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An attempt to approximate passions to law or the Spanish law of "only yes is yes" as an excuse

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> "The duty of the physician is always to cure the disease and that the sick person has recklessly exposed himself to it is irrelevant."
>
> **Concepcion Arenal.**
>
> "To understand everything is to forgive everything."
>
> Tolstoy.

Presentation

When back in 2011 the Istanbul Convention was born, it arose after great social, media and even legal pressure from the need to create a certain framework that will unify in Europe the abuses and violence that, at different times, forms and areas, women and girls had been suffering greatly; in short, to cover the normative vacuum in terms of sexist violence in Europe. This convention was signed by all the Member States of the European Union and it places special emphasis on the need to: "*Protect women against all forms of violence, and prevent, prosecute and eliminate violence against women and domestic violence*". Add that women are put as the main victim because gender bias massively affects women and so says EU Agency for Fundamental Rights, Violence Against Women: an EU-wide survey. Main Results, Luxembourg, 2014.

We will start from here in order to place ourselves before the fact that will concern us, the recent and mediatic *Spanish Law of integral protection sexual freedom of September 6, 2022*, known as "***Only yes is yes***" and that could put us on alert of potentialities of the same and especially before the fact if sometimes the laws could go ahead of new paradigms and not only legal and law, but also social. Obviously it may seem too pretentious of me that a framework approved and signed just over 12 years ago is still seen as a preview of a here and now, but sometimes reality surpasses any fiction.

And, if we focus on the strong idea or at least the one I intend to focus, part of the imbroglio that has been causing throughout history in the social, legislative, legal and legal perspective, sexual violence is its direct treatment with punishment. Online always interesting what Foucault said about it, a way.

To requalify the subjects of law making use of signs that are universally accepted that the crime is punished, we are a... "**Whoever makes it** pays." If we dare a little further and enter into socio-cultural issues we could, although this punishment was a legal improvement over the torture[1], punishment has always been understood as the need to return to order to those who leave the pre-established, ultimately impose a correction with rigor or suffering. But without forgetting what Coyle points out: "*A rehabilitated inmate is not one who learns to survive well in a prison, but who manages to live in the outside world after his release.*"[2] (2002: 84).

Meanwhile, the law or, as the case may be, the law, was announced by Plato: "*Legislation and the establishment of a political order are the most perfect means that the world can use to achieve virtue*." (Laws, 708). Cicero previously stated in his famous treatise *De legibus* that true knowledge of law must be drawn from the "*very Heart of philosophy*" and that... "*Those who received reason from nature received the law, reason that forbids and commands. And if they received the law, they also received the right*."[3]

I mean; Law, Order and Punishment in *"a here and now*" that will determine Law. Ritual of a political nature will tell us Durkheim (1893), in his work *The division of social labor* and that puts on the table of positive law the feelings and collective beliefs; that is, criminal action would attack the emotions of a society and society would put all its passion in demanding punishment. And that I insist, visualize, part of what I intend to wield. The law is formed under a cultural style where the sensitivity of a people and its punitive traditions is perfectly reflected in its legislation. Interesting, in this regard, Garland's statement: "*Punishment, expression of cultural patterns, but also, generator of cultural relationships and sensitivities.*" (1999: 291). That, at the same time, would have to be conjugated.

[1] : Model of penal demonstration, which made the guilty preacher of his sentence, taking the physical punishment to walk through the streets and even reading the sentence at street crossings. But, above all, a political ritual that functioned as socio-political derision, since the crime was an attack on the sovereign from whom the law emanates.
[2] It was revenge for the offense.: In clear allusion to the re-educational role must accompany every penalty and implicit in its legislation.
[3]: Cicero***, On the laws***, lib. I, V, 17, Buenos Aires, Ed. Aguilar, p. 42.

In some way this idea is what has been given in matters of manifest violence against women, especially when it is overbranded, and overbranded in the Spanish penal code in differentiating sexual assault (consent is lower, it is assumed, since there has been a clear and evident violence and greater penalties) over sexual abuse (violence is not so evident and consent should be assessed, minor penalties). And what does he ask us, could the same violation suffer different penalties in case it presents obvious signs of violence with another that does not show it? So how should a woman behave before her rapist, so that justice is fair to her criminal? Could we talk about first-rate rapes and second-class rapes? Here passion becomes an element that prevails in grief and nuanced by different sensibilities, which Weber (1904) already suggested to us the proper becoming (rationality) of modernity. In short, cultural aspects that we cannot get rid of.

The framework and specificity of consent

Let us start from the fact that in all legislation prevails cultural, logical and common sense conceptions of institutions among other legal ones that characterize that specific normativity that is presented or intended to be presented as a universal norm. Well... "*If laws influence manners, manners influence laws; and when customs are changed the laws are annihilated and repealed by faith*" (Grosley, 1757: 9-10). To which I would add... A culture of the environment that shapes the public constitutional sphere and law.

In Europe, after multiple demonstrations and demands both Women's Day (March 8) and the International Day for the Elimination of Violence against Women (November 25), since 1990 on the table of the European Union, sexist violence against women has been put on the table of the European Union, as a priority issue, giving rise to different manifestations, campaigns, agreements and the creation of estates; online the Council of European Recommendation REC 2002 is created, eradication campaigns between 2006 and 2008, in 2008 the REC is transformed into the CAHVIO "Ad Hoc Committee to prevent and combat Violence against women and domestic violence", which culminates with the launch of the Istanbul 2011 agreement, entering into force on August 1, 2014.

The idea was clear, at least on paper, that the different member countries of the European Union prioritize among their customs, attend to Law and above all legislatively collect the fact that Europe is a zone: "*Free of violence against women and domestic violence*". And where the issue of consent was manifestly and clearly stated[4]. Consent understood in the case at hand as the ability to exercise an agreement between the participants to have a sexual encounter. But I am interested here in introducing the political vision of it, that is; The use of power is justified only when individuals or society freely permit it and where the inalienable will of the person will be the basis of government.

I am putting on the table the basis of the theoretical discourse and legal support of the need for the "*OTHER",* in the case at hand, of the **other** in the final decision making, we speak of shared, deliberative power and exercised among equals and implicitly voluntary. In short, which can never be taken for granted and is reversible, you can change your mind, even while naked in bed. Interesting, here, we approach Ricoeur (1950) in *The voluntary and the involuntary*, in which the hermeneutics of the *self* and *homo capax* are always in sight. Where consent is always accompanied by patience, in which both can-must be given and thought of as structural elements that constitute the self (personal character of the human being before the world and others). And that places us in the dimension of respect and limits.

Returning to the current legal and legislative practice if we make a quick historical tour especially in Spain, regarding sexual violence has been characterized by a patriarchal vision of it. In fact, in some jurisdictions the victim could be charged with fornication (if single) or adultery (if married) if they cannot prove rape or sexual assault overtly, *Equality Now* (2017:22).

This has been happening from the mitigating factor when the woman was married or out of public (Spanish Penal Code 1822) to the last Penal Code 1995 where it was differentiated between sexual abuse (without manifest violence) and sexual assault (with manifest violence) with obvious differences in penalties, producing in fact potential victims who before the same fact their author or authors would have penalties considerably minor, depending on how they had acted in the face

[4]: Potential to pass with evidence of autonomy and / or self-determination of the human being.

of the same fact... be raped. It is necessary to clarify that until the approval of the Law "*Only yes is yes*" our legislation did not adapt to European legal standards, so Spain needed a review and reformulation of the violation around the consideration of consent as a key element.[5] Distinguishing, as until now, aggression/abuse did not make sense since the determining factor should be the self-determination of the victim. For a woman groped with greater or lesser intensity without her consent, does not feel abused, but assaulted in her dignity and sexual freedom.

That is what I would try to do, to weave consent as the backbone of the legislation or so it should be, returning both in the structure of the crime and in the procedural field, at the risk of reversing the burden of proof of abandoning the presumption of innocence proclaimed in article 24.2 of the Constitution (1978), but I insist, it would only be a risk that is not sustained in reality, Well, either the victim or, in her case, the Prosecutor's Office will still have to prove that there was sexual assault. The fundamental difference with the previous situation is that non-consensual sexual acts were considered abuse and if the victim had resisted or there had been intimidation it was qualified as assault. Similarly, if between perfectly consented couples, it is the case that the woman is asleep or drunk, it is evident that there can be no consent.[6]

Consent, which returning to Ricoeur, puts the accent on the feelings that externalize him in relation to himself. Jean Nabert[7] is the emblematic teacher of this current, the ambition to go "to things themselves", that is, to highlight the intentional dimension of theoretical, practical, eidetic life, etc., and to define all knowledge as... "consciousness of". I mean to witness the personal character of the subject before the world and others; It is to recognize, to realize that the self is inhabited. But ... what would it mean to be autonomous in the context at hand? "Being" in

[5].: Interesting work of Altuzarra Alonso The crime of rape in the Spanish penal code.2020 in https:// revista-estudios.revistas.deusto.es/article/view/1833/2217. Retrieved 20.3.2023.
[6]: I predict that how to settle if there is consent, will be as difficult as until now, but the important thing is that it has entered into that "passional", interesting and interested debate of consent.
[7]: The "I am" as absolute certainty that asserts itself freely and subjectively in me. Find out more Éléments pour une éthique, PUF, 1943. In http://classiques.uqac.ca/classiques/Nabert_Jean/Elements_pour_une_ethique/Elements_pour_une_ethique.html.

the acts he performs, that is, being able to recognize himself in the actions we can claim as their own, even if these are made with another. It is not less what is raised here, because we enter fully into having to settle our power of being before the "requests" or "demands" of the other, which would place us before the evidence that consent is only given when you can respond to the given situation and thus be responsible for the yes.

However, we cannot forget that the "Istanbul Convention" requires us more, so it recommends advancing in the fulfillment of state obligations of prevention, protection, persecution, support and reparation against gender violence. It is an unavoidable text that should enlighten the European Union in the design of its own legislation on the fight against sexist violence that is binding and obviously transformative, with respect to promoting re-education as a pillar more than necessary.

Law, politics, society... transformation

How to integrate it? It is evident that there is or should focus our theme, the law is shaped from rationality and not from punitive populism. Recalling here part of the essence of what Durkheim (1893) came to suggest in *The Division of Social Labor*, regarding that the judicial procedure is actually a rite of marked political character, and that this is part of the set of acts (ceremonies) through which power is made relevant. And Garland (1999: 54) insisted: *"Punishment is an expression of cultural patterns, as well as an active generator of cultural relations and sensitivities."*

Which serves as an excuse to enter fully into another not minor issue that is included in the "Istanbul Convention" ... Create a new paradigm, complex paradigm, from the evolution of re-education, since it resorts to a teleological sense of ending sexist violence and ultimately with machismo. Placing ourselves now facing the obvious fact of having to face the so hackneyed social approval and that could turn against the very intention of the legislator. For the fact of not collecting the social sensitivity, "the here and now" of the deepest passions of a society (cultural infrastructures) could generate profound distortions and above all demagogic pseudo-political positions. This is how Foucault's *Vigilance and Punishment* becomes the case that concerns us in the backbone, since criminal practice is not

Both consequence of the legal but rather product of the social and political body, specifically in the second chapter (punishment) comes to express it in a meridian way, because although actions are punished, what is really done is to judge passions, resulting in the idea that the law is not a system but rather a subculture that is due not only to custom but in the same way to the moral.

And this is part of what has come to happen, with a law that in essence has been able to pick up among others the strong idea of adopting an integrated and integrative approach, where a whole culture of education appears and not only acts from the punitive field. Thus, in chapter I from art.7 where the law is implemented with educational measures to art.17 awareness and prevention in political parties and social organizations, through safe public spaces (art.16) or prevention in the military field (art.14) the law, comes to reset the current situation and promotes the values of sexual freedom, Basic principle to be represented and respected.

In short; law and culture are implemented by reminding the sophists who were undoubtedly the first to notice... thus the "Protagoras, Gorgias, Hippias, Thrasymachus, Callicles", dealt with the legal phenomenon by analyzing its relative, volatile character through natural law and human or cultural law[8]. However, if this is so, it is no less true that it has not been sufficiently explained and above all presented. There is no doubt that a country with an efficient school system with educational training policies, without significant social, economic deficiencies and good social policies, will prove to be more effective in coexistence than with the creation and application of a particularly punitive and repressive penal regime. To paraphrase Lacassagne's strong idea in *The Death of Rousseau*: "*Macho societies have the rapists they deserve...*[9]".

I intend here to enter fully into the question that originated this section, how to integrate through law, the complex recommendations of Istanbul in a Spanish society in which we could ask ourselves ... is it, was it prepared for said become

[8] In Greece we can observe a paradigmatic example of what I agree, the cultural discussion of the juridical between Sparta and Athens, while the Rhetra of Lycurgus (700 BC) organized the State in a militarized way; in Athens, the constitutions of Solon and Cleisthenes were based on basic principles of a relatively democratic society.

[9] Alexandre Lacassagne, French criminologist, main thesis of his work "La Mort de Jean-Jacques Rousseau" of 1913.

legislative? And I put in the past because according to recent events you will understand me, because the one initiated in its analysis Law of “only if it is if” after more than a year in debate, and carried by different forums, tables, congress, senate and finally congress and approved on September 7, 2022, as of today a few months, has been amended by part[10] of the government that approved it. Example of what has come to happen with this law and passions as a right.

And I have no doubt... the law is cultural[11] and cannot be detached from the moment, the here and now and in the case at hand, we observe how part of the Government amends itself and goes ahead with the sole support of the majority group of the opposition; coming to visualize the consensus of a majority that for years decades and especially during the vast majority of Spanish democracy represented a governability based on bipartisanship. I consider the latter not minor, because an *ethical look*[12] puts us in front of the image of a bipartisanship that unites to mark territory of those who represent the establishment of morality, custom and law. And all very well seasoned by an alarm encouraged by some revisions of sentence that, in any case, will continue to occur because the first version of this controversial law is more favorable. That is, the amended will only apply to crimes committed after it enters into force. But...

Conclusions. (back to business as usual)

And, the parenthesis clarifies everything and we could almost conclude with it. We return to what we did before, because the amendment is made to put us back socially, morally, politically and judicially where we were. If the case of physical violence were to occur, before the same fact it will be an increase in penalty, giving the potential possibility that a victim of rape and obviously without consent, may come to wonder after the different nuances of physical struggle more or less manifest ... should I oppose

[10] The government is formed ***by PSOE-Unidas*** Podemos, the law was proposed and presented by the Minister of Equality of Unidas Podemos, and the amendment has been presented by the socialist group with the support of the right of the congress and the votes against Unidas Podemos (part of government) and the minority groups of the left that supported the governability of the current coalition government.

[11] Anglo-Saxon common law exemplifies custom as a feature of its culture.

[12] For anthropology, among others, external gaze of an external analyst who does not live or live in the situation observed or to be observed.

more vehemently way? Or even should I fight? In short, the potential possibility that the raped woman, the victim feels questioned, we leave open again and this is not a minor issue, since it was what was intended to be avoided in part with the law "only yes is yes". If we give more importance to violence in the basic type, it implies that the severity of the injury to sexual freedom will depend on whether there was also an injury to physical integrity. But we cannot that the essence of the law and not the passion of the punishment of this LAW is (was) sexual freedom, not physical integrity. And in any case that is tried for another crime that of physical aggression.

Which reminds us that sexuality has always been the object of control of power, let them tell Foucault (1976) in *The Will to Know*, because if power controls sexuality, it controls the most intimate of being and that would be reinforced by the Marcusian contributions that argued that societies in general have repressed people through sexuality: *"In a repressive order, which reinforces the equation between normal, socially useful and good, the manifestations of pleasure for its own sake must appear as fleurs du mal" (1995: 58)*. And it seems that some have wanted to take it literally, in the case at hand, especially when it can become a throwing weapon.

And that relocates us before a castration of the essence, the consent, of a law that came to stay from the overcoming of the punitive and under the aroma of re-education and training, which makes us have to ask ourselves more pretentious questions and questions ... Can legislation transform society? Manifestly not. The jurist, the legislator can interpret the meaning of the times, jump on the bandwagon of social changes, but not provoke them. At most, help. Maybe that would be an option I'd at least like to get involved in. Montesquieu in his preface *On the Spirit of the Laws* wrote:

> I began to examine men with the belief that the infinite variety of their laws and customs was not merely a product of their whims. I formulated principles and then saw that particular cases conformed to them; The history of all nations would be but the consequence of such principles, and every special law is bound up with another, or depends on a more general one.

In our case, punishment continues to shape us as a society that needs it as a sufficient reason and above all as an element of moral justice that. It constructs our imaginaries,

being the punishment who has been claimed as sufficient reason to dilute an entire law that was not its intention. However, the discussion was none other than the lowering of penalties in reviews of very specific cases and perfectly mediatized by the most conservative parties and sectors of our country. But... recent European history had spoken before, so we can observe even in other continents similar situations have been experienced, interesting in this regard the study made by Mockus (1995) in *Formar Ciudad*, where data are given on how the legal has been given with unavoidable support of the cultural and more specifically from ideology and religion. Crises generated by divorce, abortion, same-sex marriages, the encounter of law, morality and culture, has been and is a constant. What could we apprehend?

Evidently... that behind all positive law there is always a theory of justice, that is, a conception of the world. Refusing to deal with it means arbitrarily dividing that totalization into which reality is expressed; And above all, what emerges from the greatest pragmatism is that much remains to be done. Online, a recent study in Spain[13] confirms the fact that young people, including girls, are less feminist and about half of boys see feminism as a direct attack on their masculinity, even trivializing gender violence itself (not so much). And it is that the texts do not change, it changes the look and the look of those who have neither lived nor have been explained the genealogy of a becoming that far from constituting a threat would be the link between the diversity of conceptions that equals us and in a certain way the "binder" of the society in which they live has been missing and continues to be missing despite presuming that legislating is enough.

It is time to finish, but we could not finish without returning to the evidence of consent central theme of the Convention of the Law of the article itself and central theme at present, especially in the fields of politics and law. Thus, we have something to say from philosophy, from anthropology and that is that I believe that part of what we are dealing with today would become more understandable if we recover Locke in particular to his conception of "tacit consent" [14] and that would come to explain

[13] ***Fad*** Youth performed with young people between 14 and 17 In https://fad.es/notas-de-prensa/crece-el-sentir-antifeminista-y-el-discurso-negacionista-de-la-violencia-de-genero-entre-los-adolescentes-espanoles/

[14] Of course, the notion of tacit consent that Locke employs in his work is aimed at offering a justification for political authority.

That a society systematized through sexual dimorphism the roles have designated a part (the female) debtor to the other part (the male) that was represented throughout history the authority. But I insist that this does nothing more than give a further explanation to what has been happening with the subject discussed here. Since it is still a justification, because and even in this case, it would be urgent to find out what are or would be the personal reasons that mobilize that person, even regardless of whether the act or measure that has it as a recipient, evaluated from a certain objective parameter, reports some kind of benefit.

And yet; what it does come to evidence is an act of submission that impepinably implies a restriction of freedom. In short, what remains in that background of passion, punishment and vehemence is that, yes, but let's not leave aside what Ripstein expressed so well (2009: 71) and that somehow represents what we have come here to deal with: *"If an act is not wrong, consent is not required"*. And I insist... How and from where are we looking at consent? In other words, to what extent does authority (consent) reside in the will of the person? But I think I remember that it was Porée who said that: "*the paradox of hope"* consists in "*an impotent effort to be yes; on the other hand, the expectation of being able to be so by the grace of another who does*" (2011: 40). So we have to keep waiting. As long as it's not to Godot.

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