

The Law in Cervantes and Shakespeare

The Law in Cervantes and Shakespeare

By

María José Falcón y Tella

Translation into English from

El Derecho en Cervantes y Shakespeare

By

Deirdre B. Jerry



BRILL
NIJHOFF

LEIDEN | BOSTON

Translation into English from *El Derecho en Cervantes y Shakespeare* (Marcial Pons, 2021) by Deirdre B. Jerry

Library of Congress Cataloging-in-Publication Data

Names: Falcón y Tella, María José, author.

Title: The law in Cervantes and Shakespeare / by María José Falcón y Tella.

Description: Leiden, The Netherlands ; Boston : Koninklijke Brill NV, [2021] | Includes bibliographical references and index.

Identifiers: LCCN 2021037854 (print) | LCCN 2021037855 (ebook) | ISBN 9789004470637 (hardback) | ISBN 9789004470644 (ebook)

Subjects: LCSH: Cervantes Saavedra, Miguel de, 1547-1616--Criticism and interpretation. | Shakespeare, William, 1564-1616--Criticism and interpretation. | Law in literature.

Classification: LCC PQ6358.L3 F35 2021 (print) | LCC PQ6358.L3 (ebook) | DDC 863/.3--dc23

LC record available at <https://lcn.loc.gov/2021037854>

LC ebook record available at <https://lcn.loc.gov/2021037855>

Typeface for the Latin, Greek, and Cyrillic scripts: "Brill." See and download: brill.com/brill-typeface.

ISBN 978-90-04-47063-7 (hardback)

ISBN 978-90-04-47064-4 (e-book)

Copyright 2021 by María José Falcón y Tella. Published by Koninklijke Brill NV, Leiden, The Netherlands. Koninklijke Brill NV incorporates the imprints Brill, Brill Nijhoff, Brill Hotei, Brill Schöningh, Brill Fink, Brill mentis, Vandenhoeck & Ruprecht, Böhlau Verlag and V&R Unipress.

Koninklijke Brill NV reserves the right to protect this publication against unauthorized use. Requests for re-use and/or translations must be addressed to Koninklijke Brill NV via brill.com or copyright.com.

This book is printed on acid-free paper and produced in a sustainable manner.

For Keke



*Master, when shall we be rid of this enchantment
that has us sequestered in castles and inns
and hinders us from walking the roads?
I know not, Sancho, but when we sally forth
there will be no giants able to withstand us.*

DON QUIXOTE



Contents

Foreword by Carla Faralli	xI
1 Introduction	1
2 The Law in Literature	4
3 Miguel De Cervantes Saavedra	8
3.1 Historical Background	8
3.2 Life	9
3.3 The Omnipresence of Legal Themes in Cervantes's Works	15
4 Don Quixote of La Mancha	18
4.1 General Observations on the Work	18
4.2 Law and Literature in <i>Don Quixote</i>	25
4.3 The Sanchification of Don Quixote and the Quixotization of Sancho	26
4.4 Don Quixote, a Left-Wing Democrat	29
4.5 The Character of Dulcinea del Toboso	30
4.6 Significance of the Curate's Character in <i>Don Quixote</i>	31
4.7 The Quixotism of Christopher Columbus	33
4.8 A "Golden Age Speech" with Communist Undertones	33
4.9 Defense of Nationalities and Languages	35
4.10 Knights-errant According to Don Quixote	35
4.11 Individual Rights and Freedoms in <i>Don Quixote</i>	37
A <i>General Observations</i>	37
B <i>The Question of Cervantes and Human Rights</i>	38
C <i>Honor</i>	38
D <i>Women in Don Quixote</i>	39
E <i>The Right to Freedom of Thought: General Observations</i>	42
F <i>Jews and New Christians: Antisemitism and Blood Purity</i>	43
G <i>Moors and Moriscos. The Basque and Indiano Cases</i>	44
H <i>Heresy, Magic, and Witchcraft</i>	44
I <i>Censorship</i>	45
A Censorship "in" the Work	45
B Censorship "of" the Work	45
J <i>The Inquisition</i>	45
K <i>Elder Law</i>	46

- 4.12 War and Peace 47
- A *Is War Ever Just?* 47
 - A General Observations on Just War Theory 47
 - B Was the War in Iraq a Just War? 53
 - C Evolution of the Concept of Just War After 9/11 55
 - B *War in Don Quixote* 56
- 4.13 Monarchy, States, and Republic 59
- 4.14 On Government and the Administration of Justice 61
- A *Proverbs* 61
 - B *The Government of the Island of Barataria* 62
 - C *The Episode of the Galley Slaves* 70
 - D *Arbitration* 74
- 4.15 Criminal Law 75
- A *General Observations* 75
 - B *Aggravating and Mitigating Factors in the Novel* 77
 - C *Specific Crimes Mentioned in the Novel* 77
 - D *Don Quixote's View of Delinquents* 78
 - E *Toward a More Humane Criminal Law: The Privatization of Criminal Law* 82
 - A Historical Background 83
 - B Comparative Law 84
 - C Restorative Justice and Probation in Criminal Law 84
 - D Repairing Harm: Toward a Conciliatory System 85
 - E What If We Did Away with Punishment? 86
 - F Handling Conflict as an Inevitability 88
 - G Resocializing Society to Make It Less Unjust Rather than Resocializing the Individual 88
 - H The Perfection of Criminal Law 89
 - I Dealing with a Complex Interdisciplinary Problem 90
- 4.16 Civil Law 90
- A *General Observations* 90
 - B *The Last Will and Testament of Alonso Quixano* 92
 - C *Marriage in Don Quixote* 94
 - D *Civil Tort Law* 97
- 4.17 Labor Law 98
- A *General Observations* 98
 - B *The Remunerative Relationship between Don Quixote and Sancho: Wages or Rewards?* 100

4.18	Commercial Law	104
	A	<i>The Business Activity of Inns from the Perspective of the Accommodation Contract</i> 104
	B	<i>The "Ass-Colt Order" as a Glimpse of the Law of Negotiable Instruments</i> 105
4.19	Tax Law	105
4.20	Procedural Law	107
4.21	Aristocratic Law	108
4.22	Madness in <i>Don Quixote</i>	108
4.23	Values in the Work	115
	A	<i>Freedom</i> 115
	B	<i>Equality</i> 116
	C	<i>Justice</i> 117
4.24	Love in <i>Don Quixote</i>	121
4.25	Legal Material: Sources of Law	123
4.26	The Geopoetic Landscape	124
5	William Shakespeare	126
5.1	Life	126
	A	<i>Relevant Legal Aspects of Shakespeare's Life</i> 126
	B	<i>Correlations between the Life and Work of Cervantes and Shakespeare</i> 127
5.2	Work	130
	A	<i>King Lear</i> 130
		A Legal Aspects of the Work 130
		B Madness in <i>King Lear</i> 135
	B	<i>The Merchant of Venice</i> 136
		A Legal Aspects of the Work 136
		B Similarities to <i>Don Quixote</i> 144
	C	<i>Hamlet</i> 144
		A Legal Aspects of Hamlet 144
		B Madness in <i>Hamlet</i> 147
		C Comparison of the Characters of Don Quixote and Hamlet: Soulmates? 148
	Bibliography	155
	Index	206

Foreword

It is widely accepted that the first phase of studies on law and literature began with the publication in 1908—in the midst of the revolt against formalism—of John Wigmore's *List of Legal Novels*, where the author presented a selection of narrative works related to legal themes, with the stated purpose of promoting and making jurists aware of literary works that represented the fundamental legal values of American culture. In the years that followed, other similar works were published, cementing the conviction that literature was useful for shaping the ethical conscience of lawyers and jurists, and, by this route, the law-and-literature perspective found its way into university lecture halls.

In his 1925 essay *Law and Literature*, Benjamin Cardozo heralded the possibility of reading and interpreting sentences as examples of literature or, more accurately, of literary writing.

In this way, the two branches into which the movement has traditionally been divided—law *in* literature and law *as* literature—began to take shape. The former encompasses the analysis of literary depictions of the law deemed useful for the humanistic education of legal practitioners; the latter, predicated on the analogy between law and literature as texts, tends to develop a methodology that uses techniques of literary criticism to tackle some of the classic problems of legal theory (interpretation and analysis of legal reasoning).

In the first half of the 20th century, many works devoted to the topic of law and literature also appeared in Europe. In German-speaking culture, *Recht und Literatur* emerged with the publication of two essays by Hans Fehr—*Das Recht in der Dichtung* in 1931 and *Die Dichtung im Recht* in 1936—which, together with the 1929 work *Das Recht im Bilde*, constitute the *Kunst und Recht* trilogy. In these contributions, Fehr examined one hundred and fifty authors, mostly German, from traditional legends to the contemporary era, associating them with the rapprochement between law and literature that had characterized the German Historical School.

In Italy, the first systematic work was *La letteratura e la vita del diritto*, published in 1936 by Antonio D'Amato, who argued that, ideally, literature and the law both express the aspirations of collective consciousness; they are two different moments of the materialization of the human spirit, initially manifested through literature and later formalized in the law.

Another relevant name in this early stage of law and literature in Italy was Ferruccio Pergolesi, whose extensive output on the subject began in the 1920s (*Il diritto nella letteratura*, 1927) and reached the pinnacle of its development in the 1940s and 50s (particularly in the 1949 work *Diritto e giustizia*

nella letteratura moderna narrativa e teatrale, revised and republished in 1956). Pergolesi believed there were two different approaches to analyzing law in literature: that of legal sociology, which allowed for the consideration of living, unwritten law as well as the effective practice of positive law; and that of legal philosophy, which focused on the reinstatement of the sentiment of justice and ethical ideals.

In Spain, a significant milestone was the release in 1949 of *Derecho y Literatura* by Juan Ossorio Morales, professor at the University of Granada, republished in 2016. In that essay, through a selection of writers, the author underscored the importance of studying literary works to acquire a better understanding of legislation.

A second phase in law and literature studies was inaugurated, so to speak, by almost unanimous consensus, with the publication in 1973 of James Boyd White's *The Legal Imagination: Studies in the Nature of Legal Thought and Expression*, the first installment of a trilogy that continued with *When Words Lose Their Meaning* in 1984 and *Heracles' Bow* in 1985. In these volumes, White took an in-depth look at the affinity between law and literature: like literature, the law is a cultural product, a cultural and social activity that must be critically examined; the law should be considered an integral part of a cultural "system" to which jurists must constantly refer when attributing meaning to the words they use.

In this respect, he argued that the field of law and literature should be part of the jurist's education: unlike in the movement's initial phase, which focused on using literature to instruct students in a system of values, White believed that the nexus between law and literature could give students a broader knowledge of the cultural aspect of the law, thereby overcoming the excessive technicality that had dominated legal studies in the United States since the mid-20th century.

In America, the debate was fueled by White, Robert Cover, Richard Weisberg, Martha Nussbaum, Robin West, Guyora Binder, Richard Posner, and many other renowned scholars, who also branched out into new fields of research, considering the law as interpretative practice, as narrative practice, as an activity aimed at persuasion, etc. In addition to these and other traditional areas, another variant, called the regulation of literature by law, is concerned with copyright, crimes committed in the press, etc.

Over the last forty years, Europe has witnessed a "revival" of law and literature studies instigated by scholars in both disciplines.

Fields that have traditionally embraced the rapport between literature and the law, such as the philosophy of law (for many of us, I think, Sophocles' *Antigone* was our introduction to the topic), the sociology of law (where

literary depiction is a tool for understanding the social dimension of the law and regulatory expectations), or the history of ancient law (where recourse to literary sources not only replaces direct sources but also serves to comprehend the symbolic context in which laws emerge and are formalized), have been joined by legal theory, political philosophy, cultural psychology, various legal disciplines (from constitutional law to private or procedural law), and, above all, comparative law (whose scholars regard literature as a highly effective tool for understanding the distinctions between different legal cultures and legislation).

In the Spanish-speaking world, María José Falcón y Tella stands out among those authors who have studied the theme of law and literature in its diverse modalities. In 2015 she published one of the greatest contemporary European studies on law and literature, a dense volume titled *Derecho y Literature*, with a foreword by François Ost, divided into three sections that explored the three different variants of law and literature.

In the first part, dedicated to the law “of” literature, the author addressed topics related to private law (copyright and intellectual property laws), criminal law (censorship, pornography, libel and slander in the press), and constitutional law (freedom of the press and freedom of speech); in the second, she examined the law “as” literature, discussing questions of interpretation, hermeneutics, and rhetoric; and in the third, devoted to the law “in” literature, she analyzed 46 of the most significant literary works from a legal perspective in different historical periods.

Naturally, those works included *Don Quixote* by Miguel de Cervantes and Shakespeare’s dramas, the topic of this new monographic volume by María José Falcón y Tella, which is divided into five chapters. The first two offer an introduction to the law and literature movement; the two longest chapters are dedicated to Cervantes and his masterpiece, *Don Quixote*, although some of his other works are also mentioned; and the fifth focuses on Shakespeare and three of his plays—*King Lear*, *The Merchant of Venice*, and especially *Hamlet*, concluding with a comparison of the characters of Don Quixote and Hamlet.

The publication of this volume, with its impressively extensive bibliography, in English by Brill-Nijhoff (Leiden/Boston) will give global audiences a chance to reread, through the “lens of law and literature,” immortal works that have shaped western culture, of which the law is an integral part.

Carla Faralli

Professor of Legal Philosophy
University of Bologna

