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THE PLAY AND THE CONSCIENCE OF THE KING: LITERATURE, DEMOCRACY AND THE EDUCATION OF LAWYERS

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ABSTRACT: The hierarchy of values, which is a condition of intelligibility to any literary narrative, makes literature a prime tool for the education of lawyers – especially those living under democratic regimes and engaged in perfecting them. In presenting as inextricably linked conditions for intelligibility and ethical assessment, literary discourse often allows to understand, with greater force than do legal and social theories, the major tensions involving Law in practice.

KEYWORDS: law and literature; democracy; condition of intelligibility; narrative.

> Is it not monstrous that this player here
> But in a fiction, in a dream of passion,
> Could force his soul so to his own conceit
> That from her working all his visage wanned,
> Tears in his eyes, distraction in his aspect,
> A broken voice, and his whole function suiting
> With forms to his conceit? [...]
> The play's the thing
> Wherein I'll catch the conscience of the king.
> (*Hamlet*, Act II, scene 2; Shakespeare, 2015, p. 105-106))

Hamlet's stratagem to *catch the conscience of the king* is based on the firm belief that literary fiction, with its power to bring passions to the fore, is a prime tool to reveal the reasons for human actions and thus to allow for a better assessment of their justice.

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On stage, as in everyday life, *form* and *substance* are inextricably linked and so are the practical and ethical reasons underneath the actions of each character. It is impossible to watch the drama and to understand it, without simultaneously making a judgment on the legitimacy – or lack of if – of the behavior staged. Understanding the dramatic narrative and judging it are simultaneous, interconnected moves.

Shakespeare's audience has no trouble understanding Hamlet's strategy because it also believes that even a heartless murder like Claudius cannot but be moved when his own villainy is staged, when the *artifice* of theatrical representation, a world away from the hypocritical flattery of courtesans, makes plain the cruel cowardice of his act. That is why Claudius' reaction, his unease and the paling of his face are perceived by Hamlet and the audience as undisputable evidence of his guilt. The play within the play, and the response it elicits, aptly reveals not only the culprit but also his *malice aforethought* and the right/duty to punish him.

Hamlet's cunning is that of understanding that staged drama does not simply offer a vicarious experience of real life, a *mirror to the times*, but that it necessarily elicits a moral response from the audience:

> Suit the action to the word, the word to the action, with this special observance that you o'erstep not the modesty of nature. For anything so overdone is from the purpose of playing, whose end, both at the first and now, was and is to hold, as 'twere, the mirror up to nature, to show virtue her own feature, scorn her own image, and the very age and body of the time his form and pressure (*Hamlet*, Act III, scene 2; Shakespeare, 2015, p. 116-117).

The verisimilitude of the action represented is essential (*o'erstep not the modesty of nature*) in order to make the mimesis on stage work the imagination with enough force to bring to conscience, individual and collective, the passions and values hidden underneath social conventions. Thus, a well-crafted play necessarily produces a hierarchy of values, a

tension between just and unjust actions, legitimate and illegitimate reasons, without which it cannot be fully understood.

The audience watching *The murder of Gonzago* can not find meaning in what happens on stage without an ideological framework determining what *should happen* on stage. This ideological framework is a *sine qua non* condition for the plot to be intelligible. Its presence is required to give substance to the clash between protagonists and antagonists and to produce the *suspension of disbelief* which characterizes fictional works.

Elizabethan censors were quite aware of the connection between axiological assumptions and drama. They did not hesitate to severely punish authors who, in fact or allegedly, attempt to arouse the audience's sympathy for subversive values (Briggs, 1983).

Almost two centuries after *Hamlet*, Adam Smith would try to understand the foundations for a spectator's spontaneous reaction to the events she or he observes, on and off stage. Why is it, he would ask, that we respond with approval or disgust to some situations even before we can adequately bring together the rational arguments that would justify such reactions? He concludes that this phenomenon is due to the fact that humans beings are endowed with *moral sentiments*:

> How selfish soever man may be supposed, there are evidently some principles in his nature, which interest him in the fortune of others, and render their happiness necessary to him, though he derives nothing from it except the pleasure of seeing it. Of this kind is pity or compassion, the emotion which we feel for the misery of others, when we either see it, or are made to conceive it in a very lively manner. That we often derive sorrow from the sorrow of others, is a matter of fact too obvious to require any instances to prove it; for this sentiment, like all the other original passions of human nature, is by no means confined to the virtuous and humane, though they perhaps may feel it with the most exquisite sensibility. The greatest ruffian, the most hardened violator of the laws of society, is not altogether without it (Smith, 1999, p. 5).

Empathy towards others is, for Smith, an original passion of human nature. It cannot materialize, however, without one working out the moral import of the situation experienced, without a distinguishing between right and wrong, just and unjust, once these elements are necessary elements to the experience.

It is this link between the hierarchy of values intrinsic to any narrative and the conditions of intelligibility of literary works makes literature a prime tool in the education of jurists – especially those living in democracies and willing to make them stronger. By presenting as inextricably connected understanding and ethical judgement, literature may allow one to understand the tensions of law in action more clearly than do legal theories or sociological analyses.

Literature can play this role, it must be observed, not only due to the way literary texts are written but also to the way they are received. That is to say: it is the whole of the social functioning of literature which allows one to develop a stronger understanding of the workings of law in democratic societies, as well as of its strengths, limits and challenges.

One must acknowledge, nevertheless, that positing such a crucial and potentially productive connection between literary texts and law might seem at first sight a bit far-fetched. After all, the growing prestige of law and literature studies notwithstanding, it is impossible to ignore the huge differences in the social functioning of each of these discourses. Bringing them together requires the careful designing of a methodological strategy which has per force to take into consideration the many and important dissimilarities between the two fields.

In fact, making the opposite argument might appear to some to be indeed much more sensible. Some might embrace the idea that, when all is said and done, there is precious little that law can learn from literature, at least, nothing which was not revealed before and better trough the study of legal theory. One could call this position the negative view of law and

literature in the sense that it posits the absence of any substantial gain deriving from the interplay between the fields. According to this view, law could at best serve as a pleasant illustration or as a fictional commentary to situations involving legal issues. Because it is a different genre, however, it would be prevented from truly helping understand what is specifically legal about law: in other words, as a tool to give insights into the specificity of law, literature would be of as much use as dance or gastronomy.

I obviously do not agree with this rendering of the relations between law and literature – in fact, it runs contrary to the argument I want to make in this text. I am convinced that this line of reasoning is ultimately wrong, among other reasons, because it springs from a very narrow reading of both law and literature. That does not mean, however, that it should sound immediately absurd. On the contrary. Beliefs still hegemonic in Brazilian legal studies today would suggest that this is the current (if unstated) understanding the relations between the two fields – a fact which would go a long way to explain the peripheral place law and literature studies occupy in the very few law schools in Brazil which have them. That is why, while taking in consideration the limits of the negative view stated above, one should recognize its powerful insights before offering an alternative version.

The negative view is very useful, in the first place, as a warning against the facile connections so characteristic of Brazilian bacharelismo. Brazilian essays on this vein tend to overstate the meaning of superficial, episodic coincidences between literary and legal texts and to downplay or ignore a vast array of important differences separating them. The fact that masterpieces such as Dostoevsky's *Crime and Punishment* or Kafka's *The Process* center on legal matters does not immediately make them apt instruments to help one better understand law.

Moreover, as has been already pointed out, the skepticism of the negative view correctly points out to a fundamental distinction, one whose importance would be hard to overstress: law, unlike literature, has a normative function, that is to say, it exists primarily to solve conflicts and to guide conduct. As José Reinaldo de Lima Lopes elegantly states: "we say that someone knows law when, mastering the [legal] system, decides something in one way or another. [...] One learns law to solve questions, legal questions, and not for divertissement" (Lopes, 2006, p. 47, my translation)2.

In order to perform such a task, law must ascertain one meaning as correct in a given situation. It is troubled, therefore, by the grey areas of the hard cases. It thus attempts to establish, as neatly as possible, the borders separating the mandatory from the permitted and the prohibited. The celebrated debate between Hart and Fuller on the meaning of the rule prohibiting vehicles in the park synthetizes law's intention to overcome the deadlocks arising from mutually exclusive interpretations (Cane, 2010).

It is therefore not surprising that those who are not legal professionals voice their expectation that legal norms be clear and objective, apt to be understood, without great effort, by any citizen. According to this view, the ideal would be that every legal norm had the (perceived) simplicity of traffic norms: if a statute establishes that the speed limit on a given highway is 80km/h, then anyone driving over that limit is at fault. The rule is crystal clear, as some like to say, and to most people, that is exactly the way it should be. For those who adopt this view, uncertainties have no place in law and when they do occur, they represent a hurdle to be overcome.

From this point of view, any attempt to use literature (a genre that feeds exactly on polysemy and its uncertainties) to understand law is an

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[2] "Alguien sabe derecho cuando, prévio domínio del sistema, *decide* alguna cosa em um sentido o em otro. [...] Aprendemos derecho para resolver cuestiones, cuestones jurídicas, y no por *divertissement*".

odd, crass mistake. Attempts to do so would fall prey to a confusion between the illustrative function that literary texts may play within a legal argument and their function as a tool to explain law. This latter task, adepts of this reading would say, literature can not perform.

Still according to this view, courts are expected to render the same decision in lawsuits which display, or seem to display, similar features. People often get furious when they believe this is not the case. Common sense expects that judges merely apply the law without changing it because of, v.g., their own political preferences or of social differences between the parties. In everyday life, it is not uncommon to hear people criticizing courts for having allegedly decided against the (supposed) letter of the law. For the ordinary citizen, varying interpretations represent an illness the legal system must get rid of.

Literature, on the other hand, seems intent on creating objects which invite the rise of exactly this kind of conflicting interpretations. When two critics disagree about the meaning of a scene in a novel, or value differently a poem, they do not usually feel worried nor anxious to arbitrate between the two hypotheses. Of course they would like the other to agree with them but, if this does not occur and the disagreement persists, there would be no malaise nor any sense that there is something wrong in the literary system. Both accept that the capacity to prompt competing interpretations is characteristic of literary works.

What is more, we tend to value most those literary works which allow for a multitude of interpretations, many of them clearly antagonistic. The fact that *Don Quijote* can be read from a Marxist, liberal or feminist standpoint, just to name a few perspectives, does not mean that the novel is confusing or poorly written, nor does it suggest that Cervantes was not quite clear about what he wanted to say. The opposite is true. We admire the author even more because his text allows us to articulate so many different readings. The overlapping of meanings, their potential clashes, is a

sign of the force of this superb classic. Unlike what happens when talking about law, in literature we tend to see conflicting interpretations as a virtue, not as a sin.

This fundamental difference is at the heart of the objection the negative view makes to the belief of a productive dialogue between law and literature. How could it be – the argument seems to run – that a discourse which feeds on uncertainty and plurality of meanings (literature) will make us better equipped to understand another type of discourse whose social function is exactly that of deciding and defining unequivocal meanings (law)? The gap between the two areas is so abyssal, the argument concludes, that it is hard even to compare them, let alone mixing them productively.

In fact, if things were like this, that is to say, if these objections were grounded on a fair description of the whole functioning of literature and law, then it would probably be wise to keep the two fields apart. However, issues are much more complex and one can discern, beneath this difference on the surface, a wealth of deeper, meaningful similarities.

On a closer look, it is even possible to suggest that there is a powerful continuum between these genres of discourse. One could cogently present law and literature as two ways of responding to the same key problem, namely, that of the meaning and conditions for the full human flourishing in a given polis.

Otherwise said, the discursive structure of both law and literature gets shaped, albeit differently, by the same set of concerns: what does it mean to have a, meaningful life, a life worth living, the one we feel ourselves entitled to (i.e. the one we feel we have a right to)? What fundamental goods and values does it include? Which means are legitimate to achieve them? Is there a hierarchy of goods, values and means?

Let's start by examining the way these questions appear in literature. In literary narratives, we recurrently find a hero in quest for a goal which is perceived as essential for his/her individual flourishing or that of his/her

group. *The Odyssey*, one of the founding texts of Western literature, is the paradigm here. In it, Ulysses struggles to get back to his beloved homeland and to rejoin his wife Penelope and his son Telemachus.

At the heart of his quest, there is an affirmation of a central value: the author expects those who hear or read the story to understand and approve the hero's desire, his craving to go back home after the fall of Troy. This affirmation is a key assumption of the text, a sine qua non condition for its functioning. Homer did not feel it necessary to *justify* (that is to say, to prove just) the reasons the hero had for his actions. Returning to the homeland and the family after a period of war is exactly what was expected from a good Greek. The justice of the will to do just so is immediately evident to the hearers or readers of the saga.

If we fail to take this premise into account, we will find it difficult to fully understand the tensions informing the narrative. Action only becomes comprehensible because we, as audience, understand that there is something which both deserves to be accomplished and is hard to accomplish. The antagonists to the protagonist do not merely act: they act to prevent the emergence of a state of affairs which the audience understands to be right or desirable. Thus, there is a sense of justice which is pervasive to the narrative. The audience wants Ulysses to be reunited with his family and countrymen because it believes that this is required to allow the hero a fairer, more complete, flourishing.

The object of the quest may, of course, vary – and it does vary greatly, according to work, epoch, genre. The type of flourishing Romeo and Juliet seek, for example, may seem quite different from that desired by Victor Frankenstein in Mary Shelley's novel or by Bentinho in Machado de Assis'Dom Casmurro. This does not alter the fact that all these characters act to achieve a goal that seems to them to be fundamentally just.

To fully understand and enjoy these narratives, we have to realize that this quest for fulfillment exists and that it is, simultaneously relevant (that

is to say, the value represented by the goal of the quest must seem worthy, or the story will be considered silly or shallow) and fair (that is to say, it is legitimate that someone desires this type of fulfillment even if, personally, the reader might want to follow a different course).

Let's go back to Ulysses. Throughout his journey, he meets with innumerable obstacles to his plan of returning home: his journey is full of practical difficulties, moral dilemmas, accidents involving gods and demi-gods, etc. To extricate himself from these difficulties, the hero can make use of a limited number of legitimate means. There are things which are fair for him to do but there are also solutions which, though perhaps feasible in practice, are not permissible morally: they are not acceptable as a just response to the challenges he has to meet.

He can, for instance, lie and fool the giant Polyphemus but he can not – without being censored for having acted as a villain - disregard the honor codes so important to the Greek. Ulysses' journey is thus made up by a specific kind of tension which includes the goal he has, the value such a goal represents and the means he can legitimately use to triumph.

Homer's narrative is an example of the way literary works can help us perceive not only the values of a certain culture but also the problem of the means available to promote them. They thus posit, more often than not implicitly, criteria for deciding whether the hero has a right (or not) to triumph, whether it is fair or unfair that he succeeds in his quest.

At the same time, in any literary work it is possible to discern a certain idea of what it means to be human. For that reason, they also present a deep link between the implicit) idea of human subject and the notions of justice or injustice of the goals he/she seeks.

Let's now proceed to examine how the same question (the meaning and conditions for the full human flourishing in a given polis) appears in law. Although the odd mix of pomposity and technicality of legal discourse sometimes hide it, there is also a tension between goals, values and means shaping the structure and dynamics of law. A society creates legal norms to

preserve some goods (in the broad sense) which it considers to be valuable and worth fostering.

Individual freedom, for instance, is perceived as a fundamental good (at least in theory) in almost every single legal system in the West. Its importance seems in effect self-evident, so that often there is very little need to explain or justify why it is worth protecting it.

Nevertheless, even as fundamental a good as this one – rather, above all a good as fundamental as this one – is encompassed by law because it emerges from a deep-seated, very specific notion of what it means to be human. Today, many of us believe that it is impossible for one to live a full life if he/she is denied the right to choose his/her on life goals and the strategies to achieve them. The belief in this right to self-determination is so inextricably linked to notions of identity and individuality that denying freedom seems to be tantamount to denying the human (Taylor, 1992).

John Rawls theory is probably one of the most prestigious versions of this belief. According to his first principle of justice, "Each person is to have an equal right to the most extensive total system of equal basic liberties compatible with a similar system of liberty for all" (1999, p. 266). So important individual freedom is for him that it is made the cornerstone of his fascinating A theory of justice.

Rawls' perspective will only seem axiomatic, however, to those who espouse the idea that human beings are essentially free agents and that this is a necessary condition for their flourishing. This emphasis on individual freedom, one should always keep in mind, has not always been hegemonic, nor in time, nor in space. Different times and different societies have understood this value in markedly dissimilar ways.

The debate on free-will between Luther and Erasmus in the 16th century, puts in evidence the historical, political character of our current ideas on freedom. When we read the texts of these two major scholars, it

becomes clear that, for them, Rawls proposition would hardly sound self-evident.

This allows us to see that there is a previous, deeper narrative at work underneath the legal norms protecting individual freedom. This narrative only very rarely surfaces on the texts of statutes though it may appear, slightly more often, in the arguments and ratio decidendi of legal decisions. It is, nonetheless, indispensable for the working of law and legal institutions. To organize society and regulate the behavior of individuals, law needs a narrative that furnishes it with a meaning of society and individuals, their telos (if there is one), their goals and fundamental values.

This deeper narrative will shape law in each society. It will determine, for instance, what falls under the purview of law and what not; the conditions that convey legal subjectivity to a person; the type of adjudication system it will adopt; the relation between procedural and substantive matters in legal decisions, etc. As with literary texts, this legal narrative also implies the existence of a subject (collective and individual) in quest for a goal which can only be achieved by means of a limited number of options.

It is thus possible to suggest that the same way literary works become masterpieces because they are seen by the audience to articulate and express a synthesis of the fundamental values of a given community, legal systems can only function, in democratic societies, when they are seen to embody these values as adequately as possible. The strength of the discourses of law and of literature is due, to a large extent, to the fact that they incorporate and express constitutive communal values, values without which the very existence of that community, as a cohesive whole, becomes hard to understand.

When we see law and literature as two types of response to a single problem, we can better perceive, through their dissimilarities, what is unique to each of them. At the same time, we can also refine, through their

similarities, our understanding of the common problem they both attempt to tackle.

Traditional approaches to law and literature have often paid scarce attention to this deep connection between the fields (which articulates notions of subject, value and justice), focusing rather on thematic coincidences or on the artistic rendering of situations involving law. Although the importance of such studies is undisputable, it is possible to suggest that there is much to gain if we look for a new way of bringing together law and literature.

Moreover, the way by which literary texts present conflicts brings implicit a set of legitimate reasons for action as well as a logic for weighing the justice of competing positions (protagonist, antagonist). A hero will be defined his/her handling of these elements. The fair limits for his/her choices are established by the values of the society from which and within which the text exists.

This tension between capacity of action and legitimacy of action is at the heart both of law and of literary polysemy, and entails a permanent instability between multiple possible meanings. This does not mean, of course, that any ascription of meaning will be validated, in either field. There are well-defined boundaries for the construction of literary and legal meanings, as discussed in the celebrated Dworkin-Fish debate (1982).

This latter point leads us to the problem of interpretation as negotiation (Eco, 2012) and to yet another convergence between the fields. Both literature and law require, for their functioning, a consensus on procedure in order to be able to accommodate and set a hierarchy between competing readings. This procedural consensus is what makes possible to establish which interpretations are legitimate and which are not. Such procedural agreement is far from stable or uncontroversial, of course but it is a condition for their functioning.

This procedural consensus, fragile as it is, is a condition and leaves ample room for substantive disagreement. In the process of negotiating the legitimate ways to handle these differences, literature offers jurists a vicarious experience, as the play in Hamlet, of the hurdles and possibilities for the workings of law, mainly in democratic societies.

Because it argues that allowing for a plurality of interpretations is what makes a work truly great, literature serves as an important caveat against the ever-present danger in democratic societies – mainly those in which, like Brazil, wealth distribution is so uneven – of the effacing of boundaries between equality and homogeneity.

No individual reader has the power to determine the ultimate meaning of a literary text. Someone may offer a reading that sounds convincing to others, to such a degree that it becomes hegemonic. But this will only occur if it represents the understanding of most within the community of readers.

This need for a continuous negotiation of meanings suggests that a homogeneity of readings is not a goal – it is, in fact, something undesirable. The permanent questioning of interpretive hypotheses forces the hegemonic version to constantly renew itself or risk becoming irrelevant. Conflict and dissent are proof of the force of literature, not a sign of weakness.

It goes without saying that the same holds true for democratic societies. If different social groups yield to the temptation to call anathema ideas they oppose they end up by embracing, even if unknowingly, a notion of democracy as homogeneity. When this happens, the risk of an authoritarian regime looms large. It is no surprise that totalitarian governments have so often, and so brutally, attacked literature and the space of freedom and diversity it represents.

It is this celebration of diversity within a common project, linked to the ways of perceiving goals, values and means that makes literature a prime locus for understanding what is specific of legal discourse and institutions. The delicate balance literature tries to strike between the uniqueness of experience and the collective of expression is mirrored in the social task law attempts to perform.

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