Culpability

Ezequiel Vacchelli

Abstract 1

The culpability principle is a requisite for the legitimacy of State punishment in Roman-Germanic criminal law systems. Culpability is synonymous with reproachability for the infringement of a rule of conduct. The scope of reproachability, however, cannot be understood independently of the purpose of punishment, the stage of development of society and the standard defined by the social role of the perpetrator. A guilt-based model of responsibility has consequences that manifest in both criminal policy and systematic considerations of the theory of crime. These and other issues are examined and analysed in this essay.

I. Approach to the concept of culpability, positivisation and jurisprudence in the Roman-Germanic legal tradition

In the legal systems of the Roman-Germanic tradition,[1] the culpability 2
principle (*nullum poena sine culpa*) is of particular importance in the creation and application of criminal law and[2], as such, it is a requisite for the legitimacy of State mandated punishment in liberal democracies.[3] This

1 The discussion presented here has taken the jurisdictions of Germany, Spain and Argentina as reference points for the purposes of making a functional and comparative presentation of the institution of the culpability principle. For this reason, the references to doctrine and jurisprudence are only representative due to the scale of this work having been limited to just these three legal systems.

2 For a distinction of principles from rules, Fernando Guanarteme Sánchez Lázaro, «El principio de culpabilidad como mandato de optimización» [2011] *InDret* 4, pp. 1 ff. Following Robert Alexy, «Die Gewichtsformel» [2003] *Gedächtnisschrift für Jürgen Sonnenschein*, pp. 771 ff., the author notes that generally rules are norms which prescribe actions in a definite way while principles only result in the gradual realisation of real-world action to a greater or lesser extent.

3 There is virtually unanimous agreement on this point, although this is not the case with regard to its basis and limits. On this subject, see, among many others, Arthur Kaufmann, *Das Schuldprinzip* [1961] pp. 15 ff.; Claus Roxin, *Culpabilidad y prevención*

means that a penalty can only be imposed on the perpetrator of an illicit act[4] if they have acted culpably. The commission of an illicit act is culpable when the perpetrator is responsible for undertaking the act with a lack of a dominantly lawful motivation.[5] thus, a perpetrator cannot argue that the illicit act in question is not something that he or she is responsible for. Culpability, then, is reproachability for the infringement of a rule of conduct.[6] In other words, to impose a penalty on a person, it must be possible to reproach him/her for having disregarded the requirements set by the infringed legal norm.

3 The judgement of culpability is intimately linked to the philosophy-based concept of person.[7] It is human dignity that commands the realisation of this judgement. Expressed in Kantian terms, the person must be treated as an absolute end and never as a means subject to other ends, a position that prohibits the instrumentalisation of the perpetrator through the imposition of punishment. What this translates to is that the severity of the punishment must be proportional to the degree of the culpability that has been established in the case at hand.[8] This is one of the central pillars of the rule of law.

4 In Spain, doctrine and jurisprudence tend to derive the principle of guilt[9] from Article 5 of the Spanish Criminal Code, which states "there is no penalty without intention or recklessness". In Argentina, the doctrine

en Derecho penal [2nd edn, 2019] pp. 41 ff.; Günther Jakobs, «Das Schuldprinzip» [1992] extended text of the conference at the Complutense University of Madrid, translated by Manuel Cancio Meliá and published in *ADPCP* vol. XLV fascicle III, pp. 1051 ff.; Tatjana Hörnle, *Determinación de la pena y culpabilidad. Notas sobre la teoría de la determinación de la pena,* [2003] pp. 20 ff.; Fernando Guanarteme Sánchez Lázaro, «El principio de culpabilidad como mandato de optimización» [2011] *InDret* 4, pp. 1 ff.; Pablo Sánchez Ostiz, *Víctimas e infractores, cumplidores y héroes. La culpabilidad en clave de imputación* [2018] pp. 37 ff.; José Milton Peralta, *Motivos reprochables* [2012] pp. 175 ff.; Raúl Eugenio Zaffaroni, *Manual de Derecho penal, Parte general* [2005] § 40.

4 The term 'illicit act' refers to what is known in Spanish as *hecho antijurídico* (*rechtwidrige Tat* in German). *Antijuridicidad* (Rechtwidrigkeit in German); in contrast, it has been translated into English as 'illicitness' I think this does not work, rather "wrongfulness" or "unlawfulness".

5 Günther Jakobs, *Strafrecht Allgemeiner Teil* [2nd edn 1991] 17/1.

6 Along these lines, Pablo Sánchez Ostiz, *Víctimas e infractores, cumplidores y héroes. La culpabilidad en clave de imputación* [2018] p. 49. «To reproach is to throw in the face» (Ibíd. p. 53, see also p. 63, note 39).

7 Along these lines, Arthur Kaufmann, *Das Schuldprinzip* [1961] p. 117.

8 See, among many others, José Cerezo Mir, *Curso de Derecho penal español* [2001] pp. 16 ff.

9 I use culpability and guilt as synonyms.

derives this principle from several articles in the National Constitution, namely, Article 18 (principle of legality and innocence), Article 19 (principle of legality), Article 33 (other rights derived from the republican form of government) and, finally, Article 75, Section 22, amended in 1994 (which refers to the International Conventions on Human Rights that are part of the constitutional body of laws). Finally, in Germany, the principle of "no punishment without guilt" has constitutional status; it finds its basis in the requirement to respect human dignity and in Article 2, section 1 of the Basic Law and in the rule of law. Additionally, Article 46, Paragraph 1, StGB announces: "the culpability of the perpetrator constitutes the basis for the determination of the penalty", while Article 19 StGB defines the grounds for having an incapacity to incur culpability and Article 21 StGB describes diminished culpability.

As far as international instruments are concerned, Article 11.1 Universal Declaration of Human Rights (UDHR) prescribes that "everyone charged with a penal offence has the right to be presumed innocent until proven guilty according to law in a public trial at which they have had all the guarantees necessary for their defence". Along these lines, Article 8, Subparagraph 2 of the American Convention on Human Rights (Pact of San José, Costa Rica) states that "[e]very person accused of a criminal offense has the right to be presumed innocent so long as his guilt has not been proven according to law". Similarly, the International Covenant on Civil and Political Rights, in Article 14, Paragraph 2 states that "[e]veryone charged with a criminal offence shall have the right to be presumed innocent until proven guilty according to law." 5

With regard to the normative significance of the pronouncements of the highest courts of the relevant jurisdictions, the German Constitutional Court (Bundesverfassungsgericht or BVerfG) has stated that the principle of 'no punishment without culpability' has constitutional status and finds the basis for it in the obligation to respect human dignity, as elucidated in Article 1, Paragraph 1 of the Basic Law and the general principle of the rule of law. For the BVerfG, the culpability principle entails a duty for the courts to ensure that sentences are appropriate to the gravity of the offence and the extent of the offender's culpability in a specific case.[10] In addition to this, the Tribunal Supremo Español (TS), Spain's supreme court, has underlined the value of the culpability principle for the criminal system operating in a 6

10 BVerfG, 26.2.2008, Akt.Z.: 2 BvR 392/07

State that respects the rule of law, the main consequence of which manifests in the individualisation of penalties imposed by prohibiting them from exceeding the guilty party's culpability, thus emphasising the function of the culpability principle as a limit.[11] Finally, Argentina's supreme court, the Suprema Corte de Justicia de la Nación Argentina (CSJN), has referred to the culpability principle as an individual guarantee which presupposes an imputation of reprobation based on the idea of just desert which is opposed to the idea of dangerousness. In line with this, the Court has held that the penalties imposed by lower courts should not exceed the extent of punishment the perpetrator deserves, i.e. be proportional to the perpetrator's culpability for the act. For the CSJN, culpability by constitutional mandate dictates the punishment deserved and this, in turn, determines the severity of the punishment meted out.[12]

7 In summary, there is a pronounced commonality regarding the views and approaches taken by the German, Spanish and Argentinian legal systems outlined above that shows that the culpability principle holds a central place in their highest courts as a result of their respecting of the dignity of the human person and fundamental laws. The culpability principle has also been defined as an individual guarantee that determines the merit and measure of punishment, in contrast to the idea of dangerousness and objective liability. In this regard, the following section will analyse its specific operation in the imputation of reprobation to the perpetrator in detail.

II. Aspects of the principle of culpability: the purpose of punishment, society and roles

8 If a particular course of action is qualified as culpable, this means that the unlawful motivation, borne from a disregard for the law, has been found to be the only motive explaining an individual's behaviour concerning the crime in question. If this is true, then culpability cannot be understood separately from the discussion of the purpose of punishment as a response to the offender's attitude and conduct. Once the purpose of punishment has been clarified, only then can the question of how severe a penalty should

11 On the understanding of the culpability principle in Spanish jurisprudence, see Fernando Guanarteme Sánchez Lázaro, «El principio de culpabilidad como mandato de optimización» [2011] *InDret* 4, pp. 7 ff.

12 Tejerina [2008] 4 AC (Argibay J.)

be to sufficiently address the act in question in a proportionate manner be addressed while still strictly respecting the dignity of the person. In this chapter, it is assumed that the offender's refusal to conduct themselves in accordance with the relevant norm presupposes that the community's overall confidence in the norm has been affected. Punishment is therefore a response to an infringement of a norm, imposed on an offender to reaffirm the validity of the infringed norm.[13] The maximum limit of the social utility of the penalty, however, may not exceed the limit of what is deserved in accordance with the seriousness of the act committed by the perpetrator.

9 The theory of negative general prevention, whereby punishment is meted out to deter the citizenry, as well as the theory of negative special prevention, which entails the search for the innocuousness of the perpetrator when coupled with the theory of positive special prevention, where rehabilitation and social reintegration are the primary functions of punishment, should be ruled out as plausible explanations for determining the purpose of punishment in the jurisdictional phase. This is because these approaches go beyond simply providing a form of retribution that is wholly deserved by the perpetrator while simultaneously ignoring the culpability principle. All of them ultimately instrumentalise the perpetrator and manifest a series of issues in terms of respecting adequate proportionality between a crime and its penalty. Naturally, this does not automatically assume that social reintegration should be given special consideration when deciding upon and enforcing a penalty,[14] however, its operability must always be harmonised as a desirable objective, together with the reaffirmation of the validity of the rule violated by the perpetrator.

10 Having said that, it is not only the purpose of punishment that is factored into the equation here since the culpability principle does not exist in isolation from the temporal context. In other words, to determine the principle's scope and meaning, the stage and state of development of the society in question must be taken into account. In societies governed by and respecting the rule of law, the culpability principle is a condition of subsistence in that it links a perpetrator's illicit act in a rational and foreseeable manner with an appropriate State-mandated response without depersonalising it. The optimisation[15] of the culpability principle as a basis for the legitimacy

13 Günther Jakobs, *Strafrecht Allgemeiner Teil* [2nd edn 1991] 1/9.

14 This is the view of STC 160/2012 of 20 September.

15 See Fernando Guanarteme Sánchez Lázaro, «El principio de culpabilidad como mandato de optimización» [2011] *InDret* 4, pp. 1 ff.

of punishment must therefore cut across criminal policy and the theory of crime. As far as criminal policy is concerned, one of its main consequences is the marginalisation of responsibility for the result itself, while in the field of the theory of crime, it is the theory of objective (fair) imputation that excludes chance, the behaviour of a third person or that of the victims themselves as matters for which the perpetrator must bear responsibility, even at the level of the elements of the offence.

11 This, however, will be taken up later on in this text, for now, it suffices to note that not all societies consider the culpability principle to be an inherent requirement in the development of their legal systems. Indeed, the principle often takes a rather elementary conceptual form, if present in any capacity at all, in authoritarian States. The same is true of very primitive societies where the imputation of responsibility could be tied to fantastic, magical or mythical parameters, however, as this is not the case with the jurisdictions under consideration here, it is sufficient to remark that the reproachability of behaviour in the light of rational criteria and respect for human dignity are two conditions that promote continued respect for and observance of the rule of law.

12 Nevertheless, even in the context of secular societies, to concretely determine the limits of judgements related to culpability, the specific social role of the judicial agent, in their capacity as the addressee of the behavioural expectation derived from the legal norm, must be taken into account. This is because what is expected of each citizen depends on their specific social position in the social structure. Thus, in situations of need involving, for example, a child swept out to sea, if those present include a lifeguard, the father of the child and an aged tourist sitting on the beach, each will not be expected to respond identically. Naturally, more will be demanded of the lifeguard, whose responsibilities will likely include swimming out to the child even if that puts their life at some risk, an onus not necessarily placed on the aged tourist or even the parent. Similarly, the parent's qualified duty of care towards the child may require he/she do more than the tourist, who is not involved in the unfolding events at all and hold no positions of guarantee that require efforts beyond minimal duties of solidarity. In other words, what is expected of someone depends, to a large extent, on the bundle of duties the agent is subject to in accordance with their specific role in the events at hand and, consequently, will determine how much they will be reproached should this expectation not be met. In short, it is a matter of phenomenologically equivalent situations, albeit normatively different because of the basis of standards pre-set by certain roles.

In short, the architecture of the culpability principle is defined by a triad that needs to take into consideration the purpose of the punishment which, in liberal a State, is (1) retributive in nature insofar as the State's reaction does not exceed what is deserved according to the magnitude of the act, (2) largely determined by the specific stage of development of a demystified and normativised society and, finally, (3) by the specific role of the perpetrator as this defines the limits of what is required/expected of them in accordance with their position in the social structure. The harmonious interplay of these three aspects gives rise to the specificity of a functional culpability principle with political-criminal and systematic consequences that prove valid for all current legal systems retaining or employing a Roman-Germanic orientation. 13

III. Culpability as a counterpoint to destiny: political-criminal implications

Three fundamental political-criminal implications arise from the fact that the culpability-based model of responsibility entails an imputational (attributory) relationship between a perpetrator and an illicit act he or she committed at the moment of the act itself. 14

The first one is that the perpetrator of the act in question must know what they are doing is prohibited but deliberately decided to proceed anyway. As a natural result of this, they can be exonerated from any culpability provided that they could not have known their course of action was prohibited or they acted unwillingly. In the Roman-Germanic systems, a distinction is made between (1) the knowledge about and the will involved in the alleged act and (2) the knowledge and awareness of the prohibition or illicitness of the act. This concept is the old *dolus malus* of causalism which, after the emergence of the finalism assumed in German criminal law theory[16], became split, with one part remaining in culpability (knowledge and awareness of the prohibition) and the other part move to the 15

16 About the finalist thinking (and imputation) see Kai Ambos, «Toward a Universal System of Crime: Comments on George Fletcher's Grammar of Criminal Law», *Cardozo Law Review*, 28 (May 2007), pp. 2647 ff.

actus reus (*typus*[17] as intention or recklessness).[18] Beyond the systematic discussion, what seems important to emphasise here is that, much like in the creation of law by a legislator and in the theoretical elaborations of doctrinaires, the culpability principle presupposes the verification of the subjective imputation of the act to the perpetrator. If this is the case, then the perpetrator cannot be held liable for merely causing the result as this would be unjust. This kind of causation outside the subject's possibility of self-determination was typical of primitive societies, where misfortunes of fate and inexplicable events were still viewed as punishable. In this way, liability for the result is a distinct issue from culpability-based liability,[19] where it is a matter of determining by means of a normative procedure who is responsible for the result and to what extent.

16 The second policy implication of a culpability model is that the model is opposed to the so-called 'culpability for the conduct of life', according to which the agent is reproached for what they have 'become' because of their wrong decisions in the past. This is an expression of dangerousness in which the focus is shifted from the individual act to the character of the person. The usual expressions of dangerousness in criminal law in the late 19th and early 20th century concerned the prosecution of 'habitual criminals' as well as other 'undesirable' citizens. The limits of the *typus* were then diluted, as there was no criminal offence according to which one had to answer for one's own character as a social disturbance and all the guarantees of the rule of law which safeguarded the dignity of the human person in their relationship to criminal law suffered a similar fate. 'Culpability for the conduct of life' is opposed to the criminal law of the act (culpability for the act). However, studying the origins of the commission of criminal acts

17 To refer to the doctrinal category of 'tipo penal' (precise description of what is considered an offence under the law), the original German expression *typus* will be used.

18 In truth, the *dolus malus* of causalism ended up divided into three parts. One is the *typus*, the second is culpability and the third consists of knowledge of the permissibility of a justification cause, should that exist.

19 Although in both there is "a strong common root: the explanation of disturbances in social life through imputation", Günther Jakobs, «Das Schuldprinzip» [1992] *ADPCP* Vol. XLV Fascicle III, p. 1056. Jakobs rightly explains that in primitive societies it is not a question of any one person being responsible for any one result, for then they would be a mere scapegoat. On the contrary, even in these superstition- and myth-driven societies, consequences were also attributed which, although they did not respect a natural-scientific conception of causality, they did respond to specific norms and rules that generated social disturbances.

by certain perpetrators, be it rooted in drug addiction, extreme poverty, marginalisation or similar, may, in some cases, be the only way to exonerate an accused individual (for the conduct of life).[20]

17 Finally, it should be noted that the principle of coincidence, also called congruence or simultaneity, derives from a version of the culpability model of liability according to which the agent must be capable of culpability at the moment of the commission (or omission) of the criminal act. This premise needs to be further specified in terms of its scope in those cases when the perpetrator brings a defective state upon themselves which affects their capacity for culpability. In these cases, there is a defrauded law (the punitive law which requires culpability at the time of the act) and a covering law (the law which establishes an exemption from punishment in cases where, for example, non-imputability is involved), the application of which is provoked. For example, in a case where a perpetrator becomes seriously intoxicated to 'pluck up courage' to physically assault their victim, during the process of becoming intoxicated (phase 1), the perpetrator does not commit a criminal act, while at the moment of the assault (phase 2), they are now in a diminished state of mind and incapable of guilt.

18 The doctrinal figure of the *actio libera in causa*[21] aims to resolve the punishability gaps that are generated when agents provoke their incapacity to act or construe a situation of justification or non-imputability to commit a criminal act.[22] In these circumstances, as has been mentioned previously, two phases may be distinguished: first, the action or omission

20 It is beyond the scope of this essay to detail this issue. See Jesús-María Silva Sánchez, *Malum passionis: mitigar el dolor del Derecho penal* [2018] pp. 98 ff.; Javier Cigüela, *Crimen y castigo del excluido social* [2018] pp. 277 ff.

21 See George Freund, «Actio libera in causa vel omittendo bei Rauschdelikten im Straßenverkehr» [2014] GA pp. 137 ff.; Dietrich Herzberg «Gedanken zur actio libera in causa: Straffreie Deliktsvorbereitung als Begehung der Tat (§§ 16, 20, 34 StGB)?» [1992] in *FS-Spendel*, pp. 207 ff.; Joachim Hruschka, «"Actio libera in causa" und mittelbare Täterschaft» [2002] in *FS-Heinz Gössel,* pp. 145 ff.; Joachim Hruschka, «Der Begriff der actio libera in causa und die Begründung ihrer Strafbarkeit» [1968] JuS, pp. 554 ff.; Günther Jakobs «Die sogenannte actio libera in causa» [1998] in *FS-Nishihara*, pp. 105 ff.; Claus Roxin, «Bemerkungen zur actio libera in causa» [1987] FS-Lackner, pp. 314 ff.

22 The scope of application of this figure is disputed. There is agreement that *alic* would cover those cases in which the agent has provoked their non-imputability to commit a crime in that state. However, when it comes to extending its application to the absence of other elements of the crime, especially incapacity to act, the opinions of the doctrine are divided. On this, see, with an extensive bibliography, Ujala Joshi Jubert, *La doctrina de la «actio libera in causa»* [1990] pp. 28, 66 ff.

that produces the imputability defect subsequent to which the crime is then committed. Depending on whether the action or omission was intentional or negligent in relation to the result produced, an intentional or negligent offence will be imputed.[23] Two distinctive scenarios, each with two different modalities, belong to the hypotheses conceptualised as *alic*, depending on whether an action or an omission is at play in the respective phase. In *actio libera in causa*, it is an active criminal act committed in a defective state, which can be provoked actively [*actio libera in agendo*] or through an omission [*actio libera in omittendo*]. Conversely, in *omissio libera in causa* the agent does not carry out the indicated action when it is due because they lack the capacity to do so, either because they could have previously prevented the defect from occurring but did nothing to avoid it [*omissio libera in omittendo*] or because they actively provoked such incapacity [*omissio libera in agendo*].[24]

19 In the case of *alic*,[25] three solutions are proposed: (1) punishing the perpetrator for the creation of the defective situation, which is the approach taken by the German legislator in Article 323 section a) of the StGB that specifies the commission of an offence as the moment when the defective situation is created; (2) focusing on the fact that the perpetrator acted without the capacity to act, justifiably or without culpability, and (3) denying them the possibility of invoking exculpatory circumstances. These three perspectives show differences from one another in terms of what they considered to be unjust: the act of placing oneself in a defective situation [getting drunk, in the case of *Vollrausch*], the act set in motion by the defective situation [mode of the *Typus*] or the act carried out in a state of non-imputability or incapacity to act [exception model]. Each perspective leads to specific systematic consequences in relation to the object of reference of the subjective *typus*, as well as the instances in which the special elements of the offence, which are necessary in each case, are to be realised.[26]

23 Along these lines, Claus Roxin, «Bemerkungen zur actio libera in causa» [1987] FS-Lackner, pp. 314 ff.

24 Along these lines, Jesús-María Silva Sánchez, *Estudios sobre los delitos de omisión* [2004] pp. 46 ff.; Jesús-María Silva Sánchez, *El delito de omisión* [1986], pp. 260 ff.; Jürgen Welp, *Vorangegangenes Tun* [1968] pp. 134, note 145.

25 As the reader will have noticed, in some parts of the text the acronym *alic* is used to refer to the imputation structure in a broad sense.

26 See Günther Jakobs, *Strafrecht Allgemeiner Teil* [2nd edn 1991] 17/58.

IV. Origin and evolution of the systematic category of culpability

The autonomous category of culpability was the result of a theoretical confrontation between two paradigms in the late 19th and early 20th centuries, a period of intense doctrinal systematisation of the theory of crime. On the one hand, an analytical paradigm that was essentially designed by Feuerbach,[27] and later developed by von Liszt,[28] postulated distinguishing illicit conduct (wrongfulness) and culpability as two successive levels of judgement to determine the criminal character of a given behaviour. On the other hand, Merkel[29] and Binding[30] proposed a synthetic paradigm that proffered an understanding of guilt as another element of illicit.[31] In the Roman-Germanic tradition, as is well known, this was the first model to enjoy widespread prevalence as a way of understanding crime. A series of ordered strata were created by this paradigm, each with different material content, that made it possible to identify which acts were punishable and which were not. The purpose of the tripartite system was to divide punishable conduct theoretically by means of formal categories so that a judge would be able to comprehend it legally and in a consistent manner and thus verify the general elements of punishability in each case. 20

The real hinge of the theory of crime, however, lay in its distinction between wrongfulness and culpability.[32] Both in academia and judicial practice, a theoretically-practically oriented model was imposed that sought to examine wrongfulness prior to culpability.[33] The judgement of wrongfulness formally expressed the prohibition of behaviour that contradicted the 21

27 Paul Johann Anselm von Feuerbach, *Revision der Grundsätze und Grundbegriffe des positiven peinlichen Rechts* [vol. I 1799, vol. II 1800] cited by Fernando Molina Fernández, *Antijuridicidad y sistema del delito* [2001] pp. 127 ff., with more references.

28 Franz von Liszt, *Lehrbuch des Deutschen Strafrechts* [1914] §§ 26 ff.

29 Adolf Merkel, *Kriminalistische Abhandlungen* [t. 1 1867] pp. 42 ff.; Adolf Merkel, *Lehrbuch des deutschen Strafrechts* [1889] §§ 26 ff.

30 Karl Binding, *Die Normen und ihre Übertretung* (1872) [vol. I 1991] pp. 243 ff.

31 On the historical background of this theoretical counterpoint, in depth, see Fernando Molina Fernández, *Antijuridicidad y sistema del delito* [2001] pp. 117 ff., 290 ff.

32 Citing to George Dahm, «Verbrechen und Tatbestand» en *Grundfragen der neuen Rechtswissenschaft* [1935] p. 90, explains Michael Pawlik, *Ciudadanía y Derecho penal,* translated by Ricardo Robles Planas *et al* [2016] pp. 105 s. that "the divorce between *typus* and wrongfulness may 'be valid as an expression of practical knowledge'. Beyond this, however, they have no genuinely systematic significance in the theory of crime".

33 See Hans-Heinrich Jescheck «Nueva dogmática penal y política criminal en perspectiva comparada» [1986] ADPCP, pp. 12 ff.

legal order, while materially it was concerned with determining the degree of harm to the protected legal interest; the judgement of culpability, for its part, made it possible to attribute the wrongfulness personally to the perpetrator. There is now almost consensus, at least in civil law systems, about the need to maintain this pair of concepts at the core of the criminal law system. The categorical binomial of wrongfulness-culpability is, therefore, presented as a minimum analytical structure which now seems irrevocably embedded in practically all civil law jurisdictions. With the foregoing in mind, it seems prudent to now analyse the concrete evolution of the culpability principle within the stratified model of the theory of crime and its concrete configuration within the framework of the naturalistic causalist, value-based causalist, finalist and functionalist systems.[34]

22 In naturalistic causalism, culpability was understood as a psychological relationship between the perpetrator and their act.[35] Within the framework of this closed system constructed on the basis of the method of natural science and positive law, a completely objective concept of wrongfulness and a completely subjective concept of culpability were proposed. This is where intention and recklessness were placed as forms of culpability. In short, it was a question of finding a causal link both at the level of wrongfulness (between action and result) and at the level of culpability (between perpetrator and act). However, this mental fact was impossible to prove, because no one could verify the relationship between the mind of the perpetrator and their action. Additionally, it could not explain either reckless or negligent crimes, as the psychological relationship that presupposed culpability was difficult to determine, or the excusing state of necessity. These and other problems linked to the systematic placement of intention and recklessness in this systematic category eventually led to its demise.

23 With the move away from scientific positivism and the focus on neo-Kantianism, value-based causalism came to the rescue of the legal sciences. This type of causalism emerged from the domain of the natural sciences and led to the design of a doctrinal system open to the values of culture and was intended to make the content of the systematic categories of the theory of crime more robust. Accordingly, *typus*, wrongfulness and culpability be-

34 See, among many others, Hans-Heinrich Jescheck, «evolución del concepto jurídico penal de culpabilidad en Alemania y Austria» [2003] RECPC, pp. 3 ff.

35 In addition to von Liszt, Löffler, Beling and Radbruch were among the most important representatives of the psychological concept of culpability, with varying degrees of nuance. On this see, with further references, ibid. pp. 3 ff.

came normativised and no longer remained outside of what was happening with that set of values. In fact, this theoretical proposal laid the foundation (albeit elementary) of the functionalist system. The normativisation of the theory of crime brought about a profound change in the understanding of culpability.[36] Although this system did not manage to completely dissociate itself from the causalist paradigm, it added subjective elements to the wrongfulness while maintaining intention and recklessness in culpability. As such, it completely moved away from the psychological relationship between the perpetrator and the act that was present in the previous model. Culpability in value-based causalism then became normativised and was identified with the idea of reproachability. In other words, the perpetrator was reproached for the infraction of the behavioural norm. This idea would guide later theoretical developments.

The acceptance of finalism meant a return to a closed doctrinal system, 24
albeit built on completely different foundations. It was an ontological foundation of crime based on objective logical structures that were conceived as pre-legal concepts binding a legislator to the creation and praxis of criminal law. Among them was an understanding of culpability as 'being able to act otherwise'. The main systematic change of finalism was, as already indicated above, the transfer of intention and recklessness to the *typus*, consequently resolving the numerous problems generated for the resolution of cases by their placement within the framework of culpability where only the awareness of wrongfulness and the enforceability of lawful conduct remained. Within the framework of this approach, free will took a central place as a presupposition of the possibility of self-determination of the person, which was the basis for the reproach of culpability,[37] even though such verification is widely accepted as being impracticable. Nevertheless, even leaving aside this stumbling block, assessing culpability as 'being able to act otherwise' presented, among other things, problems in dealing with the serious acts of perpetrators by conviction.

36 One of the architects of this normative concept of culpability was Reinhard Frank, *Uber den Aufbau des Schuldbegriffs* [1907] p. 11 followed with decisive contributions by Goldschmidt, «Der Notstand -ein Schuldproblem» [1913] ÖZSt, pp. 129 ff. who further elaborated and completed the definition of the contours of culpability as reproachability on the basis of the infringement of a specific rule of duty —in the absence of grounds for exculpation— which differed from the legal rule underlying illicitness.

37 See Hans Welzel, «Persönlichkeit und Schuld» [1941] *ZStW* 60, p. 456; Arthur Kaufmann, *Das Schuldprinzip* [1961] pp. 280 ff.

25 Thus, the functional approach attempts to make progress on these questions and proposes a notion of culpability derived from the theory of positive general prevention that cuts across the whole theory of crime.[38] From the level of the objective *typus,* with the theory of objective imputation and then through to wrongfulness and the causes of justification to the category of culpability itself, the aim is to reaffirm the validity of the rule violated by the perpetrator through punishment, and so strengthen the public's confidence in the law. In this model, criminal law is only interested in culpable actions as they are the only ones capable of manifesting a relevant criminal law meaning that calls the dominant orientation into question.[39] From this premise, both the foundations of the system and the systematic consequences are derived. The category of culpability is then defined as the need for punishment to comply with the aims of general positive prevention that a given social order demands to safeguard its normative identity. This understanding has managed to answer some of the most important recent questions from the neurosciences that cast a shadow over the principle of culpability, at least in the formats that demanded the verification of the perpetrator's free will. This is because culpability is determined by the needs of the system to maintain confidence in its normative structure. In short, functionalist culpability is not related to the perpetrator's freedom of will, but to the will to self-administer.[40]

26 In Germany, Spain and Argentina, the evolution of the concept of guilt was a response to the triumph of the stratified analytical paradigm of Feuerbach and von Liszt in the conception of the theory of crime. In each of its most important milestones, despite the different methodological approaches, a gradual and increasing objectification of the culpability in the theory of crime can be observed. Thus, this led to an objectivist understanding of culpability that was no longer seen as a psychologistic concept

38 See Günther Jakobs, *Strafrecht Allgemeiner Teil* [2nd edn 1991] 17/22; Günther Jakobs, «Das Schuldprinzip» [1992] ADPCP Vol XLV Fascicle III, pp. 1051 ss.; Günther Jakobs, *Schuld und Pravention* [1976], p. 14.

39 The intense normativisation of the system of Jakobs and his disciples has led them to defend a concept of culpable action with diverse repercussions on the whole theory of imputation: "There is no logical impediment to calling only the act that is entirely imputable, i.e., culpably [...] The existence of a legally relevant action still depends, in this solution, on the legal presuppositions of imputation; the action becomes a concept that is relative to the system of imputation relevant in each case", Günther Jakobs, *Strafrecht Allgemeiner Teil* [2nd edn 1991] 6/2.

40 See Günther Jakobs, «Das Schuldprinzip» [1992] translated by Manuel Cancio Meliá, *ADPCP* Vol XLV Fascicle III, p. 1082.

but became based primarily on the defective motivation of the agent as the addressee of an institutionalised behavioural expectation at the end of the 20th century. This expectation was not shaped by either the perpetrator's or the victim's perspective but was based on the subsistence needs of the social system at hand to maintain its identity, unaltered in the face of crime.

V. The systematic category of culpability

The most useful systematic result of the Roman-Germanic theory of crime emerged from the gradation of the requirements of imputation.[41] The distinction between wrongfulness and culpability allowed for a separate treatment of the question of the contravention of the norm, the successive capacity to understand the prohibition and to then behave accordingly. Now, although a stratification of the development of the requirements of crime proves very useful in teaching criminal law, what is more important are the systematic consequences that have been derived from it, making it possible for the theory to survive in its tripartite form as something more than a mere didactic instrument. From a methodological point of view, first and foremost, the tripartition of the theory of crime has an undeniable ability to problematise a case and offer possibilities to solve it in a generalised and systematic way. The translation of intuitions into scientifically verifiable results in the light of positive law proves its most valuable theoretical capital that leads invariably to greater legal security for the victim and more guarantees for the perpetrator.[42] This added value places the modern-day theory of crime in a privileged position compared to the 'black box' of the Anglo-American model. 27

From a systematic point of view, the advantages of analytical thinking mainly involve the distinction between wrongfulness and culpability, which fixes a level of (dis)valuation prior to the judgement of liability, deriving various legal consequences from it. Firstly, illicit conduct is argued to potentially give rise to a duty of tolerance towards a victim's defensive 28

41 See Armin Kaufmann, «Zum Stande der Lehre vom personalen Unrecht» [1974] FS-Welzel, pp. 391 ff.

42 «In criminal procedure, the tripartite concept of crime means that the levels of *typicity*, illicitness and culpability follow one after the other in the process of reaching a decision, thus enabling, or at least facilitating, a considered and verifiable jurisprudence, which guarantees legal certainty», Hans-Heinrich Jescheck «Nueva dogmática penal y política criminal en perspectiva comparada» [1986] ADPCP, p. 14.

actions. Therefore, it would not be possible to react in self-defence against a person acting justifiably, though it would be possible, for example, to react defensively against a non-imputable person or a person acting in a state of exculpatory necessity. Secondly, and strictly linked to this point, illicit conduct is emphasised as being sufficient to create a position of guarantee in the area of liability for interference. Thirdly, the capacity to trigger the imposition of a security measure is attributed to non-culpable illicit conduct. Here, the agent who acts without culpability, but carries out illicit conduct, could, together with other requirements relating to the danger of criminal repetition, be liable for such a measure. Fourthly, it would be possible, in the case of an illicit act that did not incur culpability, to make a civil liability claim to compensate for the damage caused by the agent, even if the damaging act was not criminally reprehensible. Fifth, the distinction would also have repercussions in cases of error, resolving any situations involving those who are unaware of the offence and those who are unaware that the offence is prohibited differently. Finally, a perpetrator's illicit conduct would bring into play, by differentiation, the limited model of accessory liability from which could be derived the impunity of those who intervene in a justified or atypical act.[43]

29 In order to reproach a perpetrator who suffers from the lack of proper motivation, which gives rise to the finding of culpability, is it not only relevant to establish that the perpetrator has committed an illicit act but also that, in the specific case, they are an 'equal'. In other words, the judgement of culpability presupposes that a person who is capable of expressing criminally relevant legal meaning and who acts in a situation of normal motivation. This person, being capable of motivating him- or herself in accord with the norm, must not suffer from any volitional or cognitive defect that prevents them from accessing the message of the norm. Likewise, even if the agent has understood the scope of the behavioural directive, they must not be in an exceptional situation which would explain their illicit behaviour.

30 This inequality is verified, firstly, when the person does not have the necessary degree of psychological development that allows an understanding of the norm and/or the reproach associated with its infringement. This is the case with children and mentally ill persons. The illicit acts of a non-im-

43 In addition, it is emphasised that systematic thinking penetrates into the internal context of the various legal rules and their teleological basis that then, in turn, presents itself as a guide for the elaboration and development of the law. This would be a political-criminal function derived from the systematics of the theory of crime. Cf. Claus Roxin – Luis Greco, *Strafrecht Allgemeiner Teil,* vol. I [2020] §§ 7/35 ff.

putable individual do not disturb the stabilising function of the law insofar as these individuals are not valid interlocutors to question the validity of the legal norm. As mentioned above, when it comes to functionalism, culpability presupposes the individual possesses at least a minimum freedom of self-administration, as opposed to free will, and, therefore, the obverse of the lack of culpability as non-imputability will be the hetero-administration of the agent. Among equals, there is a degree of self-administration which gives rise to reproachability, while among unequals, there is hetero-administration of their spheres of organisation, which leads to exoneration.

Nonetheless, culpability also presupposes that an agent is acting in a 31
normal situation. This implies that the agent can be required to behave in accordance with the law, a subject taken up by legal doctrine under the heading of enforceability. However, this context changes when, for example, the agent acts under duress, suffers from an insurmountable fear or is in a situation of danger to their own life or property. In this last case in particular, there is an exculpatory state of necessity in which goods of equal value are in conflict for the perpetrator. For example, if two climbers are hanging from a rope which, due to misfortune, can only support the weight of one of them, this constitutes an abnormal situation which is exculpatory; thus, the one who is higher up decides to cut the rope, with the one below falling to their death. In this case, it cannot be said that the climber who decided to save their own life did not 'kill' in the sense of an illicit act of homicide, but neither could the law require that this climber let themselves die with the other climber when the rope fails. Of course, things would be different if the person in the situation of necessity were obliged to tolerate the danger. A firefighter, for example, could not claim to be afraid of the flames during a fire, because their social role implies a bundle of duties that place them in a position of specific guarantee.

Finally, an agent can be exonerated when they are mistaken about the 32
message of the legal norm, be that about the existence of the prohibition, its extent or the appropriateness of exceptional permission given to carry out an instance of prohibited conduct (cause of justification). This defect in the understanding of the norm is known as a prohibition error and, depending on its vincibility or invincibility, it will give rise to lesser reproach or complete vindication of any culpability. In contrast to the *typus* error, which acts at the level of the definitional *typus*, the prohibition (legal) error, in this case, exclusively affects the culpability of the perpetrator, leaving the wrongfulness of the offence intact with important systematic consequences for other persons. By way of example, these consequences may include the

fact that punishable participation would be possible, the perpetrator would have to tolerate any reasonable defensive actions on the part of the victim and that liability for interference would remain unaffected.

VI. Conclusions

33 The principle of culpability or guilt is particularly relevant in countries with a Roman-Germanic legal tradition and, as such, includes all Latin American countries. There guilt is positivised in their various fundamental laws and criminal codes and has been accepted by their highest courts. While it has its roots in the development of the institution in Germany, it is now seen as an almost universal prerequisite for the legitimacy of State punishment, taking its specific form from the articulation of the aims of punishment, the stage of development of society and the social role of the perpetrator in the specific case. Its consequences for the criminal policyl-evel are the requirement of a subjective imputation link, the rejection of objective responsibility and the coincidence between the moment at which culpability is required and the moment at which the act is carried out.

34 At the systematic level, the dogmatic structure of guilt is based on communication between equals, both in terms of respect for the norm as a guideline and for punishment as a reproach that seeks to stabilise (reaffirm) the validity of the infringed norm. This presupposes positive requirements for culpability consisting of the agent's imputability, that the perpetrator must be capable of being culpable and have had an awareness of the offence while there must also be virtual knowledge of the illicitness of the behaviour. This is tempered with special elements of culpability, derived from certain crimes in particular and the negative requirements which are relevant to situations of abnormality which can give rise to exoneration which, if not established, requires an agent to behave in accordance with the law.

Further reading

Herzberg D, «Gedanken zur actio libera in causa: Straffreie Deliktsvorbereitung als Begehung der Tat (§§ 16, 20, 34 StGB)?» in FS-Spendel [Walter de Gruyter, 1992]

Sánchez Lázaro F G, «El principio de culpabilidad como mandato de optimización», InDret 4 [2011]

Jakobs G, «Das Schuldprinzip» in ADPCP vol. XLV fascicle III [1992]

Kaufmann A, Das Schuldprinzip [Winter, 1961]

Silva Sánchez J M, Malum passionis: mitigar el dolor del Derecho penal [Atelier, 2018]

Peralta J M, Motivos reprochables [Marcial Pons, 2012]

Pawlik M, Ciudadanía y Derecho penal translated by Robles Planas R, et al [Atelier, 2016]

Sánchez Ostiz P, Víctimas e infractores, cumplidores y héroes. La culpabilidad en clave de imputación [BdeF, 2018].