

## **“Reasonableness” A Phenomenon for Validity of Actions Begging for Validity?**

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### **Abstract**

The word, ‘reasonable’, resounds in every aspect of human endeavour. Most actions are judged by their reasoned nature. It derives from the expectation that all humans are rational, and act based on this rationality. If reasonability is based on rationality, the question may be raised and is always raised; what advises mans rational action and the test of the reasonableness in man’s action? In his decisions, the administrator is expected to act reasonably. The adjudicator, bases his adjudication on certain levels of probability, based on his reasonable reasoning. Even the legislature must not present legislations that seek the doing of impossibilities or absurdities; he too must be reasonable. The test requiring every act to be reasonable, lays no rule for determining the standard of the reasonable man. In this paper, we adopt the doctrinal research method which is a legal research approach. The purpose of this research is to establish how the standard of reasonability have been sought to be set; and to bring out the difficulties in applying either a subjective or objective test. The significance of this research is that it questions and brings out the fallibility of the reasonable mans’ test. We find that these difficulties stem from legal, as well as sociological factors, which affect the reasoning of man. Finding that these factors are self imposed, this research arouses a quest for how to establish the reasonableness in actions and to find a balance in what humanity is and expects.

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### **INTRODUCTION**

To be reasonable implies that one acts within the bounds of ‘common sense.’ However, in the interactions with men, it is shown that ‘common sense is not that common.’ Judging from common sense, we envisage one with the ability to perceive and be motivated by sound moral or ethical principle. And so morality and ethics play much role in determining reasonability, as emanating from the ability to act common scenically, which in turn is determined by ones morals and ethics.

Ethics refers to the study of moral values; and how they affect conduct. Etymologically, the word ethics is connected with the Greek word “*ethos*”, which means “custom” or “conduct”, a habitual way of acting. Morality itself has bearing with the latin word “*Mos*”, meaning custom or behaviour. Consequently, from the etymological point of view, “ethics” and “moral” appear to serve the same purpose, and are sometimes often used interchangeably.

The Cambridge Dictionary of philosophy also defines ethics as the philosophical study of morality. It goes ahead to say that the word is commonly used interchangeably with morality. Morality considered on its own, has been defined by the Encarta Dictionary as standards of conduct that are generally accepted as right or proper. It considers the rightness or wrongness of something as judged by accepted moral standards. According to Ome, it has to do with

right or wrong conduct, and with good or bad character. Moral judgments are made not only about the actions that people do, but also about their motives or reasons for doing them and about their more general character traits. In all judgments of conduct, motives and character traits, we are applying moral norms. A moral norm may be either a rule of conduct or a standard of evaluation. It maybe a requirement that anyone in certain circumstances ought to do a certain kind of action or ought to refrain from doing a certain kind of action; or the norm may be a standard of evaluation which we refer to when we judge whether something is good, or bad, desirable or undesirable, worthy or worthless. As applied to conduct, standards are used for judging how good or bad are the consequences of a person’s action.

American jurist Oliver Wendell Holmes, Jr. explained the theory behind the reasonable person standard as stemming from the impossibility of “measuring a man’s powers and limitations.” Individual, personal quirks inadvertently injuring the persons or property of others are no less damaging than intentional acts. For society to function, “a certain average of conduct, a sacrifice of individual peculiarities going beyond a certain point, is necessary to the general welfare.” Thus, a reasonable application of the law is sought, compatible with planning, working, or getting along with others. As such, “his neighbors accordingly require him, at his proper peril, to come up to their standard, and the

courts which they establish decline to take his personal equation into account."

In this reasoning, the "reasonable person" is a suppositious person who represents the "average" citizen, and sets the standard on how persons, under the same circumstances should act.

### STATEMENT OF THE PROBLEM

On the level of the individual, a person's morality includes his moral beliefs about what is right and wrong, the standard he uses in judging human motives and character, and the rules by which he tries to guide his life. These rules determine his actions, but who determines the reasonability of that action? Thus, for every 'reasonable' or 'unreasonable' act taken, a judgment is made based on someone's morality. Morals and ethics regulating someone's life may come from ones' inner self, his religion, culture, or code of business or professional ethics. The fact of these varied sources of morality and ethics suggests the difficulty in standardizing moral and ethical standards for all, except perhaps in cases of professional ethic. Yet, persons subscribing to the same professional ethics with different culture and background may present different application of the ethics, and hence different perspectives on reasonableness. Here therefore lies the problem of establishing the reasonable man, and his actions. It is a problem that, the very yardstick for adjudging actions is itself, fraught with definitional and standardization problems, hence the need for this research.

### LIMITATIONS OF THE STUDY

The issues in discourse are abstract, and not of interest to many. Most attempts to bring it into focal discussions always ended without resolutions. We therefore hinged our discussions on exposition and analyses of the difficulties to reach a resolution.

### Meaning of Reasonableness

Reasonableness is from the word reasonable. The Encarta Dictionary defined reasonable as being rational; sensible and capable of making rational judgment. What is reasonable is an acceptable act in according to common sense or normal time. It also means not expecting or demanding more than is possible or achievable. Here, what is reasonable is still tied to rational, sound thinking and being within the bounds of common sense. According to Lucas, the word is nearly always challenged; and the question "What do you mean by 'reasonable'?" is often used rhetorically rather than to elucidate; as a means of disallowing the use of the word 'reasonable' altogether, and insisting that it always be replaced by a substitute.

### Historical Use of Reasonableness

The term "reasonable man", can be traced to Adolphe Quetelet's detailed characteristics of "*l'homme moyen*" in 1835. Many translations were given to this work, resulting in the use of either the "common man", or the "reasonable man". Two years later, the "reasonable person" made his first appearance in the English case of *Vaughan v. Menlove*. In *Menlove*, the defendant had stacked hay on his rental property in a manner prone to spontaneous ignition. After he had been repeatedly warned over the course of five weeks, the hay ignited and burned the defendant's barns and stable, and then spread to the landlord's two cottages on the adjacent property. Menlove's attorney admitted his client's "misfortune of not possessing the highest order of intelligence," arguing that negligence should only be found if the jury decided Menlove had not acted with *bona fide* and to the best of his own judgment."

The *Menlove* court disagreed, reasoning that such a standard would be too subjective, instead preferring to set an objective standard for adjudicating cases:

The care taken by a prudent man has always been the rule laid down; and as to the supposed difficulty of applying it, a jury has always been able to say, whether, taking that rule as their guide, there has been negligence on the occasion in question. Instead, therefore, of saying that the liability for negligence should be co-extensive with the judgment of each individual, which would be as variable as the length of the foot of each individual, we ought rather to adhere to the rule which requires in all cases a regard to caution such as a man of ordinary prudence would observe. That was, in substance, the criterion presented to the jury in this case and, therefore, the present rule must be discharged.

This standard was again upheld, nearly 20 years later in the English case of *Blyth v. Company Proprietors of the Birmingham Water Work* holding:

Negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do.

### Standard for Reasonable Action

The standard for the reasonable person is not easily deciphered. How is it to be determined? Is it based on the biological composition of the human person determining intelligence; or in grooming and culture, or based on experience? How much does emotion

and sentiments determine the reasonableness of an action.

Again, should reasonableness be tested against the backdrop of the level of morality in a given society? In which case, a highly corrupt economy may reduce the threshold for determining the reasonability and thereby the permissiveness of actions.

Holmes had suggested that the reasonable person will weigh all of the following factors before acting:

- the foreseeable risk of harm his actions create versus the utility of his actions;
- the extent of the risk so created;
- the likelihood such risk will actually cause harm to others;
- Any alternatives of lesser risk, and the costs of those alternatives.

Judging only from the factors listed by Holmes above, we contend that it is not such a simple rule to apply anymore. The factors may be affected by many other applicable variables. Thus,

- On the first point, the foreseeable risk of harm his actions create should be considered against the backdrop of whether this harm or its utility is created to self, other persons or the state. It will not be a surprise to find that when this is the consideration, several results will be reached.
- Whether the extent of the risk so created is of person, property, self, state or other persons. In this determination, whether the risk is of physical injury or collateral injury might lead to different decisions or actions. Again, where the loss or injury will accrue to the state (government), other persons will also lead to different decisions and actions; especially in economies without strict accountability policies and practices.
- The likelihood that the risk will actually cause harm to others also depend on several variables. If harm is determined by complaints and seeking of redress, then certainly, a lot will depend on access to justice and the confidence in the legal system. In systems where the populace do not have confidence in the judicial system, the alternatives that offer less cost in both time and material, may receive more patronage.

Disagreeing with Justice Holmes view of the "reasonable person", who contends that "the law does not attempt to see men as God sees them" Ellis Washington concludes that:

The reasonable person is the judge or legislator that endeavors to see through another's eyes, and in regards of the facts of a given situation attempts to

remove every petty human tendency and unrealistic desire, as a balancing test. However, this characterization of the reasonable person leaves no room for a heroic or a transcendent use of law.

This conclusion of the reasonable person as he who endeavours to see through another's eye presupposes that the eye through which he sees is reasonable. What happens when the judge sees through a perverse eye? What if the eye through which the legislator is expected to see reason is dented with ulterior motives? What if the eye from which this reasonable person sees through, is itself unreasonable?

This does not help in establishing the standard of the reasonable person, rather continues to beg the question.

Yet, reasonableness continues to be the yardstick for determining permissive and acceptable standard of action.

#### **Expectations of Reasonableness**

Legal language is, in part, the language that is used by the legislature to communicate with the people. It is also the language that lawyers and judges use to communicate. In verbal communication, you understand the words a speaker uses - the speaker communicates his or her intention through words. However, quite often, problems arise as to the precise meaning of provisions of written words, when the maker is not there to express the true intentions of the written word. Lawyers and Judges, in the administration of justice, also encounter this problem when they are called upon to interpret the statutory words and phrases. These problems arise owing to a variety of reasons, and thus place a burden on the legislature, to always act reasonably, use precise words and act foreseeably.

In Adjudication, a reasonable person is a composite of a relevant community's judgment as to how a typical member of said community should behave in situations that might pose a threat of harm (through action or inaction) to the public. The reasonableness standard is a test which asks whether the decisions made were legitimate and designed to remedy a certain issue under the circumstances at the time. Courts using this standard look at both the ultimate decision, and the process by which a party went about making that decision. Courts must determine whether or not a particular decision is arbitrarily made, or if it is designed to address a defined issue or risk.

Most jurisdictions require that criminal cases be proved beyond reasonable doubt. Such jurisdictions make it impossible for any court to convict an accused person in a situation where such a person is not blameworthy. This is akin to the principle of *mens rea* which, in common law country, is a necessary couple to that of *actus reus* before a conviction is grounded in criminal cases not involving offences of strict liability. This requirement that the guilt of the accused has to be proved beyond reasonable doubt is imported from the English Common Law and re-affirmed in *Woolmington v. Director of Public Prosecution*.

When courts invoke the reasonable person as a means to assess culpability, they attribute to the standard some but not all of the objective and subjective characteristics of the accused. The reasonableness of the action of the accused in defensive actions such as self defence and provocation; is different from the standard in establishing guilt.. The judge is to be convinced, beyond reasonable doubt, that the suspect's action is reasonable.

Police officers are routinely thrust into uncertain situations that demand hurried decisions. The courts require only one thing of officers: that they act reasonably. In the exercise of the police powers, both to arrest, search and execute orders, the term is necessarily subjective as it all depends on the surrounding circumstances, especially whether quick action is essential. In this subjective assessment, what role does training, state of mind, superior authority and disposition to corruption play? These are elements that may affect the reasonableness of actions of police officers, and indeed other officers under authority.

In civil law, the reasonable person test can be applied in determining negligence. The standard also has a presence in determining contractual intent, or if a breach of standard of care has occurred. The intent of a party can be determined by examining the understanding of a reasonable person, after consideration is given to all relevant circumstances of the case including the negotiations, any practices the parties have established between themselves, usages and any subsequent conduct of the parties.

However, these standards do not exist independently of other circumstances within a case that could affect an individual's judgment.

In the area of medical practice, malpractice can be caused by various actions or failures to act, but the main cause of medical malpractice always boils down to negligence. However, it is always difficult to establish medical negligence, especially where medical opinion on a particular course of treatment is still emerging or controversial.

The expectation to be reasonable is evident in various other activities of men; from the differences in the grading of examination papers, to the reasonableness in employment relations. In sexual harassment cases for instance, the reasonable person standard aims to avoid the potential for parties to claim they suffered harassment when most people would not find such instances offensive if they themselves were the subject of such acts. This introduces the variant, "reasonable woman", since women are historically more prone to sexual harassment in the workplace. In the work environment, employees must obey all lawful and reasonable orders. This has always caused disagreement, as what the employer regards as reasonable, may be regarded as unreasonable by the employer.

In professional careers, where a human actor utilizes a professional skill set, the "reasonable person under the circumstances" test becomes elevated to a standard of whether the person acted how a "reasonable professional under the circumstances" would have, without regard to whether that actor is actually a professional, and further without regard to the degree of training or experience of that particular actor.

#### **Adjudging the Reasonableness of Reasonable - Towards a Reasonable Standard for Analysis**

While we may consider the reasonable person as that balanced human actor, not necessarily the ideal actor, but that person so rational in thought and action that he becomes the yardstick upon which all others are judged; one finds it difficult to characterize any individual human as meeting the standard, whether in whole or in part, all of the time. Being that most human actors have limitations, based on many factors, ranging from nature and nurture, the standard only requires that people act similarly to how "a reasonable person under the circumstance" would. The difficulty in ascertaining this reasonable person and using him to adjudge the action of others lies in the ability of the adjudicator to determine the circumstances of the reasonable person, and then assuming that experience upon the object of his adjudication and then determining that their circumstances are so closely related that the reasonable person has been ascertained.

In ascribing in an adjudicator the ability to determine the reasonableness of the action of the object of adjudication, it must be emphasized that there are prominent areas of deviation in human behaviour occasioned by fundamental inconsistencies within our societal notions of right and wrong, fault and punishment, integrity and disloyalty; the effect of status, education, wealth and religion on the action of the reasonable man, which may drastically differ in spirit, even where it might appear same, outwardly.

These account for our argument precluding a universal rule.

For instance, some justifications for punishment, such as general deterrence, have no relation to intent or subjective culpability; whereas others justifications, such as fault-based punishment, require knowledge of wrongdoing. Accordingly, making an objective assessment of the reasonable man becomes problematic. In his article, "Rethinking the Reasonable Person: An Egalitarian Reconstruction of the Objective Standard", Mayo Moran shows that individual biases such as socio-economic status and political perspective shape our views of which characteristics of an accused should be considered when juries evaluate fault or guilt. However, according to him, because these biases are unprincipled and inconsistent, legislative reform is neither possible nor desirable. He reckons that the problem of how to judge individuals with cognitive or intellectual shortcomings illustrates one aspect of the 'trouble' with the reasonable person.

Recently in 2014, this thinking on the difficulty of establishing the reasonable person was re-echoed in the appeal in the case of *Healthcare at Home Limited v. The Common Services Agency*. The UK Supreme Court reviewed the term "reasonable person" using the analogy familiar in English law of "The man on the Clapham omnibus". The court said:

The Clapham omnibus has many passengers. The most venerable is the reasonable man, who was born during the reign of Victoria... Amongst the other passengers are the right-thinking member of society, ... the officious bystander, the reasonable parent, the reasonable landlord, and the fair-minded and informed observer. ... They belong to an intellectual tradition of defining a legal standard by reference to a hypothetical person, which stretches back to the creation by Roman jurists of the figure of the bonus paterfamilias... In recent times; some additional passengers from the European Union have boarded the Clapham omnibus. This appeal is concerned with one of them: the reasonably well-informed and normally diligent tenderer.

## CONCLUSION

Many persons have surely boarded the bus in recent times; but what type of bus? The type of bus determines the occupants. If it is the average luxurious bus, then you can find the banker in it, the medical personnel, the ICT expert, the politician, a child, and the illiterate woman on a trip to visit the child in the city. If it is not the so luxurious bus, the

same persons may still be there, but different levels of them. Thus the question continues to resound; who is the reasonable man and what is the test of reasonableness?

Judging from the variables that affect the objectivity of the reasonable man, such a man, balanced in thought and action, becomes rare. Yet, an entirely subjective test may lead to greater inculpability, where the peculiar circumstance of a person is used to adjudge the reasonableness of his action. A way out may have to be in the intensification of the standard of action, and the heightening of the threshold of duty of care and of available defence. If this is to be the way, then it must be definite and ascertainable, thereby suggesting legislative assistance.

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