

Falcón y Tella, M^a.J. «Culpa y Castigo en Derecho y Literatura» Cervantes,
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**English translation: *Guilt and Punishment in Law and Literature*. Brill – Nijhoff,
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Long before they appeared in legal texts and became the subject of discussion in criminal law classrooms, guilt and punishment have transcended eras and cultures, forming part of the collective human experience. It is precisely here, on this dividing line between Morality, Law and Literature, where Professor María José Falcón y Tella, chair of Philosophy of Law at the Complutense University of Madrid and author of 36 monographs, situates her book *Culpa y castigo en «Derecho y Literatura»*.

The present book consists of an *introduction* in its first chapter, followed by six additional chapters. The second chapter, devoted to *guilt*, analyses this concept from a triple perspective: psychological, legal and religious. From the psychological perspective, Professor Falcón y Tella opens the debate with a question that, despite its apparent simplicity, encompasses legal, psychological, and philosophical complexities: “Are criminals – or at least some of them – mentally ill?” The author addresses this question taking into consideration various Schools of Thought and approaches, such as English legal doctrine, Freudian theory, as well as arguments concerning genetic inheritance and the environment in which a person develops. The analysis goes further, extending to a question of particular legal and philosophical relevance: the role of the State in imposing a penalty or security measure, on one hand, and the potential responsibility that can be attributed to society in light of that sentence, on the other. It seems reasonable to consider that the function of punishment should not be limited to the isolation of the individual during their time in prison. Instead, it should give substantial attention to preparing them for the moment of their release. In this regard, a greater focus in prison life on education, the acquisition of tools to access employment, and support throughout the process of reintegration could help prevent release from prison from becoming the beginning of a new cycle of exclusion that hinders the individual’s true reintegration into society.

Once guilt has been examined, the author turns her attention on punishment as a possible legal consequence, to which she devotes the third chapter of this work. Punishment can take the form of two broad types of sanctions. The first form is the penalty, which corresponds to a static perspective of law and primarily addresses its logical aspects. The second one is the security measure, which adopts a dynamic perspective and takes into account its teleological elements. While the former looks to the past, the latter looks to the future. Professor Falcón y Tella outlines the theories underpinning these sanctions: absolute theories and relative theories, the latter being divided into theories of general prevention and special prevention. It is worth focusing on the doctrines of special prevention, which consist of religious and secular theories. The secular approach recognizes three types of offenders: the occasional offender, the state offender, and the habitual offender. To each one of them a different punishment is attributed, respectively: individual intimidation; re-education, resocialization and social reintegration; and, finally, incapacitation. It is worth reflecting on the question of whether human beings are evil by nature or whether, on the contrary, the family into which they are born and the society in which they grow contribute to instilling in them ideas, values and behaviours that subsequently shape their conduct. Another particularly interesting point in this chapter is section E: “What if we did not punish?” According to Durkheim, criminality fulfills a positive social function, as it is an expression of freedom and creativity, albeit in its negative form.

Durkheim's ideology is very different from mere common sense. In Professor's Falcón y Tella words, "Is it not, perhaps, more effective to raise free individuals, capable of taking responsibility for their actions, and to place greater trust in the fact that an order will be respected because it is fair, rather than because of the sanction prescribed in the event of non – compliance?" What is preferable, rigidity or flexibility? The law serves to regulate society and impose certain limits, rather than let everyone take the law into their own hands. Nevertheless, conflict is inevitable. Consequently, as Professor Falcón y Tella rightly states, "conflicts can be resolved, but one can also learn to live with them".

As a preliminary step to the analysis of the works of Cervantes, Dostoevsky and Kafka, the author, in the fourth chapter of her book, refers to "Guilt and Punishment in Some Masterpieces of World Literature of All Time". This chapter covers works by Aeschylus, Sophocles and Euripides, as well as the judgement of King Solomon in the Bible and Faust's pact with the devil, while also mentioning Shakespeare and George Orwell, among others. This overview offers an appreciation on how the conception of guilt and punishment does not remain static, but varies according to the historical, cultural and social context in which each work emerges. Thus, Aeschylus' work addresses the law of retaliation and human justice as two opposing poles. In Shakespeare, the omnipresent theme is revenge carried out through the law. Alexandre Dumas, for his part, reflects on divine law in *The Count of Monte Cristo*, while in the community depicted in *Billy Budd* there is a dilemma between respecting an unjust law and obeying justice, which becomes a genuine act of civil disobedience.

In the fifth chapter, Professor Falcón y Tella traces the life and literary career of Miguel de Cervantes Saavedra. Although he did not study law, in *The Ingenious Gentleman Don Quixote of La Mancha*, one of the most influential works of literature, Cervantes demonstrates his legal knowledge, acquired – fortunately or unfortunately – from the events of his private life, as well as from the books he owned. Prominent themes in his work include justice, legality, freedom and human dignity, among other topics of legal and political nature. Particularly noticeable is the way in which Don Quixote perceives the criminal. Far from seeing him as someone who deserves to be punished, he perceives him as a victim of the system. This conception is related to section G of the third chapter of the book subject of analysis: "The resocialization of society in order to make it less unjust instead of the resocialization of the individual". However, it is important to take into account the era of Don Quixote and, therefore, the mindset of the people of that time and the forms of punishment used to make justice. Being punished under the Ancien Régime – characterized by a hierarchical society and a substantially different punitive system – is not the same as being punished in a social and democratic state governed by the rule of law. From this perspective, it could be argued that Don Quixote's mindset was ahead of its time. Likewise, Don Quixote seems to be in favour of the application of a security measure over the imposition of a custodial sentence, choosing a solution that, instead of looking backwards, it embraces the future. It is equally relevant to note that, at that time, due process guarantees did not exist; rather, torture was often used as a method of obtaining a confession.

The authors Fyodor Mikhailovich Dostoevsky and Franz Kafka, who are the focus of the final two chapters – chapters six and seven, respectively – share a certain similarity in terms of their relationship with the paternal figure, a similarity that becomes evident in certain works by both authors.

In the sixth chapter, Professor Falcón y Tella focuses on two of the most representative works by the great Russian author: *Crime and Punishment* and *The Brothers Karamazov*, both of which are closely linked to topics of guilt and punishment. Perhaps one of Dostoevsky's most remarkable aspects is that he published his works in a world heavily controlled by censorship under the Tsarist regime. In both *Crime and Punishment* and *The Brothers Karamazov*, Dostoevsky places guilt within the social realm. "We are all guilty of everything before everyone". This conception ties in with some of the ideas developed by the author in the previous chapters. The philosophical dimension of *Crime and Punishment* revolves around freedom. Each person is responsible for their own actions. It should be added that thought itself is not a crime. However, when thought is externalized through a conduct that violates the established norms, that is when the sanctioning mechanism is set in motion. In *The Brothers Karamazov*, "attitude is more important than action".

In contrast to Dostoevsky's approach, Kafka believed that human beings do not enjoy freedom. It may be that his family circumstances – the relationship with his father – or the totalitarianism under which he lived, or a combination of both factors, led him to view the human being as lacking freedom and critical spirit. Kafka then questions whether the law succeeds in providing (legal) security and certainty, but he does not doubt the inevitability of punishment. Man is morally guilty, and innocence does not exist. He faces power alone.

He does not usually turn to the judicial system, since the judicial system in an absolute state is not designed for man, but rather operates against him. In Kafka's world – both in *The Trial* and in the society in which he was part of – due process guarantees were something that only very few people could afford. Ultimately, Kafka showed no particular affinity for law. He transposes his criticisms of law into *The Trial*, demonstrating that the presumption of innocence does not exist, and that the punishment is not imposed fairly, based on the crime and its corresponding legal classification. One of the ways in which Kafka articulates his criticism is through irony. *The Trial* is built upon it: a trial that takes place on a Sunday, when the courthouse should remain closed; a time that has not been agreed upon; an arrest that is not the consequence of any crime; and so on. The accumulation of these situations leads the reader to the conclusion that there is still a long way to go before justice is achieved. In *The Trial*, people are punished for who they are, not for what they have done. In this final chapter of her work, the author Falcón y Tella explores a very interesting aspect of punishment: “The punishment of the innocent as victimization”. Victimization occurs when an innocent person is punished while being fully aware of their innocence. There is a distinction between what can be done and what ought to be done – between whether guilt is an essential requirement for punishment or merely a necessary one. As Professor Falcón y Tella states, *The Trial* is a “parody of justice”.

Personal Assessment

After reading *Culpa y castigo en «Derecho y Literatura»*, I cannot help but highlight Professor María José Falcón y Tella's ability to address highly complex legal questions from different and complementary perspectives. If this work demonstrates anything, it is that its contents go far beyond the study of guilt and punishment, entering fields such as Law, Morality, Literature, Psychiatry and Psychology. Moreover, it allows us to understand and learn about the development of criminal law in past eras and across different cultures and societies.

I find particularly insightful the parallel that Professor Falcón y Tella draws by comparing an abstract question from Philosophy of Law – for example, what is better, flexibility or rigidity? – with parent – child relationships, thereby offering a better understanding of the subject matter with which the reader can identify. What Philosophy of Law and parent – child relationships have in common, in this case, is knowing where to set boundaries so that the individual /children have sufficient freedom in order to develop their individual autonomy. Furthermore, parent – child relationships reappear in the chapters devoted to Dostoevsky and Kafka, whose relationships with their paternal figures were marked by conflict – a factor that constitutes a significant element in the composition of certain works by both authors.

One word that recurs several times in different contexts is the word “pain”. In turn, pain has several facets: physical pain, psychological pain, and deliberate pain. Pain is one of the causes that lead to the commission of a crime and its subsequent punishment. After reading this enriching book in knowledge, I have begun to reflect more deeply on the structure of prisons and how, instead of helping prisoners learn and grow, the prison system hinders their return to a certain degree of normality in their lives after incarceration. Perhaps, first, we would have to “resocialize society”, as Durkheim used to say, since the large number of prisoners who served their custodial sentences find themselves marginalized and discriminated against upon release from prison and face great difficulty in rebuilding their lives.

The subject of guilt is something I have begun to view differently after reading Professor Falcón y Tella's work. “Guilt is both the foundation and the limit of punishment”. The person who has committed a crime is not the only one responsible for it. The concept of freedom comes into play – a concept associated with free will, along with terms such as conscientious objection, civil disobedience and mental states. Professor Falcón y Tella, in addition to exploring these topics through legal concepts, approaches them in a very unique way through the fields of Neurology and Psychiatry.

Likewise, I had the chance to learn about Émile Durkheim's theories thanks to the references that Professor Falcón y Tella makes. I would not have thought of criminality as “an integral element of a healthy society”. Also, Durkheim examines crime on a psychological level – as a pathological phenomenon – on one hand, and on a sociological level – as a normal social phenomenon – on the other. What must remain stable is the social equilibrium.