THE NEED FOR A SECULARIZED CRIMINAL LAW: PAST, PRESENT AND FUTURE
A Proposal to Unravel a Complex Issue in Western Society

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mon good'; C) Nobody should be disqualified in the public sphere for his/her personal ideas or circumstances; BIBLIOGRAPHY.

1. INTRODUCTION: THE NEED FOR A SECULARIZED CRIMINAL LAW

The secularization of law is one of the most controversial issues of the modern era. However, it is not a product of modern times but is rather a characteristic trait of the Western Legal Tradition whose origin can be found in the 1st century, in the context of the Roman Empire.

Someone, trying to trap Jesus, asked him the controversial question of whether the Jews were allowed, by their law, to pay taxes to the Roman power that occupied their country. It was a hard question to answer. If Jesus had replied that they should pay the Roman tax, he would have been accused of betraying his people and collaborating with their enemy. If he had replied, on the contrary, that they should not pay the tax, he would have been denounced to the Romans as a troublesome rebel, as eventually happened anyway in his trial before the Sanhedrin (Lk 23:2). Jesus' reaction and answer were both unexpected and astonishing:

> "Show me a denarius. Whose likeness and inscription does it have?" They said, "Caesar's." He said to them, "Then render to Caesar the things that are Caesar's, and to God the things that are God's" (Mk 12:13-17).

Unlike in other legal traditions, Talmudic, Islamic, Hindu, Confucian, etc., (Glenn, P., 2010), in the Western legal tradition, including both the civil-law and the common-law traditions, the separation between church & state and religion & law constituted a peculiar trait from its very beginning. This feature has been constantly developing throughout history and, in fact, it can be affirmed that the secularization of law is an issue which is both permanent and complex. It is a permanent issue because it is always on the move, touching upon the past, the present and the future. It is also complex because it is, first of all, an interdisciplinary scientific matter which involves many social sciences: law (criminal law, constitutional law, legal philosophy, legal history, legal culture, etc.), philosophy (morals, ethics, political

philosophy, etc.), theology, political science, history, sociology, etc. In addition to its interdisciplinary scientific nature, it is also a cultural and ideological issue which is inextricably linked to a variety of interests: feelings, passions, prejudices, subjective interpretations of the past, personal or collective interests; religious interests; economic interests; political interests; public opinion (*mass media*); etc. Moreover, it should not be overlooked that social sciences might be particularly attached to culture and ideology. Some 20th-century historical episodes and experiences show this very clearly.

There are different and irreconcilable views on the separation between church and state. The two main positions could be synthesized as follows:

1) There is no need to separate state and church, and law and religion. The best Western example would be Israel. Two years ago, I gave a faculty seminar on the secularization of criminal law at a Jewish university. When I was trying to emphasize the convenience of grounding the criminalization of some behaviours on natural reason (rather than on religious grounds), someone asked me why I was making such an effort, as if criminal law had nothing to do with religion. A sizeable part of the audience found it odd that I should affirm that crimes should not be criminalized because of their sinful nature but because they might threaten social peace, making coexistence unbearable.

2) There is a need to separate state-church & law-religion. According to this view, the political and legal domains should be separated from, and not confused with, religious and ecclesiastic ones. I share this view. However, within this line of thought there are disagreements on the notion and extent of the secularization of criminal law. There are indeed different concepts of secularization. Some identify religion with morals, so they would regard it as intolerable that religious moral principles would influence law in general and criminal law in particular. According to this way of thinking, the minimum standard of secularization should be very high. For example, some authors hold that US criminal law was not secularized until 2003, the year in which the US Supreme Court struck down the sodomy law in Texas and, by extension, invalidated sodomy laws in thirteen other states, making same-sex sexual activity legal in every U.S. state

and territory (Lawrence *v.* Texas, 539 U.S. 558). Let me give another example. According to some criminal lawyers, the decriminalization of abortion constitutes a necessary requirement for a secularized criminal law (Gimbernat, E., 2009). To put it simply, Spain was not completely secularized until 2010, the year in which the criminal code was reformed and abortion was decriminalized. I find this view on secularization too simplistic (Masferrer, A., 2011). One may wonder how far secularization should go. Should this simplistic notion of secularization lead us to argue for the decriminalization or legalization, in the name of liberty, of incest, polygamy, prostitution, drugs, etc.? I'm not exaggerating. Two years ago, when I finished a lecture I gave at GW Law School on this subject, some of the audience asked me precisely this, namely, whether I thought the time was ripe to decriminalize polygamy and incest in the US.

It is not easy to answer these questions without properly reflecting on the notion of secularization, and a way to do this is by first emphasizing some of the misunderstandings concerning secularization. Let us examine two of them:

1.1. "Criminal law should get rid of religion"

Some people think this way. However, what does it mean to state that "Criminal law should get rid of religion"? Does it mean that freedom of religion should not be criminally protected? I don't think so. Does it mean that believers should not impose their beliefs on the rest of society? I wonder whether only believers impose their views when they give their own, as any other citizen does. If not, why do we not use the expression 'impose' when referring to the views of non-believers? If we do not do that, then we are simply discriminating against believers. Is it that believers are exerting some kind of physical coercion upon members of parliament, forcing laws to be passed according to their own views? If not, how can we say that believers impose their views in legislating criminal laws? Does it mean that believers are not allowed to express their opinions because their thoughts are too rigid, too categorical, and are, therefore, not compatible with democracy? It would indeed be ridiculous and not very democratic to use the law to forbid individuals from expressing their views because they are considered too rigid or too categorical. Who would deter-

mine what is 'too rigid' or 'too categorical'? This would be closer to totalitarianism than to democracy. Note that any totalitarian system seeks the destruction of the 'enemy.' As Hannah Arendt wrote in *The Origins of Totalitarianism* (1951), "the source of the mass appeal of totalitarian regimes is their ideology, which provides a comforting, single answer to the mysteries of the past, present, and future." Thus, 'enemies' are those who do not share the morals, ethics and ideology of a concrete political system (*die Weltanschauung*). The totalitarian regimes' ideology is incompatible with the respect of human dignity and the fundamental rights which flow from it. To put it simply, in totalitarian regimes political power becomes unlimited. A totalitarian system would never admit that "[t]he aim of all political association is the preservation of the natural and imprescriptible rights of man. These rights are liberty, property, security, and resistance to oppression." (art. 2, *The Declaration of the Rights of Man and the Citizen*, 1789).

1.2. "Criminal law should get rid of morals"

Some people think that this is what secularization means. Not just getting rid of religion, but of religion and morals altogether. Does this mean that there should be no connection between criminal law and morals? That does not seem to be possible: criminal law will be always linked to morals. A different thing would be to hold the opinion that criminal law should intervene in any moral issue: that would be nonsense since it would somehow imply the replacement of individual conscience by the criminal legislator. The majority of behaviours are moral yet most of them have neither social nor criminal relevance.

Does it mean that crime and punishment have no other foundation (or legitimacy) than their legal sanction or legislative approval? This is what 19th-century legal positivists defended, but such a school of thought proved to be inconsistent. Few people really defend such a voluntarist approach to law, affirming that laws are fair and must be obeyed simply by virtue of their legal sanction, as if this was a guarantee of justice. History, and particularly the 20th century, shows that this is not true.

Some authors assert that before Kant (1724-1804) there was confusion between law and morals, between crime and sin. Some think

that criminal laws should never punish those behaviours that might be regarded as sins according to a particular religion. This does not seem to be a very sound criterion, since many sins, according to religious beliefs have been, are and, hopefully, will remain criminalized (e.g. homicide, assassination, rape, theft, robbery, etc.). In this line of thought, some scholars think that today's criminal law is not entirely secularized because there are still remnants of the Christian legacy (incest, polygamy, drug trade, prostitution, abortion, limitations on biotechnological experimentation in humans, etc.). Some seem to see remnants of Christianity everywhere. After a paper I delivered at a US university some time ago, someone asked me whether "the notion of 'human dignity' is a Christian legacy, and whether we can really resort to it in a secularized Western legal system". It seems to me that the fact that most of Western thought has been developed by Christian thinkers, with some notable exceptions, or embedded by principles in line with Christianity does not preclude us from resorting to the notions and categories we have received. For example, the notion of 'human dignity' can be used by all, regardless of whether one is a believer or not. It is understandable that a non-Christian will never ground this notion on the idea that God created man in his image and likeness (Waldrom, J., 2010), and even less on the theological dogma that through the death of Christ on the Cross men became sons of God. Non-believers do not need such a religious foundation of 'human dignity', although they may respect the religious grounding of believers. On the other hand, there may be believers that, having the option to resort to such a religious foundation, prefer not to do so in order to make the dialogue between believers and non-believers much easier. That is my case. Of course I think believers are free to use the reasons they find most convenient to defend their views, but it seems to me that natural reality and reason might usually make superfluous, unhelpful and, sometimes, even counterproductive, the recourse to religious or theological arguments. In this vein, it is not surprising that many 17th and 18th legal philosophers, who were Christians, grounded human dignity in human nature rather than in other religious or theological reasons (Masferrer, A., 2016).

2. THE PAST

How may one draw a solid line of separation between law and religion, and between law and morals? What should be the criteria for drawing a line between these two domains, without violating common sense or falling into a degenerative state below a sound human standard? How can we find the criteria? Classical thinkers usually argued by resorting to authorities (*auctoritates*), reasons (*rationes*) and past experiences or history (*experientias*). Even in the 19th century, lawyers resorted to all of these when discussing legal issues or deciding how best to undertake legal reforms (Masferrer, A., 2008, pp. 201-256; 2008-2010).

I wonder whether we can learn anything from history on this matter. As Cicero stated, "*Historia magistra vitae est*" ("History is life's teacher"):

> "By what other voice, too, than that of the orator, is history, the evidence of time, the light of truth, the life of memory, the directress of life, the herald of antiquity, committed to immortality?" (Cicero, *De Oratore*, II, 36)

There are two opposite camps that have extreme approaches to history, and neither is entirely correct. The first are those who believe in "the good old days" when things were better ("cualquier tiempo pasado fue major"). They think that the past is always better than the present and the present is, in turn, better than the future will be. The opposite camp defend the opinion that "nothing can be learned from history" since the future will necessarily be better than the present, as the present is much better than the past. They firmly believe in inevitable progress (rather than in the mere possibility of things improving), and think that advances in science, technology, economic development, and social organization are vital to improve the human condition. They do not even envisage the possibility that the future might bring damaging aspects, as can be appreciated by a comparative analysis of the present and the past.

Can we really learn anything about the secularization of criminal law from the past? Some lawyers think that the criminal law tradition can hardly show us anything from which we can learn. Some scholars even argue that there was no science of criminal law in the *Ancien ré-*

gime, and that the legal science of the criminal law started in the 18th century, particularly with the French revolution and the promulgation of criminal codes in the context of liberal political systems. I do not think this is so. This is an unfair simplification of historical reality (Masferrer, A., 2003; 2007; 2009). Even among those who recognize the existence of a science of criminal law before the 18th century some scholars maintain that in the medieval and early-modern-age the notions of crime and sin were entirely blurred (Tomás y Valiente, F., 1969, pp. 219-242; 1990, pp. 33-55; Clavero, B., 1990, pp. 57-89).

The Criminal law tradition contains its lights and shadows, as does criminal law today. In this regard, it is important to keep in mind the distinction between theory, e.g. what laws prescribed or legal doctrine defended, and practice, e.g. how laws were effectively applied or what some specific lawyers might defend.

Let me give an example from human rights law. We are said to be in the 'Age of Rights' (Bobbio, N., 1996). We all feel proud of the explicit recognition of human rights in many Declarations, international instruments and national constitutions all over the world. However, we all also know that, in practice, human rights are not effectively protected in many cases. In this regard, the present global dualism is unsustainable: some people live in opulence at the expense of others who lack the basic needs in order to live with a minimum of dignity (drinking water, food, housing, education, communication, etc.), while the rest contemplate, with a certain degree of complicity and impotence, the wealth of a minority and the poverty of millions of others. The fact that part of the world enjoys a consumeristic and hedonistic lifestyle, and justifies to itself the multiple violations of the rights of the powerless, of the most vulnerable, of those who cannot look after themselves, or of those yet to be born who will never have the chance to enjoy the environment as we may enjoy it today, is simply unsustainable (Masferrer, A. / García-Sánchez, E., 2016).

As experiences have varied in different places and in different periods the comparative legal history approach is particularly suited to examining the topic of secularization. As stated, the history of criminal law, and criminal law today, has its lights and shadows. What are the positive lessons we can learn from it? I will comment on three aspects that are particularly pertinent to the secularization of criminal law: 1) the separation between church and state and between law and

religion (a product of Christian thinkers who instead of conceiving, as Islamic law did, that there was no distinction at all between the civil/secular laws and canon/ecclesiastic laws, e.g. between the '*Corpus Iuris Civilis*' and the 'Holy Scripture', contemplated such a separation); 2) the belief that the main purpose of criminal law was to achieve 'social peace' or 'social order' based upon a 'natural order' (instead of saving souls, or guiding them to eternal salvation); and 3) the fact that behaviours were criminalized because they constituted a threat to social peace and order (and not just because they offended God and went against religious rules).

What are the negative lessons we should try not to follow or repeat? 1) The separation between church and state has been blurred when states have used religion to enhance political unity and social cohesion (particularly in the 16th and 17th centuries); and 2) in the 17th century states became the guardians of religious orthodoxy (this tendency was particularly strong in Calvinist territories, e.g. Switzerland, Scotland, Netherlands, England, Massachusetts).

Some scholars have defended two ideas that, despite not being fully consistent, have reached general acceptance: 1) there was no real secularization of criminal law until the 18th century (as if theology had dominated the criminal law until the doctrines of Beccaria, Voltaire, Montesquieu, etc.); and 2) Up to the 18th century, there was an identification between crime and sin. Those who defend this view are thinking particularly of two kinds of crimes, namely, i) 'crimes against Divine Majesty' or '*crimina laesae maiestatis*' (including heresy, apostasy, blasphemy, witchcraft, sacrilege, etc.), and ii) 'crimes against good customs' (or morals) or today's so-called 'sexual crimes' (including, adultery, prostitution, stuprum, incest, sodomy, bestiality, etc.).

Are these ideas historically real and consistent? Or do they just conform to a whiggish interpretation of history? In my view, they are partly consistent, and partly myths which deserve to be dispelled. It is true, as stated, that the separation between church and state considerably blurred when states used religion to enhance political unity and social cohesion, and that, in the 17th century, states became the guardians of religious orthodoxy. However, it is false that a category called 'sexual crimes' existed (although the expression '*delicta carnis*' was used by a few 17th-century lawyers); it is also false that crimes

were commonly prosecuted just because they constituted a moral or religious sin (although in some cases this may have been considered a relevant element of the criminal offence); it is also false that the influence of theology over criminal law ended in the eighteenth century, the moment in which the secularization of criminal law took place. According to this view, the secularization of criminal law came into existence thanks to authors like Beccaria, Mostesquieu, Voltaire and Lardizábal, among others.

The reality is much more complex. An adequate explanation would go beyond the limits of this chapter. Although this is part of an on-going research project, I shall advance three of my provisional conclusions: 1) despite the influence of Christian ideas and morals, the Western legal tradition never, or at least almost never, punished a behaviour just because it constituted a moral or religious sin, although in some cases this may have been considered a relevant element of the criminal behaviour; 2) 16th and 17th century legal scholarship reflects a clear process of secularization that 18thcentury authors defended, claimed and further developed in a particularly convincing way; and 3) the secularization of law did not necessarily mean a higher tolerance towards sexual offences, as if Christian morals had been the only reason why sexual misconducts were persecuted and punished. In this vein, it has been proved that sexual offences were particularly controlled, notably persecuted and severely punished during the 18th and 19th centuries for different reasons (far removed from the religious or Christian-moral ones).

3. PRESENT AND FUTURE: A PROPOSAL TO UNRAVEL A COMPLEX ISSUE IN WESTERN SOCIETY

How should such a complex subject be approached in our Western society? Social sciences are not mathematics. In addition, and as has already been noted, the secularization of criminal law involves a variety of disciplines and might easily touch upon deep personal feelings (ideological, political, religious, etc.) which might lead scholars and politicians to argue too passionately and to resort to biased arguments. To put it simply, it is not an easy subject for legal reasoning.

Being fully aware of this, I will restrict myself to proposing some general principles (instead of focusing on more specific issues). I will also try to ask more questions than give answers. In doing so, I want the reader to think about the difficulties involved and appreciate the complexity of the subject. In other words, I would be satisfied if I were able to make the reader think or, at least, to help him/her to think about these issues. It might help to reproduce part of two emails I received from students who attended a lecture I gave at their University two year ago with the title "The Secularization of criminal law in the Western tradition: past, present and future" (Université Paris X Nanterre, Paris, France, 23rd March 2015):

> "Dear Professor Masferrer,
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> I would like to thank you for your lecture. When I received a message announcing the subject you are working on, I was a bit surprised. But after your lecture, I've been thinking (all the time) about the importance of the problem in understanding how legislators draft the law even today, what they have in mind (or might have in mind), even though they don't (and surely can't) write down every thought or principle that leads them to legislate or vote for a law." (26 Mar 2015, 18:51:43)

> "Dear Prof. Masferrer,
>
> (…) allow me to send you an article we received to prepare a seminar, in which, I think, you might find elements to feed your reflection: I'm talking about an article exploring the way reflection about law has changed through the centuries in Western Europe; it deals more precisely with how lawyers and judges have thought about and applied the law; and argues in favour of the idea that judges might have operated with moral principles in mind, even though the law had no overtly moral (or religious) wording (or considerations) in its text.
>
> (…) since your seminar, I can't help but have this frame of mind [the one you transmitted in your lecture] every time I read an article; I'm afraid that it will be this way until you publish your book bringing the answers." (Sun, 3 May 2015, 09:22:02)

As I mentioned before, I do not claim to be able to provide all the answers to such a complex issue, I do not even know whether I might ever be able to do so, but I hope I can at least transmit the "frame of mind" referred to by my French student.

What is "this frame of mind" which might enable us to depict the main features of a sound model of secularization of criminal law for the present and the future? In my view, a sound model of seculari-

zation of criminal law should be based upon three main principles, namely, a) Criminal law as the last resort; b) pluralism and respect for human dignity as requirements of a Constitutional democracy; and c) the use of public reason in public debate. Let me briefly explain these principles.

3.1. Criminal law as the last resort

In the last few decades the use of criminal law has expanded considerably. The reasons for such an expansion are manifold (Silva Sánchez, J.-M., 2001). It is well known that the so-called "war on crime" has strongly contributed to this tendency from the 1960's onward, a period in which states have increasingly made use of criminal sanctions as a way of regulating private life, families, schools, workplaces, and residential communities. This has led to what many scholars have called the problem of 'over-criminalization' (Husak, D., 2008). Examples of this extraordinary expansion of criminal law abound. Such expansion has affected both domestic and international criminal law (Tigar, M.E., 1987). There is a need to rediscover the classical liberal principle of minimalism in criminal law, whereby criminal laws should be used only as a last resort (Husak, D., 2004). I do not share the view of those who passionately defend the need for decriminalizing certain behaviours which have been persecuted and punished over the centuries (Husak, D., 2002; 2009a; 2009b), but I do think that criminal laws should be used wherever possible as the *ultima ratio* (Husak, D., 2005), and never to undercut the exercise of fundamental rights and freedoms (of expression, association, conscience, religion, etc.) (Masferrer, A., 2016a, 2016b).

The expansion of criminal law or the problem of over-criminalization could also be related to the gradual process of permissivism or demoralization of society. In this vein, the degradation of the doctor-patient relationship and the emergence of defensive medicine, as the physicians' behavioural response to threats from medical malpractice litigation, shows the connection between immoral behaviour, the breakup of bonds of trust and the increase of both litigation and criminal laws. Trust is a key component of the patient-physician relationship, but also of any interpersonal relationship. 'Don't trust the person who has broken faith once', said William Shakespeare. As Frederick Douglass pointed out, 'trust is the foundation of society':

> "Mankind is not held together by lies. Trust is the foundation of society. Where there is no truth, there can be no trust, and where there is no trust, there can be no society. Where there is society, there is trust, and where there is trust, there is something upon which it is supported" (Douglass, F., 1869).

The more generalized immoral (or unethical) behaviour is, the more criminal laws are needed. If religion might really help people to freely lead an ethical life, it could also contribute to developing sound and mature societies which could manage without so many criminal laws. From this perspective, the 19th-century Spanish lawyer who argued that "there is no need for harsh penalties in Spain where a religion like ours rules and is professed, which provides an infinite number of crimes and makes men docile and obedient to the precepts", might be right (De Dou y Bassols, R.L., 1800, p. 37).

3.2. Pluralism and respect for human dignity as requirements of a Constitutional democracy

We all know that the plurality which characterizes modern Constitutional democracies requires an attitude of respect for all individuals. There are neither second-rate citizens nor second-class individuals. After World War II, human rights became the *lingua franca* of international relations. Both international legal instruments and national constitutions established human rights as the basis of legal systems. In doing so, legal texts cited human dignity explicitly as the source and foundation of human rights. The close relationship between human rights and human dignity is emphasized by international human rights instruments, which explicitly recognize that human rights "derive from the inherent dignity of the human person" (*International Covenants on Civil and Political,* and *on Economic, Social and Cultural Rights*, 1966, Preambles). In many international documents as well as philosophical theories, "human dignity is considered to be a source of human rights" (Mieth, C., 2014, p. 11; Griffin, J., 2008; Nussbaum, M.C., 2006). There is no need to list those instruments here to show what can be easily observed by the most superficial reading of them (Barak, A., 2015, ch. 3; Alzina de Aguilar, J.P., 2011; Andorno, R., 2014).

The notion of human dignity and its role has relevant implications in the domain of criminal law. In fact, human dignity is not only regarded as the foundation of public law, to which criminal law belongs, and poses unnegotiable limits to state power, but it also serves to determine what should be considered, from a criminal law perspective, as a protected legal good ('Bien jurídico protegido').

The discernment of protected legal goods which theoretically define the boundaries of the criminal-law domain faces two notable difficulties, namely, i) how to deal with diverse conceptions of 'human dignity' and 'protected legal goods'?; and ii) how to combine universality (society) and singularity (individuals) without resorting to the notion of 'common good'? They are indeed hard questions to answer.

Concerning the first difficulty, it seems clear that determining whether a particular legal good should be criminally protected or not will mainly depend on the notion or conception of human dignity one may have. If there is no agreement on the notion of human dignity, then criminal law suffers as a consequence. Let me give an example. Euthanasia, which comes from the Greek - εὐθανασία: 'good death', is the practice of intentionally ending a life in order to relieve pain and suffering. Whereas some argue that assisting a subject to die might be a better choice than requiring that they continue to suffer, others stress that accepting euthanasia implies that some lives (those of the disabled or sick) are worth less than others and that accepting voluntary euthanasia would be the start of a slippery slope that would lead to involuntary euthanasia and the killing of people who were thought to be undesirable. In this vein, the expressions 'good death' and 'dying with dignity' have opposite meanings depending on the conception of human dignity one may uphold. For many centuries there was agreement on the meaning of human dignity. Once this notion was detached from human nature at the end of the 18th century, such agreement fell apart (Masferrer, A., 2016), and since then nobody has been able offer another conception of human dignity that has been so widely and commonly accepted by scholars and thinkers.

As to the second difficulty, namely, 'how to combine universality (society) and singularity (individuals), without resorting to the notion of a 'common good', several political philosophers have attempted to solve it by giving priority to either society (universality) or individuals (singularity). Hegel, following in Jean-Jacques Rousseau's footsteps

(who regarded 'law as the expression of the general will'), opted for universality, defending the idea of 'Totalität'. The question is how to combine the general will and individual wills. Immanuel Kant recommended us to 'Act from maxims fit to be regarded as universal laws of nature' (Kant, I., 1796, p. 52). The well-known Kantian principle whereby no man should ever be treated as a means (but as an end) was founded upon the dignity of humanity or human nature: "…each Intelligent, being by his *nature* an end in himself, should subordinate to this end the maxims of all his causal and arbitrary ends" (Kant, I., 1796, pp. 51-52). In other words, Kant's autonomous will did not fit with the idea of a libertarian or utilitarian conception of free will or autonomous will. Not all choices are good or equally good. The goodness of moral acts does not come merely from the free will. According to Kant, there are some rules that are founded on human nature, and autonomy should move within these 'universal laws of nature.' If such 'universal laws of nature' are common to all human beings, then there is a 'common good' to pursue and attain. If such 'universal laws of nature' do not exist, as many thinkers hold today, there is no real common good, and such a category is (badly) replaced by another one, namely, 'common interests', whose meaning is entirely different. Here lies the difficulty: how to legislate criminal law when there is no agreement about the existence of a universal common good? The answer seems to be impossible unless we rescue a platform on which we can all firmly stand, as was the notion of a 'common good' for many centuries (Rhonheimer, M., 2013).

3.3. The use of a 'new public reason' in the public debate

John Rawls tried to show that his two principles of justice ('Principle of Equal Liberty' and 'Difference Principle'), properly understood, form a 'theory of the right' (as opposed to a 'theory of the good') which would be supported by all reasonable individuals, even under conditions of reasonable pluralism. The mechanism by which he attempted to demonstrate this was called 'overlapping consensus'. In doing so, he developed his idea of 'public reason'. He coined the expression 'public reason' to refer to a common mode of deliberation that individuals may use for issues of public concern. In doing so, he argued that such a category involved the implicit exclusion of certain

assumptions or motivations that might be considered improper as a basis for public decision making, even though an individual might apply them in personal decisions concerning matters that have no significant impact on the public. More specifically, public reason requires the effort of justifying a particular position by way of reasons that people of different moral or political backgrounds might be able to accept (Rawls, J., 1971; 1996). Rawls' exclusion of certain assumptions or motivations as improper was highly criticized, and later on, he changed his view, adding what was known as the proviso, whereby non-public reasons could also be given inasmuch as public reasons would be also provided in due course (Rawls, J., 1997). Rawls' efforts were meritorious, but some aspects of his theory deserve criticism (Rhonheimer, M., 2005; Larmore, C., 2012).

Unlike Rawls' theory of public reason, I do think that citizens or particular associations should only be allowed to address their comprehensive conclusions about political issues to like-minded souls, but rather to everyone in the community whatever their beliefs. I also think that believers should be allowed to refer to their religiously inspired arguments, for example in regarding abortion as murder, to both believers and nonbelievers. A different question is whether this is the best way to argue in a pluralist society.

Citizens should be allowed to argue in public debate as they see fit. In doing so, however, they should keep in mind that they need to be understood by others, including those who do not share their comprehensive views. The category of 'public reason' might constitute, in my view, a reminder, to both citizens and politicians, of the convenience of arguing in a way that might eventually lead to an agreement as to how to regulate a specific subject or, in our case, whether a specific behaviour should be criminalized or decriminalized. In my opinion, public reason should be used in the public debate, that is, when public issues are at stake. That is the case when the legislator needs to decide whether a particular behaviour should be a criminal offence or not.

While I regard the category of 'public reason' to be useful for engaging in public debate, I propose a modified version of Rawls' public reason, which would comply with three requirements to ensure its fruitful outcome:

A) The primacy of reason over will as a requirement for making a 'common good' possible

I do not agree with the contractarian approach of Rawls' theory, whereby morality is just an agreement for mutual advantage; for if that were the case we would have no obligations towards people of the future with whom we cannot interact. In addition, Rawls' rejection of a 'theory of the good' (replaced by a 'theory of the right') reflects his scepticism towards the existence of any 'common good' for society, a characteristic principle of utilitarianism, a philosophical movement Rawls devoted his main works, *A Theory of Justice*, *Political Liberalism*, to fighting against. Convinced that there is neither 'human nature' nor any (substantive) 'common good' which might be grasped by the light of reason, Rawls was content with setting up a formal procedure whereby an agreement could be reached. In short, he proposed a reasonable procedure for establishing what is right, but not for finding or discovering what is good. Such rightness did not derive from a reason capable of grasping what is true and good for man and for the whole of society, but just from a 'fair' consensus or agreement. Thus, in Rawls' theory of public reason the will had clear predominance over reason. In my view, reason should not be degraded to a mere tool to design and follow procedural rules. Reason is not a servant of the will. It deserves something more than that. In fact, reason should have priority over the will.

It is impossible to reach an agreement if the debate and arguments revolve around just 'public interests', and not about the 'common good' for the whole community. The primacy of reason over the will in using public reason in the public debate has several consequences. Here I will mention just two of them:

i) *The rejection of arguments of authority*. There should be no room for arguments of authority. Arguing that a particular behaviour should be criminalized just because it "goes against God" or because it "constitutes a serious sin", would be improper for public reason. Arguments such as "something is bad because someone says so" or "something is good because the majority says so," would not be consistent with public reason.

ii) *The rejection of arguments which are almost exclusively based upon individual wishes*. Arguing that "I have the right to do

something because I wish so" does not seem to be consistent with public reason.

B) Reasons and arguments must pursue the 'common good' (Not just the 'public interest' or even less 'individual' perceptions, beliefs or wishes)

Two ideas are particularly relevant to this requirement:

i) A permanent search. The 'common good' does not come out of the blue. Nobody knows what it consists of precisely. No institution can claim to having grasped it completely. It requires a constant search by all and cannot be easily encapsulated in one expression or sentence. In this regard, arguing that "a behaviour should be criminalized because it goes against natural law" would be improper for public reason, not because citizens are not allowed to invoke natural law if they find it convenient, but because such an argument might be quite meaningless and unhelpful for those who do not regard natural laws as a solid foundation upon which a social order and peace should be based on. Those who think that natural law is important should make the necessary efforts to translate this category into a more elaborate reasoning which might be more appealing or persuasive to those who regard natural law as odd as heavenly angels.

ii) An interdisciplinary search. The search for the 'common good' should be as scientific as possible (including philosophy, political science, law, history, sociology, etc.), using the data needed to come to sound and consistent conclusions. An accurate and honest interdisciplinary work would be very helpful for ascertaining the convenience of criminalizing or decriminalizing a particular behaviour. Honesty implies the good faith of the researcher who strives to carry out his/her work as objectively as possible, without getting swept up in (or being carried along by) his/her own ideas or beliefs. Some might think this is impossible. I think it is both possible and necessary for the good of society. For that to be a reality, education plays an important role.

C) *Nobody should be disqualified in the public sphere for his/her personal ideas or circumstances* (Race, colour, religion, creed, ethnicity, ancestry, national origin, sexual orientation, etc.)

This requirement leads us to ask whether believers should be allowed to engage in public debate, and if so, how, they should use 'public reason'. The first question can be easily answered: yes, they should be allowed to participate in public debate for the simple reason that nobody should be excluded from it. As to how believers should join the 'public reason' discussion, I said something on this matter above. In my view, although believers could resort, if they wished, to religious or theological arguments in public debate, I rather think that Christians should not do so because, besides being unhelpful, they have no real need to do so. The relation between faith and reason, as well as the important role of reason in Christianity makes it generally unnecessary to resort to religious arguments. As Hugo Grotius pointed out, Christians might perfectly engage in public debate and use public reason without resorting to either God or religion ("*Etsi Deus non daretur*"; Grotius, H., 1625, *Prolegomena*, n. 11). In short, they have no need to resort to religious or theological arguments to defend a position in accordance with their own ideas or beliefs. They just need to observe reality (particularly, the human condition and society) and give those arguments which might be understood and shared by non-believers, using sound and consistent reasoning aided by their common sense, their experience, their ability to listen carefully and their attempt to sincerely understand other people's opinion, and, wherever possible by in-depth scientific knowledge (of philosophy, political science and political philosophy, history, law, sociology, etc.).

Some people think that "all Christians are prejudiced" because they have fixed ideas, do not accept moral relativism, and try to impose their moral views on others, etc. I will address this objection with a simple question: is it not true that we are all, for whatever reasons, prejudiced? We all have a variety of religious beliefs, economic interests, political interests, personal experiences and situations, social or family backgrounds, etc.

It is time to get rid of two kinds of clericalism, namely, the 'ecclesiastic clericalism' of those who think that secular laws should comply

with God's laws because that is God's will, and the 'civil clericalism' of those who defend the idea that political powers or state and international organizations (e.g. the United Nations) should deny the voice and vote of those whose ideas might constitute a threat to what is presented as progressive.

As has been rightly argued, "[s]ocial peace and personal happiness, as bulwarks of democratic societies, are better served by separating religious argument from legal deliberation, but not by expelling God from legal systems" (Domingo, R., 2016, p. 23), and even less by expelling believers from public debate, or by regarding them as second-rate citizens.

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