

# RISKS OF REVIEWING FREE-WILL IN PENAL LAW: CURRENT VIEW OF THE DISPUTE BETWEEN LUTHER AND ERASMUS OF ROTTERDAM

*Victor Gabriel Rodriguez<sup>1</sup>*

## *Abstract*

The neurosciences have evolved to the point that both philosophy of mind and penal law are revisiting the determinism v. free-will dichotomy. However most of these contemporary discussions fail to appreciate the fact that the discussion has largely been framed since scholasticism. Although posed in a new scenario, arguments around free will such as those made by Erasmus of Rotterdam and Martin Luther may be revisited for the legitimation of contemporary penal law. The need for an individual to believe they are capable of 'self-regulation' or making their own decision to obey the law was posed long ago in the Reformation's critique of determinism.

## *Keywords*

Guilt and blame. Penal law. Free-will. Erasmus of Rotterdam. Protestantism.

## *Summary*

1. Introduction: Penal law in relation to evolving neuroscience and the great aporias revisited; 2. Brief history of the diatribe between Luther and Erasmus; 3. Martin Luther's 'De Servo Arbitrio'; 4. Brief considerations on Luther's position and Erasmus' refutation; 5. Main point: the risk of investigating free will and the conciliation between freedom and causal-will; 6. Conclusions; 7. References

---

<sup>1</sup> Associate Professor. Universidade de São Paulo.

## 1. Introduction: Penal law in relation to evolving neuroscience and the great aporias revisited

There is nothing new in arguing that contemporary neuroscientific discoveries call for a review of some of the key points of penal law. If a penalty or punishment is based on the need to admonish individual behaviors, the causes of these behaviors must be constantly reviewed.

Therefore the neurosciences and their technological developments may destabilize traditional penal concepts such as guilt, moreover they revive epistemological debate as to whether legal knowledge should directly apply medical technology or remain true to concepts from the philosophical tradition.

There are many neuroscientific experiments, which are not reviewed here but have been examined at length in penal law literature, in which medical doctors and other hard science researchers have raised questions concerning free will. Generally speaking, they argue that an individual's decisions respond to purely biochemical causes that may be shown in the relationship between brain activation and illusory decision-making.

If medical technology is truly innovative, and neuroscientific publications are constantly tending to refute any separation between mind and body of the type ascribed to Descartes, then the philosophical debates are not so innovative after all. I shall argue that the framework of the free-will aporia largely coincides with the great debates of the late Middle Ages on almost every point. Penal -law experts have forgotten some of these arguments due to epistemic prejudice. Revisiting them may thus help elucidate the role of penal law today, given the major progress made by medical technology in relation to determinism.

The present paper revisits a 16th century discussion of this dichotomy in the ideas of two great intellectuals and theologians of their time and ranks

the main arguments concerning freedom or slavery of human will. I shall return to the interpretation of pre-reformation arguments about free will which turn on an extremely relevant question for penal law: how can we continue to argue the need to obey rules when humans themselves no longer believe in their self-determination?

The rarely revisited debate between Luther and Erasmus of Rotterdam on 'slave will' in their interpretation of the gospels and epistles may now be revisited in light of contemporary resurgence of deterministic theories.

## 2. Brief history of the diatribe between Luther and Erasmus

Quite reliable historical documents show that Erasmus of Rotterdam<sup>2</sup> received a letter around 1516 from which he learned that an Augustinian monk from Wittenberg criticized a Latin translation of the New Testament. Luther's criticisms were already outlining the Reformation's key concept of justification through faith. Although Erasmus did not respond to these provocations, they were the beginning of their relationship and a dispute that was to be pursued at some length. Especially after the latter's *Praise of Folly*<sup>3</sup>, Martin Luther apparently saw him as someone who might especially support his anti-Papist cause. However Erasmus remained faithful to the constituted church and rebutted support for the Reformation. On the other hand, he also rebutted

---

<sup>2</sup> The main elements of this narrative are found in the introduction to the bilingual edition (Latin/Castilian Spanish) of the 'Discussion on free will' used herein. On this basis, further sources were sought as confirmation Cf. ROTTERDAM, Erasmo de, *Discusión sobre el Libre Albedrío*. Prologue by Ezequiel Rivas. Buenos Aires, El cuenco de plata, 2012.

<sup>3</sup> *Praise of Folly* is a milestone in Erasmus' free thought. Although not analyzed herein, this surely explains Luther's insistence on Erasmus being his great ally in Protestant causes.

the various proposals made by the kingdoms<sup>4</sup> and the Supreme Pontiffs of his time, who sought to use his intellect and fame as a great humanist in order to oppose Protestant theses, thus placing him in the firing line from vehement reproaches from the more conservative Catholics<sup>5</sup>. Of course the backdrop to the free will controversy may well have been the validity

---

<sup>4</sup>Charles V is said to have dreamt of designating Erasmus to lead the war against Luther's theories. Erasmus would then have suggested that monarchs should hold a *Council* to discuss the matter. In this respect, Tubau denied the transcendence of the relationship between Erasmo and Alfonso de Valdés for such a council to be held: 'Cuando ambos se pongan en contacto años después, lo harán movidos por sus propios intereses particulares: Erasmo se procurará —con la ayuda de Valdés— la protección del Emperador; Gattinara tratará de servirse de Erasmo —apoyándose también en Valdés— para su propia campaña propagandística en contra del Papado. La complicidad en el modo de percibir la política contemporánea era inexistente. En este sentido, las propuestas de Erasmo en su *consilium* no podían suscitar demasiado interés en Gattinara. Un tribunal de arbitraje convocado por Carlos V, Enrique VIII y Luis II de Hungría, según proponía Erasmo en su *consilium*, tuvo que parecerle una propuesta extravagante por ser, sin duda, jurídicamente complicada, pero sobre todo políticamente inapropiada, teniendo en cuenta que el crédito político de la solución del problema iba a repartirse entre tres monarcas; la propuesta del concilio pudo interesarle, pero es obvio que de este concilio Erasmo y Gattinara esperaban cosas muy diferentes, aceptando incluso que ambos estaban de acuerdo en reducir el poder temporal de la Iglesia'. TUBAU, Xavier, *Alfonso de Valdés y la política imperial del canciller Gattinara*, in: [Studia Aurea: Revista de Literatura Española y Teoría Literaria del Renacimiento y Siglo de Oro](#), No. 4, 2010, p. 27

<sup>5</sup> Rivas explains this as follows: 'Los católicos, a quienes la aparición del Elogio había irritado sobremanera y mal predispuerto, arremeten contra él. Hezios dice, por ejemplo, que 'habría sido mejor para la cristiandad que Erasmo no hubiese escrito o tocado temas teológicos'. El príncipe de Carpi, Alberto Pío, sospecha de toda teología que provenga del autor del Elogio. Los protestantes, si bien en constante actitud de beligerancia contra la Iglesia Romana, tampoco ven con buenos ojos el texto de la *Diatribé*: Bullinger considera que el libro es blasfemo y Capito lo juzga un libro carnal. Según éste último, Erasmo 'prefiere la paz bajo el Anticristo que la guerra bajo Cristo'. Sólo el papa Clemente VII parece aprobar vivamente el escrito'. RIVAS, Ezequiel, *Introducción* à edição bilíngue latim-castellano do *Diatribé*, (Buenos Aires, Cuenco de Plata, 2012) p. 13

of the papal authority and the constituted doctrine of the Catholic Church, but this is a point that does not help the present study. The explicit debate between these intellectuals turned on free will.

The timeline for the specific debate in their publicly known writings<sup>6</sup> may be summarized as follows: Luther had already written letters in which he openly criticized the notion of free will when he wrote<sup>7</sup> his *Assertio*

<sup>6</sup> Here I have excluded epistolary controversies, which are raised only for the introduction.

<sup>7</sup>In Germanic language, he wrote a letter to Jerome Mühlpfordt, administrator of Zwickau, in 1520. The text is headed *Von der Freiheit eines Christenmenschen* (*On the freedom of a Christian*). A reading of this text – if one may make such a brief summary – shows that its main theological occupation was salvation through faith – the Reformation's most central point. The letter is divided into 30 arguments. In the first 20 it shows that the exercise of Faith does not depend on works. The 13<sup>th</sup> argument may explain the central idea: 'Então tu compreenderás a razão pela qual se atribui tanto valor à fé por ela cumprir todos os mandamentos e justificar sem precisar de todas as outras obras. Tu já viste como ela cumpre sozinha o primeiro mandamento, o qual ordena 'Honrarás a um só Deus' {Ex. 20,3}. Mesmo que te transformasses em boas obras da cabeça aos pés (*Wenn du nun eitel gute Werke wärest bis auf die Fersen, so wärest du dennoch nicht fromm und gäbest Gott noch keine Ehre, und also erfülltest du das allererste Gebot nicht!*) tu não serias justo, nem prestarias a Deus honra alguma deixando, portanto, de cumprir o primeiro de todos os mandamentos' (p. 39). From argument 20 onwards, it goes on to explain why man must perform works even though his salvation does not depend on them. This is what is called *outer man* (*ausserlichen Menschen*). It explains (see argument 20) that the inner man has been satisfied and had his wishes fulfilled by faith, but outwardly he finds something in the flesh that wishes to go on pursuing his own pleasure. In his words, faith does not admit this act and hurls itself at its throat (*Das mag der Glaube nicht leiden, und legt sich mit Lust an seine Hals, ihn zu dampfen und wehren*) to hold back and protect it, and to this end is again found in St Paul's epistles [Rom 7, 22-23 and 1 Cor 9,27] and their narrative on the need to restrain the flesh. Cf. LUTERO, Martinho, *Da Liberdade do Cristão*, 1520, Bilingual German-Portuguese, São Paulo, UNESP, 1998. Note that there is an outline of the notion that was later radicalized and specifically named 'free will': it is faith that 'is hurled' at Man, subjecting him to its own will, therefore being sufficient to resist the temptations of the flesh, i.e. sinning, without further intervention. In the same text, Luther explains that Man must do good works merely because they will be reflections of

omnium articulorum M. Lutheri per bullam Leonis X, in 1520, which was brought to the attention of Erasmus. From this Lutheran text, Erasmus wrote a dialogues or his 1524 the publication in Basel of *De Libero Arbitrio Diatribé Sive Collatio* (discussion on free will), which contains his main arguments on the subject. In the following year Luther responds in *De Servo arbitrio*, which is a concrete dialogue, an individualized point-by-point answer to the *Diatribé*. Despite assuming an unequivocally active role, *De servo arbitrio* was written for a specific purpose: to counter the arguments of the previous year's author of *Praise of Folly*. This confrontational or rather argumentative and challenging nature of Luther's writing lends it a somewhat hyperbolic and contradictory air - while not

---

earthly life. In his words, whoever chastens the body and fasts in the belief that good works deprived of faith lead to salvation has misunderstood the meaning of faith, 'quebram a cabeça e estrabam o próprio corpo, (*zuweilen zu brechen die Köpfe und verderben ihre Leiber driiber, das ist eine grosse Torheit und Unverstand cristlichen Lebens und Glaubens, dass sie ohne Glauben durch Werke fromm und selig werden wollen.*)'. In 1522, he returned to the issue and published an introduction (*Vorrede*) to St. Paul's Epistle to the Romans, which both humanists relied on for conflicting interpretations. The German reformer approaches a stance that goes beyond taking a clear position on free will. He repeats that faith is the only thing God demands and henceforth all sins are forgiven, because 'em virtude de a carne não estar morta, somos todos pecadores (*Um des ungetöteten Fleisches willen sind wir noch Sünder*). Mas, por crermos em Cristo e termos começado no Espírito, Deus nos é tão propício e misericordioso, que não leva em conta nem julga tal pecado; ao contrário, Ele procede conosco segundo a fé em Cristo, até que o pecado esteja morto'. Cf. LUTERO, Martinho, *Prefácio da Epístola de São Paulo aos Romanos*, or. 1522, ed. Bilingue alemão-portugues, São Paulo: Unesp, 1998, p. 91. Only at the end of this preface does he then state 'Uma tal justiça, nem a natureza, nem o livre arbitrio, nem nossas forças podem produzir (*Solche Gerechtigkeit kann Natur, freier Wille und unsere Kräfte nicht zuwege bringen*), pois, de mesmo modo que ninguém pode dar a fé a si mesmo, tampouco pode eliminar a falta de fé' (p. 93). In this respect, Luther is clearly outlining a position in which Man does not enjoy freedom because he is dependent on how much faith God gives him. Given this kind of consideration Luther was prompted to respond to the *Diatribé's* provocation by refining (or perhaps more precisely, radicalizing) to argue that human beings are in bondage to the will of God.

denying its merit of outlining arguments that challenge Erasmus. Of course one of its consequence was a view of all human action as being slavishly directed - which is the point of interests more especially in my case.

*Servo Arbitrio* (1530) was structured as a step-by-step contrast with the arguments and examples set forth in the *Diatribé*, so here I shall take up some of Luther's main argumenta to highlight points of interest and whenever convenient I shall refer back to the original terms that challenged publication of Erasmus. This is so largely because, in terms of historical process, Luther's ideas are more original and striking in that they more aggressively broke away from the period's Catholic doctrine. However, Luther's Augustinian origins - which are refracted throughout his writing - must also be taken into account. In fact, the debate described below is an intellectual dispute between two Augustinians.

### 3. Martin Luther's 'De Servo Arbitrio'

The premise for '*Servo Arbitrio*' was the Protestant point of view: a hostile stance toward all Catholic dogma not directly derived from Scripture.<sup>8</sup>

---

<sup>8</sup>Proof of the above is found in the following: '¿Qué dices, Erasmo? ¿No basta con haber sometido la propia opinión a las Escrituras? ¿La sometes también a los decretos de la iglesia? ¿Qué puede decretar la iglesia fuera de lo que está decretado en las Escrituras? Además, ¿dónde queda la libertad y potestad a juzgar a aquellos legisladores [lat. 'decretores'], como lo enseña Pablo en 1<sup>a</sup> Corintios 14: 'los demás juzguen'? ¿No te place ser juez sobre los decretos de la iglesia? ¿Qué puede decretar la iglesia fuera de que Pablo lo ordena? ¿Qué nueva religión y humildad en que con tu ejemplo quieres quitarnos la potestad de juzgar decretos de hombres, y nos quieres someter sin juicio a los hombres? ¿Dónde nos mandan esto las Escrituras de Dios? Además ¿qué cristiano despreciaría los preceptos de las Escrituras y de la iglesia hasta el punto de decir 'sea que los comprenda,

Luther's argumentative strategy relies on biblical texts - both the Old Testament and the Gospels, particularly St. Paul's Epistles - to reach its conclusion: Man is unable to make his own decisions in relation to his salvation. In doing so, Luther lists arguments that are worthy of some consideration, not only for their historical value but also because they will later be found, albeit in a different guise in the thinking of other determinists who succeeded him.

Since this argument uses his strategy of establishing a dialectic between (or response to) Erasmus' statements, Luther's *De Servo Arbitrio* begins by highlighting the relevance of the theme as one of the foundations of the Christian faith, while attributing to Erasmus a gift of oratory that is capable of making him deviate from the truth and hide his conservatism and fear of change by downplaying the importance of the discussion. Hence Luther's scathing expressions when asserting that the words of the Diatribe sound as if nothing mattered to Erasmus: 'whatever anyone anywhere believes'<sup>9</sup>, as long as peace in the world, goods or fame remains unchanged'<sup>10</sup>, from which there may be drawn important considerations

o sea que no los comprenda?' De 'Parte I, II: Que a certeza provém da fé, in: LUTERO, Martín, *De Servo Arbitrio: La Voluntad Determinada* (Obras Completas vol. 4), Buenos Aires, Paidós, 1976, Trans. Erich Sexauer, p. 41

<sup>9</sup> Here and elsewhere in the text, one notes Luther's insistence for the real interpretation of man.

<sup>10</sup> 'En resumen: estas palabras tuyas suenan como si nada te importara qué cosa cree cualquiera en cualquier lugar, con tal que no se altere la paz del mundo, y como si en vista del peligro para la vida, fama, haberes y buena posición, estuviera permitido imitar a aquel que dijo: 'Si dicen sí, yo también digo sí; si dicen no, yo también digo no, y a considerar los dogmas cristianos en nada mejores que las opiniones de los filósofos y demás hombres, en favor de las cuales sólo un perfecto tonto se metería en disputas, riñas y aserciones, ya que de ello no resulta otra cosa que luchas y turbación de la paz exterior. 'Lo que está por encima de nosotros, nada nos importa'. Así te vienes como neutral con intención de dirimir nuestras controversias, de detener a ambos bandos, y de hacernos creer que nos estamos peleando por estupideces y cosas inútiles'. LUTERO, Martín, *De Servo Arbitrio: La Voluntad Determinada*, cit., p. 42

concerning Erasmus' intellectual behavior. At the same time - in my opinion, a discerning reader who wants to get to the essence of his arguments has to filter long excerpts for their personalized counterpoints, thus being diverted from objectivity.

Luther's first major argument questions the role of God's prescience. His words are elementary for the theme covered here: 'the other part of the whole of Christian formation is whether God's prescience is such that it leaves room for contingency, and whether we do everything out of necessity,'<sup>11</sup>. To untangle this question, which would no longer be the task of setting the limits that separate contingency from that which is determined by divine power, one must first reveal that which Man is capable of before asking how God himself acts in relation to this capability<sup>12</sup>. A definition of the forces and works of free will, according to the Protestant, should have been the starting point for Erasmus.

For Luther, however, the task is to establish the position that divine foreknowledge obviously leaves no room for human freedom, therefore anyone who believes in the latter would have to expressly deny this 'immutable, eternal and infallible will.' And so it poses the question that will be taken up by other philosophers, even without due credit: would God consent to something that did not involve in which his prior knowledge? In this ambivalence of knowledge and will, that which is now the most forceful assertion of all theological determinists is upheld: it is as

---

<sup>11</sup> 'La otra parte principal del conjunto de la enseñanza cristiana es si la presciencia de Dios es tal que deja libre juego a la contingencia, y saber si nosotros lo hacemos todo por necesidad. Y también de esta parte dices que es una falta de respeto hacia Dios, una id ad indiscreta y cosa superflua. Lo mismo dicen todos los Y no sólo ellos: también los diablos y los condenados la declaran odiosa en extremo y execrable'. LUTERO, Martin, *De Servo Arbitrio: La Voluntad Determinada*, cit., p. 51

<sup>12</sup> Pues de ninguna manera puedes saber qué es el libre albedrío, si no sabes de qué es capaz la voluntad humana, ni qué hace Dios, ni si él tiene de las cosas una presciencia de índole tal que implica un necesario acontecer de lo pre-sabido [an - necessario praesciat]. LUTERO, Martin, *De Servo Arbitrio: La Voluntad Determinada*, cit., p. 55

impossible for God to know something in advance without his will being involved, as it is impossible for God to want something without being his foreknowledge being involved in it.<sup>13</sup> Therefore adds the priest, for an individual events seem to take a changeable course<sup>14</sup>, meaning they could happen in different ways (*mutabiliter et contingent fieri*), but they will necessarily take place and there is no alternative, there is no way of their being assembled in a different way. God's will is eternal and constant, so it is not possible to conceive of Him interrupting it at any given time, when he notices that his work is finished. Man alone is allowed to finalize his will with death, but with God the opposite is the case: his will is necessarily materialized and there is no place for a recess or pause, to use Luther's own expression.

The arguments that reveal the obligatory nature (*omnia necessario fieri*) of the divine will are listed on the basis of the logical characteristics of the Faith, before moving on to analyze Scripture: why would Man believe in God, one wonders, if He is not believed to be capable of fulfilling his promises? Only from this question does Luther turn to Scripture, which he sees as full of messages assuring us that God will 'reward those who have hope in him'<sup>15</sup> to then accuse his interlocutor of 'going against God's works and scripture to please others'<sup>16</sup>. Moreover he believes that it is

<sup>13</sup> '¿O crees tú que Dios preconoce algo sin que esté implicada su voluntad, o que quiere algo sin que esté implicado su conocimiento [lat... quod nolens praesciat, aut ignarus velit]? Si él pre-sabe queriendo, su voluntad (por ser así su naturaleza) es eterna e inmutable; si él quiere pre-sabiendo, su saber (por ser así su naturaleza) es eterno e inmutable'. LUTERO, Martin, *De Servo Arbitrio: La Voluntad Determinada*, cit., p. 56

<sup>14</sup>Note that Luther was already circling around the idea of illusory of freedom, so Spinoza was not the first to pose this notion, as some have claimed. On the same lines, Hegel's *Philosophy of Right* paragraph 35 subtly asserts that man **knows himself** as something infinite, -- universal and free.

<sup>15</sup> This particular quotation, as Luther notes, is from Hebrews 11, but the original text cites other books such as Romans 3

<sup>16</sup> p. 15. In this passage, the father of Protestantism reminds Erasmus that to advocate peace with the popes is to disobey the Word of God, which calls for war. 'Querere aplacari

essential for man's salvation that he abase himself before God, because the latter only promised his grace to the humble, those who lament and despair of themselves. Therefore, the most lowly form of humiliation would be to admit<sup>17</sup> that the creature is incapable of achieving its own salvation and depends on the free will of superior being, or divine free will. 'As long as a man holds opens the conviction that he can make a contribution, however small it may be,' says Luther, 'on the path to his salvation, he remains sure of himself, does not despair of himself and therefore does not abase himself before God'<sup>18</sup>. He also states that it would be impossible for Man's will to oppose God's, which would mean that those who follow the divine commandments would not do so due to

---

estos tumultos no es otra cosa que querer abolir la palabra de Dios y prohibir su predicación (...) Pero aun los escritores paganos atestiguan que no puede haber ninguna transformación de un estado de cosas sin que se produzca conmoción y tumulto, y más aún, sin que corra sangre' LUTERO, Martin, *De Servo Arbitrio: La Voluntad Determinada*, cit., p. 68. In this respect, the great tergiversation that has Luther avoiding the matter for page after page to personally admonish Erasmus also exists to subliminally persuade him of the Protestant cause and break from the Church. This might then mean in some way, in my opinion, that not even Luther is wholly convinced of his thesis but may be using the discussion to entwine the theme of the great schism. Hence their historical dispute attaining its relevance because it is quite possible that there is only one opportunity to hold a dialogue on the future of the church, rather than discussing free will as such. In other words, I would say that Luther's attempt to entirely prove the non-existence of free will did not even come close to the forceful content of his other theses. Denial of free-will would have to wait for another philosophical period.

<sup>17</sup> 'Ma l'uomo non può umiliarse veramente finché non saprà che i suoi sfrozi e le sue risoluzioni, la sua volontà e le sue opere non servono a nulla, ma che la sua salvezza dipende unicamente dalla decisione, dalla volontà e dall'azione di Dio'. Sin embargo, no puede un hombre humillarse del todo hasta que no sepa que su salvación está completamente fuera del alcance de sus propias fuerzas, planes, empeños, voluntad y obras, y que esta salvación depende por entero del libre albedrío, plan, voluntad y obra de otro, a saber, del solo Dios' LUTERO, Martin, *De Servo Arbitrio: La Voluntad Determinada*, cit., p. 74

<sup>18</sup> LUTERO, Martin, *De Servo Arbitrio: La Voluntad Determinada*, cit., p. 75

sacred inspiration but through their own action, their being free to choose between good and evil. This hypothesis would contrast with Scripture, which would show several moments in which those who trust in God's Words make themselves invincible in salvation.<sup>19</sup>

This literal interpretation of Scripture also gives rise to Luther's postulate that God and 'the kingdom of Satan' dispute human action without leaving any margin of freedom for the individual, which results – in my opinion, and absent more in-depth grounds in this respect – in one of the book's most forceful assertions: that human will is disputed between God and the Devil as if Man were a beast of burden, because 'if God rides, it goes and wills to go where God wills (...); If Satan rides, it goes where Satan wills (...)'. The earthly reality is then a race between God and Devil for control of the world, as one who takes over control of souls because, in the words of the reformer, both these forces 'dispute the acquisition and possession' of Man.<sup>20</sup> Hence his suggesting that theologians no longer use the term 'free will' because it induces confusion, since it cannot refer to what man is in fact capable of doing (*de humana virtute*). He suggests that theologians may be right to discuss free will, but assuming that it is absolutely directed by God, the discussion burgeons into misunderstanding for the faithful, for the people<sup>21</sup> who wish to see a fully human ability to decide between

<sup>19</sup> For this purpose, he uses Paul's words to Timothy: 'We are captive to the Will of God' LUTERO, Martin, *De Servo Arbitrio: La Voluntad Determinada*, cit., P. 86

<sup>20</sup> The excerpt below summarizes the author's words: 'Así la voluntad humana es puesta en medio cual bestia de carga: si se sienta encima Dios, quiere lo que Dios quiere y va en la dirección que Dios le indica, como dice el Salmo: 'He sido hecho como una bestia de carga, y siempre estoy contigo'; sí se sienta encima Satanás, quiere lo que Satanás quiere y va en la dirección que Satanás le indica. Y no está en su libre elección correr hacia un jinete u otro y buscarlo, sino que los jinetes mismos se disputan su adquisición y posesión'. LUTERO, Martin, *De Servo Arbitrio: La Voluntad Determinada*, cit., p. 91

<sup>21</sup> Here once again rests the concern – to some extent shared by Erasmus and Luther – for the common people to participate in theological comprehension. Luther asks: 'if we never possess the concept and meaning of such a sublime word, why do we so stubbornly retain this word without content, deceiving and endangering the faithful?'

good and evil. For Luther, his main thesis in this respect has to be explained (and here there is a less forceful statement of his theoretical position) in the sense that Man is free only in matters inferior to God, but not in matters of salvation<sup>22</sup>. It does not extend to debating how these boundaries between one and the other would be defined, but this specific point will be briefly covered herein.

Luther follows his strategy of taking elements from the Bible rather than the respective interpretation made by the doctors of the church to show that the human condition is, in his own expression, 'bondage' of the dichotomy between Good and Evil on the higher levels. The gospels shows that the words of Jesus silenced Jewish unbelievers but never persuaded<sup>23</sup> them, quite the contrary: the silence of the others resulted from the power of Jesus' word, an element that therefore coerced and so to speak compelled their belief.<sup>24</sup> Since then, his concerned was

---

<sup>22</sup> 'Pero si no queremos prescindir de él, al menos enseñemos con buena fe que se lo debe usar en el sentido siguiente: que al hombre se le concede un libre albedrío no respecto de lo que es superior a él, sino sólo respecto de lo que es inferior. Esto es: el hombre debe saber que en lo referente a sus bienes y posesiones materiales, él tiene el derecho de usar, hacer y no hacer conforme a su libre albedrío, si bien también esto lo guía el libre albedrío del solo Dios en la dirección que a él le place; pero que frente a Dios, o en lo pertinente a la salvación o condenación, el hombre no posee un libre albedrío, sino que es un cautivo, un sometido y siervo ya sea de la voluntad de Dios, o la de Satanás' (p. 28). Obviously, this issue requires further explanation. Being free to choose what is below God in the material world and not to choose what is above would, at the very least, require more extensive illustration of where this limit is situated.

<sup>23</sup> I cannot but remark here, as in the following note, that this is the discourse that reveals the just war against savagery that was opposed by Bartolomé de Las Casas. See: LAS CASAS, Bartolomé de, *Apología o declaración y defensa universal de los derechos del hombre y de los pueblos*, Salamanca, Ed. Junta de Castilla y León, 2000; LAS CASAS, Bartolomé, *Del único modo de atraer a todos los pueblos a la verdadera religión*, México, Fondo de Cultura Económica, 1975

<sup>24</sup>On this point Bartolomé de las Casas is innovative because his discourse is precisely the opposite: the Indian's human condition is granted by free will, and in it there is no way of

deconstructing the Dutch humanist's definition of free will, which is transcribed: 'The human willpower through which an individual may apply to that which leads to eternal salvation, or stay away from it'. There are two more relevant criticisms of the definition: firstly that freedom is divine rather than human, so there would be an error in relation to the subject; secondly, the opinion refracted throughout the text is that Man does not retain his decision-making power. The essential contradiction would be that the individual would seek out God to live under his authority, so there would never be freedom and one could at most speak of 'inconstant will' or 'mutable will' (*yertibile arbitrium vel mutablte arbitrium*)<sup>25</sup>; moreover, adds Luther, if it is admitted that Man can desire and will, one will also have to assume that he can love and hate, or wish death, or want God and what is in God himself, but God would be in all this and therefore the actual agency would be of God himself. Luther also wishes to establish the difference between recognizing that Man has a capacity for effort and admitting that some alteration in the world of facts may be attributed to human powers. There may be effort made by an individual, but its results will depend on divine intervention says the reformer. Luther also finds a

---

being convinced other than by reasoning. See the contrast with Luther's passage 'It is better to show this with examples. When according to Mathew chapter 22, Christ silenced the Sadducees by appealing to Scripture and proving the resurrection from the dead - with Exodus 3: 'Yo soy el Dios de Abraham, etc.; Dios no es Dios de muertos, sino de vivos', no le pudieron resistir en este punto ni decir nada en contra. Pero ¿acaso desistieron por eso de su opinión? ¡Y cuántas veces refutó Cristo a los fariseos con evidentiísimas pruebas escriturales y argumento, de modo que el pueblo los veía públicamente derrocados, y ellos mismos se sentían vencidos! No obstante, perseveraban en su posición de adversarios. Esteban, según el testimonio de Lucas en Hechos 7, hablaba de una manera tal que los adversarios no pudieron resistir a la sabiduría y al espíritu con que hablaba. Pero qué hicieron ¿Acaso dieron su brazo a torcer? Nada de esto; avergonzados por su derrota, y sin fuerzas para resistir, se enfurecen, cierran los oídos y los ojos y envían contra Esteban falsos testigos, Hechos 8.' LUTERO, Martín, *De Servo Arbitrio: La Voluntad Determinada*, cit., p. 122

<sup>25</sup> LUTERO, Martín, *De Servo Arbitrio: La Voluntad Determinada*, cit., p. 125

contradiction in Erasmus' idea of combining Divine Grace with free will, which is nevertheless quite an intricate theological issue: the ecclesiastical definition posited by Erasmus argues that in the absence of divine grace, an individual cannot wish for good, which means that he needs a force to do so, and this, he notes, annuls freedom. Thus Luther establishes the logical rupture in the discourse of his interlocutor, whose discursive examples would deny his own definition. Just to be aware of his scathing words, it is worth noting the forceful irony used by the founder of Protestantism to announce the split: 'So it turns out that Erasmus has over other men the advantage of having two free wills, which oppose each other.'<sup>26</sup>

But it should be noted that Luther too then imposes a certain degree of free will, based in particular on a reading of the book of Ecclesiasticus. He does not admit it this way, but this forced flexibility surely comes from the force of biblical passages invoked by Erasmus, which denote God's leaving the world to man's decision.<sup>27</sup> From this, the reformist author concludes that Scripture shows that man is 'spread across two kingdoms.'<sup>28</sup> In the first of these, he finds himself under his own free will, and reigns over that which is 'inferior to him.' God would not intervene in these matters, moreover Man does not have the ability to free himself from this need to exercise his agency; in the other kingdom, however, man is directed and led by divine decision.

This is an interesting conciliatory-compatibilist position, evidently showing some discrepancy from the previous image of man as beast led by God or

<sup>26</sup> 'Y resulta así que Erasmo tiene sobre los demás hombres la ventaja de poseer dos libres albedríos, que están en franca oposición el uno al otro'. LUTERO, Martin, *De Servo Arbitrio: La Voluntad Determinada*, cit., p. 133

<sup>27</sup> Luther refers to passages in Genesis 1 and 2 that show that man had been left the world to rule over it. He quotes Moses: Let man govern the fish of the sea, the birds of the air, the domestic animals, all the wild beasts and all reptiles that crawl on the earth (Gen 1, 26).

<sup>28</sup> LUTERO, Martin, *De Servo Arbitrio: La Voluntad Determinada*, cit., p. 143

Satan. *Servo Arbitrio* unfortunately shies away from showing the limits of these kingdoms (God's and Man's) and does not even establish a direct correlation with Saint Augustine's dichotomy between divine and human laws. Away from the delimitation of these boundaries to move on to a repeated excerpt from Scripture, which reiterates his design for the individual to be part of the divine battleground for the imposition of Good, a battle involving God's attitude of informing the creature of its situation of dependence, while Satan would have the mission of keeping man in a state of blindness as to his misery, equivalent to his bondage.<sup>29</sup> Luther's view is thus paradigmatic: blindness - the inability to perceive this state of bondage - is a demonic manifestation preventing Man from being led to grace; the devil's great triumph<sup>30</sup> would be make Man feel sure that he is capable of doing good, deciding for some way other than that in which he truly acts<sup>31</sup>.

Assuming that humanity's blindness or ignorance of its state of bondage to divine will is also a kind of condemnation, Luther enumerates a series of excerpts from Scripture - more the Old Testament than the Gospels, some of them from the Diatribe - in which he attempts to show that none of the many biblical passages that refer to human will show that there is free will<sup>32</sup>. Biblical references to human freedom would connote the impossibility

<sup>29</sup> p. 151

<sup>30</sup> 'Pues Satanás sabe que si los hombres tuviesen noción de su miseria, él no podría retener a ninguno de ellos en su reino, porque de la miseria reconocida y suplicante, Dios no puede sino apiadarse de inmediato y acudir a socorrerla, ya que en toda la Escritura se habla de él con tanta alabanza como del Dios que está cercano a los quebrantados de corazón, y ya que también Cristo testifica en Isaías 61 que él 'fue enviado para dar buenas nuevas a los pobres y para sanar a los quebrantados de corazón'. Consecuentemente, la obra de Satanás es tener asidos a los hombres a fin de que no se den cuenta de su miseria sino presuman ser capaces de hacer todo lo que se ordena [dicuntur]'. LUTERO, Martin, *De Servo Arbitrio: La Voluntad Determinada*, cit., p. 153

<sup>31</sup>Luther attributes the human illusion of free will to the Devil.

<sup>32</sup> The text itself mentions one of them. Firstly, Matthew 19: 'If you want to enter life, keep the commandments.' And others: 'if you want to be perfect', 'if somebody wants to

of realizing it, as a linguistic expression<sup>33</sup> that actually shows it is unattainable for earthly power, and therefore elementary for the will of God.

Arising from this will that Luther is ready to challenge is the following problem, which is more relevant from a penal law point of view: the response to the evidence of the Diatribe, which states that all promises of rewards (mercies) that appear in the scriptures would be devoid of any meaning if man acted out of pure necessity, because 'necessity has no merit'<sup>34</sup>. De servo arbitrio answers the question on two grounds, the difference between old and new testaments and - in his words - the actual 'merit' of the theme. For the reformer, the Diatribe fails to make the following distinction: the New Testament is based primarily on an exhortation and promise of grace, while the Old Testament refers to laws and threats. In this respect, everything in the New Testament is an exhortation to the apostles, who are 'in a state of grace and justice, meaning on a higher level than free will'<sup>35</sup>. Other individuals, ('we', as the author says), are still at odds with laws and threats – the Old Testament's – that only ask man to know himself and lead himself to the grace of the Gospel. This being the first point, another elementary point is raised by Luther: the promise of divine reward does not show that we are capable of

follow me', 'he who wants to save his life'. Luther's baroque style - which was typical of his period, especially in confessional milieu - establishes rhetorical figures for *ad hominem* attack but fails to show that these biblical passages do not refer to an unfree will. Of course, this personal observation does not mean to be our conclusion on indeterminism, but only that the *biblical text*, as Erasmus shows, is really full of passages that point to human free choice, which therefore seems to be one of the foundations of Christianity.

<sup>33</sup> 'Idéntico es el caso con las escrituras: en pasajes tales como los recién citados, se pone de manifiesto qué puede ser hecho en nosotros por el poder de Dios, y qué no podemos hacer nosotros mismos', LUTERO, Martin, *De Servo Arbitrio: La Voluntad Determinada*, cit., p. 173

<sup>34</sup> The original text quotes Matthew 5, e.g. Rejoice, and be exceeding glad: for, great is your reward in heaven:

<sup>35</sup> Cit, p.178

altering the world of our own free will, but only that we will be worthy of receiving this or that if we act in a certain manner. Telling somebody that 'if you are under water, you will drown; if you reach the other bank, you will be saved'<sup>36</sup> does not mean that this person is capable of swimming to save their life. Luther shows that Scripture is full of promises<sup>37</sup>, but 'with all these texts there is no more than the consequence of reward, but by no means the dignity of merit.' In other words, those who do good works would be on the right path to salvation, but not of their own free will<sup>38</sup>. The contradiction between God's prescience and human freedom then returns to the agenda but now seen from a somewhat different perspective. The specific question is how one could believe God's promises if they were not fulfilled from sheer necessity, if they could be obstructed by Man's will. In this passage, Luther is hyperbolically highlighting the propriety of the subject as 'the most radiant light of undoubted truth [which] makes everyone completely mute, settles all questions and assures victory over all evasive cunning.'<sup>39</sup> The text, which

---

<sup>36</sup> Cit. p. 179

<sup>37</sup>To this end, quoting Romans 2: to those who seek eternal life will be given glory (...)

<sup>38</sup> Luther also refers at this point to the strong argument posed by Erasmus in showing that by asking God to forgive his murderers [The well-known 'Father, forgive them for they know not what they do', Luke, 23] Jesus is proving free will, because there would be no need to pardon those who do not have free will. The Augustinian friar, however, finds the opposite interpretation in this same passage: Christ confirms that the Hebrew people were incapable of wanting the good. Luther believes that "They know not what they do" clearly means that humans do not have access to the knowledge required to wish or will for anything, because 'that which is unknown is not an object of desire' (cf. LUTERO, Martin, *De Servo Arbitrio: La Voluntad Determinada*, cit., pp. 183-184).

<sup>39</sup>*Servo Arbitrio* henceforth revives dialogue with one of the most sensitive points from *Diatriba*, in the question asked by the apostle Paul 'Who resists his will, has mercy on whoever wants and hardens himself to what must be hardened?' [Romans 9: 'Therefore hath he mercy on whom he will have mercy, and whom he will he hardeneth.' (KJV) Will you tell me now. 'Why does he still find fault? For who can resist his will?' But who are you, O man, to answer back to God? Will the earthen vessel ask of him who molded it;

is debated in a concession from the Diatribe, based on the powerful metaphor of Romans 9 in which the apostle Paul says that God is like a potter who can make one earthen vessel for honor and another for dishonor, and the vessel cannot argue with the creator about its shape. Against this passage, Luther attempts to argue that upholding human ability to make decisions is at the same time to state that freedom and necessity are incompatible. Note however that what the Augustinian friar poses as a logical absurdity – the coexistence of freedom and necessity – would be one of the most sensitive points in the discussion on the subject of free will, as element of religion.

In a world that God rules over in every detail, pursuing absolute divine justice in earthly choices would just be trying to taking something that defies human reasoning - because it is divine - and trying to adapt it to this logic. Human reason, he argues, praises God when He saves the ungodly and through His grace, but against Him rebels (and blasphemes) so often that divine will condemns those who are not worthy of it.<sup>40</sup> The argument

Why have you made me this way? Does not the potter have the power to make one vessel for honor and another for ignominy from the same clay?]) Luther's analysis also covers the classic question of the Bible's showing that Jesus knew of his tragic end, while Judas had betrayed him because he *so wished* (p. 229), it is true that given the provocation of the Diatribe, which expressly states that 'God had predetermined the time and this being so, Judas so wished it'. Here also remains the aporia of knowing how the action of Judas can be bad, if it was essential for the fulfillment of the divine will of the Redemption. Knowing whether the apostle freely betrayed is a question that scholastics have discussed.

<sup>40</sup> Thus says the text, after saying that making Cain a king would be the same as throwing innocent Abel into prison and killing him: 'Por lo tanto: visto que la Razón alaba a Dios cuando él salva a los indignos, y en cambio lo acusa cuando condena a los que no lo tienen merecido, se ve obligada a confesar que no lo alaba a Dios como Dios, sino como a uno que sirve a los intereses de ella; vale decir, que la razón busca y alaba en Dios a sí misma y las cosas suyas, y no a Dios o las cosas que son de Dios. Pero si te agrada Dios cuando premia a los indignos, no te debe desagradar tampoco cuando condena a los que

assembled here once again takes up the idea that man cannot know God's plans and is therefore a mere object of He who wills everything. To explore this flank, the last major theme of *Servo Arbitrio* goes on to examine which critics call 'biblical anthropology', from which he tries to show that man, although born 'flesh', is 'inclined to evil'<sup>41</sup>. On this specific point, there is another disagreement between the two Augustinians: for Luther this human carnal origin is a great argument in favor of will as bondage. In his conception, the flesh – which represents captured by wrongful values - only means the ability to sin, and then only the Spirit of God saves man from this natural inclination <sup>42</sup>; for Erasmus, carnal origin does not necessarily imply an obligation to commit sin and injustice, because free choice, even that of the flesh, can make man look for different paths to come closer to God.

This turns out to be the conclusive core of Luther's bondage of will, which would later become one of the most disputed theological cores of his reformist vision. Thereafter his book makes a final tour of the biblical excerpts quoted by Erasmus, which show God constantly intervening in

no lo tienen merecido.' LUTERO, Martin, *De Servo Arbitrio: La Voluntad Determinada*, cit., p. 236

<sup>41</sup> To this end, he refers to various elements from the Old Testament, such as Genesis, 8, (p. 247), in which he says that 'every inclination of the human heart is evil from childhood', or from the Gospels such as John 3, in which Christ says that which is born of the flesh is flesh; and that which is born of the Spirit is spirit.

<sup>42</sup> There is a significant excerpt from this point on p. 247: 'Ahora bien: como los hombres son carne, según el testimonio del propio Dios, sólo son capaces de conocer (inclinaciones carnales; por lo tanto, el libre albedrío sólo puede tener capacidad) para pecar. Puesto que van de mal en peor aun cuando el espíritu de Dios actúa entre ellos llamando y enseñando, ¿qué harían si estuviesen abandonados a sí mismos, sin el espíritu de Dios? Y tampoco aquí 'tiene nada que ver la circunstancia de que Moisés esté hablando a los hombres de aquellos días: lo mismo se aplica a todos los hombres, pues que todos son Carne, conforme a lo que dice Cristo en Juan 3: 'Lo que es nacido de la carne, carne es'. Allí mismo, Cristo enseña también cuán grave es este mal al decir: 'A menos que uno naciere de nuevo no puede entrar en el reino de Dios'.

human life, whether from the Gospel or St. Paul's epistles. The German priest allows that the writers have interpreted the same passages in different ways: Diatribe (Erasmus) sees the presence of God's grace enabling Man to decide in favor of goodness, therefore doing so through his own merit, while *servo arbitrio* asserts that man can do nothing without the grace of God, therefore he is not free<sup>43</sup>, and no good work has in itself any human merit.

#### 4. Brief considerations on Luther's position and Erasmus' refutation

Although Luther's theological determinism is extremely important for its bearing on the question of human free will, it did not yield as many fruits as his other theses contesting established doctrine<sup>44</sup>, such as breaking

---

<sup>43</sup>Luther' summary of the controversy: 'Léete, pues, cinco o seis páginas de la Disquisición donde tras haber citado ejemplos de este tipo y bellísimos textos y parábolas del Evangelio y de Pablo, no hace otra cosa que demostrarnos que en las Escrituras se hallan textos en cantidad innumerable (como dice ella) que versan sobre la cooperación y el auxilio de Dios. Si yo saco entonces de dichos textos la siguiente conclusión: 'El hombre no puede hacer nada sin la gracia auxiliadora de Dios, por lo tanto ninguna obra del hombre es buena', la Disquisición me replica con otra conclusión y dice, recurriendo a una inversión retórica: 'Al contrario: no hay cosa que el hombre no pueda hacer si lo auxilia la gracia de Dios, luego todas las obras del hombre pueden ser buenas. Por ende, cuantos textos hay en las Escrituras divinas que mencionan el auxilio, tantos hay que constatan la existencia del libre albedrío; tales textos empero son incontables. Consecuently: si se evalúa la cuestión según el número de textos probatorios, la victoria será mía' LUTERO, Martin, *De Servo Arbitrio: La Voluntad Determinada*, cit., p. 274

<sup>44</sup>Labrousse explains the differences on free will from the Reformation's point of view, while warning that these positions become much more complex in a more detailed approach: 'El catolicismo quiere salvar la libertad desde el comienzo de la vida cristiana porque hará descansar en ella todo el proceso de ascensión hacia la beatitud. En cambio la reforma sacrifica desde el principio una actividad (en sentido teológico, no psicológico) de la que no necesitará en adelante; pues na negación del mério es la llave de toda teología protestante. Y la negación se funda en aquella infinita desigualdad entre Creador y

away from the authority of the Church or finding salvation through works. Perhaps because some essential points are missing from the German Augustinian's discourse, especially in the second part of his exposition, when he assumes human freedom in the earthly world of everyday things that are not drawn onto the path toward salvation. Without establishing this boundary, it is difficult to imagine the concreteness of his image of man as beast led sometimes by God and other times by the devil but having freedom of intellection for all other matters that do not involve the soul's final fate. As an ad hominem element, one must note the fact that that Luther's *On the Jews and Their Lies* (published at the end of his life) is the apex of a fatalistic determinism imputed specifically to a people. This attack on the Jewish people as a whole is, in our opinion, theological determinism ab absurdo, thus aiding in the discrediting of this particular thesis. However, certain passages from the Old Testament and particularly the writings of Paul the Apostle, much celebrated by Catholic doctrine, do provide sufficient grounds to uphold theological determinism.

But another specific aspect may be drawn from the debate with Erasmus<sup>45</sup>: it is not impossible that the Dutch intellectual was more inclined

---

creatura que Santo Tomás había proclamado, pero al que no rectifica aquí ninguna aequalitas proportionis' LABROUSSE, Roger, *Libre albedrío tomista y servo arbitrio luterano*, in: Actas del Primer Congreso Nacional de Filosofía, Mendoza: Argentina, marzo-abril 1949, Tomo III, p. 1972. To recall this distance as a fundamental postulate of Protestantism, Labrousse recalls chapter 16.5 of the Westminster Confession of Faith (Calvinist, 1643), which reads: '*V. Nosotros no podemos, por nuestras mejores obras, merecer el perdón del pecado o la vida eterna de la mano de Dios; a causa de la gran desproporción que existe entre nuestras obras y la gloria que ha de venir, y por la distancia infinita que hay entre nosotros y Dios, a quien no podemos beneficiar por dichas obras, ni satisfacer la deuda de nuestros pecados anteriores;*' Note that chapter IX of this 'confession' addresses free will but does not pose radical determinism in the manner of Luther.

<sup>45</sup> On the similarity of Jakobs' normativism based on the idea of self-regulating and the same conclusion that the law must psychically motivate obedience to rules, see

towards Luther's 'bondage of will' idea as part of his humanist thought but then decided to challenge it for different and more utilitarian reasons<sup>46</sup>. Erasmus may actually have been persuaded that the discussion would discourage individuals from living better lives. In this respect, even proclaiming the controversy was dangerous, as he himself declared. Ultimately, he is skeptical of his own freedom of action and asks: *Quis malus studebit corrigere vitam suam?*<sup>47</sup> On reflection here (reading between the lines), one may wonder whether Luther had realized that

RODRÍGUEZ, Víctor Gabriel, *Livre arbítrio e Direito Penal: revisão frente aos aportes da neurociência e à evolução dogmática*, Sao Paulo: Marcial Pons, 2018, pp. 290 et seq.

<sup>46</sup> Chi dunque – dici tu – si sforzerà di correggere e di migliorare la sua vita? Rispondo: nessuno lo può; infatti quelli che pretendono di farlo senza l'aiuto dello Spirito sono degli ipocriti che Dio abbandona alla loro sorte. Gli eletti e gli uomini pii saranno corretti e migliorati grazie allo Spirito Santo; quanto agli altri essi periranno senza esser sati corretti. Agostino – d'altronde – non disse affatto che nessuna opera humana o che tutte le opere umane sono ricompensate, ma anche le opere di qualche uomo lo saranno.

<sup>47</sup>The Spanish translation of this passage follows: 'Ia10: Supongamos, pues, que fuese verdadeiro em certo sentido lo que enseñó Wycliff y a lo que Lutero asintió, que cualquier cosa que hacemos no la hacemos por libre albedrío sino por mera necesidad. ¿Qué más inútil que divulgar esa paradoja al mundo? (Quid inutilius, quam hoc paradoxon evulgari mundo?). De la misma manera, supongamos que en cierto sentido fuese verdadeiro lo que em alguna parte escribió Agustín, que Dios hace em nosotras tanto las cosas buenas como las malas, recompensándonos respecto de sus buenas obras y castigándonos respecto de las malas. Que ventana hacia la impiedad para incontables mortales abriría esta opinión extendida entre el vulgo, particularmente en medio de tanta incapacidad, estupidez, malicia e inclinación hacia todo género de sacrilegios. Qué enfermo sostendrá una lucha perpetua y trabajosa contra su carne? Qué malvado se esforzará en corregir su vida?'. The next paragraph concludes: 'Tales materias deberían tratarse quizás en reuniones de eruditos, o en las escuelas teológicas, aunque pienso que ni siquiera allí serían útiles si no se hiciera con prudencia. Pero debatir estas historias ante la mirada de las multitudes de cualquier tipo me parece que no sólo es inútil sino incluso pernicioso (ceterum hoc genus fabulas agere in teatro promiscuae multitudinis mihi videtur non solum inutile, verum etiam perniciosum). ROTTERDAM, Erasmo, *Discusión sobre el Libre Albedrío*. Prólogo de Ezequiel Rivas. Buenos Aires: El cuenco de plata, 2012, pp.34-37

Erasmus was arguing that religion was essential to foster belief in free will, thus foreshadowing issues that Stuart Mill and others were to discuss from a utilitarian point of view a century later.<sup>48</sup>

To explain this, the historical element of Erasmus' letters has some bearing. At least by recalling his suppressed attraction to Luther's ideas, to the point of the former's rejecting alluring (or threatening) calls for him to confront the reformist head-on. Within the limits of this study, therefore, I cannot rule out the possibility of Erasmus having actually been the first to go even beyond the ideas some penal law theorists are currently insinuating: failing to inquire into the question of free will is not only of little use but also dangerous.

5. Main point: the risk of investigating free will and the conciliation between freedom and causal-will

Current developments in the neurosciences pose a revisiting of the question of human free-will. However much medical researchers may deny

---

<sup>48</sup>Referring here to Stuart Mill's *The Utility of Religion* (orig. 1874) essay in which argues from a utilitarian perspective and even dialogues with Bentham by enumerating the advantages of religion on both individual and social levels (e.g. 'Generalmente, si no siempre, los pueblos antiguos recibieron su código moral, sus leyes, sus creencias intelectuales e, incluso, sus artes de la vida práctica – todo lo que, en una palabra, tendía a guiarlos y disciplinarlos – como si se tratara de revelaciones provenientes de poderes superiores' p. [111] [112] [113] [114] [115] [116] [117] [118] [119] [120] [121] [122] [123] [124] [125] [126] [127] [128] [129] [130] [131] [132] [133] [134] [135] [136] [137] [138] [139] [140] [141] [142] [143] [144] [145] [146] [147] [148] [149] [150] [151] [152] [153] [154] [155] [156] [157] [158] [159] [160] [161] [162] [163] [164] [165] [166] [167] [168] [169] [170] [171] [172] [173] [174] [175] [176] [177] [178] [179] [180] [181] [182]), although his position is ultimately a critique of this same utility ('Por ejemplo: el reconocimiento de que el máximo objeto de nuestra adoración es un ser que pudo hacer un Infierno, y, al mismo tiempo, pudo también crear generaciones y generaciones de seres humanos con la certeza de que estaba criándolos con ese destino. ¿Habrá algún acto de barbarie moral que no pueda justificarse por imitación a la conducta de un dios así? p. 105). In Stuart Mill's time, Anticlericalism was of course the rule rather than the exception, but the underlying question could already be latent in Erasmus' rejoinder. Cf. MILL, John Stuart, *La utilidad de la religión* (orig. 1874), Madrid, Alianza Editorial, 2009

it, those who dare to design research essentially probing awareness of the instance of willing or choosing are reaching beyond<sup>49</sup> biological boundaries and venturing to pose a moral question: the instant, location and causes of human will.

Revisiting the question of free will from an exclusively biological point of view involves acute risk that is rather similar to Erasmus' warning: if the individual of his own bondage is now faced not with God's will but with the inescapable laws of natural causality (the reality of natural laws as such), self-determination to legal conduct may be overwhelmed and any meaning of punishment with it.

In this respect, the Dutch intellectual made this almost disguised affirmation at the beginning of the 16<sup>th</sup> century and it is still a forceful maxim worthy of jurists' consideration.

The alternative, in order to minimize this risk, must not be - even in penal dogmatics- to declare free will an unquestionable assumption (as did Carrara in the past or Roxin presently, with unjust action despite being able to access the rule 'unrechtes Handeln trotz normativer Ansprechbarkeit'), acting otherwise would be admitting all neuroscientific progress into the realm of Law. Otherwise, a penal law scholar in the discourse of rationalism assumes more rigid dogmas than those of the 16<sup>th</sup> century, when the issue was thoroughly discussed with all its theological shackles, as shown here.

An unstable solution to the problem – but the only one currently possible – is merely showing that neuroscientific findings concerning free have not even come close to proving absolute determinism. The learned scholars

---

<sup>49</sup>This is one of the positions that are more extensively argued in my abovementioned thesis *Livre Arbitrio e Direito Penal*.

who believe they have shown this is so are actually making serious methodological mistakes when they set out from the laboratory state of a brain to then tackle metaphysical issues, which are based on very different premises. If this conciliation, which implicitly presumes the existence of a metaphysical reality, is not accepted, we are indeed endangered by Erasmus' question: *Quis malus studebitcorregere vitam suam?* A question that must be revived as a fully current maxim to examine the consequences of recent medical research for the formation of individual will.

## 6. Conclusions

I. Advances in neurosciences have revived the classic philosophical discussion of free will based on studies showing there is no wilful agent capable of breaching the chain of biopsychic causality of the brain and the nervous system;

II. Despite these new scientific contributions, the philosophy of mind and penal law cannot do without the consequential discussion between indeterminism, determinism and fatalism;

III. Discussions such as the one between Erasmus of Rotterdam and Martin Luther contain arguments that may be revived to discuss the purpose of punishment if the reader is free of epistemic prejudice;

IV. Although an opposite view is often held, the theological core of Luther's Reformation was denying Free Will rather than rejecting papal authority. Erasmus of Rotterdam took up this theological point but at some stage, in our opinion, he insinuated that belief in free will was finalistic and utilitarian. Only a man who believes himself to be free may be motivated to be orderly in society; only wrongful behavior that is free in its origin may be punished;

V. Outside of the theological context, the same pursuit of legitimate grounds to punish deviant behavior continues today. Claus Roxin's moderate normativism poses freedom of action as the 'rule of the game' (Spielregel<sup>50</sup>). It must be assumed that the individual is free to heed the 'call of the rule' so that he can respond positively to it. However, since this is admittedly a presumption, the theory seems to allow that it is essential to penal law that the individual believes he is able to decide in accordance with the norm.

VI. In its attempt to conceive punishment for failing to self-regulate, Günther Jakobs' systemic functionalism (after Luhmann) seeks to frame penal law separately from the issue of determinism v. indeterminism. Despite a teleological focus, it lacks in-depth analysis of the key question: how will an individual be motivated to follow rules if they do not believe themselves capable of ongoing self-regulation?

VII. For all of the abovementioned reasons, the debate between Martin Luther and Erasmus of Rotterdam now has renewed relevance: the utilitarian function of belief in free will, which is at the heart of the debate from the early Reformation period, is still the main question to be answered today in terms of the legitimacy of penal law. Particularly due to ongoing findings from the neurosciences, which are unequivocally deterministic.

---

<sup>50</sup> 'Die Freiheitsannahme ist insoweit eine 'normative Setzung', eine soziale Spielregel, deren gesellschaftlicher Wert vom erkenntnistheoretischen und naturwissenschaftlichen Problem der Willensfreiheit **unabhängig** ist.' ROXIN, Claus, *Strafrecht: Allgemeiner Teil*, Band I, München, C. H. Beck, 2006, p. 868

## 7. References

- LAS CASAS, Bartolomé de, Apología o declaración y defensa universal de los derechos del hombre y de los pueblos, Salamanca, Ed. Junta de Castilla y León, 2000
- LAS CASAS, Bartolomé, Del único modo de atraer a todos los pueblos a la verdadera religión, México, Fondo de Cultura Económica, 1975
- LUHMANN, Niklas, Organización y Decisión. Autopoiesis, acción y entendimiento comunicativo. Barcelona: Anthropol, 1997
- LUTERO, Martin, De Servo Arbitrio: La Voluntad Determinada (Obras Completas vol. 4), Buenos Aires, Paidós, 1976
- LUTERO, Martinho, Da Liberdade do Cristão, 1520, Bilingual German-Portuguese, São Paulo, UNESP, 1998
- MILL, John Stuart, La utilidad de la religión (orig. 1874), Madrid, Alianza Editorial, 2009
- RIVAS, Ezequiel, Introducción à edição bilíngue latim-castellano do Diatribé, (Buenos Aires, Cuenco de Plata, 2012)
- RODRÍGUEZ, Víctor Gabriel, Livre arbítrio e Direito Penal: revisão frente aos aportes da neurociência e à evolução dogmática, SP: Marcial Pons, 2018
- ROTTERDAM, Erasmo de, Discusión sobre el Libre Albedrío. Prologue by Ezequiel Rivas. Buenos Aires, El cuenco de plata, 2012
- ROXIN, Claus, Strafrecht: Allgemeiner Teil, Band I, München, C. H. Beck, 2006
- TUBAU, Xavier, Alfonso de Valdés y la política imperial del canciller Gattinara, in: Studia Aurea: Revista de Literatura Española y Teoría Literaria del Renacimiento y Siglo de Oro, No. 4, 2010