THE DEMISE OF THE 'REASONABLE MAN'

A Cross-Cultural Study of a Legal Concept

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Contents

1

Introduction

This work explores some small part of lawyers' reasonings, and because it has been written by an anthropologist, it is preconditioned by two assumptions. The first is that in almost every human society, disputes are brought before judges for resolution. And second, the process of judicial reasoning is heavily conditioned by culture, and consequently is itself a culturally relative phenomenon. This means that the present work, by disciplinary definition, is comparative and relative. Ironically, its point of departure is a claim for universalism. Gluckman has written that "the reasonable man is recognized as the central figure in all developed systems of law" (1955:83). Armed with this assertion of Gluckman, the initial aim of this project became an attempt to comparatively review the centrality, or at least the identity, of the reasonable man in both contemporary modern legal systems and in other legal cultures. For the purposes of this essay the concept of the reasonable man has been extended to incorporate any judicial pronouncement on reasonableness. Responding to a query made by the present writer to a retired judge as to if, and under what circumstances, he had ever employed the reasonable man concept in his judgments, he asserted that there are no reasonable men, only reasonable or unreasonable judges. This terse reply demanded not only a closer look at Gluckman's assertive generalization, but also some addi-

tional examination as to whether the Barotse[1] are in fact applying a reasonable man criterion for deciding their cases. It has become all too apparent that Gluckman's statement was, perhaps, more in accord with wishful thinking than a description of reality. The reasonable man plays an extremely limited role in contemporary modern legal systems, and the concept remains shrouded in its indeterminacy.

On the other hand, Gluckman's account of the Barotse legal system is convincing insofar as it demonstrates that a *form of the reasonable man concept* is being systematically applied. It provides a rationale, upon which not only is Barotse jurisprudence explicated, but which might also serve as a most appropriate framework of reference for analyzing the underlying rationales of other primitive legal systems. There are, however, both glaring contrasts as well as some undeniable similarities between the legal reasonings of Barotse judges and those of judges in our own legal system. These differences and similarities determine the broadest parameters of this study and establish the context within which relevant questions may be asked.

Couching the issue in these broadest possible terms, it is clear that similarities are indeed to be found between occurrences in both Barotse and Anglo-American courts. The obvious common denominator, albeit a functional one, is that judges in both situations are attempting to resolve disputes and provide remedies for a variety of social dysfunctions.

Eliminating from the present study what Weber has ideally described as *formal irrational* law[2], which characterizes some primitive legal cultures—trial by ordeal or the use of magical techniques—much of primitive law is, nonetheless, based on a process of reasoning. Hart has labeled this form of reasoning as "defective," "static," and "inefficient" (1961:90). On the other hand, he has not denied either the functional similarity between primitive and modern law nor that primitive law is based on any form of reasoning. But by placing primitive law outside the pale of Hart's own definition of law, and by dismissing it through the attribution of value-laden, ethnocentric labels, much useful comparative work that could serve to throw light on the workings of our own system is liable to be ignored. Employing a broad functional definition of law to the effect that all legal cultures operate on the basis of

reasoned argument to resolve disputes between individuals and between individuals and their society, this would effectively incorporate within its scope both primitive law and its modern counterpart.

The use of the term *legal culture* is significant here. If the object of the study is the comparative analysis of legal thought processes, then the appropriate units for analysis are cultures. This would indicate that a legal system is merely one form of a legal culture based on formally systematized thought processes. The claim that such systematized thought is the exclusive criterion for determining the presence or absence of law in a society is a weak claim. Different cultures have in fact different rationales underlying the way in which they order their legal thinking. If this working definition is a valid one, then the central question of this work cuts across all legal cultures and becomes one of attempting to account for the transformation of a broad and diffuse application of the reasonable man concept in primitive society to its narrow and highly defined application in modern legal systems. While this question has its own intrinsic value, it also has obvious wider implications for theoretical questions in sociological jurisprudence and the sociology of law, as well as demanding answers to some very specific empirical questions.

The following passages, while critical of Gluckman, are not designed to detract from the central thesis that concepts of reasonableness are employed by all legal cultures. The aim is not to set up Gluckman as a "straw man," but rather to point out some of the pitfalls in making comparative assessments of what constitutes reasonableness.

Returning to the central question, Gluckman has described the difference in the application of the reasonable man concept between Barotse and modern law, as follows:

> In Barotse law "reasonableness" focuses on the extent to which persons concretely fulfil the expectations inherent in their roles as occupants of specific positions of status, while in the tests of English law and in English superior courts the "reasonable man" is much more of a judicial fiction within the differentiated realms of the law to assess fulfilment of duty within restricted dyadic relationships. (1969:19–20)

This somewhat opaque statement does little to further the argument, if all Gluckman is saying is that the reasonable man concept has limited application in modern legal systems. But in qualitative terms it is not at all clear what the difference is between the phrases, "concretely fulfil the expectations inherent in their roles as occupants of specific positions of status" and the "fulfilment of duty within restricted dyadic relationships." Both instances require the definition of standards of reasonableness for evaluating the fulfillment of either expectations or duties, and both instances also require, at the very least, a dyadic relationship that is implicit in any context of litigation. Furthermore, it is not clear why one is more of a judicial fiction than the other.

Gluckman enthusiastically applied his concept of "reasonableness" to the Barotse legal process, and the verbatim accounts of his case material make apparent sense in this context. They show that judges invariably cite standards of reasonable behavior, required by a given situation, and if either party to the dispute demonstrates in its own position a deviation from the cited norms, this enables the judges to break down that position and render a judgment. In their own reasonings, the judges concentrate, with considerable emphasis, on intention and motivation, and the litigants themselves, aware of the rules of the game, formulate their own positions in terms of reasonable or unreasonable behavior. Unlike the process of law in a modern court setting, where cross-examination is employed primarily in order to establish whether or not an act took place and where the opinions of the actors are often deemed inadmissible, there are no instances in Gluckman's cases in which opinionated evidence is ruled inadmissible.

What Gluckman may have done was to somewhat exaggeratedly overpersonalize the standards of behavior, cited in the cases, into the stereotype of the reasonable man. He was, perhaps, tempted to follow this direction, influenced by the Barotse terms, *mutu yangana*, a "man of sense" and *mutu yalakile*, an "upright man." These are stereotypes that embody the correct standards of behavior, but by his own admission he states that the judges rarely use these terms, merely implying their meanings by referring to specific statuses, for example, a "good husband," a "good fisherman," and so on (1955:126). Both in semantic and logical terms there is a substantial difference between a "man of sense" and an "upright

man." The canons of justice, or criteria for decision making, will be different in either case, the man of sense being assessed by his prudence, while the upright man would, presumably, evoke recourse to moral and/or ethical standards. Even reducing the overall concept to an assessment of specific roles leaves much to be desired, since a good fisherman, judged primarily by his technical skills, is again something different from the good husband, who may be judged predominantly out of moral or ethical considerations.

Gluckman also had the tendency to rely heavily on implication and extrapolation. This emerges clearly in his 1965 article, "Reasonableness and Responsibility in the Law of Segmentary Societies," in which he replied to his critics by reevaluating their own ethnographic data in the mold of his own reasonable man model. One example of this is a case given by Gulliver from his Arusha Masai material. Gluckman inserts into the text the concepts of reasonableness and unreasonableness. Without quoting the full passage, the first two instances will provide sufficient clarification.

> A father-in-law demanded outstanding cattle from the bridewealth[3] due for his daughter, stressing that he had to have the cattle to pay tax (i.e. *he was being reasonable*). It was pointed out to the son-in-law that under Arusha custom *it is not reasonable* to expect to have a wife and children without paying cattle. (1965:145, italics mine)

This assertiveness by Gluckman is a shortcoming. In the first instance, we do not know whether the payment of tax is a reasonable cause in this particular instance for prosecuting such a claim. One could equally surmise that a prudent man would ensure the payment of his taxes on his own recognizances. Second, the obtaining of a wife and children by means of paying brideprice may have nothing whatsoever to do with reasonableness, and is simply a matter of compliance or noncompliance with Arusha Masai law. This is a clear example of an attempt by Gluckman to mold the ethnographic data of others into the concepts that he wishes to employ. His treatment of Gulliver's material is plausible, but no more than that.

Where Gluckman leaves himself open to more severe criticism is when he equates other concepts with his own ideas on the reason-

able man. For example, in referring to Llewellyn and Hoebel's *The Cheyenne Way* (1941), he takes the concept of *ranges of leeway*, explained as permissible deviations from norms of behavior, and finds this to be synonymous with the reasonable man (1965:126). But as will be demonstrated, the interpretation later ascribed to this concept by the American movement of legal realism was a far cry from the meaning of the reasonable man among the Barotse.

The problem, to which Gluckman addressed himself insufficiently, is the overall rationale of the judicial process. By his own admission, the Barotse judges do not employ the abstract concept of the reasonable man when deliberating over their decisions. They are, however, citing standards of behavior that apply to people in their different roles. But it is also clear, on reading Gluckman's case material, that the standards of behavior are not *ad hoc* criteria for assessing a given situation, but rather highly idealistic and perfectionist predetermined rules. These are rules embodying expectations of what people ought to do, being tailored and applied to given situations, in most respects similar to law finding in any modern legal system. The question of reasonableness, defined in terms of purely reasoned behavior under given sets of circumstances, does not become the major issue. This may be illustrated by the modern counterpart of the test of reasonableness in *Chief Constable of Avon and Somerset v. Jones* (*Times Law Report*, 13 November 1985). The question before the appeal judges was "was it reasonable for him (the defendant) to have acted as he did, and not according to the standard of perfection yielded by hindsight?" The defendant had been driving an articulated lorry with a cargo of hay on the M-4 highway when his lights failed. He was traveling at a speed between 52 and 57 miles per hour. He immediately pulled over on the hard shoulder and collided with an unlit vehicle. The lower court, in convicting the defendant, had held that he should have braked and slowed down before turning onto the hard shoulder and should have switched on his hazard warning lights. Lord Justice Watkins, in quashing the conviction, said that the action suggested by the judge used the language of perfection. No motorist should be called upon to achieve that standard when confronted with an emergency, especially at night when his lights had failed. Justice Watkins provided the simple alternative stan-

dard: "Was it reasonable *in the circumstances* for the motorist to act as he did?" (italics mine). In this case the judges looked solely at the circumstances of the case and refused to apply any predetermined standards of behavior that are couched in perfectionist terms.

This type of reasoning is not evident in most of Gluckman's Barotse cases, since all standards of behavior have been clearly established *a priori* and are expressed in terms of preexisting moral or ethical standards. The perfectionist standard is a most convenient tool for breaking down a litigant's case. Moreover, the Barotse judges are in perhaps an even better position than their modern counterparts to determine the legislative intent of what people ought to do in given circumstances, since they are, at one and the same time, both political and judicial figures. It is they themselves who determine the standards of behavior underlying the reasonable man. This is clearly a distinctive feature of many primitive legal cultures, where there is no apparent separation of powers between the "legislature" and the judiciary, and most of the "laws" are judge-made laws. This returns the reader to one of the opening statements of this book, in which the comment of the judge quoted is echoed in Gluckman's statement that "there are therefore reasonable and unreasonable judges" (1955:153).

Reading through Gluckman's case material, it becomes extremely clear that the predetermined rules, incorporated into the reasonable man concept, are in the nature of moral and ethical imperatives. It bears out Allott's contention that in traditional society, "the area of law is entirely located within the sphere of societal morality . . . whereas in modern society there is much morality which is not expressed in law, and much law which does not correspond to any moral imperative" (1980:25). Surveying the ethnographic literature, the forms that these imperatives may assume for legal purposes are often quite varied. The closest approximation to the reasonable man, beyond a direct statement as to what a reasonable man does or should do, is the oblique reference to reasonableness as recounted in stories containing characters, real or mythological, that epitomize ideal standards of behavior in different situations. But more often than not, the usual forms are either straightforward statements of the imperative or, occasionally, its embodiment in an aphorism.

Ethical and moral imperatives are often, by nature, highly ambiguous statements that leave judges with a considerable amount of judicial latitude. By employing the reasonable man format they have an efficient technique by means of which they can mold their interpretations of current standards of morality to the facts of the given case. It is never precisely clear from Gluckman's account whether Barotse judges are asking themselves the question, if given the facts of the case, what would a reasonable man do in order to foresee the consequences of his actions. Alternatively, are they asking whether the behavior conforms to their interpretation of commonly held standards? These are very different lines of questioning, involving by definition very different forms of reasoning. The abstracted format of the reasonable, occasionally employed in the modern court setting as exemplified above by the case of the truck driver, addresses itself to nothing more than the facts of the situation, and makes no explicit *a priori* assumptions about the person's behavior. Assessment is not made on culturally loaded assumptions and thus excludes moral and ethical imperatives. This stands in stark contrast with the mode of reasoning employed by the Barotse, as reported by Gluckman.

At the other end of the continuum, at the level of the modern legal system, the reasonable man concept poses another set of difficulties. The element of foreseeability, already mentioned, has been cited by Lawson: "*[C]ulpa* amounts to failing to foresee damage, which a diligent person would have foreseen" (1950:40). Like any other adjective, "diligent" is a variable, and while not culturally biased to any great extent, is nonetheless extremely difficult to ascertain. It is perhaps easier for the judge to apply a value to this variable on the basis of hindsight, when all the facts are known. But in objective terms it is an inaccurate assessment of the actual situation, in which obviously and logically all the facts are not perceived.

Powell (1957) has written a scathing critique, attacking the semantic indeterminacy of the notion of reasonableness in the judicial process. He draws on cases to show that there are situations that do not allow for the reasoning implicit in the application of the reasonable man concept. He poses serious questions, such as whether people of subnormal intelligence, while not insane, are capable of foreseeing the consequences of their actions. He also

cites a case, so patently absurd, that the standards of reasonableness applied, in order to achieve an outcome, are dubious to the extreme. In *Newberry v. Cohen's (Smoked Salmon Ltd.)*, as reported in the *Times Law Report*, 27 April 1956, the question arose as to whether "raw kippers constitute meals within the meaning of the Fifth Schedule to the Shops Act, 1950." If so, a shop could be open on Sunday to sell them. The court held, by virtue of reason, that a raw kipper could be a meal. An even more telling question is whether reasonableness is given to measurement or to mathematical tests of probability. And, finally, if the court is to use the standard of the customary or the ordinary, what is the competence of the judge to determine this standard? This last question returns to the skepticism, evoked from the outset, that there are no reasonable men, but only reasonable or unreasonable judges. Powell, in addressing himself directly to Gluckman, writes,

> Because the courts often use a phrase, which he translates by a "man of sense," he deduces that they apply the standards of the reasonable man. But most of the cases he cites show that the judges are primarily concerned with what is usual and customary, without regard to whether it is sensible and rational. (1957:119–20)

One might dispute Powell's use of the word "rational," since its supposed universality is qualified by cultural relativism (Barnes and Bloor, 1982; Overing, 1985). But it is also equally clear that the Barotse judges are not applying the Barotse equivalent of the "man on the Clapham omnibus" in order to determine what is sensible.

The words *reasonable, usual, customary, sensible,* and *rational* are bandied about as if they were, somehow, interchangeable qualities. Of these, *rational* is perhaps the most problematic category. Its usage requires a brief digression into the domain of the sociology of knowledge in order to make two points. First, the rational and the reasonable are not only nonsynonymous (rather than antonymous), but reasonableness is not necessarily to be inferred from rational postulates. Second, if certain currents of modern legal philosophy lay claim to an exclusive positivist rationality underlying a legal system, it is difficult to understand how such a system can address itself to the issues of what may or may not be