

CULPABILITY REVISITED: TRAJECTORIES AND DEBATES IN MODERN GERMAN DOCTRINE

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ABSTRACT: This paper aims to analyze the evolution of the concept of criminal responsibility, highlighting the transition from traditional systems that adopted collective punishment and objective liability toward a modern understanding that links responsibility to culpability, understood as the psychological and moral relationship between the individual and the unlawful act. Furthermore, the study seeks to examine the role of culpability as a principle, foundation, and limit of criminal intervention, emphasizing its relevance to the individualization of responsibility and the legitimacy of punishment. The methodology adopted consists of a theoretical approach grounded in a critical analysis of legal, philosophical, and criminological doctrines, as well as a historical examination of the development of the concept of culpability in criminal law, with emphasis on its origin, evolution, and practical application.

Keywords: *culpability, criminal responsibility, individualization of punishment, legitimacy of punishment, historical evolution of criminal law*

1. INTRODUCTION

In many regimes predating the Enlightenment, criminal responsibility was objective, collective, impersonal, and

unequal, grounded in systems that did not regard the human being as an individual, much less as a free person responsible for their acts. Punishment extended beyond the offender and was borne jointly by the perpetrator and their kin; in some systems, the mere causal link sufficed to ascribe to someone responsibility for the unlawful act. The decision to punish an individual or a collective subject was discretionary and relied on utterly unreliable criteria, such as presumptions, denunciations, or even political expediency.

Punishment could reach persons who had no connection to the act itself but only to the offender, as the harm caused by the crime was likened to a disease that contaminated all those close to the perpetrator; if attribution was collective, so was the punishment. A human being could suffer penalties on account of the conduct of their ancestors, spouse, children, and members of their immediate circle. This was a system that disregarded the unique and unrepeatable value of the subject's inner activity.

With culpability, criminal law sets limits on sovereign power, discarding strict liability for results and introducing responsibility tied to a psychological nexus between the subject and the punishable act, thereby fostering the subjectivization of criminal responsibility and the moderation of public penal authority (FERNÁNDEZ, p. 139). The human person becomes the reference point of punitive intervention.

The concept of culpability is not a creation of criminal law; it has played an important role in other fields of knowledge, such as theology, philosophy, criminology, and psychology (DÍAZ PITA, 2002, p. 73). In the criminal sphere, there is a correlation between the ideas of culpability and imputation, and it may be said, to some extent, that culpability emerged as a principle for determining the criteria by which responsibility for a given criminal act can be attributed to someone.

In this regard, Achenbach (1974, p. 19) warns that the criminal-law conception of culpability that emerged at that time did not mark the beginning of a "theory of culpability" or a "theory of individual imputation," because the task that the concept of culpability came to perform had previously been performed by another concept, the *imputatio iuris*, which German doctrine links to the traditional concepts of *dolo*

(intent) and culpa (negligence), with roots in Roman law. He further states that the word “culpability” is not new to criminal law; it had earlier been used in a different sense, and not to designate imputation (*Zurechnungstatbestand*). He concludes, therefore, that the concept of culpability came to occupy, within criminal law, the space previously held by the concept of imputation.

Culpability, as a systematic category, has a plurality of contexts, and along these lines it is possible to set out three possible concepts of culpability: (1) culpability as a principle that both grounds and limits state violence, serving as an instrument for legitimating criminal law vis-à-vis the concrete individual; (2) culpability as the measure of punishment, describing the factual predicate that serves as the reference point for the judicial assessment of the sentence; and (3) culpability as the ground of punishment, by which punishment is justified or excluded with respect to a particular offender. Culpability thus comes to consist of a set of elements that justify or preclude the punishment of an individual author.

Thus, this article seeks to conduct a literature review on the concept of culpability from the standpoint of its role as the foundation of punishment, and on how German doctrine has evolved on that basis.

2. From Enlightenment Culpability to the Psychological Concept of Culpability

The basis for imposing punishment on a concrete individual, in the earliest Enlightenment manifestations, was grounded in free will—that is, in the free and conscious will of a rational human being. At the beginning of the nineteenth century, freedom was the fundamental right, and the prevailing axiom held that this freedom was a consequence of human beings’ capacity for free will, as autonomous, rational, and dignified agents—an outlook that influenced the current of thought later known as the Classical School.

Francesco Carrara (1996, pp. 69–71), the principal representative of the Classical School, builds his system of imputation on the autonomy and moral responsibility of the individual, in which free will serves to justify penalties imposed as deserved punishment for a criminal act freely and voluntarily performed. For the Classical School, the human being is punished insofar as he freely chose the path of crime and

therefore must be held personally and individually accountable. The subject is criminally responsible because he is morally responsible.

The thesis of moral responsibility grounded in absolute indeterminism faced severe criticism, first, for treating free will as a dogma—premised on an idealized, unreal, metaphysical conception of the human being that does not correspond to the characteristics of the individual person (BUSTOS RAMIREZ; HORMAZÁBAL MALARÉE, 1999, p. 328).

Free will fell into decline in the mid-nineteenth century and was progressively replaced by scientific positivism, largely because of the perceived link between free will and bourgeois liberalism—the latter in crisis amid new tensions generated by communist and anarchist ideologies and the rise of the idea of class struggle. In the sphere of criminal law and culpability, a doctrine of social responsibility took hold, grounded in a conception of the human being as subordinated to causal determinism (STAECHELIN, 2000, p.293).

Culpability emerged as an autonomous category within the theory of the offense, as an institute distinct from unlawfulness, at the end of the nineteenth century—most notably in the thought of Franz von Liszt and his psychological theory of culpability, aligned with the scientific positivism then prevailing. This psychological conception had a merely formal character, limiting itself to observing the psychological links between the perpetrator and the act, ascertained through scientific observation.

The psychological theory aligned with a deterministic stance, seeking to expel imprecise value judgments from the concept of culpability by subjecting it to securely verifiable data. It amounts to legal positivism applied to criminal law, in which the foundation of legal rules is sought in phenomena governed by natural laws. Thus, the structure of the offense was divided into two parts that manifest separately as grasped by the senses: the external part, identified with the domain of unlawfulness, and the internal part, consisting of the set of subjective elements of the act. The fundamental defining element of this concept is the idea of action and causality, such that the offense appears as a double causal linkage: a relation of material causality, which gives rise to unlawfulness, and a psychic causality, which

constitutes culpability (MIR PUIG, 2004, p. 453). In this “objective–subjective” structure, everything external (objective) fell under unlawfulness, and everything internal (subjective) fell under the rubric of culpability.

Critiques of psychological culpability led to its historical overcoming: (a) because it is impossible to exclude culpability in situations where the subject acts with intent (such as irresistible duress and an exculpatory state of necessity); (b) because of the normative character of negligence; (c) because, in unconscious negligence, there is no mental nexus between the author and the act; (d) because the concept of culpability is empty, gathering within a single institute utterly disparate elements such as intent and negligence and thus turning culpability into a merely formal notion; and (e) because it violates human dignity, universalizing and ossifying culpability into subjective, value-free elements whose rigidity precludes gradations within the concept and, as a result, prevents consideration of the concrete person, with their particularities and individuality (MELENDOS PARDOS, 2002, P.28).

3. Neokantianism and the normative conception of culpability in Germany: the thought of Frank, Goldschmidt, and Freudenthal.

In the early twentieth century, value-neutral positivism entered into crisis, and a paradigmatic shift occurred in the concept of human dignity, in light of the new social and economic rights that were added to the classical fundamental rights (MELLO, 2023, p. 115). The new understanding of human dignity requires that people be guaranteed a minimum of material and social well-being, as well as learning and education. This breaks with the positivist paradigm of axiological neutrality, for the legal order is once again seen as an order of values.

As a reaction to positivism, neo-Kantian currents emerged that rediscovered philosophy and reintroduced value into the domain of legal science. Chief among them was the Baden School, also known as the Southwest German School, which proceeds from unequivocal, a priori value conceptions and counts Rickert, Windelband, and Lask as its principal references—thinkers who exerted a clear influence on early twentieth-century criminal law doctrine.

This cultural and scientific milieu, combined with the doctrinal shortcomings of the psychological theory of culpability, led German scholarship to modify the concept of culpability by incorporating within it a value judgment—or rather, a disvalue. Culpability ceases to be a psychological bond between the author and the act and becomes a value judgment expressing censure or reproach directed at the offender. Intent (*dolo*) and negligence (*culpa*) no longer exhaust culpability; from then on, they are necessary but not sufficient elements. The decisive element is the judgment of censure and reproach. Thus arose the normative theories of culpability.

Normativist thought cannot be described as a single, harmonious movement; its common thread lay in a broader reading of the content of culpability, breaking with the identification of culpability with intent and negligence—a hallmark of naturalistic psychologism—and introducing concepts or value judgments. In line with Achenbach, it is possible to distinguish, among the normative positions of the last century, three categories of normativism: (1) ethicizing tendencies; (2) conceptions according to which culpability contains a normative element; and (3) conceptions in which culpability is itself normative. These conceptions may have an individualizing matrix, as in Frank, Goldschmidt, and Freudenthal, or a generalizing one, defended above all by Mezger and Eberhard Schmidt, who—when analyzing grounds of excuse or the possibility (or not) of acting otherwise—adopted as the yardstick the so-called average citizen (*Durchschnitts-Staatsbürgertyp*) (ACHENBACH, 1974, p.55-6).

3.1 Reinhard Frank and the concept of blameworthiness

Reinhard Frank is credited with the initial construction of a normative theory of culpability.

Drawing on court decisions and ordinary language, Frank holds that there are elements of culpability beyond the notions of intent and negligence. He calls these elements “concomitant circumstances,” (FRANK, 2004, p. 30) which serve not only to grade culpability—diminishing or increasing it—but also to exclude it. Accordingly, insofar as they can grade or exclude culpability, concomitant circumstances belong within the very concept of culpability.

Frank conceives culpability as a complex phenomenon composed of subjective and normative elements, gathered under the heading of blameworthiness (which, for him, coincides with culpability itself). Starting from the premises that (a) intent and negligence do not exhaust culpability, although they are components of it; (b) imputability is an element of culpability; and (c) there are concomitant circumstances that must be considered in grading culpability, Frank constructed an alternative concept of culpability made up of three basic requirements: imputability; intent or negligence; and concomitant circumstances. He summarized these three elements in a brief expression which, for lack of a better term, he called blameworthiness (Vorwerfbarkeit). (FRANK, 2004, p. 39)

In Frank's account of culpability, the genus-species scheme typical of the psychological theory is replaced by a complex concept composed of elements on the same level, whose aggregate constitutes the notion of blameworthiness, of an eminently normative nature. It is a value-laden judgment of culpability, with the psychological content (intent and negligence) remaining within culpability as the object of evaluation—hence the designation “psychological-normative” for this theory (MELLO, 2023, p. 120).

Despite the criticisms, Frank's conception places value on the person insofar as it individualizes imputation and limits the State's punitive power, allowing the judge to grade or exclude culpability on the basis of the subject's individual circumstances. The possibility of grading or excluding culpability by reference to the normality of circumstances or of motivation enhances the status of the individual and constrains punitive intervention by the State, thereby realizing the concept of human dignity to a greater extent than the psychological conception.

3.2. Goldschmidt and culpability as violation of the “duty norm”

Goldschmidt's normative conception starts from the existence of two types of norms: there is the legal norm (norm of law), which requires a certain external conduct, and a non-manifest duty norm, which orders the subject to shape their inner conduct and to be motivated by representations of legal value. The external norm concerns outward behavior and causality; the internal norm concerns inner conduct—one's

motivation. The duty norm commands that one regularly refrain from putting into practice a will contrary to the legal norm. It is the breach of the duty norm that grounds the normative element of culpability (GOLDSCHMIDT, 2002, p. 90).

In Goldschmidt's account, there is intent (*dolo*) as a purely psychological, psychic relation, and alongside intent there stands a normative element: contrariness to duty. Thus, intentional offenses entail a double contrariness to norms: objectively, infringement of the legal norm; subjectively, infringement of the corresponding duty norm. The duty norm marks the limit of what can be demanded (*exigibilidad*) and therefore underlies the grounds of excuse: where an abnormal motivation—contrary to the duty norm—is not blameworthy in criminal law, excuse obtains. Accordingly, the norms governing grounds of excuse, in view of the absence of normal motivation, constitute exceptions to the duty norms.

3.3. Freudenthal and the general ground of excuse

Freudenthal seeks a concept of culpability closer to ordinary language, which at times diverges from jurists' technical terminology. There are situations in which, even though intent is present, culpability is absent because the agent could not have acted otherwise.

His conception begins from the idea that where there is no possibility of acting, there is likewise no duty to act. Thus, ***inexigibilidad***—the impossibility of requiring a different course of conduct—constitutes the common dogmatic foundation of all grounds of excuse, in response to the then-prevailing positive law, which admitted exclusion of culpability only in cases of necessity. This opened the way to supra-legal excuses grounded in ***inexigibilidad***, enabling more effective realization of fundamental rights and a judicial check on the State's *ius puniendi*—developments that would prove decisive for the concretization of human dignity in post-positivism.

Freudenthal draws on Beling to argue that the law demands of those subject to it that they orient their decisions in accordance with the law's own evaluative regulations.

(FREUDENTHAL, 2003, p. 71) Nevertheless, conformity to the norm can be required only insofar as it is possible. Where it is not possible, blameworthiness—and thus culpability—is likewise absent.

Here the core of Freudenthal's contribution begins to take shape: the relation between ability (power) and exigibility. On his normative account, if there is no ability, there is no duty; and if there is no duty, there is no blameworthiness, and consequently no culpability. This ethical, normative element of culpability is not found in the statute but in the very essence of culpability (MELENDOS, 2002, p. 131). At this point a clear difference emerges between Goldschmidt and Freudenthal: the former ties culpability to the violation of a duty, whereas the latter ties that violation to the absence of ability.

Freudenthal's understanding is a product of Germany's difficult economic moment, when many citizens found themselves in dire straits and faced the prospect of violating the law in an attempt to resolve economic problems (CEREZO MIR, 2005, p. 594). He examines situations in which the judgment of reproach arises in negligent offenses, in which two distinct stages must be considered: first, an objective inquiry into whether due care was observed; and second, a subjective inquiry into whether the actor was in a position to refrain from committing the offense. This inevitability, present in negligent crimes, is likewise present in intentional crimes, such that the exigibility of refraining from the act becomes a precondition for recognizing intent (FREUDENTHAL, 2003, p. 73). Thus, intent requires not only a psychic component but also an ethical element—found not in statute but in the very essence of culpability.

Freudenthal recounts various situations in which acquittal is called for, with practice confirming theory—for example, cases in which a coachman, obeying his superior's orders and fearing the loss of his job, kept a skittish horse harnessed to his carriage, and the animal eventually broke loose, running over and injuring a pedestrian.

3.4. Normativism and generalizing views

Despite the individualizing strand of normative culpability developed by Frank, Goldschmidt, and Freudenthal, there is a generalizing normative current led by

Eberhard Schmidt, whose concept of culpability rests on the distinction between the legal norm and a norm of self-preservation (PÉREZ MANZANO, 1990, p. 78). Culpability requires that a law-conforming course of conduct be demandable in place of the unlawful conduct actually carried out. This demandability is gauged by what an average citizen could have done, a model from which the ideal expectation of conduct is established.

Also generalizing is Mezger's conception, according to which culpability is a factual situation legally appraised as contrary to law and worthy of censure. Thus, culpability is a normative judgment about a psychological state of affairs. Mezger (1955, p. 129), however,

developed a notion of "life-conduct culpability," under which a person becomes culpable for shaping their character in a manner "hostile to the law," when bad habits and vices render the agent responsible for the way they have conducted their life. This concept is moralizing and instrumentalizes the person, holding individuals responsible for circumstances beyond their control.

One of the normativist conceptions that most influenced finalism—which would become dominant in the second half of the twentieth century—was Graf zu Dohna's well-known distinction between the object of valuation and the valuation of the object. For Graf zu Dohna, the will to act is the object of valuation, which is then referred to the subjective element of the offense, while the valuation of the object becomes the judgment of the actor's motivation (DOHNA, 1958, p.186).

4. Culpability and finalism

Finalism, the dominant current after the Second World War, links law to logical-objective structures—that is, structures of being as they appear in reality (MUÑOZ CONDE, 2001, p.262). Welzel, the creator of the finalistic theory, builds a theory of the offense from these structures, moving into the ontological realm whose center is the concept of action, no longer a causal concept but a teleological one, which restructures the entire system of the offense.

The purposiveness of action, as a logical–objective structure, must be respected by both the legislator and legal science. The human capacity for self-determination is another ontological structure that neither the legislator nor legal science may ignore. Positive law and the theory of the offense must start from these structures, which impose themselves as objective, insurmountable limits (MIR PUIG, 2005).

For finalism, culpability goes beyond the mere objective discordance between conduct and the legal order: it is grounded in personal censure of the subject, in that the conduct ought not to have been contrary to law because it could have been in conformity with law. The offender—considered concretely in an individualized situation—will be culpable when he could have adopted a resolution of will in accordance with the norm instead of realizing an unlawful will (WELZEL, 2004, p. 125).

Culpability is culpability of the will, for only what depends on the human will can be censured as culpable. In this sense, the will to act may be more or less culpable; it bears a negative evaluative quality, but it is not identical with the will itself. A will can have greater or lesser culpability, but it is not, in itself, culpability.

For this reason, a clear distinction is drawn between the pure normative theory—in which culpability is a negative evaluative quality of the will—and the earlier normative theories, in which negligence (*culpa*) and, notably, intent (*dolo*) still formed, to a greater or lesser extent, part of culpability's content.

For the finalistic theory of action, the difference between unlawfulness and culpability does not lie in the object of valuation—which is the same (the conduct)—but in the scale of valuation: unlawfulness is assessed by the conduct's conformity or nonconformity with the legal order, whereas culpability concerns personal censure, arising when the actor behaved contrary to law even though he could have acted in accordance with it. For Welzel, the judgment of culpability can censure only the person who, with free self-determination, can understand and direct his behavior in a norm-conforming way. Finalism also distinguishes between elements of culpability whose absence excludes culpability and grounds of excuse.

4.1. The ability to act otherwise

The material foundation of finalist culpability is the “ability to act otherwise,” that is, the subject acted contrary to the law when he could have acted in accordance with the legal order. This possibility is grounded in freedom, analyzed from a threefold perspective: (1) anthropological, in which man frees himself from innate and instinctive forms of behavior, having to discover and realize by himself the correct course of conduct through intelligent behavior, by which the human being is urged to rationally elaborate a system of action for the future. This existential freedom and detachment from the organic and instinctive is the decisive and positive characteristic of man; (2) characterological, which refers to an “ego,” a responsible regulatory center that prevails over other instinctive forms of conduct. Both this “ego” and the instinctive forces of conduct possess a certain strength and a certain meaningful content; (3) categorial, in which it is recognized that human conduct results from the concurrence of various forms of determination, but the human being cannot be merely the object of his impulses, since man will be held responsible for the impulse of knowledge, which must prevail over opposing impulses (Welzel, 2004, p.125).

Finalism conceives freedom of will as the possibility of governing oneself according to meaning; that is, freedom is not the possibility of arbitrarily choosing between what is meaningful and what is absurd, between value and disvalue. Freedom is not a state but rather an act—the act of liberation from the causal compulsion of impulses toward self-determination in accordance with meaning. Culpability, then, is the absence of such self-determination in accordance with meaning in a subject who was capable of exercising it. It is not the decision in itself, but rather the fact that the human being allows himself to be carried away by impulses contrary to value. Therefore, culpability is not a free decision in favor of evil; it consists in the fact that the subject allows himself to be bound by the causal compulsion of impulses, despite being capable of self-determination in accordance with meaning.

Thus, concrete blameworthiness is composed of intellectual and volitional elements: the agent’s actual or potential awareness of wrongfulness constitutes the intellectual element of culpability, and the demandability of compliance with the law constitutes its volitional element. The fundamental legal criteria of culpability flow directly from

the basic anthropological determinations of the human being as an actor who shapes and governs his impulses (Welzel, 2004, p.125). In this way, the elements of culpability are established as: imputability (capacity for responsibility), actual or potential awareness of the wrongfulness of the act, and the expectability of a different course of conduct—elements that remain in use even in the early twenty-first century.

Materially, culpability is grounded in the possibility that the concrete person could have acted in conformity with the law when he in fact acted against it. This is the familiar “ability to act otherwise,” centered on a conception of freedom of will that underwrites the blameworthiness of unlawful conduct. That is the material content of finalist culpability, which serves as a point of departure for contemporary accounts—whether to reaffirm the idea of freedom or to reject it on the ground of its lack of empirical verifiability.

5. Critique of Finalism

In the post–Second World War period, finalism established itself as the dominant penal doctrine, particularly in the concept of normative culpability, in which all objects of valuation were excluded from the notion of culpability, which came to be understood as a genuine value judgment expressed through the idea of blameworthiness. The formal structure of finalist culpability endures to this day. The main criticism directed at finalism, with respect to culpability, lies in its material foundation: the freedom to act in accordance with meaning, ultimately reduced to the idea of the ability to act otherwise.

As early as the 1960s, doctrinal efforts were made to find an alternative to Welzel’s thesis of freedom. The principal critiques focus on the impossibility of empirically proving this alleged “ability to act otherwise.” Well known in this regard are the criticisms of Engisch, in his influential work *Die Lehre von der Willensfreiheit in der strafrechtsphilosophischen Doktrin der Gegenwart*, where he argues that it is impossible to empirically demonstrate Welzel’s notion of free will, which forms the basis of the reproach judgment in the normative theory of culpability.

Criticism is also directed at the moralizing character of the idea of blameworthiness, which endows culpability with moral, religious, and metaphysical connotations that distort the culpability judgment (MONTES HUAPAYA, 2007). It is further criticized that the practical difficulties in verifying the ability to act otherwise lead to recourse to the standard of the average man, or even to comparing the concrete person with an “ideal” man under the same conditions and circumstances—an approach that undermines the individualizing function of punishment (MELLO, 2023, p. 184)

Pure finalism, detached from constitutional and criminal-policy considerations, fails to answer the question of the legitimacy of imposing punishment on a concrete individual by virtue of his human condition, and thus as a bearer of dignity embodied, in the legal sphere, by respect for the fundamental rights expressly or implicitly enshrined in the constitution.

Today, the guarantee function intrinsic to culpability is subject to new tensions, so that the search for an alternative concept to the “ability to act otherwise” has become a common feature of post-finalist criminal law doctrine. In German and Spanish scholarship, one notes that the starting point for discussion of culpability is precisely the critique of Welzel’s material conception of culpability.

Criminal culpability must be interpreted in light of the new constitutionalism, such that the criteria of personal imputation cease to be a mere expression of moral censure and the culpability judgment is examined through the lens of fundamental rights and guarantees.

Human dignity increasingly emerges as the constitutional principle that grounds and undergirds the principle of culpability. Culpability thus comes to be understood as a principle with constitutional stature—as a concretization of the principle of human dignity—which requires a constitutional reinterpretation of everything that falls under the rubric of the principle of culpability.

One such line of thought, contemporaneous with finalism, is that formulated by Mezger who, drawing on Aristotle, developed a concept of culpability in which the judgment turns on the way the subject acquired blameworthy components within his very character. On this subject, Costa Antunes observes that the disvalue attached to

the agent's conduct would no longer derive from the particular act committed but would instead take the form of culpability based on the individual's life orientation. In this perspective—close to Mezger's notion of culpability grounded in personal character—the reproach arises from the individual's failure to properly direct his own life. In short, it is a conception of culpability rooted in defective life conduct or flawed existential decision-making (COSTA ANTUNES, 1958).

A small circle of penal theorists—though numerically limited—had outsized importance due to the prominence and influence of its members and followers, who defended not an act-based culpability but an offender-based culpability. As Toledo notes, despite internal differences in substance, these currents share the premise that in certain cases the agent's grasp of wrongfulness is compromised by his life conduct or way of being. And since they maintain that the “ability to act otherwise” cannot be demonstrated, the only way to preserve culpability would be to shift the judgment of censure from the act to the agent's way of being and living—his character, his personality, his overall life conduct (TOLEDO, 1991, p.235).

On this topic, the doctrines of Schopenhauer and Engisch stand out—unsurprisingly, both critics of the concept of freedom as an “ability to act otherwise,” and both adopting a visibly determinist stance. For Schopenhauer, a person acts or refrains from acting because he is as he is—because of his character—so he should be held responsible for that character. Engisch, in turn, argues that the subject's character grounds his responsibility to bear punishment.

Roxin criticizes positions of this kind, since it would be paradoxical to attribute culpability to someone for something innate over which he could do nothing (ROXIN, 2003, p.802-3).

Cirino dos Santos (2000, p. 211), synthesizing Roxin's criticisms, notes that theories of this kind, even if animated by the laudable intention of excluding metaphysical bases from the culpability judgment, fail for three reasons: (1) culpability grounded in character is culpability without guilt; (2) such a thesis represents a form of social responsibility, presupposing a criminal law in which culpability is replaced by

prevention; (3) character- based culpability nullifies the political and limiting function of the principle of culpability.

Theories of this nature are incompatible with a conception of human dignity, since they make a person responsible for what he is rather than for what he does. It is unacceptable to hold someone accountable for attributes beyond any possibility of choice or avoidance—an approach that ultimately corresponds to strict liability. To impose liability based on character permits the stigmatization of individuals on the basis of certain personal conditions, thereby reproducing prejudice and discrimination against the most vulnerable, and making culpability even more moralizing than the idea of reproach itself. Moreover, if culpability is conceived as a set of decisions concerning one’s character or way of life, it effectively rests on a series of choices (whether free or not) about facts that cannot, in themselves, be unlawful—an unthinkable stance within a framework of fundamental rights that inspire a juridical and secularized notion of culpability.

Character-based culpability, in this way, opens the door to the violation of a fundamental postulate of human dignity: the prohibition against instrumentalizing the person, recognized as such through fundamental rights. Accordingly, it has been settled that culpability cannot be derived from defects of character manifested in one’s personality or general life conduct.

The recourse to offender-based culpability can in fact be traced back to the Kiel School, the true nucleus of Nazi criminal law, whose main representative was Dahm. For him, questions of criminal law and culpability did not concern only actions but also modes of being. As Greco (2003) explains, Dahm considered that criminal types did not merely prohibit acts but embodied an “idea of personality,” an “image of man”—the living representation that the people held of the murderer, the thief, the receiver of stolen goods, or the pimp. In this perspective, one should not punish theft because someone appropriated another’s property, but because the person was, in essence, a thief—an essence corresponding to the image of the offender rooted in the “healthy sentiment of the people.”

The reference to the Kiel School is not accidental: offender-based culpability—whether expressed in terms of character, life conduct, hostility to law, or similar formulations—reduces the human being to an object, to a creature punished for his impulses in the name of a utilitarianism that disregards the fundamental principles of a democratic rule-of-law state. It is therefore essential to approach contemporary theories of culpability in German scholarship with the constant perspective of respect for human dignity.

6. Conceptions of Culpability in the Post-Finalist Period

A significant portion of post-finalist doctrine has resorted, in assessing the judgment of censure inherent to culpability, to the paradigm of the “reasonable person,” in which the individual capacity of the agent is replaced by the capacity of an idealized subject, constructed from the supposed ordinary characteristics of a common citizen. This approach stems from the conception of culpability developed by Gallas, who understands culpability as the reprovability of the act in relation to the agent’s state of mind—that is, an internally disapproved conduct in juridical terms (Gallas, 1959, p.62)—a notion followed by Jescheck/Weigend and Wessels.

The proponents of the reasonable person paradigm, notably Jescheck and Wessels, defend the idea of human freedom of action—at least from a juridical perspective—as compatible with a Democratic Rule of Law that has opted for the recognition of freedom, although such freedom differs from the Enlightenment conception. The responsibility of an adult and mentally sound individual is an indispensable presupposition of any social order founded on liberty. However, since individual freedom cannot be empirically demonstrated, the reproach of culpability toward the individual must be formulated through an abstract-hypothetical judgment of comparison. According to this thesis, the offender is culpable when, given the circumstances in which they found themselves, they could have acted otherwise—that is, when, based on our experience in similar cases, anyone else in their position would have behaved differently, resisting the internal failure of will that led the agent to act as they did (Jescheck; Weigend, 2002, p.441).

Building on these positions, Jescheck's conception of culpability ultimately narrows the possibilities of exculpation, confining them to the exceptional cases expressly provided by law, since culpability is treated as a juridical—not a moral—concept.

It must be acknowledged, in the thought of the authors mentioned above, the merit of constructing a conception of the legal order grounded in the idea of freedom, understood as a genuine choice of the Democratic Rule of Law. Nevertheless, the doctrine centered on culpability as a *juridically disapproved state of mind*, assessed according to the reasonable person paradigm, cannot withstand the criticisms directed at it. The judgment of censure is based on capacities that may be present in other individuals but are precisely absent in the concrete agent. This thesis, therefore, reaffirms a generalizing presumption that attributes to an ideal citizen qualities supposedly lacking in the real person.

The theory that adopts the reasonable person as its benchmark rests on a prejudiced and discriminatory premise, insofar as it universalizes and homogenizes values and behaviors. Such openness paves the way for arbitrariness, prejudice, and intolerance. In this respect, there are evident and significant differences between the “reasonable person” and the concrete individual, since no person possesses all the characteristics of that ideal model. This generalization, by its very nature, is intolerant of difference, particularity, and multiculturalism.

The reasonable person paradigm departs from the very idea of culpability as a means of individualizing and personalizing the criteria for imputation. It gives rise to a form of *culpability by analogy*—by comparison—based on an intellectual, abstract, and impersonal construct.

Culpability conceived as a *juridically disapproved attitude* is, in this sense, a formal and empty concept, for it neither explains nor establishes any criterion by which the subject's internal attitude is to be disapproved, failing to answer the fundamental question of why the imputation is justified.

6.1. Culpability According to Hassemer: Culpability as a Limit to Punishment and the Principle of Proportionality

Winfried Hassemer brings the notion of culpability closer to criminal policy, starting from the premise that there is a crisis affecting the entire criminal justice system, in which its fundamental principles—among them, culpability—have been undergoing a process of erosion. Historically, culpability has served the essential function of setting limits to the State’s punitive power; however, the introduction of preventive concepts into the notion of culpability has, in Hassemer’s view, weakened these very limits.

The author emphasizes the importance of the principle of culpability as a means of reaffirming personal and subjective criminal responsibility, preventing liability based solely on the result, and enabling the gradation of punishment. Moreover, it provides the criteria necessary to ensure a fair and equitable sanction, thereby establishing a relationship between culpability and the principle of proportionality. For Hassemer, proportionality ultimately replaces the idea of reproach, since culpability understood as reproach offers no real limiting function; the boundaries of punishment can be more effectively derived from proportionality criteria (Hassemer, 1982, p.475).

Hassemer argues that it is unreasonable to demand the impossible from the judge—that is, to demonstrate the offender’s freedom of action. What can be required, rather, is the description of negative situations that may justify exculpation. Thus, the judge may ascertain the absence of freedom and culpability—as a negative concept—on the basis of limits historically developed to restrain the exercise of the State’s *jus puniendi*. This supports Hassemer’s position that culpability does not serve as the foundation of punishment, but rather as its limit, grounded in the idea of proportionality.

The replacement of culpability by proportionality criteria reaffirms culpability’s role as a limit to punishment, yet it entails a deficit regarding the foundation of punishment itself.

Proportionality, by its nature, says nothing about substantive justification, thereby opening the possibility of a concept of culpability devoid of any positive normative content to sustain it.

6.2. Culpability and Prevention in Claus Roxin

Claus Roxin (2003, p. 791) adopts a conception of culpability closely linked to the idea of prevention, in which both culpability and prevention are elements that mutually limit one another and are brought together under the broader category of responsibility. In Roxin's view, culpability ceases to be an autonomous element and becomes part of a larger evaluative construct—responsibility—which represents a value judgment through which an individual may be deemed criminally accountable.

Preventive necessity thus serves as an additional guarantee, compensating for the deficiencies of culpability as a foundation for punishment. The recognition that culpability and prevention share the same normative level as prerequisites for criminal responsibility offers, according to Roxin, several advantages. One of them lies in the evident connection between the concept of responsibility and the theory of the purposes of punishment. In this way, the judge could exclude criminal responsibility whenever the imposition of punishment is no longer preventively necessary.

Culpability as a limit on prevention is, for Roxin, closely tied to the preservation of human dignity. As he expressly affirms: "There is a fundamental difference between using the idea of guilt to subject the individual to the mercy of the State and employing it to safeguard against the abuse of that power." He goes on to emphasize that culpability, in fact, serves as a mechanism to keep within tolerable limits the interests of the community in light of individual freedom, "[...] because the dignity of man, proclaimed in the Basic Law, is a right of protection against the State and cannot be transformed into a faculty of interference." (Roxin, 1998, p. 36)

Roxin's *material concept of culpability* consists in the realization of an unlawful act despite the individual's capacity to be a bearer of legal norms and to exercise self-determination based on that capacity. The traditional notion of *the ability to act otherwise* is replaced by an *empirical-normative concept* that Roxin calls *normative*

directability. In other words, an individual is culpable when, at the moment of the act, he or she was capable of responding to the normative call, given his or her mental and emotional state—regardless of whether that capacity is understood within a deterministic or indeterministic framework. What matters is the actual possibility of deciding to act in conformity with the norm.

Roxin's conception thus places the preventive purposes of punishment in the service of fundamental rights and human dignity. Nonetheless, it has not been immune to criticism: freedom, in Roxin's framework, is regarded as merely fictional, and preventive needs do not necessarily lead to the least burdensome outcome for the individual.

6.3. The Replacement of Culpability by Prevention in Jakobs

Under Günther Jakobs's systemic functionalism, the mission of criminal law is closely tied to stabilizing social conflicts by restoring normative trust, which is breached by the commission of criminal offenses. Punishment plays a decisive—though not exclusive—role in stabilizing these conflicts.

For Jakobs, culpability can be defined as responsibility for a deficit in legally predominant motivation within unlawful conduct. In short, culpability corresponds to *infidelity to the law*, a concept determined normatively. The judgment of culpability serves to select, from among the factual conditions that frustrated normative expectations, a single one—the actor's defective motivation—so that the act may be imputed to the offender (Peñaranda; Suarez, Cancio, 2003, p. 62). The systemic-functional demand to reestablish confidence in the law through the symbolic counteraction of punishment is more than a foundation of culpability; it is the true criterion for proving the offense's subjective elements, for determining the degree of culpability, and for fixing the measure of punishment. In this way, culpability ceases to function as an ontological criterion or as a limit on the attribution of criminal responsibility.

Jakobs maintains that the offender's motivation, insofar as it departs from the law, is the source of the conflict. The individual is punished in order to maintain general confidence in the norm; thus, on preventive grounds, culpability is oriented not

toward the future but toward the present, to the extent that criminal law contributes to stabilizing the legal order (Jakobs, 1997, p. 581). The motivational deficit is therefore determined in light of the State's adopted purposes of punishment, revealing a shift in the content of culpability from the individual to the norm—or rather, to society and its normative expectations.

In systemic functionalism, culpability has a formal character: it centers on imputation, but does not determine how the subject to whom the act is imputed is constituted, since the content of culpability lies in the aim of stabilizing social order by reinforcing fidelity to the law and confidence in the norm. On this basis, a positive and a negative type of culpability are constructed.

The systemic-functionalist idea of culpability is bound up with preventive purpose: punishment is imputed to the offender because there was a defect in his or her legal motivation—the person acted contrary to the law—and is responsible for that defect insofar as he or she was capable of respecting the foundation of the norms. This capacity for motivation is not measured by individual aptitudes but by the alignment between the purposes of punishment and the social constitution, and it rests on an idea of equality.

Jakobs's thesis allows a person to be used as a mechanism for stabilizing the normative order, shifting the center of the legal system away from the human being toward the primacy of the system. In this vein, the human being may be validly subjected to harsh treatment—even to the point of being harmed in fundamental rights—so long as such coercion serves to fulfill normative expectations. It is a thesis that privileges the public interest to the detriment of individual rights, and errs by centering imputation not on the human being but on the system.

That said, the relationship Jakobs posits between culpability and the idea of equality is the contribution of systemic functionalism with the greatest relevance for considering culpability compatible with the fundamental rights that concretize the idea of human dignity.

6.4. Culpability and Habermas's Theory of Communicative Action

A modern concept of culpability has emerged in German doctrine, broadly following Jürgen Habermas's thought on legitimacy, democracy, and the rationality of discourse. For Habermas (1997, p. 156), the legitimacy of legal norms depends on the potential participation of all individuals affected by them in a democratic process of discursive norm creation. Rational communication—mediated through language—serves as a guarantee of the democratic principle, whereby legal norms are enacted through communicative freedom among citizens who seek mutual understanding through reasoned dialogue, aiming to reach a rational position that justifies and legitimizes the outcomes of political debate.

Habermas maintains that the citizen is the rational author of legal norms, as these arise from a rational, discursive, and democratic process of norm formation in which every individual must have an equal opportunity to express opinions within a framework of debate and argumentation. In this sense, the addressee of the norm must also be—actually or potentially—its author.

6.4.1. Klaus Günther and the Deliberative Person

Klaus Günther advances a conception of culpability that takes the individual as a “deliberative person,” according to which citizens in a democracy are not merely addressees but also authors of legal norms. Persons occupy this dual position by virtue of their critical capacity to adopt motivated stances, to follow the reasons they endorse, and, on that basis, to carry out actions. The deliberative person must be able to participate in discursive argumentation, to take reasoned positions, and to engage in the critical–argumentative process through which legal norms are formed (Díaz Pita, 2002, p.102).

The concept of the deliberative person regards the human being as the source of his or her own actions and expressions, both in a causal sense and in an autocritical sense, possessing the capacity to take a stance toward one's own or another's actions and statements.

For Günther (1998, p.80), the duty to obey legal norms lies in the possibility of democratic participation in the argumentative processes that legitimate the making of legal norms. This

duty does not depend on an individual's actually exercising that critical capacity, nor on his or her internal conviction regarding the reasons that prevailed in legal argumentation. The duty exists because each person enjoyed an equal right to exercise publicly their critical capacity within the democratic process.

The deliberative person performs a dual function: citizen and rights-bearing person. As a citizen—the author of the norm—one has the right to reject it, publicly adopting a critical stance toward the norm. As a rights-bearing person, by contrast—the addressee of the norm—one lacks the right to reject it. Hence, if the norm is not observed, the law may impose sanctions on those obliged to avert the *wrong (injusto)*, even if they disagree with the norm. Accordingly, a normative violation can be imputed to the subject only when that person has the critical capacity regarding his or her own and others' actions and expressions, as well as the legal and institutional opportunity to participate effectively in the democratic process of normative change. This capacity is the general criterion for a person's imputability. In this sense, culpability results from the tension between the citizen's capacity for critical stance-taking and the rights-bearing person's position.

Günther's conception treats culpability as a legal construct that depends on legally institutionalized processes: through the democratic principle, the deliberative person, in the role of citizen, must be ensured the right to express rejection of a norm via discursive procedure. Culpability, therefore, is compatible only with the Democratic Rule of Law, and it implicitly associates conceptions of culpability as moral censure or as grounded in preventive criteria with the features of authoritarian regimes.

6.4.2. Infidelity to the Legal Order in Kindhäuser

Urs Kindhäuser seeks a material concept of culpability within a pluralistic, democratic society, subject to the mandate of neutrality, according to which one must not inquire into the reasons and motives for which legal norms are obeyed. The law

cannot compel an individual to adopt any particular motivation—that belongs to the realm of moral norms.

On this basis, Kindhäuser (1996, p. 19) asks how a material culpability could be legitimate if the law does not provide reasons capable of rationally motivating everyone, individually, to comply with criminal norms. The reasons for a norm's legitimacy, then, are drawn from its legality.

Legitimacy is thus linked to legality: in a secular, non-confessional society there is no a priori substantive content to legal norms. Legitimacy can only be deduced from the autonomy of participants in the process of social integration, and it presupposes, at the same time, that the individual may not be used as a mere instrument for the pursuit of heteronomous purposes.

For Kindhäuser (1996, p.60), material culpability stems from a breach of the agreement that undergirds the legal norm and, with it, the participant's communicative autonomy. What binds the actor to the norm is not rationality, but communicative loyalty (fidelity to law) in relation to another person's autonomy. Thus, in a democratic rule-of-law state, culpability is conduct that manifests a deficit of fidelity to the law—that is, a shortfall in communicative loyalty. This conception prevents the human person from becoming an object of vengeance and forestalls instrumentalization through preventive aims. The penal censure attached to culpability does not restore—factually or even symbolically—the breach of the norm; rather, it furnishes a response to the general sense of frustration that such a rupture produces in society. Accordingly, material culpability may be defined as follows: *the censure involved in material culpability comprises censure for a lack of loyalty.*

The theses advanced by Günther and Kindhäuser link culpability to the legitimacy of norms.

Günther's conception, however, can prompt civil disobedience, since equal conditions for critical participation exist only under ideal circumstances; Kindhäuser's thesis, in turn, severs the duty to obey the law from any substantive

content other than obedience itself, grounded in the legitimacy of the norm-formation process.

In virtually all States there is a deficit of democratic participation: more vulnerable persons have fewer opportunities to take part in the political process and, for that reason, may become targets of institutional persecution even within a formally democratic society. Moreover, persons who lack real possibilities to participate in the communicative game could never be deemed culpable.

The concept of culpability formulated by Günther and Kindhäuser nevertheless has a safeguarding dimension: it authorizes attribution only where there is an individual capacity for rational self-critique and a genuine possibility of participating in the rules of the democratic game. Yet it lacks a material substrate that would ground the duty of obedience, which leaves room for the stigmatization of those who are unable to engage in critical argument within the political arena.

7. Conclusion

Formal culpability lies in the judgment that imputes an unlawful act to a determinate agent.

Historically, this judgment has been framed as “reprovability” or “censurability,” although such qualifications are not universally accepted as components of formal culpability, notably because of the moralizing and ambiguous overtones of “reproach” or “censure.” The greater difficulties, however, concern the ground of imputation, which resides in material culpability.

The material concept of culpability represents an effort to justify the possibility of imputing punishment to an individual. If culpability serves to link criminal conduct to a concrete subject in such a way that a penalty ought to be imposed for that conduct, it is indispensable to inquire into the foundation of imputation. This means asking for what reasons a subject will be punished by virtue of his criminal conduct, and for what reasons someone should be exempt from criminal responsibility despite engaging in conduct that is both typical and unlawful.

All of these issues turn on the debate about material culpability, which begins with principles of individual and subjective imputation and extends to the search for further conditions that permit holding someone responsible for an unlawful act—conditions that may include, depending on the theoretical approach adopted, freedom of choice, the “power to act otherwise,” the capacity to be motivated by norms or to guide oneself by them, responsibility in light of the State’s demands, or the status of co-author of legal norms. What is clear is that the notion of culpability refers to a particular conception of the human being and reverberates within the very domain of personhood.

When one defines the material foundation of culpability, one is in fact drawing a boundary within the legal definition of the person: the culpable individual is treated as someone endowed with traits and capacities that render him responsible, vis-à-vis the other members of the community in which he lives, for the criminal offenses imputed to him. The concept of the culpable person thus delimits a conception of the human being as a responsible individual. To some extent, this follows a historical tradition of ascribing to human beings moral, intellectual, and spiritual characteristics that distinguish them from other living beings.

Kant believed in human autonomy and rationality: the rational human being was free to decide in such a way that his conduct could be transformed into a universal law.

Today, the view is that the culpable human being bears certain characteristics that make him special and distinct. Scholarship on culpability has invoked various predicates to regard the person as special and culpable. Some of the most salient theses maintain that the human being can be: (1) a being susceptible to motivation (including all variations on “motivability”); (2) a being capable of normative guidance; (3) an agent endowed with free will; (4) a citizen with discursive capacity and communicative freedom of action; and (5) a socially responsible being.

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