe was lying at its usual station on the beach and Esau was using it with his mother's permission.

I have abbreviated the case-record. Even so, there is much that is immediately reminiscent of so many cases reported in the African literature. The parties recount a series of grievances which at first glance seem to be fairly trifling, but gradually they begin to point to more deep-seated disturbances in some set of social relationships. The aim of the hearing is, if not to remove the disturbance, at least to try and uncover the underlying resentments and so pave the way for a reconciliation, seemingly so successfully achieved in the present instance.

But how far did the reasonable man figure in all this? The fuller account shows, for example, that IaBaiai contrasted IaTaunia's behaviour unfavourably with that of a younger sister in regard to the treatment of their grandchildren, and she sought to show that she herself behaved towards IaTaunia just as a daughter-in-law should. However, none of the others comported themselves in this way — far from casting themselves as reasonable, they remained rather petulant and stubborn. Again, neither IaBaiai nor any other was questioned in terms of any standard of normative expectation. In fact they were scarcely questioned at all. ToPirit's intervention began as a homily, but quickly developed into an appeal to Esau's finer feelings cast in terms of norms and values that everyone in the audience could be expected to appreciate. In a word, the appeal can be conceived of as being addressed to a reasonable Tolai. At the same time it must be stressed that the end achieved, Esau's capitulation, followed from an act of public shaming, not from the technique of using his own words to demonstrate that he had deviated from norms and standards of conduct he himself professed and had invoked. It should also be noted that the success of the appeal also owed much to the special position of ToPirit as mediator. ToPirit was the eldest son of a sister of IaTaunia. Thus he

counted as a "son" to IaTaunia and a "brother" to Esau; on the other hand, he was not an immediate party to the dispute since he was of a different segment of the matrilineage. A man in his middle thirties, ToPirit had begun to play an important part in village affairs, and his views were listened to with respect. But in addition to the "traditional" status he enjoyed, he was also a senior clerk in one of the government departments in the nearby town of Rabaul. Thus he was also able to address Esau as a fellow member of the younger and more educated generation of Tolai.

It appears then that insofar as the Tolai have a notion of the reasonable man, *i.e.*, a hypothetical standard of behaviour to which in given circumstances everyone who wishes to be accepted as a full member of the community can be expected to conform, the role this figure plays in the settlement of disputes differs somewhat from that described for the Lozi. It may be instructive to pursue this difference a little further, and seek the reasons for it. Let us first glance quickly at the way the mode of hearing cases is structured in the two societies. The Tolai hearing is best described perhaps as a moot (Bohannan, 1957: 160-1). The Councillor and his "committee" are referred to in the vernacular as *tena varkurai,* an expression which if translated simply as "judges" without further qualification could be very misleading. The *tena varkurai* are, at least during the progress of the moot, public officials, and they seek to use their authority to maintain decorum and the conditions for orderly argument. But they do not dominate the proceedings as do the judges in a Lozi kuta. Although from time to time they intervene to put questions to the parties, such questioning rarely amounts to an interrogation or cross-examination as in an African tribal or even urban court. Taking the form "What do you think now?" or "What do you say to that?" the questions seek to elicit further information or to stimulate fresh argument rather than to probe what has already been said. The underlying assumption in many cases appears to be that only when grievances have been properly aired on all sides can the path be opened up to reconciliation. And here, it should also be noted, the assembled villagers have an important part to play. Although at first glance they might seem to have a purely passive role as spectators immersed in the drama unfolding before them, in fact they are themselves actors in the piece who by their reactions offer from time to time judgment on the behaviour

of the parties. Seizing on such signals, the *tena varkurai* intervene at appropriate moments to try and persuade one or another of the litigants to yield gracefully and so open the way to a settlement. In the case of Esau this end was achieved, but as I have also indicated, there are many occasions when the meeting has to break up with the issues before it still unresolved. Thus the aims of a Tolai moot are in certain basic respects similar to those of a Lozi kuta, but the techniques employed are rather different; this can be related in the first instance to the fact that the procedures for dispute settlement are rooted in quite different power structures.

Gulliver (1963: 300) makes a somewhat similar point when he argues, on the basis of his Arusha material, that the technique of the reasonable man is most distinctively associated with judicial processes which involve emphasis on impartiality of judgment. In the segmentary lineage system of the Arusha there are no courts with power to compel litigants to submit to their jurisdiction or accept their judgments; a more relevant consideration in dispute settlement there is the relative distribution of bargaining power between the parties. A similar situation obtains on Matupit where, although the cases offer no evidence of a bargaining process, in most of the land disputes I recorded the relative strength of the parties was not so much a "relevant consideration" as the basic issue itself. Few of these cases could be regarded simply as suits between individual litigants seeking to establish their proper legal entitlements; they were rather public contests between opponents who were seeking to advance or defend their positions as political leaders for whom rights of control over land were an important attribute of their authority. The moot thus provided, under contemporary conditions, a political arena whose conventions were defined in terms of the legal rules governing the acquisition, use and disposition of rights in land. In such circumstances any appeal to the canons of the reasonable man, if it is made at all, is often likely to go unheeded.

Yet certain questions still remain. Tolai society is multiplex in much the same way as Gluckman has described for the Lozi. Tolai live in small communities which are at one and the same time collectivities of kin, neighbourhood associations, units of economic co-operation, religious congregations and so on. Similarly, they lay the same stress as do the Lozi on the values of kinship; kinsfolk should observe me-

ticulously the onerous obligations due to one another and seek to live together in amity. We have seen the moot seeking to serve these values in the case of Esau. Why is it then, we may ask, that so often a land dispute in Barotseland turns into a broader inquiry into how far the mutual obligations due between kin have been satisfied, while this does not occur among the Tolai? To answer this fully would take us far beyond the scope of the present paper. Here I wish to draw attention only to one point: that while the nature of the judicial process is bound up with the structure of power in a given society, the political process in turn embraces a scheme of values which derives from the wider social structure. Gluckman's *Case of the Biased Father* illustrates the point neatly. That case involved land rights, but as Gluckman (1955: 92) points out, it emerged from it that a man cannot sue for land merely as a landholder. "A suit for land involves his position as headman or villager, and his position in a kinship grouping, and it may involve questions of how far he has fulfilled the general obligations of those positions." In other words, the case was also a domestic affair. A dispute between close kin about rights of access to garden land, it also concerned them, however, as kin in a particular way. The kuta's whole handling of the affair reflected a system in which great stress is laid upon maintaining the unity of the village.

Among the Lozi the village is the basic social unit, and on this foundation a whole complex political system rests. Among the Tolai, as in other parts of Melanesia, local organization is predicated upon quite different principles. Here autonomous territorial groups, commonly referred to in the ethnographic literature as parishes or districts, are the major political units of the society. These in turn are made up of a greater or lesser number of local descent groups, each associated with a small tract of land and acknowledging its own leaders. The smallest local group is the hamlet, and although frequently this is comparable in size and social composition to a typical Central African village, it does not function, as does its African counterpart, as a jural, ritual or political unit. All of this finds expression most clearly in the fact that, traditionally, Tolai society had nothing comparable to the institution of the village headman, who provides such a key figure among the Lozi and other tribes of the region. Political leadership was provided rather by "big men" who emerged on the local scene

chiefly by virtue of their personal attributes and entrepreneurial and other skills, and whose following was not primarily associated with their own immediate locality. Thus at Matupit the village functioned as a solidary group only in a limited number of contexts; far from providing a focus of unity, it was rather an arena in which men, who might also be kin and neighbours, competed for power and prestige.[8] The values associated with this kind of system, transposed to the domain of law, would suggest a stress on such attributes as assertiveness and will rather than on reasonableness.

III

I have been exploring a few of the similarities and differences between procedures for dispute settlement, and the legal ideas associated with them, among Lozi and Tolai, and have tried to account for these with reference to a widening range of "social facts": in the first instance to the forensic institutions themselves, then to the political systems in which these are embedded, and finally to aspects of each group's wider social system. The perspective is sociological, and in this regard I have done little more than follow in the path of a number of distinguished pioneers of the anthropology of law. Yet it seems to me that as we seek to press our analyses further we come upon a range of problems for which the sociological approach in itself is no longer adequate. The reasonable man is a case in point. Thus I have tried to show in this paper that different legal systems may make use of the same kind of device, the standard of reasonable expectation, defined normatively, to solve a variety of juridical problems. However, two points should be immediately noted. First, that while the use of this technique implies the presence of the reasonable man as a "folk" category, the converse does not hold, as I believe the Tolai data demonstrate. Second, that where the standard of normative expectation is found to play a part in the judicial process, it does not imply that the reasonable man so invoked will everywhere display the same profile. As we have seen, the Lozi and Common Law systems appear to stress quite different attributes in their conception of the reasonable man. In other words, in order to delineate his features in any given culture, we may need to consider the matter not only within the context of a structure of social relationships, but also in relation to a deeper stratum of ideas, what I have called elsewhere an underlying structure of assumptions, which links legal doctrine to quite different realms of the culture such

as religion and philosophy. For example, in a paper (Epstein, 1967) which attempts some tentative steps in this direction, I tried to show how a notion of "wholeness" is basic to an understanding of the legal concept of injury among a number of Central African tribes. It then appeared that "the implicit assumed central fixture" (Hoebel, 1961: 381) of these systems was not just the reasonable man, he was above all a "whole" man. It followed further that the particular conception of reasonableness present here had itself to be understood as rooted in a more comprehensive set of assumptions, which permeate these African cultures, about the nature of man and in particular the view held of him as a "whole" being. To explore the nature of these assumptions and to seek to explain how they have arisen seem to me important tasks for a developing anthropology of law. In adopting this position I tread to some extent the same path as Hoebel (1954) who was the first to urge the study of primitive legal systems in terms of their jural postulates.[9] The problems involved are perhaps more complex than Hoebel at the time allowed. Nevertheless, his challenge remains. To meet it, however, we shall need to develop approaches that go well beyond those that have served us so well in the past.

FOOTNOTES

[1] See also Powell (1957: 104-126) who lists six different meanings of "reasonable" as the word is commonly employed in the English courts.

[2] An error of which I myself have been guilty on occasion. When, for example, Professor Kuper once drew attention to the different senses in which I was using the term "reasonable" in my discussion of urban courts procedure, I considered that I had met his point by replying that this simply illustrated the plasticity of these basic terms (Epstein, 1954: 30). I was of course confusing here "folk" and "analytic" usage, a distinction which I take up again later.

[3] The facts in this case also raise the interesting question of whether Lozi kutas are reluctant to admit evidence that would "bastardize the issue." Cp. the whole question of evidence of non-access in English law.

[4] Cf. Lord Devlin (1965: vii, 15): "What I want is a word that would clarify the distinction between "rational" and "reasonable" . . . . English law has evolved and regularly uses a standard which does not depend on the counting of heads. It is that of the reasonable man. He is not to be confused with the rational man. He is not expected to reason about anything and his judgment may be largely a matter of feeling." Cp. Powell (1957: 109): "It follows that in some cases reasonable has little or nothing to do with the power of reasoning."

[5] It seems worth noting that in somewhat similar circumstances the urban courts make use of a kind of rule of "estoppel." Thus in one case I cite (Epstein, 1954: 14) the claim rested on the husband's assertion that his wife was no longer a virgin at the time of the marriage. The question of "proof" is much more difficult than in the case where intercourse is followed by pregnancy, and in this instance the plaintiff's failure to report his complaint *at once* was held to be fatal; the presumption that he was in fact the first man to take her virginity operated to debar him of a remedy.

[6] Just as to act unreasonably is not in itself always wrongful, so, conversely, to act reasonably is not to be assured of protection against loss

or injury if the law provides no remedy for one's particular complaint. All legal systems can be expected to offer ready examples on the latter score, and Lozi law is certainly no exception, as the material relating to contract or to negligence, which I discuss below, attests.

[7] I have reported elsewhere (Epstein, 1954: 26-27) a case from the Copperbelt which fully supports Gluckman's statement that Lozi law recognizes no liability for damages sustained by fire. The Lozi defendent in the case argued that fire spread by the wind was an "Act of God," but the urban court found against him on two counts: (1) in the tribal area of the plaintiff (who came from the Congo) and, indeed, in most other parts of the country, customary law did recognize liability in these circumstances; and (2) that allowance had to be made for the fact that the circumstances prevailing on the Copperbelt differed from those in Barotseland.

[8] For a more detailed comparison of political processes in Melanesia and Central Africa, see Epstein (1968).

[9] My notion of assumptions would coincide closely with Stone's definition of jural postulates cited in Hoebel (1954: 16). However, Hoebel's own use of the concept is not always consistent, and many of the "postulates" cited in the course of his book I would not myself regard as postulates in Stone's sense of the term or assumptions in my own. Cf. Sawer (1969: 149).

REFERENCES

ANDERSON, James (1955) "Review of the Judicial Process among the Barotse," 18 The Modern Law Review 643.

AYOUB, Victor (1964) "The Judicial Process in Two African Societies," in G. SCHUBERT (ed.) Judicial Behaviour: A Reader in Theory and Research.

BOHANNAN, Paul J. (1957) Justice and Judgment Among the Tiv. Oxford University Press for the International African Institute.

DEVLIN, Patrick (1965) The Enforcement of Morals. Oxford University Press.

DIAMOND, Arthur S. (1956) "Review of the Judicial Process among the Barotse," 5 The International and Comparative Law Quarterly 624.

EPSTEIN, Arnold L. (1971) "Dispute Settlement among the Tolai," 41 Oceania 157.

..... (1969) Matupit: Land, Politics and Change among the Tolai of New Britain. Canberra: Australian National University Press.

..... (1968) "Power, Politics and Leadership: Some Central African and Melanesian Contrasts," in Marc SWARTZ (ed.) Local Level Politics. Aldine Press.

..... (1967) "Injury and Liability: Legal Ideas and Implicit Assumptions," 6 Mankind 376.

..... (1958) Politics in an Urban African Community. Manchester University Press.

..... (1954) Juridical Techniques and the Judicial Process. Rhodes-Livingstone Paper No. 23.

GLUCKMAN, Max (1969) "Concepts in the Comparative Study of Tribal Law," in Laura NADER (ed.) Law in Culture and Society. Chicago: Aldine Publishing.

..... (1967) The Judicial Process among the Barotse of Northern Rhodesia. 2nd ed. Manchester: Manchester University Press.

..... (1965a) The Ideas in Barotse Jurisprudence. Yale University Press.

..... (1965b) "Reasonableness and Responsibility in the Law of Segmentary Societies," in H. and L. KUPER (eds.) African Law: Adaptation and Development. University of California Press.

..... (1955) The Judicial Process among the Barotse of Northern Rhodesia. Manchester: Manchester University Press.

GULLIVER, Phillip H. (1963) Social Control in an African Society. Routledge and Kegan Paul.

HOEBEL, E. Adamson (1961) "Three Studies in African Law," 13 Stanford Law Review 418.

..... (1954) The Law of Primitive Man. Harvard University Press.

KERR, A.J. (1956) "Some Recent Studies in African Law," 15 African Studies 139.

MARCH, J.G. (1956) "Sociological Jurisprudence Revisited, a Review (more or less) of Max Gluckman," 8 Stanford Law Review 499.

NADEL, Siegfried (1956) "Reason and Unreason in African Law," 26 Africa 160.

PATON, George W. (1964) A Text-book of Jurisprudence. 3rd ed. Edited by David P. DERHAM. Oxford: Clarendon Press.

POWELL, R. (1957) "The Unreasonableness of the Reasonable Man," 10 Current Legal Problems 104.

SAWER, Geoffrey (1965) Law in Society. Oxford: Clarendon Press.