Law and Literature: A Still-thriving Relationship

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# Law and Literature: A Still-thriving Relationship

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*A Rosa,*
*estrella polar de mi vida, mi trabajo y mi fe.*

# Contents

# Foreword

Those with an interest in the relationship between law and literature are undoubtedly already familiar with Professor Talavera's significant contributions in this field.[1] This new book, as the author explains in his introduction, using a fascinating tale by Yourcenar, offers an in-depth survey of the doctrinal trends in legal-cultural studies which have analyzed that relationship, paying particular attention to the most representative movement, law and literature studies, and to relevant contributions from the perspectives of legal philosophy, interpretation theory, and legal argumentation. But Professor Talavera does not overlook the fact that this relationship is not only or even primarily a question that only interests specialized scholars, and for this reason the title of his book reminds us that the ties between law and literature go all the way back to classical Greece and are still alive and well today.

The intersections between literature and law are not new or specifically academic but deeply rooted in our culture, particularly if we think of instances when the law has been portrayed in novels, plays, poems, and essays: the list of illustrious authors ranges from Sophocles, Aristophanes, Euripides, and Plato to Shakespeare, Cervantes, Defoe, and Swift, and from the indisputable milestones of Dickens, Dostoevsky, Balzac, and Kafka to great contemporary writers like Orwell, Simone Weil, Camus, Harper Lee, Capote, McEwan, and Von Schirach.

In other words, there is a time-honored connection between the narrative *logos* (in its poetic version, even in the original *mixtum* of the *mythos* that gave birth to *logos*, as Nietzsche critically theorized and Nestle and Cassirer explained from a different angle) and the legal *logos*. This connection is so strong that, as my colleague and friend François Ost—an inspiration to Professor Talavera and everyone with an interest in this field, myself included—once wrote, if we examine what he calls the "law as mirrored in literature," the Latin aphorism *ex factor oritur ius* should actually be changed to *ex fabula oritur ius*.[2]

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1 See, for instance, his monographic work *Derecho y literatura. El reflejo de lo jurídico* (2006), as well as the book edited by him and titled *Derechos humanos y literatura. Aportación del movimiento "Escritores proderechos humanos" a la literatura social* (2021). His numerous articles include: "Ejes de conexión entre el discurso jurídico y el discurso literario" (2008), "Economía y literatura, la fábula de las abejas de Mandeville como relato legitimador del capitalismo" (2018), and "Hermenéutica literaria e interpretación jurídica" (2022). In addition, Professor Talavera has dedicated various works to examining the relationship between legal discourse and the language of cinema.

2 François Ost, "El Derecho, en el espejo de la literatura," *Doxa*, 29, 2006, pp. 33–48. Professor Ost, whom I consider the leading exponent of law and literature studies, is a prolific writer

However, it must be noted that, in addition to this perspective which reveals the law's reflection in literature, there is a more specific field that has to do with the awareness or, if you will, the conception of the law as a cultural phenomenon. This has been until quite recently an *outlying* perspective in academic legal doctrine, characterized by a self-referential approach consistent with what Teubner called the autopoietic vision of law. This interest in discourses outside the technical legal realm has, very slowly and only quite recently, made inroads among scholars in the disciplines of law, where the most antiquated legal formalism still carries far too much weight. And I believe it is hard to ignore the fact that its progress has been driven by approaches typical of disciplines which are themselves *outliers*, such as the history of law, the sociology of law, legal anthropology and psychology, or criminology. This explains why the analysis of law-literature relations has fallen within the sphere of the movement known in American academia as "cultural studies" and, more specifically, critical legal studies, which in turn encompass the law and literature studies that are the subject of Professor Talavera's coherent and focused attention.

Having said this, I feel it would not be fair to overlook the fact that Professor Talavera's work pertains to a context in which these contributions, so often considered extravagant by jurists and dismissed as eccentricities or dilettante whims, have been incorporated into the common sense of legal scholars, and not just those who cultivate what we might call "legal culture." His work is now part of the analyses of the doctrinal procedure that constitutes legal technology, a term which I prefer to the conventional "legal science." For this very reason, it is only fitting to recall some of the precedents that paved the way for this change of perspective in Spain. Talavera alludes to two of those colleagues from the philosophy of law: Professor Jesús I. Martínez García, who wrote a monograph that introduced the "legal imagination" to legal theory and philosophy;[3] and, above all, the late Professor José Calvo González, author of numerous essays on the subject.[4] I must also mention a

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who has authored numerous works (most of which are cited in this book, as the fifth section of the second chapter is devoted to him), although I will only mention the three most recent: *Shakespeare. La Comédie de la Loi* (2012), *Si le droit m'était conté* (2019), and *Nouveaux contes juridiques* (2021).

3 *La imaginación jurídica* (1992).

4 It is difficult to list all the works of Professor Calvo González, a true pioneer of law and literature scholarship in Spain ever since the publication of his *Derecho y narración: materiales para una teoría y crítica narrativista del Derecho* (1996). I will simply mention a few of his books: *La cultura literaria del Derecho: escritura, Derecho, memoria* (2020), *Iura et poemata* (2019), *Proceso y narración. Teoría y práctica del narrativismo jurídico* (2019), *La destreza de*

pioneering doctoral dissertation on critical legal studies, written back in 1993 by Professor Pérez Lledó[5] and heavily influenced by the American law professor and literary critic Stanley Fish. Thirty years have passed since then, and this field of scholarship has gained traction in our country,[6] as illustrated by the recent creation of the Spanish Law and Literature Association[7] and the growing number of works written from the perspective of the cultural criticism of law.[8]

But let us return to Professor Talavera's book. As he explains in the introduction, it analyzes the relationship between literature and law from different perspectives. I found his "diachronic, progressive biography" of law-literature relations in the first chapter to be quite an instructive summation, paying specific attention to the principal academic movement concerned with these relations, law and literature studies. His genealogical overview is rounded out by a discussion of the different "types of connection"—humanistic, ethical, and critical—in chapter two, and of the propositions behind the examination of the relevance of literature to the education of jurists and even in the praxis of legal practitioners in chapter three.

At this juncture, I cannot help pointing out a paradox: some of the authors mentioned in these pages reveal a surprising ignorance of law and legal history and culture. For instance, Derrida unknowingly paraphrases Hobbes on the fallacy of *iustum quia bonum*; and Nussbaum, an overrated author in my

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*Judith. Estudios de cultura literaria del Derecho* (2018), *El escudo de Perseo. La cultura literaria del Derecho* (2013), and *El alma y la ley: Tolstoi entre juristas* (2010).

5 *El movimiento Critical Legal Studies*, Universidad de Alicante, 1993.

6 That traction was facilitated by, among others, Professor García Pascual, author of essays like "Derecho y Literatura: racionalidad jurídica e imaginación literaria" (2009) and "Cuatro novelas y un poema para la filosofía del Derecho" (*CEFD*, 2023), and holder of the Narratives chair at the Universitat de València. I must also mention the noteworthy contributions of Professor María José Falcón y Tella, who has written *Law and Literature* (2016) and *The Law in Cervantes and Shakespeare* (2021), among other books, edited volumes including Martín Laclau, *Law and Literature in Ancient Greece* (2024), and written articles such as "La venganza en la literatura" (2020) and "El progreso de la humanidad: Dostoievski y Kafka" (2012).

7 Formally established in 2022, the association has its own website (https://sites.google.com/view/aedel/inicio), has organized several international conferences, and publishes a journal called *Ius fugit*.

8 Here I would be remiss if I did not mention the studies of Professor García Cívico, author of the book *La condición despistada* (2022). With Ignacio Aymerich, she co-edited the compilations *Derecho y cultura: la norma y la imagen* (2019) and *La norma y la imagen. Iconografía y cultura legal* (2020). I might also cite, among other articles, her "Derecho y cultura: una dimensión cultural del Derecho" (2018), "Presupuestos para una perspectiva cultural del Derecho" (2019), and "Cultura jurídica: una perspectiva creativo-reflexiva para enseñar en las Facultades de Derecho" (2022).

opinion, confronts the literary judge with real judges, disconcertingly ignoring or forgetting how much legal imagination can be found in the reflections on legal realism of Justice Holmes or Jerome Frank, two eminent American jurists. By the way, Professor Talavera opens his fourth chapter with a very fitting Holmes quotation, which I urge readers not to pass over.

I might also suggest that since, as I have already mentioned, the author has examined the connections between the languages of cinema and law in some of his earlier works, this third chapter could have benefited from a more detailed discussion of the educational relevance of films (and cinematographic education, as well) for jurists. He knows that this is largely an observation *pro domo mea*, being aware of my personal interest in the rich relationship between law and cinema and my repeated invitation, which still stands, to participate in a collection on this subject.[9]

Finally, I would like to draw the reader's attention to the way in which Professor Talavera, in the second part of his book, narrows his focus to two specific aspects of the law in literature. The first is the evolution of the idea of justice. The second, addressed in the last third of the book, is the relationship between literature, economics, and law. This analysis broaches another important perspective and one that was also initially considered an outlier in legal studies, the economic analysis of law or law and economics, whose leading exponent is an inevitable reference in any work on law and literature and is frequently cited here: former federal judge and University of Chicago professor Richard Posner. While acknowledging his prominence in the field, Talavera clearly expresses his criticism of and distance from some of Posner's central theses, particularly regarding the importance of literary education for jurists. In any case, this part of the work is clearly not a separate discussion but a continuation of his investigation into the ties between the legal and literary languages,

9 I must acknowledge and thank Pedro Talavera for generously dedicating this third chapter to me. We who have always maintained a critical stance toward the self-referential model of law, long before Gödel debunked the myth of self-referentiality, who have tried to point out the flaws in that myth—which are the failings of formalist legal positivism—often turn to literature. I myself have exemplified it with one of the literary fables that Raspe invented featuring Baron Munchausen, and we know we have invented nothing not already posited by critical reflection, even from within the ranks of legal positivism: we have only to recall the different conceptions of anti-formalism and the link between Ihering's theses and the tale of Michael Kohlhaas, Von Kleist's famous novella, introduced to us by our colleague and leading expert on Ihering, Mario G. Losano. Spain's greatest connoisseur of Ihering's oeuvre, Luis Lloredo, has also pointed out that connection. It is no coincidence that one of the people responsible for introducing our country to Ihering's work, along with Adolfo Posada, was a professor of Roman and natural law in Oviedo named Leopoldo Arias, better known by his alias "Clarín," author of the immortal *La Regenta*.

and in the fifth chapter he uses the plots of two classic tales, the *Epic of Gilgamesh* and Mandeville's famous story, the relevance of which was drilled into us by our common teacher, Professor Ballesteros: *The Fable of the Bees*. He then goes on to weave a thought-provoking, well-grounded argument around the beloved fairytale of "Puss in Boots," the subject of his extensive last chapter. I sincerely urge readers to pay close attention to this intentional, ironic, eloquent analysis, which is the ultimate purpose of this work, as the originality of Professor Talavera's contention will undoubtedly serve to confirm the veracity of the claim that no literary genre is minor if properly cultivated. And for those of us who are interested in the perspective of the law offered by the economic analysis of legal questions, it provides plenty of food for thought.

However, I must admit that—no doubt as a result of my own educational background and professional history—the pages I find most interesting are in the fourth chapter of the book and deal with the connection between revenge and justice in certain literary masterpieces. Allow me to elaborate.

In the previous chapters, the author has conveniently told us everything we need to know about the *raison d'être* of the perception of law as "reason by force" and, consequently, the survival of the *lex talionis* as an invisible red thread of legal response. The expression and critique of this perspective permeates literature, from Antigone and Creon to Shylock and Portia or Don Quixote and Sancho in their famous encounter with the galley slaves. We know, and Pedro Talavera reminds us, that the vision of the law as a cage which imprisons the most underprivileged members of society has found some of its most creative expressions in the pages of Dickens, Victor Hugo, and Balzac. My friend, Professor Jarauta, once imagined how a conversation on this topic between Dickens and Marx in a London pub might go; and another common friend, Professor Massimo La Torre, has authored brilliant studies on the image of the law and courts in some of the English novelist's works, such as *Bleak House* and *Hard Times*.[10]

In any event, I must confess that my own position is quite distant from Nussbaum's in several respects, particularly her notion of "poetic justice," in which I see more than a few risks, aside from the beauty of a classic metaphor. The crucial importance of certain qualities in jurists is another thing entirely,

10 See his article "*Bleak House* and Law as Despair" / "*La maison d'âpre vent* et le droit comme désespoir" (*ARSP*, 2018). La Torre is one of the legal philosophers who has most closely examined the law as mirrored in literature, penning various articles on the subject for the review *Materiali per una Storia della Cultura Giuridica*, including "Maigret, il diritto comparato e il giudizio impossibile" (2018) and "La disperazione del diritto: Honoré de Balzac e Charles Dickens" (2019).

as Pedro Talavera points out (quite rightly, in my opinion). I am not sure that the figure of the "virtuous judge" is entirely suitable or appropriate, unless it refers exclusively to what we might call "legal virtues." Virtue is, by definition, a supererogatory quality. I am convinced that we should not expect or insist that judges be virtuous; instead, we should demand that they not twist or violate their bond of legitimacy, which is loyalty to the law. However, in today's legal and democratic culture, that loyalty no longer exists in the sense that Montesquieu envisioned, with judges as silent "mouths of the law," primarily with the aim of preventing judges from becoming cogs on the wheels that might derail the revolutionary endeavor. Today we know there can be no mechanical application of the law, in accordance with the old paradigm of subsumption. All interpretations are creative. But taking note of all those nuances does not mean we cease to view certain qualities as necessary for jurists and take pains to impart them—even the ones we consider legal virtues. For instance, I believe empathy is an essential trait for jurists. I would say that empathy, prudence, and piety are three qualities that we must try to instill in those who practice legal professions. However, this idea only holds up if we understand these as specifically legal virtues, not moral complements, particularly in the case of empathy and piety, because the classic notion of prudence, in the Aristotelian sense, is a basic requirement for anyone who must issue normative judgments. But the interpretive scope of empathy and piety is much greater, which is why I feel it is important to specify the sense in which I believe they are advisable qualities for legal professionals. And this entails explaining how they are connected to the classic idea of compassion, which bears little resemblance to the customary paternalistic interpretation of this word as something we might more accurately call sympathy.

With regard to the former, I must rely on the words that Harper Lee put in the mouth of her lawyer character Atticus Finch:[11] you can't judge a person until you climb into his skin and walk around in it. Practicing law requires, as François Ost has emphasized, that ability to put yourself in another's place, so that you can not only defend their interests but also evaluate their position. As I once wrote, in dialog with Manuel Atienza and Aurelio Arteta, the jurist must cultivate empathy as compassion, and that requires a cognitive dimension. You can only cultivate empathy if you strive to understand the other's position. The legal dimension of recognition is impossible if there is no cognition. I would dare to add that empathy also requires an effort to understand shared passions,

11 I wrote about the deontological model, what might be called the "Atticus Finch template," in De Lucas, *Nosotros que quisimos tanto a Atticus Finch. De las raíces del supremacismo al Black Lives Matter*, Valencia, Tirant lo Blanch, 2020, pp. 19–69.

i.e., the capacity to feel what others feel: their wounds, their consciousness, and the reasons for their grievances, as Simone Weil explained so well. For my part, I attempted to prove this by using the lesson that Atticus's daughter learns from the family housekeeper, Calpurnia, in Harper Lee's prequel *Go Set a Watchman*.

As for piety, I am talking about *pietas* in the classical legal sense we find in Roman law, which also has nothing to do with sympathy or pity. *Pietas* as a legal virtue is linked to the process of normative constitution (and separation, specification) which, since the initial *mixtum* of religion, morality, and law that Bergson explained so insightfully, has been decisive for the comprehension of the legal domain. And, of course, the literary expression of this legal notion is vitally important: symbolically, compassion was instrumental in the very founding of Rome, associated with a figure who embodied *pietas*, Aeneas. Virgil described the protagonist of the *Aeneid* as "pius Aeneas" and says that he fled Troy carrying his father on his back and leading his son by the hand.

*Pietas* was so important to the ancient Romans that they even made her a goddess, a divine personification of duty, loyalty, and honor. In order for *pietas* to become a specifically legal virtue, what was initially an expression of the duty to respect and revere the gods had to be transformed and expanded to include respect and reverence for one's country, customs, tradition, and family via a genuinely familial bond, i.e., filial piety or respect for one's parents. *Pietas* came to mean doing one's duty in all things, particularly in caring for one's mother and father. That is one of the reasons why, in the context of dealings with others, I prefer the idea of respect to that of tolerance. And I believe that notion of respect and care, implicit in the concept of *pietas*, in the obligation to consider the needs of others, on which feminist thinkers have so rightly insisted, marks a turning point in our vision of the function of law. In fact, I believe that duty of care is a cornerstone of a broader, more holistic understanding of the law, such as that proposed by legal philosophers like Lombardi-Vallauri and Ferrajoli, a conception that looks beyond cosmopolitan law and leads us to the law of life, of all forms of life.

The transition from the demand for justice as vengeance to justice as recognition of *suum cuique*—perfectly illustrated by Professor Talavera in this fourth chapter, with reference to classical texts—is, in my view, essential for sustaining that other notion of the law as something primarily attentive to the needs of others, starting with those who cannot supply their own needs in the way that others can because of their personal circumstances or traits. I am thinking of the most vulnerable members of society, particularly children, who embody the idea of legal innocence as well as the need for care and protection.

Literature has much to teach us about these matters, so relevant to the thorough comprehension of law that we need right now, at this civilizing juncture, and this lesson is brilliantly and effectively imparted in the pages that readers are about to enjoy.

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