

Article

The Research of Comparison between Law and Literature: As Illustrated by Kafka’s “The Trial”

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I. INTRODUCTION

The comparison between Law and Literature has attracted the attention of many western scholars in recent years.¹ These scholars have also expended a great deal of effort² in examining the relations between these two topics.³ Although it might be considered as an unknown area in Taiwan in the past, this newly prospect has started to sprout nowadays.⁴

As a law researcher and Literature lover, I tried to conduct my research incorporating with these two subjects. Concurrently, I started a course named "The Comparison between Law and Literature" at my home institution – The Law Department at Tunghai University in 2002⁵ and at the Fu Jen Catholic University in 2003. Fortunately, I found the students were very interested in this certain field of discipline. They believed that the course would be very helpful in their own professional career. This course would not only open up research in Law and Literature but also build an understandable connection between these areas of study.

In November 2004 I hosted a conference called "Law and Literature" in Tunghai University, the very first step in exploring the interaction of these two fields. By examining literary pieces like Crime and Punishment (Fjodor M. Dostojevskij); Wuthering Heights (Emily Bront); Tess of The D'Urbervilles (Thomas Hardy); Der Vorleser (Bernhard Schlink); A Passage to India (E. M. Forster); The Outsider (Albert Camus), and Resurreccion (Leo Tolstoy), we found out that literature work not only enriches law man's life, broadens our views but also makes us

1. Law and Literature is an academic movement originated from American law schools in 1970s, and developed into a school or a field of legal studies. Kenji Yoshino, "The City and the Poet," 114 YALE L.J. 1835, 1836 (2005); RICHARD A. POSNER, LAW AND LITERATURE 5 (Harvard University Press revised and enlarged ed., 1998).

2. For example: RICHARD WEISBERG, POETHICS, AND OTHER STRATEGIES OF LAW AND LITERATURE (Columbia University Press, 1992); MARTHA C. NUSSBAUM, POETIC JUSTICE: THE LITERARY IMAGINATION AND PUBLIC LIFE (Beacon Press, 1995); IAN WARD, LAW AND LITERATURE: POSSIBILITIES AND PERSPECTIVES (Cambridge University Press, 1995); PETER BROOKS & PAUL GEWIRTZ (EDS.), LAW'S STORIES: NARRATIVE AND RHETORIC IN THE LAW (Yale University Press, 1996); POSNER, *supra* note 1; ANTHONY G. AMSTERDAM & JEROME BRUNER, MINDING THE LAW (Harvard University Press, 2000); GUYORA BINDER & ROBERT WEISBERG, LITERARY CRITICISMS OF LAW (Princeton University Press, 2000); PETER BROOKS, TROUBLING CONFESSIONS: SPEAKING GUILT IN LAW AND LITERATURE (University Of Chicago Press, 2000); JEROME S. BRUNER, MAKING STORIES: LAW, LITERATURE, LIFE (Farrar, Straus, and Giroux, 2002).

3. L. LEDWON (ED.), LAW AND LITERATURE: TEXT AND THEORY, Preface 1 (Garland, New York, 1996).

4. The field of law and literature has received great attention in the U.S. The reason behind this phenomenon might be that law school students in USA have already received literary training early in life, much like the instance of Judge Richard A. Posner of the USA, who studied Literature regarding the analysis of Economic Law, before formally studying law.

5. I asked a lot of my students. They also tried their best to join in discussion. Some of them even took my course several times. We read together. In this case, who could say that law people were those who only holding briefcases without any emotional spirit?

more sensitive to the nature of human as well as the reality of society.

With the overwhelming vibration of the previous success, in January 2006 and May 2007 we held the second and third conference concerned the dialogue between law and literature, in which we discussed the transition of literature from the romance age to realistic age and to existent age. In this conference, we discussed about literature works such as *Les Miserables* (Hugo); *Le Comte de Monte Cristo* (Alexandre Dumas); *The Scarlet Letter* (Nathaniel Hawthorne); *Dead Souls* (Nikolay Gogo); *Uncle Tom's Cabin* (Harriet Beecher Stowe); *Der Vorleser* (Bernhard Schlink); *The Outsider* (Albert Camus); *The Bandits of the Liangshan Swamps* (Shi Nai'an and Luo Guangzhong); *Romance of the Three Kingdoms* (Luo Guangzhong) and *The Plum in the Golden Vase* (Lanling Xiaoxiao Sheng).

As we can conclude from above, with more and more practical studies regarding the relation between Law and Literature so far, it becomes more and more impossible to treat Law and Literature as two unrelated, apart subjects.⁶ This paragraph is an introduction about the comparative study of Law and Literature: firstly, we will explore their common points, their differences and the interactions among them; then attempting to describe their co-rule and conflicts; finally by analyzing the limit of Law to Literature and the critics of Literature to Law. Moreover, to enhance the readers' comprehension to the mentioned comparative study, with the example of a literary classic, "The Trial," from Franz Kafka, we could examine their interaction from the standpoint of Literature. This work will prove their amusing segments and their importance in the integration of Law and Literature.

II. COMPARISONS OF LAW AND LITERATURE

The study of Law and Literature can be divided into big two distinct parts "Law in Literature" and "Law as Literature."⁷ As a reflection of "Law in Literature," we should notice its description of law order in classics and in dramas. Looking at it as "Literature in Law," we use literary words and literary theory to explain all kinds of law rules and its cases. This is considered "Literature in Law."

"Literature in Law" plays an important role in novels and dramas. Through these media, the value of law can be discerned. By examining this topic through this lens we can understand the timing of law and its

6. Actually the interest from the Literature field in Law occurred earlier than the interest from the Law field in Literature. This theory has since been proved true following the title of a seminar "Literature, Law and explanation" in 1995.

7. LEDWON, *supra* note 3. It can be also divided into four distinct parts: "Law in Literature"; "Law as Literature"; "Law through Literature" and "Law of Literature."

value to society. It allows us to think more deeply about human beings and their community.⁸ Looking at this topic "As Literature in Law" we can see this method has understandable, explainable methods. For instance, we use hints and descriptions to explain the law and the real meaning of these rules. Through classics and dramas we can discern the function of law. Actually, these categories as just mentioned should not be that distinct and they should not be that different either. Both studies pay attention to how to handle the literary words and the meaning of law. Along with these many commonalities there are distinct differences between Law and Literature.

A. *Similarities between Law and Literature*

1. *Common domain of study*

Even though Law and Literature are two different areas, both fields are creations of humans and target "humans and society" as their research structure. That is why their relationship is so interlinked. To the present there are many classics in which law is the subject. They describe the relations among law, humans, and society.

Through examples such as "The Trial," Crime and Punishment; The Brothers Kalamazoo, The Outsider, Le Rouge et le Noir, Tess, Bleak House, The Merchant of Venice; Measure for Measure, Les Miserables, written about the topic of law, Literature has made Law rich. It has deeply described the relationship between law and human life. On other levels these two areas of study may be different, but both of them are fundamentally concerned with the same thing. So, in general speaking, we could say that the basic contents of these two fields are overlapping in some ways.

2. *Their functions are the same*

Law and Literature have the same function. They both deal with the relationship between "humans and society." Both of them are under the obligation of idealizing humans and society. Their basic function is to move and change humankind's world. Literature serves the function of education, self expression, compassion, self searching, life, feeling, and healing. Literature inspires people's minds. It makes us dream about a beautiful world, ideal societies, and human justice.

The obligation of law is to limit humans' behavior. And there are

8. For example, in the novel of "The Trial" by Kafka, let us compare this situation to the violence of the early administration in Taiwan.

punishments to the people who break the rules. People will remember the punishment and then follow the rules. So, it aims to keep society safe. Although law is a subject of social science with the function of solving human conflict, if we want to solve the real problem; we will need to know what people are thinking. Even more, we need to have plenty of understanding and compassion towards human beings. We endeavor to discover the outer limit of human behavior. This is the basic function of law and literature.

3. *Their methods of study are the same*

The close relationship between Law and Literature is revealed in their methods of explanation, description, readings, and expression. This connection is most apparent in that they both implement the use of words and rhetoric. They both gather human's experiences and stories. Beneath the strict language, they simply reflect the human world of experience. Novels are very popular in the western world. The writers create characters and describe their complicated roles in human relationships. They convey the dialogs and thoughts of these characters. They add a surprise ending through rhetoric and a logical sequence of events.

Law and Literature have the same method of explanation, however, Literature presents an artwork through the use of literary words. Intending as its goal, a congruent methodology and the implementation of the whole structure as part of the work's artistic value. The explanations in Law, on the other hand, need to meet two criteria. Law explanations must be practical. Because of this law must also express the importance of the practice and its value. In explaining Literature or Law, their value and uniqueness become apparent. Both of them explain what they intend to in order to attain their appropriate goal.

B. *Differences between Law and Literature*

1. *Their characteristics are different*

The language used in law and those used in any kind of literary expression are so different. Law and Literature utilize two different vocabularies. Literature originates from humankind's inspirations and ambitions and feelings all brought together in this personalized product. It is complex with emotion and personality. It expresses the writer's personal thoughts and personal style. The novels from Jing-Yung, "The women in the tower" (Anonymous),⁹ "The Trial" from Franz Kafka. The

9. This would be the first work of literature I have ever read. I was attracted by the story

main purpose of Literature is to create. However, some of them are real stories turned into novels.¹⁰ There is a realistic side to Literature. These classics brought out the hard to solve problems in society. They moved their readers. They expressed what the writers wanted and intended.¹¹

Literature is not only about story telling and gossiping. Literature expresses the human concern for the bitter and tough life. It is a personal voice. It becomes simply a tool when Literature is used in the songs of the country, or the mouth of the political parties, and the media.¹² And then, Literature loses its original function.

Law is the rule of human behavior. It should be clear and stable. It should gather people's intelligence to reach the goal – order and peace. Under these auspices, we can create justice laws. Although, there were few famous classics written by many writers, works of law come under more general authorship as they reflect the whole society and its culture.

2. *Their foundations are different*

Literature was created by writers. So it shows its uniqueness through literary words. These writers didn't follow the rules. They liked to shatter boundaries. Even more, they fought with the power. There would be no limits. It challenged the current ideology and society's values. Therefore, it is very unstable. Law is the rule that everyone should follow. It solves the issues of people's relationships. So, its theory should be very reasonable and logical. It must avoid unclearness. Also it cannot continuously be amended. Law should be stable.

3. *Their conditions of creation are different*

The classics arose from all walks of life. Great classics can come out of any era and any environment. Great classics can appear no matter whether it is a time of war or a time of peace. However, outstanding works seem to come out in an especially unmerciful world. Law is the standard

when I was 12. I might not have understood it completely then. But since then, I knew I loved Literature.

10. In the book of "Le Rouge et le Noir" from Stendhal. He wrote the story from personal experience. Therefore, a sub-title "Diary of 1830" came out. "Resurrection" from Tolstoy was rewritten according to a real story from a procurator.

11. "Der Vorleser" from Schlink, it described in elaborate detail the life of an illiterate person, how cruel history had changed sweet love into bitter story, and the importance of learning to forgive. Also in "Jean Christophe" from Romain Rolland, it described the whole life of a musician. Except for enjoying the master writings skills of the author, we can also learn to be brave and optimistic, while facing the hardship of life.

12. Shin-Jam Kao, Nobel Prize in Literature award-winning speech: "The Reason of Literature," Royal Swedish Academy of Sciences, Switzerland, 2000. I believe that he also values such topic a lot.

which manages society. However, there would be no space for law were it an unmerciful world. There would be only dictators. And then, law becomes these dictators' main tool of oppression. Law only works in a peaceful world.

III. COMMON POINTS AND CONFLICTS BETWEEN LAW AND LITERATURE

Literature has the same function as the Law does. A scholar said, they are "The Happy Couple."¹³ Classics instruct us how to treat people within the construct of the law. More over, it pedestrianized law knowledge. At the same time, they are the "fatal enemies" to each other. Literature will not willingly be limited by law. The writers often like to describe behaviors that break the law and the injustice of law in their books. Especially the conflicts between emotion and reason, and the conflicts between natural law and positive law. Literature places greater value on emotion. Law is more concerned with human behavior and society. The former is mystical and vague. The latter should be clear and stable. Therefore, conflicts between them arise quite often. It does not matter whether it is the words of literature or the generalizations of law that brought about this dissonance, it will not fade away on accord of these conflicts.

From the whole structure of Law and Literature, we will find out that many classics revolve around law cases. For instance, "The Merchant of Venice" (William Shakespeare) is about the explanation of contracts; "Crime and Punishment" is about a struggling criminal; "Der Vorleser" (Bernhard Schlink) is about Nazis and hopelessness; "Tess" (Thomas Hardy) is about prosecution and an unfair judgment. "Wuthering Height" (Emily Bronte) is about revenge; "Resurrection" (Tolstoy) is about the trail by jury in a criminal case; "Bleak House" (Charles Dickens) is about child abuse; "The Trial" (Franz Kafka) is about the courtroom; "The Outsider" is about the process of investigation (Camus); "A Passage to India" is about due process of law (Foster); "Le Rouge et le Noir" is about the trial procedure (Standhal). All of these classics are so called "Literature Art" structured by law cases. So, we could say that Law creates Literature, and Literature expresses the Law. They are so interrelated.

Under the influence of romantic writers, Literature became an artwork. Law is just an open a work of literature. Law attempts to become the communication medium between the Lawmakers and its readers. So, we could say that the openness of Law is the same as with with Literature.

13. J. N. TURNER & P. WILLIAMS (EDS.), *THE HAPPY COUPLE: LAW AND LITERATURE* (The Federation Press, Sydney, 1994).

In an other way, it also disseminates the writers' messages. However, Law could not be written in any form as with Literature. Law is limited in that it should uphold the standards of society. Literature on the otherhand can exceed these limitations. Because of these exceptions Literature can not stand in the law world. Conflicts arise. The next amazing development in law was directed by this breakthrough in Literature.

IV. LIMITATIONS OF LAW ON LITERATURE

Law has the power to limit Literature. Although Literature is only an artwork, the result of imagination, law limits the behavior of writers and the characters in the book. Human's law places power and responsibility on writers and to the roles in their novels. The writers have a responsibility not to hurt real people in the real world when they write. The roles in the book, especially those roles that criticize others' activities should be fictitious, real names and real people in the real world, should not be utilized.

Each writer has a limited lifespan. Therefore, our experiences are limited. Under these circumstances, one can maintain his or her inspiration through outside exploring. A writer's own work is done by telling others' stories. These stories come from talking to others and observing others' lives. That is why the writer is also referred to as "the life thief." We all knew that it's illegal to steal. But the strange thing is that, others' life stories were written by writers who receive no punishment for their activities. The reason might be that these people were just seen as simply intruding into others' lives. Another reason might be the lack of limitations on this activity from the law. Before the writings are commenced, the Law has already limited one's reputation and privacy. Under these conditions, the writers can conduct their works and avoid the limitations that might hinder other works.

V. CRITIQUE OF LITERATURE TO LAW

The literary critics of law have been around since the time of the Greeks and Romans. From ancient Greek authors to Franz Kafka in this past century. Authors often criticized the law in a very strict way. Especially Shakespeare, Tolstoy and Dickens. In this way the tables were turned and law was monitored by Literature. Literature perfects our laws and makes our life better. In this way, Law became more just and reasonable.

Literature will always be outside the Law. Even more, it will be expected to reach for the goal of justice that law can never attain, so we can get satisfaction from so-called "Hero Choices" in Literature or

Literature would create “Hero Justice.” It would make sure that there was a formula for eternal justice to replace the Law. It challenges the current legal environment. The justice portrayed in the works of literature might not stand in reality. However, they make us think more critically about the law. Through this eternal justice and law justice, we can even appeal to law executors to make justice come true.

Justice searching will be Literature’s motive outside the limits of law. It can break the limits of the system and choose the right, merciful justice at the same time. However, it cannot stand in real life without conflicts of interest. On the other hand, law will be changed by humanity and after that, law will succumb to its pressure.

Finally, humanity could manage the world in the name of law or ignore the law. In the later case, humanity’s management would leave the world of Law. Law would no longer exist. And it would be even harder to reach justice.

For example, the leading role (Portia) in the “Merchant of Venice” by Shakespeare, Portia said, “mercy falls like the gentle rain from the sky upon the earth. It blesses him who gives it, and him who receives it. Kings have mercy in their hearts. And God has mercy.” Her faith has made justice come true through the experience of humanity and practice of law. And it amazed us.¹⁴ The explanation of law should be under the limits of humanity. Humanity is the life of Literature too. Great authors should know humanity well.

But the most important thing is: the whole story told us of the injustice in law at that time. Contracts can be attempted to be explained by their intelligence under these poor circumstances. Utilizing Literature to monitor and to criticize would be a great tool identifying “the role of Law with a view on Law.” Like: “Tess” from Thomas Hardy or “Resurrection” from Tolstoy, the authors intended to criticize the injustice of judgement, human’s compassion, and the conflicts of punishment. This work expressed the criticism from Literature to Law.

“Resurrection” from Tolstoy, described the procedure of the trial at the beginning of the novel. Through an improbable courtroom situation, an incredibly unjust judgement was given. And that judgement framed their pitiful destiny. Innocent Siliva as an accused and Neholitof as a juror who made her so, appeared at the same time. Through these characters and situations the unjust court system of the time was criticized.

“Tess of the D’Urbervilles” from Thomas Hardy, “Le Rouge et le

14. The idea of mercy is important in *The Merchant of Venice* because it provides a focus for the contrast between Venetian Christian society and the alien invader, represented by Shylock. Mercy occupies a “central” position in the trial scene, where the power struggle between aristocratic Venetian society and the threatening force Shylock comes to a climax.

Noir" from Standhal, and "Resurrection" from Tolstoy, under these writings, there were pure or beautiful souls facing the death penalty. Through their works, a treasury of sacrifice by injustice of law was brought to light. These works awakened people's inner compassion. The conflicts of natural law and statute law were revisited. The criticism from their works brought forth the injustice of reality and law.

VI. THE FUNCTIONS OF LITERATURE IN THE MODERN-DAY LAWS

Except for showing the spirit of the authors, literature analysis simultaneously possesses the function of inspiring the readers. I hold the idea that in order to let literature stand high in the contemporary era as well as make the nature of literature more abundant, we should investigate it through the lens of modern law concept. So far I have written some articles¹⁵ concerning this prospective as an initiative attempt.

For example, as to the homicide, through the plot of the "Romance of the Three Kingdoms," a renowned Chinese classical novel, I discussed about the issue of mis-justifiable denfense. Meanwhile by exploring the "Le Rouge et le Noir" from Standhal,¹⁶ I deal with the question that whether if it is reasonable to sentence one the death penalty, since he only attempted to kill a man but failed to;¹⁷ on the other hand, by another famous Chinese classical novel: "The Legend of the 108 Heroes," I talked about the topic of when is necessary to decree death punishment.¹⁸ Furthermore, I pick up the issue of making or inciting someone to commit murder by the chivalrous novel from Jinyong.¹⁹

Also I explored the effect of pre-commitment of the victim on the injury crime by "Merchant of Venice" from Shakespeare.²⁰ Regarding to larceny. With *Les Miserables* from Hugo, I talked about the effect of post-condone of the victim on the thief.²¹ By the Chinese classical novel "Journey to the West," I discussed the question of whether it should be trespass or larceny, if someone occupies thing which is under his

15. Those articles are titled as "Series of Case Studies concerning Law and Literature" have been carried in several publications so far.

16. Li-Ching Chang, Series of Case Studies concerning Law and Literature (I) "Romance of the Three Kingdoms" – Mis-justifiable Denfense, Law Forum 14th, Taipei, Feb. 2003, pp. 47-52.

17. Li-Ching Chang, Series of Case Studies concerning Law and Literature (III) "Le Rouge et le Noir" – Reasonable Death Penlty, Law Forum 17th, Taipei, May 2003, pp. 66-71.

18. Li-Ching Chang, Series of Law and Literature (II) "The Legend of the 108 Heroes"– Continuous Murders with the Death Punishment, Taiwan Jurist 44th, Taipei, June 2006, pp. 83-94.

19. Li-Ching Chang, Series of Case Studies concerning Law and Literature (VII) "Chivalrous Novel from Jinyong" – Issues about Triggering Murder, Law Forum 28th, Taipei, July 2004, pp. 86-92.

20. Li-Ching Chang, Series of Case Studies concerning Law and Literature (VI) "Merchant of Venice" – Pre-Commitment on the Injury Crimo, Law Forum 25th, Taipei, Jan. 2004, pp. 90-99.

21. Li-Ching Chang, Series of Case Studies concerning Law and Literature (II) "Les Miserables" – Post-Condone on Larceny, Law Forum 16th, Taipei, April 2003, pp. 64-69.

control.²² And inspired by “The Scarlet Letter” from Hawthorne, I wrote an article concerning adultery and symbolic meaning of the scaffold.²³ Moreover, I since the both plots of bring a false charge against an innocent man and the abusing power to prosecute are the major turning points in “Le Comte de Monte Cristo” from Alexandre Dumas, I tried to examined these scenes from the lens of modern laws perspective.²⁴ Finally, I talked about the aftermath of a victim who was raped by someone with Tess from Hardy.²⁵ From my those effort, it seems that “the image of literature in the modern-day laws” should be a distinguishing characteristic in the process of studying the comparison between Law and Literature which worthy our while to pay attention to.

Although it might be said that such kind of comparison method would contribute to the so-called space-time confusion, however it is indeed necessary for us to put efforts on such comparison method in the analysis of literature. Because if we are able to set aside the misgivings of space-time perplexity, and try to judge the plots written in the works of literature by our sense of modern law conceptions; we will realize that the expansion force, resulting from the interflow between the scenarios in works of literature and our usage of modern laws logical-mind, can not only make literature be equipped with the nature of enlightenment, but also enhance the strength of literature.

VII. KAFKA’S CLASSIC “THE TRIAL” – A PORTRAIT OF CRIMINAL LAW THROUGH THE LENS OF LITERATURE

A. *The Mysterious Franz Kafka*

Franz Kafka was an attractive writer who was mysterious at the same time. Franz Kafka born on July 3, 1883 in Prague. He came from a Jewish family. He took the course of Literature in Prague University when he was eighteen. After that, he went on to receive a law degree. In 1923, he moved to Berlin. On June 3, 1924, he died in the Kiel nursing house near Vienna. He asked his friend Marx Klaud to burn all his letters and

22. Li-Ching Chang, Series of Case Studies concerning Law and Literature (IV) “Journey to the West” – Trespass or Larceny?, Law Forum 18th, Taipei, June 2003, pp. 53-59.

23. Li-Ching Chang, Series of Case Studies concerning Law and Literature (V) “The Scarlet Letter” – Issue concerning Adultery, Law Forum 23th, Taipei, Nov. 2003, pp. 90-99.

24. Li-Ching Chang, Series of Case Studies concerning Law and Literature (VIII) “Le Comte de Monte Cristo” – Issue concerning Judicial Procedure, Law Forum 31th, Taipei, Jan. 2005, pp. 44-52.

25. Li-Ching Chang, Law and Literature: First Lecture “Tess of The D’Urbervilles” by Thomas Hardy” Victim Complex, Taiwan Jurist 40th, Taipei, Feb. 2006, pp. 62-71; Second Lecture: “The Legend of the 108 Heroes” by Shi Nai’an and Luo Guangzhong – Continuous Murders with the Death Punishment, Taiwan Jurist 44th, Taipei, June 2006; Third Lecture: “John Christopher” by Romain Rolland -Self-Defence and Fights-, Taiwan Jurist 51th, Taipei, Jan. 2007.

writings before he died. Those novels included "The Trial." If Klauke did not go against his friend's wishes, we could not have enjoyed his classic of criminal law.

Kafka began to write in 1904. Four short stories and three novels would be his main works. Kafka was a famous writer in Europe.²⁶ He lived in the era of the collapsed Umayyad Kingdom. Friedrich Nietzsche and Henri Bergson influenced him a lot. He used to express himself through loneliness and a hateful manner. His attitude towards politics was simply to observe.

Kafka was known as one of the most influential writers of this century. The topics of his works are mystical. He described humans and society in a very abstract way. He expressed his personal feelings and thoughts to the world by combining elements of vagery with reality and reasonable and unreasonable in the same way. He emphasized feelings and absolutes. His works incorporated the strong meanings from the symbols within language. While this form in a way made his work more difficult to understand and read, his specific critiques have attracted us deeply and described very moving moments and places.

His chief works concentrated on the lonely people and unknown world in Western life. It brought forth the ugly realities in Western life. There was everyone from middle-class people to scholars featured in his works. There were the sad and helpless. And they compromised all the time. However, in the end they still could not avoid their lonesome destiny. The narrative did not point out the particulars as to period, date and background of the work. However, his work expressed the confusion of Western people during his century. It demonstrated their negative thoughts: condemnation but no fighting; a trapped feeling unable to find a way out.

B. *The bizarre story of "The Trial"*

In the beginning of "The Trial," our attention are drawn in by the first sentence:

"Joseph K. must have been maligned by somebody, for without having done anything wrong; he was arrested on one fine morning."

The wardens caught Mr. K without showing their identification cards. K was arrested in his rented apartment on the morning of his 30th birthday. Before that, he had fallen in love with Miss Bürstner who recently moved into the same apartment building.

26. Kafka was a great author. From the First World War to the 30's. Dramas and novels would be the main structures of that era. Novels' popularity did not stop until the First World War in 1914. However, there was a revival in the 20's and 30's, and this went on to influence Western European and American dramas.

In the beginning, Mr. K thought it was only a joke. He could not figure out why he would be caught or what kind of criminal activity he had been involved in. Although at first Mr. K was allowed to live as usual, even the wardens told him that he was free to move around, for the court would contact him, still he felt a great deal of pressure. All hints showed that “he would never have freedom.”

After that, Mr. K tried to defend his innocence. He tried to discover the name of the writ and crime he has been accused of. Try so hard as he might, but he never grasped the meaning, procedure and laws of the secret court. Mr. K devoted a great deal of time to his case; he even had hired a lawyer, still he never knew what crime he had committed, nor was released from the summons of ordering to appear on the court. His lawyer told him that the court was a bribery system. Mr. K also heard from others that once you get into the courtroom, you could never free yourself from it. No matter whether you were guilty or innocent or not, men’s properties would be gone and their lives would be taken away. Mr. K tried to seek for help, but everyone tried to avoid him. Then he realized one thing: although truth does exist, it was unattainable.

One day, Mr. K planned to pay a visit to an Italian customer. The customer did not show up when Mr. K arrived on time. In the dark church, Mr. K met a priest. The priest told him a fable:

Before the Law stands a door-keeper on guard, and a man came from the countryside begging for admittance to the Law. But the door-keeper says that he cannot admit the man immediately. So there he stays, waiting for days and years. He makes many attempts to be allowed in, and finally his eyes grow dim. He asked the door-keeper, “it seems that everyone should strive to attain the Law. But how come that in these years, no one but me has come to seek for admittance?” The door-keeper perceives that the man is at the end of his strength and his hearing is failing, so he bellows in his ear: “no one but you could gain admittance through this door, since this door was set only for you. I am now going to shut down it.”

After continued failures in defending his innocence. Mr. K began to believe he was guilty and wanted to be punished. On the eve of Mr. K’s thirty-first birthday, two strangers with suits came into his apartment without any prior notification, while unexpectedly Mr. K was sitting there and waiting for them to take him away. On the street, although he could not be sure whether the person was Miss Bürstner, still he believed that the woman he saw was who he had always had a crush on. At that moment, Mr. K suddenly realized that he could not resist the present situation any longer, so he submitted to taking the penalty, and received his final verdict. On a desolated quarry, those two officers acted like wild dogs and killed him without mercy. To Mr. K, the trail of law was such a

cruel procedure.

C. *Discussion of "The Trial" from the prospective of criminal law*

There were many scholars who have analyzed "The Trial" with different views. However, the legal view on Criminal Law is that, "Guilt" "Court" and the "the trial procedure" would be the main structures of "The Trial." Through irony plots, this work expresses the unclearness and inefficiency of the bureaucratic system. It described the helplessness that people feel nowadays under these ridiculous circumstances and the distress when they find out that the way for out has been blocked.

Of course, it is impossible to examine the whole law procedures in "The Trial," because of the different times and backgrounds of laws in different countries. However, since the rule of "due process of law" relating to human rights protection is a universal principle, I would try to analyze the inner-connection between law and literature, their complexity of accord, and conflicts by the studies of comparison between literature with Criminal Law as follows. At the same time, I would also try to explore the characteristics of law in literature and the characteristics of literature in law.

1. *"Presumption of innocence" is far from "no law, no punishment"*

"No law, no punishment" and "no crime, no punishment."²⁷ All countries had followed this principle for years. Under this rule, law should be clear. On the other hand, "presumption of innocence" means that a suspected or a defendant in a criminal action is presumed to be innocent until the contrary is proved. And it is the minimum of dignity for the individual as far as procedural safeguards.²⁸

In "The Trial," it's unknown what crime Mr. K had committed. He was presumed of guilty before he was placed under arrest. The warden told K that "our officials, so far as I know them, and I know only the lowest grades among them, never go hunting for crime in the populace, but, as the Law decrees, are drawn towards the guilty and must then send out us wardens. That is the Law. How could there be a mistake in that?" "I don't know this Law" said K. "All the worse for you," replied the warden. "And it probably exists nowhere but in your own head," said K; he wanted in some way to enter into the thoughts of the wardens and twist them to his own advantage or else try to acclimatize himself to them. But the warden merely said in a discouraging voice: "you'll come up against it

27. LI-CHING CHANG, GENERAL PROVISIONS OF CRIMINAL LAW 39 (Taipei, 2007).

28. "The presumption of innocence" had not been seen in many criminal procedure codes.

yet” Franz interrupted: “see, Willem, he admits that he doesn’t know the Law and yet he claims he’s innocent.”

Kafka tried to explain that one could not judge the standards in life by unclear Criminal Law. People did not know what law actually was. The ridiculous administration and omnipresent uncertainty of a dictatorship were demonstrated in the book. Waster said, Kafka was an author who could criticize right to the point in the society.²⁹

A system that arbitrarily decides which behaviors can be punished without the guard of “presumption of innocence” would let the bureaucratic system kill its people at any time.

2. *The conflicts of “doctrine of guilt”*

When a sentence is imposed, all circumstances of the case shall be considered and special attention shall be given to determine the severity of the sentence. It is forbidden for a defendant to be penalized outside the law without any probable reason. Upon the ignorance of the “doctrine of guilt,” lawmakers could only deter people through very strict Criminal Law.

Under this doctrine, the crucial criminal policy might come out.³⁰ The dignity of the individual would disappear.³¹ In fact, the effect of punishment should come from the probable penalty upon the criminals’ behavior instead of the strictest penalty. Only this probable penalty can develop people’s law conscience. Then it can become a system of moral principles.³²

There should be a crime, then follows a punishment. So, no crime, no punishment. Judging from a single behavior instead of personality guilt. An actor could not be punished by the consideration of his or her ex-behavior or bad records. Moreover, “single behavior” depends on what an actor had done right then. And we should not even consider one’s guilt or innocence when an actor is unconscious.³³

Mr. K was under arrest as an accused. However, Mr. K did not know what crime he had committed. Or, we could say, he did nothing but was presumed guilty and accused.³⁴ And it seemed that what Mr. K had done

29. RICHARD A. POSNER, *LAW AND LITERATURE* 275 (Hue-Juen Yang trans., Business Weekly Publications, Taipei, 2001).

30. A report “Frankfurter rundschau” from a newspaper on the Aug. 17, 1991 in Germany, the government forbade women’s wearing. Woman who rebelled the rule got death penalty. This is an extreme example of the theory. But this is not only one example of this politic power.

31. Kant had already criticized that in the early 18th century.

32. Arguments of substantial results about General Prevention Theory can refer to E. Schmidhäuser, Kafkas „Der Prozeß.“ Ein Versuch aus der Sicht des Juristen, in: *Literature und Recht, Literarische Rechtsfaelle von der Antike bis in die Gegenwart*, Goettingen 1996, S. 347.

33. CHANG, *supra* note 27, at 217.

34. E. Schmidhäuser, a.a.O.(Fn. 32), S. 347.

did not matter at all.

Kafka pointed out, Mr. K was under arrest because of his bad records instead of what he had done in the criminal case. And this was so called "ex-behavior" trial.³⁵ This rebelled the doctrine of guilt.

3. *The authority of the "The Court" in the cabinet*

Mr. K was under arrest on his 30th birthday. His first trial was in a secret "cabinet." The trial procedure never seemed to be end. Mr. K could not even know what his accused name was. And he was executed immediately in a secret way. From the point of view of criminal law on this case nowadays, it was obviously not due process of law.

Due process of law, means that law should rule the whole procedure. The procedure should be fair and reasonable. The political system is limited by this standard. In this way, the fact finding and dignity of individual could be maintained. The punishment should be conducted in a just way. The litigation rights which are protected by the constitution could be put into practice when the procurator and advocate would be on the fair stage.³⁶

The procedure of the court in the novel "The Trial" was very secretive. Mr. K tried hard to discover what his accused name was. However, in the end he still could not know it. The uncertainty of the trial opposes the principle of "due process of law." Justice would not exist. "The Court" was settled in a dark corrupt cabinet. Kafka tried to protest the vagaries and inefficiencies of the court. The symbolization can be seen throughout the novel.

In the first interrogation, K said, "there can be no doubt that behind all the actions of this court of justice, that is to say in my case, behind my arrest and today's interrogation, there is a great organization at work. An organization which not only employs corrupt wardens, stupid Inspectors, and Examining Magistrates of whom the best that can be said is that they recognize their own limitations, but also has at its disposal a judicial hierarchy of high, indeed of the highest rank, with an indispensable and numerous retinue of servants, clerks, police, and other assistants, perhaps even hangmen, I do not shrink from that word. And the significance of this great organization, gentlemen? It consists in this, that innocent persons are accused of guilt, and senseless proceedings are put in motion

35. E. Schmidhäuser, a.a.O.(Fn. 32), S. 349.

36. Under the principle of rule by law, the request of legal judicial procedure is no less important than the truth confirmation or the recovery of law peace. The Justices of the Constitutional Court, Judicial Yuan mentioned the concept of "Due process of law" several times, such as Interpretation No. 393, 396, 418, 436, 471, 523, 528, 535, 544, 551, 567, 582, 585. LI-CHING CHANG, THEORY AND APPLICATION OF CRIMINAL PROCEDURE LAW 21 (Taipei, 2007).

against them, mostly without effect, it is true, as in my own case.”

Later, K said, “but considering the senselessness of the whole, how is it possible for the higher ranks to prevent gross corruption in their agents? It is impossible. Even the highest Judge in this organization will have to admit corruption in his court.”

When K was with Leni, Leni answered K’s question. She said, “you can’t put up a resistance against this Court, you must admit your fault. Make your confession at the first chance you get. Until you do that, there’s no possibility of getting out of their clutches, none at all.”

In the church, the priest told K, “the court makes no claims upon you. It receives you when you come and it relinquishes you when you go.”

The painter, Titorelli sat down again on his chair and said half in jest, half in explanation: “you see, everything belongs to the Court.”

All of the above shows that no matter how hard Mr. K tried, he just could never get out from under the control of the Court.³⁷ And this is how Kafka described the court in a bitter way.

Mr. K followed the order of the courtroom. In the first trial, He was notified of coming to the courtroom with a summons. But on Sunday, he showed up in the courtroom without any summons. In the scene at the church, Mr. K heard someone’s screaming. He wondered about going back or not. He knew he was free then. However, if he turned back, it meant he admitted what the screaming actually meant to him. He just decided to obey. He followed the calling from the priest. Kafka described the struggle inside of Mr. K. Although K had tried to resist, he was waiting for them when he was plaed under arrest without any resistance or fighting. In the first trial, Mr. K even had an emotional speech in the courtroom. After then, two executors took him away. Although he did fight at first, He realized it was useless to resist when Miss Bürstner came. Mr. K struggled with whether to obey or resist. Mr. K once tried his best to resist. However, he was under the authority of the courtroom. And the power of the courtroom was just too great.

4. “*Under arrest*” with violence

The wardens would not show their identification card or any writ when Mr. K was placed under arrest. And they did not know what crime Mr. K had committed. They shouted to K, “our officials, so far as I know them, and I know only the lowest grades among them, never go hunting for crime in the populace, but, as the Law decrees, are drawn towards the guilty and must then send out us warders. That is the Law. How could there be a mistake in that?”

37. WEISBERG, *supra* note 2, at 134. E. Schmidhäuser, a.a.O.(Fn. 32), S. 346 f.

In the first interrogation, K said, "listen to me. Some ten days ago I was arrested, in a manner that seems ridiculous even to myself, though that is immaterial at the moment. I was seized in bed before I could get up, perhaps – it is not unlikely, considering the Examining Magistrate's statement – perhaps they had orders to arrest some house-painter who is just as innocent as I am, only they hit on men. The room next to mine was requisitioned by two coarse warders. If I had been a dangerous bandit they could not have taken more careful precautions. These warders, moreover, were degenerate ruffians, they deafened my ears with their gabble, they tried to induce me to bribe them, they attempted to get my clothes and underclothes from me under dishonest pretexts, they asked me to give them money ostensibly to bring me some breakfast under my eyes. But that was not all. I was led into a third room to confront the Inspector. It was the room of a lady whom I deeply respect, and I had to look on while this room was polluted, yes polluted, on my account but not by any fault of mine, through the presence of these warders and this Inspector, whom I can see before me now as he lounged in a chair belonging to the lady I have mentioned, like embodiment of crass arrogance? Gentlemen, he answered in effect nothing at all, perhaps he really knew nothing."

All of the above demonstrated that the rule against actions of force without writ and human rights was unrespected. Actions of force in the Criminal procedure were used in evidence gathering, evidence saving and to ensure the defendant would be present in the courtroom. Actions of Force would encroach on human rights when people are forced to be searched or attacked. Therefore, actions of force cannot go on without due process of law. Human rights need to be protected under the rule of the constitution. The codes of criminal procedure all over the world nowadays will not allow for actions of force without a writ.

Mr. K had been caught. His properties were searched and attacked without any warnings. The whole procedure was excessive. The arrest should have followed the rule of "principles of excess." Especially since it was all conducted without a writ.³⁸ The arrest was excessive and unnecessarily brutal. Ignorance of his own personal liberty and his reputation bothered Mr. K. Taking away his movement and properties would encroach on his life. Kafka tried to describe that unknown law the like walking in the dark. People could not see any light. And once falling inside, you could speak nothing but endure this entire ridiculous situation all alone.

38. E. Schmidhäuser, a.a.O.(Fn. 32), S. 343.

5. *Secret procedure of the "Trial"*

Two roles were distinguished as "Judge" and "the one to be judged" in the system. The prosecution and the trial are together. Prosecution and execution would be the job of the judges. In the book of "The Trial", there was no public or private prosecution. The duties of prosecution and trial fell on the judge. Through the secret trial, nobody would know how these events transpired. Imagination and uncertainty were present throughout the trial.³⁹

Less experienced judges had no power to overrule the final verdict. However, higher status judges did. A judge could not conduct the trial individually. Less experienced judges had no power to release the defendant. The decision belonged to higher status judges. When they gave an order, the defendant would be taken away immediately. In this case, Mr. K's rights were unrespected and his case handled very coldly. The situation for him could never be worse.

The individual advocate, the criminal court and a procurator should stand together. The status of these litigants would be the same. According to the law, an advocate should protect his defendant from assault and encroachment by improbable force. An advocate should help seek out the truth to prevent an unjust verdict.

But when K's uncle had mentioned the lawyer, K said, "I don't know that in a case like this one can employ an advocate." Although K employed a lawyer, he still did not get real help. Lawyers could not be present when Mr. K was examined and this impuned his rights seriously. In this case, it was contrary to the rule that the defendant should be helped by his attorney, which all countries provide for in their codes of criminal procedure.⁴⁰

6. *Hopeless End*

Execution in criminal case shall follow due process of law. The death penalty could take one's life away. Once it happens, one can never be alive again. So, punishment should be conducted more carefully.

39. Actually, Taiwanese who had lived under the terrorism of the KMT's administration should have the same feeling. Many scholars in Taiwan then were taken away by force then. Up to present, we still do not know where they are. For example, Prof. Chen's mysterious death at NTU after an interrogation, had conditions similar to those of Mr. K.

40. For instance, The Code of Criminal Procedure § 245 II, "the advocate of the accused or suspect must be present at any examination given to the accused or suspect by the public prosecutor, or judicial police officer, or judicial police." It protects the right of the assistance of an attorney during an investigation. The Code of Criminal Procedure § 27 I, "any accused may employ an advocate at any time and the suspect who receives an investigation by a judicial police officer or judicial police may employ an advocate as well."

Therefore, the procurator should execute the punishment utilizing the due process of law.

Mr. K was arrested on his 30th birthday. In the end, he was executed, for reasons we are still not cognisant to. The whole procedure pointed out, that no matter how hard Mr. K tried, or how much effort he expended, it had no effect in countering his sentence.⁴¹ It was like the officer by the door of the courtroom, who would not let the country people find the light. Even more, the officer made his efforts look ridiculous.

Two officers killed Mr. K. They did it in an unmerciful way. K was executed without a verdict. The death penalty was carried out without due process of law. The defendant was like a stray dog waiting to be killed.

Kafka tried to describe, how Mr. K tried hard to live, however, in the end he received no justice. Justice and truth might exist, but it was like the light through the door of law. It seemed so real but the man could not get in.⁴² Mr. K's life had been arranged before he was born. No matter how hard he tried, his fate was unavoidable. And this is the helpless end Kafka tried to present to us.⁴³

VIII. CONCLUSION

By the comparison of Law and Literature, we discover how two different subjects integrate. Law people learn through these classics. It makes them more sensitive to humanity and society. Law is the standard of human behavior. The subjects of Law were limited by real society. But it has the same situation with Literature. Law people can find inspiration and direction by the unlimited Literature. Through these classics, law people may also write more fluently. The more important thing is, we learn through the sensitivity and compassion in Literature. Its riches enter our lives and through it, "literature keeps one's conscious."⁴⁴

In the novel of "The Trial" from Franz Kafka, we found the greatest part would not be the critics of justice, but the fallacy of the judicial system. It alerts us to the importance of a reasonable system. If there's no reasonable judicial system, people might be killed at a man's will in anytime.

41. LIN-SHIA CHEN & GU-IN CHEN (ED.), *EXISTENTIALISM: KAFKA* 247 (The Commercial Press, 1999).

42. WEISBERG, *supra* note 2, at 136.

43. In the last scene of "The Trial," it's usually the high light of the novel.

44. Kao, *supra* note 12.

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