ANAMORPHOSIS – Revista Internacional de Direito e Literatura
v. 1, n. 1, janeiro-junho 2015

THE EXCEPTION AND THE RULE: FRAGMENTS OF A LEGAL-LITERARY REFLECTION

IARA PEREIRA RIBEIRO[1]

ABSTRACT: This study analyzes the play The Exception and the Rule, written in 1929/1930 by the German playwright Bertolt Brecht. The play talks about the trial of a rich merchant who, during a business trip through the desert, killed a man who served as a coolie. The text allows the approach of the similarities between staging and judging, keeping in mind that both are characterized by orality and publicity; and criticizing the logic inversion of the use of the rule and the exception, which makes the exception the rule.

KEYWORDS: law and theater; interpretation; legal decision.

INTRODUCTION

The reader of a literary text is led to meditate on many subjects. If the reader is a student of Law, he uses a lot of his technical knowledge and professional experience to build his understanding of the text. On the other hand, reading a literary work can lead this same reader to new points of view. The communication between these two types of knowledge is enriching, especially when done consciously.

The goal of this article is to evidence how this dialogue between Law and Literature happens. In order to do that we will use the play The Exception and The Rule, written in 1929/1930 by German playwright Bertolt Brecht (1990).

[1] PhD in Law (Pontifícia Universidade Católica of São Paulo – PUC/SP). Professor of Law (Universidade de São Paulo – USP). E-mail: iararibeiro@usp.br

This legal-literary approach of the text can happen in different ways, all of which are interesting and relevant. Because of that, there is a certain methodological difficulty, detected by Silva (2009, p. 66), in specifying the boarders between law *in* literature and law *as* literature[2].

In the analysis of the play, the most obvious approximation between Law and Literature is found in the so-called "law *in* literature". It is about a merchant who killed his servant[3]. To know the circumstances of the crime, the ambiguities of the characters and the conflicting situations lived by them allows us, through this literary narrative, to imagine a situation we never lived. This allows the reader/lawyer to reflect upon his own experiences, professional or not[4].

However, a polemic court decision reached by the Superior Court of Justice of São Paulo and published by the press indicated another possible approach to the text, which can be classified as "law *as* literature". The narrative of the court decision is similar to the narrative in the play, and the judge builds his decision on the same basis of Brecht's judges.

The Exception and the Rule draws attention for another reason as well. The reading of the text helps to comprehend the Law from a view other than the normative. This way, from the critical reflection about the text, one reaches the Law. The pedagogical use of Literature in the teaching of Law results from the verification that legal phenomena exists in day-to-day life, and extralegal elements fall upon them and should be taken into consideration for the understanding of the phenomena (Silva, 2009, p. 129).

Since the paths pointed here are not mutually exclusive and, instead, can complement each other, we opt to talk about the many possibilities of approximation between Law and Literature we could reach through the

---

[2] Silva (2009) states, moreover, that the classification of Law as *in* or *as* Literature is too narrow and academic, emphasizing that the growth of the legal-literary studies made keeping the purity of this distinction difficult.

[3] As will be seen throughout the text, he is not exactly "employed" in the legal sense of the word. He is a non-unionized worker and, in the historical and geographical circumstances of the text, lacking any labor protection.

[4] Silva alerts that reading literary works does not make anyone morally better, maybe only a little more understanding, more prone to connect empathically with another (2009, p. 59).

text. Without electing only one path, we adopted a fragmented approach for evidencing some interesting legal-literary aspects of Brecht's text.

THE PLOT

The play talks about the trial for a murder occurred during a trip through the desert taken by a merchant, a guide and a coolie.

The objective of the trip is to reach the city of Urga before other competing merchants, so they can close an oil deal[5]. During the hard and tiring trip, the merchant reflects upon the social differences that exist between them. Conscious of his numeric disadvantage, and afraid that they would both unite against him, the merchant fires the guide and continues the trip alone with the coolie, a simpler man, less educated and unprotected by the law.

The strategy of carrying on with the trip alone with the coolie proves to be a disaster, since the absence of the guide does not eliminate the merchant's suspicions. On the contrary, it causes other conflicting situations. Since both of them do not know the way, they walk around in circles until they are lost in the desert, with practically no water. The climax of the trip happens when the coolie, who, following the advice of the fired guide, kept an extra flask of water, offers it to the merchant, knowing that he could be accused if the other died of thirst. With this in mind, he rises in the dark and walks towards the merchant with the flask in his hands. The merchant, who was also hiding an extra flask, is surprised by the coolie, and thinks he has been caught drinking water. Scared, he shoots and kills the coolie.

---

[5] Although this is the objective informed by the merchant, in another moment of the text his real intentions, which are not of development, but of secretiveness, so everything remains the same, become explicit:
"COOLIE: The merchant always says that extracting oil from the ground is a good thing done for humanity: when oil is extracted from the ground, road are built and the well-being is general. The merchant says that even here we will have a railroad. And I, then, how will I make a living?
GUIDE: Do not fret. We won't see a road around here any time soon! I heard that oil, if a person finds it, soon another one comes and hides it: whoever covers a hole from which oil is pouring gets a lot of money to keep it a secret. And that is why our merchant is in such a hurry: what he really wants is not the oil, it's the money to keep it a secret!
COOLIE: I don't understand it.
GUIDE: Nobody understands it." (Brecht, 1990).

The scene of the trial is the central point of the play. In the session where the merchant will be tried for the murder of the coolie, the following people are present: three judges, the merchant, the coolie's wife, the guide, the keeper of the inn where the guide was fired and the chief of another group that was coming right behind them and had the same business purpose as the merchant. It is at this point in the play that Brecht favors studies on the exception and the rule.

JUDGING AND STAGING

The theme of trials is recurrent in literature, but it is the staging of the text in theater, film or television that best shows the elements, roles, functions, interests and techniques involved in a trial. The almost perfect fit between theme and artistic expression, between judging and staging, law and art, is especially due to two elements that are present in both judging and staging: orality and publicity.

The hearing may be the procedural act best known by the population. Participants in the hearing must communicate through speech. The very meaning of the word gives this sense of paying attention to the speaker. The orality of the act is a distinguishing mark that makes it different from other acts that happen in writing. It is at the hearing that the actors of Law (lawyers, prosecutors, judges, officers, witnesses, authors, defendants, experts, etc.) have the opportunity to express themselves verbally, as occurs in most scenic representations.

The possibility of the presence of an audience in the hearing is another element that makes it resemble a staging. The procedural steps must have publicity, which means that, generally, they may be known and may be carried out in the presence of the public. The law restricts publicity only in certain cases, for defending privacy or if required by social interests. The audience attending a court hearing hears the parts involved (lawyers, parties, witnesses, judge), follows the oratory, gestures, facial expressions, and the sounds produced by one or the other, building its own version of events and waiting for the outcome given by the judge.

The presence of the public in the hearing, constitutionally authorized[6], is governed by the Code of Criminal Procedure, which requires the viewer to show appropriate behavior, with the possibility of being removed from the courtroom and eventually even arrested if acting improperly[7]. The public participates in the hearing as part of a theatrical, film or television staging, and, even though restrained, it gets emotional, cheers, gets offended and makes comments[8].

The similarities of the trial with the artistic staging are not limited to orality and publicity. Note that the hearing takes place in a given space, with objects such as tables and chairs placed in an orderly fashion, with proper clothing[9] and marked places[10]. It is very similar to what happens in a scenic representation: stage, scenery, costumes and marked actors.

Certainly the composition of the hearing area and of a scenic representation has different purposes. With the scenario, the goal is to compose an environment to help the public understand the representation; the environment of courtrooms, however, seems, at first glance, to have the goal of being functional in order to serve well to the professionals who work there, but the arrangement of furniture and objects is full of meanings that convey the idea of power (Canetti, 1995; Foucault, 1996).

---

6 Art. 5, LX, from the Federal Constitution: "the law may only restrict the publicity of procedural acts when the defense of privacy or the social interest require it."

7 Art. 795, CPP: "Viewers of hearings or sessions may not manifest themselves. Sole Paragraph: The judge or the president will remove the disobedient from the room, who, in case of resistance, will be arrested and fined."

8 Francesco Carnelutti criticizes the public interest for criminal trials. He states that this is a fun way to escape from life, instigated by occupying mind with someone else's drama. He believes that indulging in a trial, just as you can be entertained with a cinematic spectacle, without regard for the real drama of the protagonists is an incivility, as it was the fight of gladiators or the running of the bulls (1995, p. 12). Elias Canetti noted that there was a pleasure in condemning, saying that "a book is bad," soon means "he is a bad poet"; the person gives herself the power of the judge to sentence and, in so doing, separates the good from the bad, obviously including herself on the good side (1995, p. 296-298).

9 Carnelutti writes about the importance of the robes worn by the judges (1995, p. 17-20).

10 Lenio Luiz Streck describes the judging room of a Jury Court to evidence that society's cultural and economic discrepancies may be perceived by a more attentive eye by the placement of the furniture and the objects in the room (2001, p. 107).

BRECHT'S PLAY

The story of the play "The Exception and the Rule" is told in a short text, divided into nine scenes. One of the scenes is a song sung by the actors as they change the scenery. In this scene, the story does not unfold; it exists to show the public the passage of time and the change of space from the desert to the Courtroom.

The author depersonalizes the actors three times: in the presentation, in the change of scenery (with the singing in the courtroom) and at the end. In these collective lines there is a provocation directed to the public. Already in the presentation, the public is advised and urged "to see well," "to find strange what does not seem strange," to be suspicious, "to find unnatural what happens, and happen again." In the final speech, urging the public to act: "we ask you [...] where you see abuse, seek remedy." This strategy of stimulating the public to act reflects the political and philosophical position of the author who, placed in the context of the twentieth century, understands art as a means of transforming society. It also justifies the classification Brecht himself gives the text: didactic piece.

There are nine scenes, and the first seven are located in the desert. In the first scene, the audience (or reader) gets to know the protagonists of the story and is informed of the reason for the trip. It is the merchant who addresses the public and presents himself, "I am the merchant Karl Langmann and will travel to the city of Urga in hopes of closing a concession deal" (Brecht, 1990).

It is interesting to observe that the merchant is the only character with a name. All the others are identified by their profession (guide, coolie, inn keeper, police officer, chief of the caravan, and judge).

The indication of the merchant's name evidences his importance as a person. He is a unique being, not only a guide or a coolie: he is Karl Langmann.

The individualization of a person is a theme of the "General Theory of Private Law"[11]. Having a name is a form of individualization which gives the

[11] Rosa Maria de Andrade Nery teaches that what gives people their uniqueness are their personality features, such as skills, status, name, fame, and housing. These features distinguish one person from the rest, they carry specially dignified individuals in the legal context of relationships (2002, p. 153).

person the possibility of having rights and duties (Pontes de Miranda, 2012), because you cannot assign something to someone without knowing "who" it is. The other characters, all without names, do not matter as people with personalities, rights and obligations.

Although the right to a name is not expressed in the items of Article 5 of the Federal Constitution that deal with fundamental rights and guarantees, there is no doubt that this is its nature, because all people are entitled to a name[12] and to be called by that name, no matter their situation in life[13]. The right to have a name stems directly from the constitutional principle of human dignity and of the exegesis of the heading of that Article, which states all citizens are equal before the law, without distinction of any kind. There is no greater distinction than to be unnamed.

The author, by failing to identify the other characters, places them as a depersonalized mass. Of course, the depersonalization of the natural person is not admissible in a democratic state, but it is a common allegory used for provocation in artistic manifestations[14].

It is interesting to point that only one character is female. Like all other characters, she does not have a name. Her identification, however, does not come from her profession or occupation, but from her marital

[12] The right to have a name is different from the right to a name. In the first case, we have an implicit fundamental right (about this, see Sarlet, 2011), while the right to a name is the right to personality, as seen in Art. 16 of the Civil Code of 2002: "Every person has the right to a name composed of name and last name."

[13] For example, the Penal Execution Law (no. 7.210/984) says on Art. 41 "It is the right of a prisioner to be called by their name". Similarly, Resolution no. 14, November 11, 1994, of the National Council for Criminal and Penitenciary Policies, which sets the minimal rules for the treatment of prisioners in Brazil: Art. 4, "The prisioner will have the right to be called by his name."

[14] Among the many possible examples, we picked the song Brave New Cattle (*Admirável Gado Novo*), by musician Zé Ramalho, which, we think, also dialogs with Brecht's text:
You that are part of this mess
That goes through future projects
It's hard to have to walk
And give much more than you receive
And have to show your courage
Despite what may seem
And see that this machine
Is already getting rusty.

status[15]: she is simply the "coolie's wife." This designation legally qualifies the character by her family status: because she was the coolie's wife, because she had that status, she is the one authorized to ask for material compensation for the death of her husband. When interpreting the text, however, it seems to us that the designation "coolie's wife" indicates her low social relevance: the coolie does not have a name, he is not an individual; well, to be the "wife" of nothing is to be nothing.

The ending of the play occurs with the trial scene in the courtroom. The Merchant, now a Defendant, is heard and judged.

In the courtroom we find the coolie's wife, the guide, the inn keeper, the members of the second caravan, the merchant and the judge. In the scene there is the presence of the judge, the defendant, the witnesses, the interested parties (in this case, the coolie's wife) and the audience (composed by the members of the second caravan who are not heard and, also, by the people watching the play). The figures who are absent from the scene – and the play – are the Accuser and the Attorney, that is, the character representing the D.A. Office, that is, the District Attorney, and the Defense Attorney. As to the theatric aspect, the absence of these characters is justifiable, since the presence of three judges transmits the idea of power more clearly, while the theatrical use of the three parts (judge, DA and lawyer) would enforce the ideia of debate and rethoric, which does not seem to be the intention of the author in this text. Without these characters, the lines that could be used to accuse of defend the merchant are said by the judges themselves, as can be seen in the following passage:

> JUDGE to the guide: So I had to accept a lot, right? Answer! Do not stand there thinking all the time about every answer you have to give! The truth always comes up. (Brecht, 1990);
>
> JUDGE (advising the defendant): Listen: you must not pretend to be more innocent than you are. That will not do anything, man. [...] Only by making this hatred justifiable will you also justify your action as self-defense. Think about it! (Brecht, 1990);

[15] The *status* is according to the personality, which translates the legal qualification of the person in the social group where he or she is inserted, be it individual, familiar or political.

> FIRST ADJUNCT JUDGE: This is a flask of water, not a rock: he was going to offer you water! (Brecht, 1990);
>
> SECONG ADJUNCT JUDGE: Now, everything points that he did not intend to kill anybody. (Brecht, 1990);
>
> JUDGE: How can that be? *To the merchant*: - He was going to give you something to drink! (Brecht, 1990, p. 157);
>
> JUDGE: It was not rock: can't you see it's a flask of water? (Brecht, 1990)

The resource of uniting the three characters in the figure of the judge – accuser, defender, and judge – hides the outcome of the story from the reader and from the audience. It is impossible to guess what the outcome of the trial will be until the last sentence. This is very interesting in a play, since it captures the attention of the audience during the entire presentation.

On the other hand, in the discourse analysis of the text we thought that uniting the three functions in only one figure evidences the equality of origins, of points of view, and of values shared by those who practice the law. Lawyers, prosecutors and judges, even though they practice different functions, are similar when they reproduce autonomously the deviances, the untruthfulness, and the contradictions of the legal system.

This similarity of the discourses of the prosecution and the defense is summarized by Lenio Streck in the sentence: "kill each other among you, and we will judge you among us" (2001).

THE CURRENCY OF BRECHT'S PLAY

In the text, there is a dialogue between the judge and the wife of the dead coolie that touches the theme of civil responsibility:

> JUDGE: You are also asking for compensation.
> WOMAN: Yes, because my little son and I were left without the one who supported us.
> JUDGE: I do not blame you: material demands do not constitute a demerit. (Brecht)

The claim by the widow for compensation is acceptable by the Court, but before it is justified by the widow and morally evaluated by the judge. The coolie's wife practically apologizes for requiring it. Her request is based on a need ("we were left without the one who supported us"), not a right.

Although, in the text, what she intends is a compensation for property damage, receiving monetary compensation for her husband's death is morally judged, "I do not blame you," says the judge, and continues "this does not constitute a demerit." The dialog shows the conflict between punishment and compensation. It is normal to want the one who killed to be punished. In the play, economic compensation seems to be undignified, in a way.

However, compensation does not have the same function as the criminal conviction. The foundation of the sentence is to punish the agent for a conduct contrary to the law. Compensation is a remedy for having caused damage to someone's legal property (Larenz, 1985) and does not even require proof of economic loss[16].

Recently, a court decision by the Court of Justice of São Paulo, Brazil, evidenced how Brecht's play is still relevant nowadays. The Court analyzed a claim for material and moral compensation entered by Alexandro Wagner Oliveira da Silveira, a photographic reporter who, while covering a manifestation on Paulista Avenue, in the city of São Paulo, was hit on the left eye by a rubber bullet shot by a police officer[17]. The wound detached his retina, incapacitating him partially and permanently for the practice of his profession.

Concerning the structural similarities of the court decisions, it seems to us that this decision has a narrative coincidence with the text in "The

[16] The understanding of the Supreme Court regarding the right to image is in Summula 403: "Regardless of proof of the damage, there should be legal compensation for the publishing of unauthorized image of people with economic or commercial purposes."

[17] BRAZIL. Court of Justice of the State of São Paulo. 2nd Chamber for Special Public Law. APPEALS AND REVIEW NECESSARY Legal compensation action Photographic reporter injured in news coverage during a protest held at Paulista Avenue, São Paulo, São Paulo by a strike movement. In all likelihood the wound in the left eye - which resulted in retinal detachment and disabling sequel, partial and permanent, which incapacitates him to perform duties that require normal sight - results from a rubber bullet shot by the police Justified police intervention, because of the illegal obstruction of public streets by protesters, who refused to leave the lane, even aggressively Use of public force, tear gas and rubber bullets shots required Absence of elements to assert, in this case, the occurrence of abuse or excess force in the police conduct linked to the shooting that wounded the author Victim's position during the turmoil, between the protesters and the police, he stayed in the middle of the conflict, to photograph, accepting the risk or danger, excluding the responsibility of the public entity Partially valid sentence of the reformed demand for dismissal APPEAL OF THE ACCUSED AND NECESSARY REVIEW PROVIDED. LACKING THE APPEAL PF THE AUTHOR. APPEAL Nº 0108144-93.2008.8.26.0000. Vote Nº 8247. Rapporteur: Judge Vicente de Abreu Amadei, 08/28/2014.

Exception and the Rule". Firstly, the event is situated in time and space: "It is a known fact that on May 18, 2013, there was a protest in this Capital, on Paulista Avenue, in front of the MASP." Secondly, the situation is described in detail: "the protest was interrupting only one direction of the avenue, but, at a certain point, several protesters decided to interrupt the other direction as well, interrupting the traffic of cars completely. Then, the Military Police intervened, with the intention of clearing that lane. At that moment, the sad altercation happened: on one side, the protesters throwing rocks at the police; on the other, the police hitting on the protesters, using gas bombs and shooting rubber bullets." By the description, it is perfectly possible for the reader of the court's decision to imagine the scene of the confrontation between protesters and police officers. This is made easier by the use of the phrase "the sad altercation happened."

Then the reader is introduced to the victim (author of the judicial action), the photographer, "It is known, as well, that the author, who was on site, working as a photojournalist for a news coverage, ended up wounded by a violent agent in the area of the left eye." And subtly, the reader learns as well that the victim, although a photographer, is shortsighted, "and then there was vitreous hemorrhage and retinal detachment, resulting in visual impairment (in addition to the one he already had in his right eye for endogenous and congenital reasons) or poor sight." It is important to emphasize the fact that the information about the shortsightedness in his right eye is highlighted in the court's decision, placed between parentheses and typed in a smaller font than the one used in the rest of the text. That highlight is noteworthy because at first glance, this information does not matter to the case.

Regarding the evidence that it was the police action that caused the wound on the victim, it is stated that there isn't "complete certainty", but that "we must consider, however, that even without this complete certainty, the probability is high that the rubber bullet shot by the police was the cause of the injury."

Now, until this point of the court's decision, the construction of the narrative takes the reader to infer that the action will be upheld, that is, that the injured photographer will be compensated. This is emphasized even

more by the following passage: "Thus, I am convinced that the rubber bullet fired by the police was the cause of the misfortune."

Brecht reproduces the same effect with this line from the judge: "Then I will pronounce the sentence! The Court considers proven that the coolie approached his boss not with a stone, but with a water flask" (Brecht, 1990).

Surprisingly, however, both in the court's decision and in the play, the decision of the trial is different from what was expected. The court's decision states that the photographer deliberately "put himself in risk or in a dangerous situation, which is perhaps inherent to his profession", and so that "the unfortunate episode of which he was a victim was his fault exclusively."

In the play, the judge says: "The accused therefore acted in self-defense, in the case of having really been threatened, or of only feeling threatened. That said, I acquit the accused, and take no notice of the complaint by the dead man's wife" (Brecht, 1990).

Thus, the photographer and the coolie, distant by reality and fiction, share the same fate of being found guilty of their misfortunes.

WHAT IS THE EXCEPTION AND WHAT IS THE RULE?

The play is called "The Exception and the Rule". This makes us wonder: what is the exception and what is the rule in Brecht's text?

Initially, we may consider that the exception is the coolie's behavior. The merchant thinks the same, so much so that when he discovers, during the trial, that the coolie had a flask in his hands, not a stone, he argues, "But I could never imagine it was a flask of water: the man had no reason to give me a drink! *I was not his friend"* (Brecht, 1990, emphasis added).

Unconformed, he opens up about how unlikely it was to imagine the friendly action coming from the coolie: "Only if he was very stupid, really. A guy that, because of me, suffered an accident capable of crippling him for the rest of his life, and on an arm, no less! Nothing would be *fairer*, on his part, than *wanting to get even*" (Brecht, 1990, emphasis added).

Lastly, he gets to his conclusion, justifying his act and accusing the victim: "To admit that the coolie did not want to finish me off at the first opportunity, would be admitting *that he had no common sense*" (Brecht, 1990, emphasis added).

The judge also thinks the coolie behavior was strange, and asked, "Why would he give water to his boss? Why?" It is the guide who answers: "He must have imagined that the merchant was thirsty. *The judges smile at each other*. Certainly because of a sense of humanity. *The judges smile again*. Perhaps even because he was stupid, and that's why I think he had nothing against the merchant" (Brecht, 1990).

In the view of the merchant and the judges, giving water to the thirsty is not an expected action, especially if the one to whom it is being offered is richer and more powerful. The contrary is expected, those who have more should always keep a distance and distrust those who do not have anything. The merchant thus acts as the rule. In this logic, the acquittal of the merchant is justified, since he acted as anyone would in the same circumstances.

However, this outcome given by Brecht is uncomfortable, given that the act of offering water to the thirsty can never be considered an exception. Well, this should be the rule.

The coolie's reasons for offering the water do not matter. If he did it for humanitarian reasons or for fear of being punished if the merchant died of thirst, his action is not disqualified. It also does not change the fact that he did not threaten the merchant.

According to the Law, the title "The Exception and the Rule" causes other considerations as well. The merchant is legally answering for murder, a crime specified on Article 121 of the Brazilian Penal Code[18]. When he is sentenced, his absolution on the legal permission to kill given by Article 23 of the same Penal Code[19]. That is, the law predicts both conducts: the one where killing is forbidden and the one when it is allowed for self-defense.

It is interesting to reflect upon the meaning of "exception" in the area of Law. Immediately, we move away from the legal concept of exception as all kinds of defense of the parties in court proceedings. The concept of exception that is interesting in this study is the "derogation from a principle or rule by virtue of which the act or person is exempted from the imposition or obligation contained therein" (De Plácido and Silva, 2004). Thus, the

[18] Art. 121, Penal Code: "Killing someone: Penalty - reclusion, from six to twenty years".

[19] Art. 23, Penal Code: "There is no crime when the agente practices the fact in self-defense".

rule is the general principle, and the exception is a special principle which excludes the application of the general one.

Emilio Betti (2007), when dealing with exceptional norms, states that they are characterized by conflict with the fundamental principles of law to which they belong. He explains that the judicial protection of rights is the responsibility of the State only, and only by exception it is accepted that individuals use private self-defense like, for example, the defense of possession. These basic principles bring normalcy to that law and give it a rational coherence, to be established in a system as an organic whole.

In the Brazilian legal system – even though the news show the opposite - "do not kill" is a rule. Although Article 121 from the Penal Code describes a conduct, it understands that killing is forbidden. The Federal Constitution from 1988, in Article 5, XLVII, forbids the death penalty except in a situation of war– which is an exception by itself. As a rule, it also forbids abortion, euthanasia or other forms of degradation or elimination of life. The Brazilian legal system does not conceive the domain of life[20].

So, self-defense is an exception to the rule since it is a self-defense authorized by the state, before an unjust aggression, which can even result in the death of the aggressor (Toledo, 1991).

We think that the exception is a mechanism created by the law system to preserve itself, since it allows the effective realization of justice[21]. It can be said that the man who kills in self-defense is not a killer. Really? He is not a criminal, but he is a killer, since he killed a man, even if his act is justified by the defense of his own life. The exception appears as a way of subverting the general rule, in which the factual support of the law allows the non-application of a sanction and absolves a murderer.

We understand that it is the lawyer's interpretative task – and not only the Judge's, because if he is the one who decides, all others have to

[20] This is an expression by Ronal Dworkin.

[21] Norbert Horn says that the issue of justice is a permanent search when he emphasizes that "Every reflection regarding the Law is accompanied by the question of whether we can guide ourselves by justice commandments which already existed before the law and independently from any legislation (pre-positives) to which the legislator and the lawyer must pay attention, since these commandments are <<unavailable>>." And after that, he says: "Each time must account for the way it treats this issue and what place it is given inside and out of the application of Law and science. Throughout the times the issue of justice was accompanied by the doubt as to if, and in what way, safe answers could be found in this field" (2005, p. 343-344).

understand the Law – to identify the rule, recognize what general and abstract law is applicable to the case, note which factual circumstances determine its application and, after that, verify if the law predicts exceptions that can work in the case. Inadequacy occurs when an exception acquires the status of a rule, or when a rule is applied before the existence

of a possibility of exception is verified. In the first case, when an exception is treated as a rule, a feeling of injustice is created, since the idea of a "special case" is altered to benefit a certain group of people, lessening the effects of the general principle; this is the reason why many people believe the law does not apply for everybody, only for some. On the other hand, blindly applying the general rule indicates abuse, because it does not consider special situations. Says Brecht:

> See the abuse in the rule!
> And, where abuse is found,
> Seek to remedy it! (Brecht, 1990).

Returning to the analysis of articles 121 and 123, II, of the Penal Code, between two possible conducts – killing is forbidden and killing is allowed when in self-defense – it is obvious that the forbidden conduct is the rule, and the other one is the exception.

In the play, when the Court absolves the Merchant, it recognizes putative self-defense. However, the basis for the decision was that the Court understood the *rule* to be "those with less always threaten those who have more:"

> The merchant did not belong to the same class as the coolie, of whom he could only think the worst. The merchant could never believe in any gesture of camaraderie coming from the coolie, [...] common sense told him that he was under the greatest threats, [...]. So the accused acted in self-defense, not mattering if he was really threatened or if he just felt threatened (Brecht, 1990).

The basis is not legal; it is ideological. The legal prediction of an exception is used for not punishing a criminal. The unjust is wrapped in the cloak of the Law.

Well, in the play, the recognition of putative self-defense is based on the belief of a fear that comes from differences in social classes. Zygmunt Bauman, when talking about fear, states that it is a feeling known by all

living creatures who, when faced with a real threat, have two choices: escaping or attacking. Human beings, however, know another kind of threat, which is not real, but imaginary, and creates what he calls a "second degree" fear, or a "derived" fear, which comes from the perception of the world, experiences and behaviors (2008).

Brecht explicitly exposes the ideology of class conflict when narrating the fear between the merchant and the coolie: each one recognizes the other as an imaginary threat supported by an ideology, that is, a "second degree" fear. The fact is that the coolie never threatened the merchant. However, the Court recognized the existence of this imaginary fear so it could absolve the merchant.

It is surprising how these imaginary fears serve as justification for the most diverse and varied acts. An example: a young driver runs over another young person, a cyclist, in the early hours of a Sunday morning. With the impact of the accident, the arm of the cyclist is stuck to the car. Even so, the driver keeps going until he finds a river, into which he throws the arm as if it were trash (as if it were acceptable to throw trash in a river). How does this driver justify his conduct? Why did he not stop and help the victim? The answer published by the press if that he did not act because of the crowd, he was afraid he would be lynched[22]. More amazing than the use of the excuse is the fact that it was accepted, and how naturally it was accepted that he did not want to run over the cyclist and that all his actions after the accident had the intention of protecting his own life. It is a justification of an abnormal conduct. The exception was made to be the rule[23].

CONCLUSION

[22] This fact happened on March 10, 2013. On the occasion, the press reported that: "The driver's lawyer [...], 22 years old, who ran over the cyclist on Sunday, said that his client did not help the victim because he was afraid of the reaction of the people present at the scene of the accident." (Available at: <http://g1.globo.com/sao-paulo/noticia/2013/03/ciclista-atropelado-na-paulista-disse-mae-que-estava-na-ciclofaixa.html>. Access: January 29, 2015). On July 3, 2014, the driver was sentenced to six years of semi-open incarceration. (Available at: <http://www1.folha.uol.com.br/cotidiano/2014/06/1464553-juiz-condena-motorista-que-atropelou-ciclista-na-av-paulista.shtml>. Access: January 29, 2015).

[23] According to the composer Zé Ramalho, in *Brave New Cattle*:
"Outside is a comfortable climate
Vigilance watches what's normal
The cars hear the news
And men publish them in newspapers"

The dialog between Law and Literature broadens the comprehension of the legal phenomenon because it captures the occurrence of the Law outside the realm of the State powers. In the study of Brecht's text we saw themes such as principles of orality and publicity of the process, the right to a name, civil responsibility, and the exclusion of criminal responsibility. The analysis also allowed us to find similarities between judging and staging, and also to draw a parallel between the literary text and a court decision.

Brecht's text instigates the lawyer to reflect on the application of legal norms, alerts about abusing the rule and about the injustice of exception, and evokes the question of how much ideology exists in the interpretation and application of law, even when disguised as rationality.

REFERENCES

BAUMAN, Zygmunt. *Medo líquido*. Rio de Janeiro: J. Zahar, 2008.

BETTI, Emilio. *Interpretação da lei e dos atos jurídicos*. São Paulo: Martins Fontes, 2007.

BRECHT, Bertolt. *Teatro completo*. 2. ed. Rio de Janeiro: Paz e Terra, 1990. v. 4. p. 129-160.

CANETTI, Elias. *Massa e poder*. São Paulo: Comp. das Letras, 1995.

CARNELUTTI, Francesco. *As misérias do processo penal*. São Paulo: Conan, 1995.

DWORKIN, Ronald. *Domínio da vida*: aborto, eutanásia e liberdades individuais. São Paulo: Martins Fontes, 2009.

FOUCAULT, Michel. *Microfísica do poder*. 12. ed. Rio de Janeiro: Graal, 1996.

HORN, Norbert. *Introdução à ciência do direito e à filosofia jurídica*. Porto Alegre: Sergio Antonio Fabris Editor, 2005.

NERY, Rosa Maria de Andrade. *Noções preliminares de direito civil*. São Paulo: Revista dos Tribunais, 2002.

PONTES DE MIRANDA. *Tratado de direito privado*: parte especial. São Paulo: Revista dos Tribunais, 2012. t. 7.

SARLET, Ingo Wolfgang. *A eficácia dos direitos fundamentais*: uma teoria dos direitos fundamentais na perspectiva constitucional. 10. ed. Porto Alegre: Livraria do Advogado, 2011.

SILVA, Joana Maria Madeira de Aguiar e. *Para uma teoria hermenêutica da justiça*: repercussões jusliterárias no eixo problemático das fontes e da interpretação jurídicas. Tese (Doutorado em Direito)–Universidade do Minho, Minho, 2009. 412f. Disponível em: <http://hdl.handle.net/1822/9058>. Acesso em: 5 abr. 2015.

SILVA, Oscar Joseph de Plácido e. *Vocabulário jurídico*. 2. ed. Rio de Janeiro: Forense, 2004.

STRECK, Lenio. *Tribunal do júri*: símbolos e rituais. 4. ed. Porto Alegre: Livraria do Advogado, 2001.

TOLEDO, Francisco de Assis. *Princípios básicos de direito penal*. 4. ed. São Paulo: Saraiva, 1991.

Submetido: 29/01/15
Aceito: 25/04/15