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The inconvenience of the reasonable person standard in criminal law

La inconveniencia del estándar de persona razonable en derecho penal

JUAN PABLO PÉREZ-LEÓN ACEVEDO*

Abstract: Following American legal sources, I argue that the use of the reasonable person standard in criminal law is inaccurate and unfair, and, therefore, inconvenient to evaluate human behaviour based on three arguments which address flaws of the standard under analysis. Firstly, this standard is by definition abstract, theoretical and general, not reflecting appropriately the person's sensory and ideational perception of the situation. Secondly, the trend in American legislation and case-law is to apply, in criminal cases, e.g., self-defence, a hybrid criterion, which consists in the consideration of a person's belief and the correspondence of such a belief to what a reasonable person would believe under the circumstances, as opposed to a purely objective standard. The principle of individual criminal culpability underlies this. Thirdly, the reasonable person standard imposes a sort of majority's dictatorship by perpetuating a predominant culture disregarding the viewpoints from minority groups.

Key words: reasonable – person – standard – American – criminal

Resumen: Siguiendo fuentes jurídicas americanas, sostengo que el uso del estándar de la persona razonable en derecho penal es inexacto e injusto y, por lo tanto, inconveniente para evaluar conducta humana sobre la base de tres argumentos que abordan las imperfecciones del estándar bajo análisis. Primero, este estándar es por definición abstracto, teórico y general y no refleja apropiadamente la percepción sensorial y cognitiva de la situación. Segundo, la tendencia en legislación y jurisprudencia americanas, en casos penales, por ejemplo, defensa propia, es el uso de un criterio híbrido, el cual consiste en la consideración de la creencia de la persona y la correspondencia de dicha creencia con lo que la persona razonable creería bajo las circunstancias, lo que es opuesto a un estándar puramente objetivo. Tercero, el estándar de la persona razonable impone una suerte de dictadura de la mayoría al perpetuar una cultura predominante sin considerar los puntos de vista de los grupos minoritarios.

Palabras clave: razonable – persona – estándar – americano – penal

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I. INTRODUCTION

The standard of «reasonable person» or «reasonable man» is considered as one of the most important criminal law concepts, since criminal law institutions such as the law of murder, duress, provocation, and self-defence rely on it¹. This standard is especially important in American criminal law, where its pervasive use is grounded on «the faith in reason as the foundation of law»². Nevertheless, I consider that such an abstract standard is not convenient in criminal law since does provide neither an accurate nor a fair means to evaluate human behaviour. I based this claim on three arguments fleshed out as follows.

II. PERSON'S PERCEPTION AS A NECESSARY COMPONENT IN CRIMINAL LAW

In criminal cases, e.g., self-defence, some lessons from neuroscience and psychology hold importance, i.e., when human beings face a threat of violence, actions follow a certain pattern that is sometimes characterized by disproportionate or inaccurate reactions³. Accordingly, in the exceptional and fast-moving scenario of a violent attack, it is normally unrealistic and unfair to request the person under attack to assess consciously and carefully the specific dimension of the risk posed by the attack, the likely (or feasible) impact of his/her response on the aggressor and the set of alternatives at hand⁴. This process, which is common to most human beings, may even become more blurred by the person's physical or mental handicaps⁵.

Person's perception is also influenced by questions arising out of prior victimization. It is hence fair to ask whether prior victimization is a characteristic of the reasonable person. This question is exemplified via two self-defence cases: «State v. Norman» and «People v. Goetz»⁶. The former concerned a woman battered and subjected to mental

1 NOURSE, Victoria. «After the Reasonable Man: Getting over the Subjectivity/Objectivity Question». *New Criminal Law Review*, 11 (2008), p. 33.

2 FLETCHER, George. *A Crime of Self-Defense: Bernhard Goetz and the Law on Trial*. Chicago: The University of Chicago Press, 1988, p. 40.

3 SIMONS, Kenneth. «Self-Defense: Reasonable Beliefs or Reasonable Self-Control». *New Criminal Law Review*, 11 (2008), p. 77.

4 *Ibidem*, p. 78.

5 LUNDY, Thomas. «Instructing on the Objective Reasonable Person Standard». *The Champion*, 33 (2009), p. 48.

6 «State v. Norman», 378 S.E.2d 8, 10 (N.C. 1989); «People v. Goetz», 497 N.E.2d 41 (N.Y. 1986).

mistreatment by her husband during many years and who decided to kill him in his sleep. The latter case concerned a man opening fire against African-American youngsters in the New York City's metro because he believed he was about to suffer a new attack from that racial minority.

Should the reasonable person standard, understood as paragon of virtue, be applicable in the aforementioned cases, we will arguably conclude that most persons will always come up short insofar as crime is an anomalous action⁷. Fletcher accurately summarizes this point when he points out: « as everyone is prepared to admit, the reasonable person does not kill at all, even under provocation »⁸. In order to get a nuanced approach, I consider it convenient to adopt a balanced assessment.

Accordingly, even though the prior victimization to which a defendant was exposed may have been very intense, the accused should not be as a matter of principle exonerated completely of criminal liability. Otherwise, we will shift from one extreme, (i.e., reasonable person standard totally disregarding a person's particular perception) to the other (intricacies of the defendant's mind as shaped by prior victimization). The approach followed in «State v. Peoples» reconciles those two extremes as follows:

The developed law of the self-defense requires the special attention of the jury to evidence of prior threats, reputation or the turbulent disposition of victim, and described acts of violence by the victim upon the defendant as those incidents may bear to prove the basic elements of the defense⁹.

III. THE HYBRID CRITERION AND THE UNDERLYING PRINCIPLE OF CULPABILITY

The (objective) reasonable person standard has been substantially nuanced through the incorporation of a subjective element, which has led to a hybrid criterion in criminal cases, including self-defence. This hybrid criterion or test requires the examination of two prongs. Whereas the first prong addresses what the defendant actually believed when, e.g., used deadly force (subjective element), the second prong requires the correspondence of such belief to what a reasonable person would believe under the circumstances (objective component)¹⁰. The adoption of this hybrid test has to a large extent substituted the previously dominant objective reasonable person standard as evidenced both in American legislative practice and case law. As for legislation, the U.S. Model

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7 NOURSE, Victoria. *Op. cit.*, p. 40.

8 FLETCHER, George. *Rethinking Criminal Law*. Boston/Toronto: Little Brown, 1978, p. 247.

9 «State v. Peoples», 621 S.W.2d 324, 327 (Mo. Ct. App. 1981).

10 Fletcher, George. *A Crime of Self-Defense*, p. 42.

Penal Code is a necessary referent. As Fletcher¹¹ highlights in cases of attempted murder, the U.S. Model Penal Code provides for that there is no liability in case of a good faith mistake in the context of self-defence, regardless of the reasonableness of the mistaken belief¹². However, the Model Penal Code also imposes liability in cases of unreasonable mistake about conditions of self-defence¹³, reflecting the hybrid character.

As for case law, in «State v. Bellino», the Connecticut Appellate Court established the following: «It is settled that a jury's evaluation of a claim of self-defense has both subjective and objective elements»¹⁴. Similar finding was incorporated in «People v. Goetz» where the following was determined: «[A] determination of reasonableness must be based on the "circumstances" facing a defendant or his "situation"»¹⁵. The trend is therefore that, following this hybrid standard, particular characteristics of the defendant—physical and others—are infused into the reasonable person standard. This hence subjectivizes what would otherwise be a purely objective standard¹⁶.

What actually underlies the predominance of the hybrid criterion is one of the very foundations of criminal law: the principle of culpability of the defendant. In other words, modern criminal law concedes a tremendous importance to the painstaking analysis of the criminal mind via categories such as intent, recklessness and negligence. Accordingly, as Richard Singer¹⁷ highlights, reliance on the fictional standard of the reasonable person takes us away from the mental culpability, which is a necessary condition to punish individuals.

IV. THE RULES OF MAJORITY

By definition, the use of objective standards like the reasonable person standard mirrors the rules of the predominant culture and simultaneously excludes the values of other groups in society. In particular, as Cynthia Lee¹⁸ remarks, the use of what is supposedly the reasonable person standard is not truly unbiased and has been used to spread narratives of racial power and violence against women. This is clearly exemplified in criminal law when an accused who possess different cultural background is denied the opportunity to explain how his conduct was reasonable

11 Ibidem., p. 56.

12 U.S. Model Penal Code § 3.04 (1) (a).

13 Ibidem., § 3.09 (1).

14 «State v. Bellino», 625 A.2d 1381, 1384 (Conn. App. 1993).

15 «People v. Goetz», 51-52.

16 Lee, Cynthia. «Race and Self-Defence: Toward a Normative Conception of Reasonableness». *Minnesota Law Review*, 81 (1996), p. 387.

17 SINGER, Richard. *New York Law Journal*, 18 February 1986, p. 1. Cited by FLETCHER, George. *A Crime of Self-Defense...*, p. 60.

18 LEE, Cynthia. *Op. cit.*, p. 383.

under his tradition due to the mere fact that his action does not meet the «reasonableness» of the American culture¹⁹.

There is lack of uniformity, at the courts, as to whether and to what extent cultural evidence may be admissible in criminal proceedings. In a deeper level, the reasonable person standard does not only omit minorities' standards but also those of the individuals. Thus, this objective standard dismisses the fact that each human being is unique and, when applied strictly, ignores consideration of relevant circumstances to the concrete case²⁰. This leads to anomalous situations: for example, if the beliefs of the accused were honest and correct, but unreasonable, self-defence is not available. Thus, the accuracy or inaccuracy of the defendant's beliefs becomes irrelevant in a model which exclusively privileges reasonableness²¹.

Moreover, the imposition of a reasonable person standard, modelled upon a sort of majority's dictatorship, may trigger a more pernicious effect. Thus, its excessive focus on what the ordinary person would think or do—wrongly or rightly—pays no attention to the fact that the average person might behave in undesirable ways²². For example, the ordinary man could get so upset when facing non-violent homosexual advances that he may consider it «reasonable» to use lethal force to repeal them²³.

V. CONCLUSION

The reasonable person standard has proved to be inconvenient in criminal law. Such an abstract standard necessarily has to incorporate elements ranging from the defendant's sensorial perception to his/her cultural background. As reflected in American legal sources, those elements have actually led to the adoption of a hybrid criterion, whose subjective component is in conformity with the principle of criminal culpability as understood in modern criminal law.

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19 See MAGUIGAN, Holly. «Cultural Evidence and Male Violence: Are Feminist and Multiculturalist Reformers on a Collision Course in Criminal Courts?». *New York University Law Review*, 70 (1995), pp. 41-43.

20 DONOVAN, Dolores and Stephanie WILDAM. «Is the Reasonable Man Obsolete? A Critical Perspective on Self-Defense and Provocation». *Loyola of Los Angeles Law Review*, 14 (1981), pp. 444-445.

21 LEE, Cynthia. *Op. cit.*, p. 389.

22 Ibidem, pp. 389-390.

23 Ibidem, p. 389.