

LAW IN THE OPPOSITE DIRECTION OF LITERATURE: THE IDEA OF CREATION IN THE CONTEMPORARY PARADIGM

O DIREITO NA CONTRAMÃO DA LITERATURA: A CRIAÇÃO NO PARADIGMA CONTEMPORÂNEO

EL DERECHO EN LA CONTRAMANO DE LA LITERATURA: LA CREACIÓN EN EL PARADIGMA CONTEMPORÂNEO

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ABSTRACT

This article is part of the field of Law and Literature studies and aims at problematizing creative freedom in the judicial sphere. For that, it presents a diachronic synthesis of the concepts of creation as formulated by literary theory and highlights its articulation with the notions of intertextuality and the horizon of understanding. Then the study refers to *Pierre Menard, author of the "Quixote"*, a short story by J. Borges, to explain the conception - derived from the assumption of the hermeneutic paradigm - that literary invention results from the process of reading, interpretation and rewriting. Finally, it indicates the contexts that gave rise to the conceptions that postulate the freedom of creation of the law in the jurisdictional sphere, addressing, especially, the positions of M. Cappelletti on the creative performance of the judges. Such an approach makes it possible to note the anachronism of the theories of law that link the concept of creation to the idea of creative freedom - whose effects are activism and judicial decisionism - given the current understanding that literature theory has of the central role of interpretation in the creative process.

Keywords: Activism; Creation; Decisionism; Law and literature; Interpretation.

RESUMO

O artigo inscreve-se no campo dos estudos de direito e literatura e tem como objetivo problematizar a liberdade criativa no âmbito jurisdicional. Para tanto, apresenta uma síntese diacrônica dos conceitos de criação formulados pela teoria literária e destaca sua articulação com as noções de intertextualidade e de horizonte de sentido. A seguir, recorre ao conto *Pierre Menard, autor do «Quixote»*, de J. L. Borges, para explicitar a concepção - decorrente da assunção do paradigma hermenêutico - de que a invenção literária resulta do processo de leitura, interpretação e reescrita. Por fim, indica os contextos que propiciaram o surgimento das concepções que postulam a liberdade de criação do direito na esfera jurisdicional, abordando, especialmente, as posições de M. Cappelletti acerca da atuação criativa dos juízes. Tal percurso possibilita constatar, o anacronismo das teorias do direito que vinculam o conceito de criação à ideia de liberdade criativa - cujos efeitos são o ativismo e o decisionismo judicial - face à atual compreensão que a teoria da literatura tem do papel central da interpretação no processo criativo.

Palavras-chave: Ativismo; Criação; Decisionismo; Direito e literatura; Interpretação.

RESUMEN

El artículo se inscribe en el campo de los estudios de derecho y literatura y tiene como objetivo problematizar la libertad creativa en el ámbito jurisdiccional. Para ello, presenta una síntesis diacrónica de los conceptos de creación formulados por la teoría literaria y destaca su articulación con las nociones de intertextualidad y de horizonte de sentido. A continuación, recurre al cuento *Pierre Menard, autor del «Quijote»*, de J. Borges, para explicitar la concepción - originada por la asunción del paradigma hermenéutico- de que la invención literaria resulta del proceso de lectura, interpretación y reescritura. Por último, indica los contextos que propiciaron el surgimiento de las concepciones que postulan la libertad de creación del derecho en la esfera jurisdiccional, abordando, especialmente, las posiciones de M. Cappelletti acerca de la actuación creativa de los jueces. Este camino permite constatar, el

anacronismo de las teorías del derecho que vinculan el concepto de creación a la idea de libertad creativa -cuyos efectos son el activismo y el decisionismo judicial- frente a la actual comprensión que la teoría de la literatura tiene del papel central de la interpretación en el proceso creativo.

Palabras clave: Activismo; Creación; Decisionismo; Derecho y literatura; Interpretación.

SUMMARY

INTRODUCTION; 1 THE PHENOMENON OF CREATION IN LITERARY STUDIES; 2 THE NOTIONS OF INTERTEXTUALITY AND HORIZON OF UNDERSTANDING; 3 THE LITERARY INVENTION: READING, INTERPRETING AND REWRITING 4 THE ROLE OF THE JUDGE: CREATOR OR INTERPRETER?; CONCLUSION; REFERENCES.

INTRODUCTION

In the last decade, the Brazilian legal community has witnessed the increasing approximation of Law with Literature and with Humanities in general. Such an approach - seen with some enthusiasm by some and with severe mistrust by others - is undoubtedly a potential path for problematization and critical revision of law, but its effective contribution requires serious theoretical and methodological questions in order to guide a so-called interdisciplinary field of study.

This is because it must be taken into account that (1) law, even if it recognizes its status as a discursive and narrative phenomenon, maintains specificities that distinguish it from literature; (2) the field of literature, on the other hand, cannot be restricted to literary texts, usually used as mere ornament that is put at the service of erudition or argumentative strategies, if not by the yearning of incipient researchers who, frustrated with the formalism and the normativity of law, seek to introduce something playful in the legal universe to combat them; (3) law and literature studies must assume their commitment to the production of knowledge, which requires - regardless of any preferences to the contrary - an appropriate theoretical and methodological apparatus, and for this to be done, it is necessary to foster interlocution between the theory of law and the theory of literature.

One of the themes that certainly deserves a prominent position in this interlocution is the phenomenon of creation. The choice for this theme, which is linked to legal hermeneutics and decision theory, results from its relevance in a legal context that is marked by activism and decisionism, thus the purpose of this text, which is to problematize the choice for the creative freedom of judges and courts.

In order to reach this objective, a synthesis of the concepts of creation that were formulated by literary theory, from Classical Antiquity to contemporaneity, is presented to

highlight the contributions of the notions of intertextuality and the horizon of understanding to the phenomenon of creation.

Afterwards, using the short story *Pierre Menard, author of the "Quixote"*, by Jorge Luis Borges, we try to explain the conception that literary invention results from the process of reading, interpretation and rewriting, relating it to the assumption of the hermeneutic paradigm in the human sciences.

Next, we examine the contexts that favored the emergence of conceptions that postulate the freedom of creation of the law in the jurisdictional sphere, with the intention of approaching, in an illustrative way, the formulations of Mauro Cappelletti about the creative performance of the judges in the work *Legislator judges?*, elected by the virtue of its relevance in the Brazilian academic context.

Finally, we point out the discrepancies found in the confrontation of the understandings of the creation phenomenon, which are adopted contemporaneously in theories of Law and Literature.

1 THE PHENOMENON OF CREATION IN LITERARY STUDIES

In the field of literary studies, many theories and concepts have been formulated in the course of time in attempt to elucidate the phenomenon of creation, which requires, even if synthetically, one to study such development, beginning with situating the notions of convention and originality, as well as of source and influence, before addressing the contemporary postulates.

With the Aristotelian conception of *mimesis* - which differs from the Platonic conception - rises the idea that art is not an imitation of reality, it is not a copy, but a re-creation. Although in the Book IX of *Poetics* Aristotle¹ emphasized that the poet - contemporarily, a writer - must first of all be a creator of stories - anticipating the importance of the creative imagination, which will be theorized for the first time by Plotinus², in the 3rd century -, for centuries the Aristotelian principles were privileged and allowed to fix the parameters and the limits of the literary creation, extracting postulates and traditional models that, from time to time, were resumed, as it happened in Classicism, 16th century, and in the Neoclassicism, 18th century.

It is observed, therefore, the understanding that tradition is constituted by models, that is, by what is called convention. While conventions define the themes and forms of expression of

¹ Cf. ARISTÓTELES. Poética. In: ARISTÓTELES; HORÁCIO; LONGINO. *A poética clássica*. Trad. de Jaime Bruna. São Paulo: Cultrix, 1997. p. 17-52.

² PLOTINO. *Enéadas*, V-VI. Trad. de Jesús Igal. Madrid: Gredos, 1998.

a generation of writers - that is, the repertoire of possibilities that the writer shares with their contemporaries - tradition refers to the set of works that a generation of writers receives from their predecessors.

It will be only at the end of the 18th century, with the outbreak of the German movement called *Sturm und Drang* (storm and impetus), arising from the opposition to the principles advocated by the French Enlightenment, which gives rise to Romanticism, that arise the aesthetic postulates that - from the notion of genius, understood as creative spirit - would highlight the idea that “art is art as an expression of incalculable subjectivity and not measurable by norms.”³

With the non-acceptance by the Romantics of absolute and eternal rules and literary categories - which tyrannized the writer and limited creative freedom - and, consequently, with the negation of the models that had been imposed since Classical Antiquity and which survived throughout the Middle Ages and the Modern Age, the premise of the impossibility of generalizations in the field of literary production takes on weight, privileging the originality of each work as a result of the writer’s unpredictable creative power.

However, one cannot lose sight of the fact that, of course, the innovative aesthetics of Romanticism founded a new tradition: a phenomenon which, moreover, is visible in any sphere of human production.

In any case, as well as the concept of tradition, the concept of creation, which until then was linked to the epiphany of a transcendent entity - such as the action of the muses or the divine inspiration - adds to that the idea of *originality*: with the cult of the subject, the writer fully assumes the status of creator, and creation bears the indelible mark of individuality and subjectivity.

In addition, the nationalist postulate of romantic aesthetics gives rise, in the field of literary theory, to the notions of *source* and *influence*, which are historically linked both to the fixation of national literatures and to the identification of points of contact between authors of different nationalities.

Being the literary work understood as the production of the creative genius, it is not surprising that the notions of source and influence, linked to the ideas of originality and imitation, are the starting point of comparative literature studies, discipline introduced in the academic field throughout the 19th century and that it was possible to formulate different

³ KORFMANN, Michael. *A diferenciação da literatura moderna alemã no processo constitutivo da sociedade funcional: uma abordagem sistêmica baseada em Niklas Luhman*. 2002. 274 f. Tese (Doutorado em Letras)- Instituto de Letras, Universidade Federal do Rio Grande do Sul, Porto Alegre, 2008. p. 126.

theoretical constructions to elucidate the ways in which a certain author is influenced by peers or to them serves as a source of inspiration.

In this same century, in contrast to the romantic conception that reacted to the imposition of rules and valued inspiration in its raw state, the idea that rationality is the essential factor of creation begins to gain momentum - highlighted by the positivist rationale - the idea that reason is the essential ingredient of creation⁴.

The models and theories proposed by August Comte, Charles Darwin, Hyppolite Taine, Karl Max and Sigmund Freud would influence both the new conceptions of creation that emerge in the field of literary theory and the production of works that are linked to the different aesthetics that marked the 19th century and the beginning of the 20th century.

The diversity of aesthetic currents of this period leads to the realization that the essential component of originality is the critical spirit: the writer does not only understand how to seek the improvement of what had been created by other writers. Thus, paradoxically, the writer draws inspiration from the convention in order to break with it.

In other words, it is said that the great literary works are characterized by their capacity to problematize the preceding aesthetic conventions and to propose to re-invent what is literature. *Don Quixote* - inscribed in the distant 17th century - acquires the status of an exemplary case, since it is the first modern novel in which one can find criticism of the of the preceding aesthetics period, allied to the expression of the power of literature and the threat it represents due to the effects it can cause⁵, after all, it was due to reading chivalry tales that the good gentleman lost his reason: “so much in those readings he became involved, that the nights were read to him from the sun set until the dawn, and the days, from dawn until late afternoon. And so, the little sleep and of the much read have dried his brain”⁶.

⁴ A foreshadowing of this can be found in Edgar Allan Poe’s essay *The Philosophy of Composition*, in which the American Romantic writer seeks to characterize the rational procedures involved in the creative process of his famous poem *The Raven*. POE, Edgar Allan. *O corvo*. São Paulo: Empíreo, 2015. [Edição trilingue].

⁵ The same occurs in the *Divine Comedy* - which precedes Cervantes’s masterpiece but is classified as epic - when it is considered that reading the story of Lancelot and Guinevere would have been the cause of the perdition of Francesca di Rimini and Paolo Malatesta. ALIGHIERI, Dante. *La divina commedia*. Milano: Garzanti, 1988. Another classic example is that of Emma Bovary, since the reading of romantic novels in the youth would collaborated to forge to her a dreamy and fanciful personality. FLAUBERT, Gustave. *Madame Bovary*. Paris: Gallimard, 2001.

⁶ Originally: “En resolución, él se enfrascó tanto en su letura, que se le pasaban las noches leyendo de claro en claro, y los días de turbio en turbio; y así, del poco dormir y del mucho leer, se le secó el cerebro de manera que vino a perder el juicio”. CERVANTES, Miguel de. *El ingenioso hidalgo Don Quijote de la Mancha*. Barcelona: Pareja, 1981. p. 23.

It is through satire that Cervantes' criticism is fully felt. But what causes the satire of to be attributed with originality? This is the question to be formulated, also valid for parody and pastiche, for example. A matter of singular relevance in the face of the evidence that such strategies are the most significant in the composition of contemporary literary works.

2 THE NOTIONS OF INTERTEXTUALITY AND HORIZON OF UNDERSTANDING

At the beginning of the 20th century, the Russian formalists - whose production was a milestone of modern literary theory -, when approaching the process of literary creation and its constant renewal, developed the concept of *ostranenie*, a term that can be translated as singularization, estrangement or dis-familiarization, to be applied both at the level of language - given that poetic language differs from everyday language, from scientific language and, it should be explained, from legal language - as well as from the level of content and form, by the potential rupture with worldviews and aesthetic conventions already established.

There were also the Russian formalists, especially Yuri Tynianov⁷, who not only provided new criteria to conceive the literary genesis and evolution, from the concept of constructive function, but also made it possible to broaden the field of literary studies by arguing that language as a social phenomenon and literature is a particular process of the elaboration of verbal language, so it must be recognized that literature, due to its verbal aspect, correlates with social life, and one cannot therefore fail to examine the correlation between the literary series and the other social series.

The formulations by Mikhail Bakhtin⁸, in particular the notions of dialogism and polyphony, served as a basis for Julia Kristeva's elaboration of the concept of intertextuality: "every text is constructed as a mosaic of quotations, every text is an absorption and transformation of another text"⁹.

Writer and Semioticist Umberto Eco, in speaking about his novel *The Name of the Rose*, emphasized the importance of other books in the construction of his own, "I rediscovered what

⁷ Cf. TYNIANOV, J. Da evolução literária. In: EIKHENBAUM, B. et al. *Teoria da literatura: formalistas russos*. Trad. de Ana Mariza Ribeiro, Maria Aparecida Pereira, Regina Zilberman e Antonio Carlos Hohlfeldt. Porto Alegre: Globo, 1971. p. 105-118.

⁸ Cf. BAKHTIN, Mikhail. *Questões de literatura e de estética: a teoria do romance*. Trad. de Aurora Fornoni Bernardini et al. São Paulo: Unesp; Hucitec, 1988; BAKHTIN, Mikhail M. *Estética da criação verbal*. Trad. de Maria Ermantina Galvão Gomes Pereira. São Paulo: Martins Fontes, 1992a; BAKHTIN, M. *Marxismo e filosofia da linguagem*. 6. ed. Trad. de Michel Lahud e Yara Frateschi Vieira. São Paulo: Hucitec, 1992b.

⁹ KRISTEVA, Julia. *Introdução à semanálise*. Trad. de Lúcia Helena França Ferraz. 2. ed. São Paulo: Perspectiva, 2005. p. 68.

writers have always known (and often said): books always speak of other books, and every story tells a story already told before”¹⁰.

For Gérard Genette¹¹, the focus is the image of the palimpsest: the parchment whose handwritten text was scraped for reuse and in which parts of the previous text remain visible and mingle with the new text that was written on it.

Therefore, it is not without reason that one often experiences a kind of *déjà-vu* when reading a text. The linear reading of a text breaks when the reader perceives the presence - by implicit reference or allusion - of another text, and the meaning of this text is incorporated into the comprehension of the text being read, whether by contrast or convergence.

Considering the effects of the phenomenon called intertextuality, Laurent Jenny states: “Intertextuality is therefore a disturbing machine. It is a question of not letting the sense in quiet - of avoiding the triumph of the *cliché* by a work of transformation”¹².

From the point of view of the analysis of the creation phenomenon, in the context of literary historiography and comparative literature, the concept of intertextuality makes it possible to go beyond the concepts of source and influence - which focused on the relation between the production of a given author and the models followed - to privilege the work as a *social fact*.

The premise is that the text is linked both to the set of texts that precede it and to the historical and social context of its production. This idea is therefore linked to the postulate that history and society *are* texts which the writers read and appropriate and are part of, inserting themselves in history and in society, texts that the writer rewrites.

It is, however, from the studies of the Aesthetics of Reception, especially from H.-R. Jauss¹³, that the notion of aesthetic deviation is theorized, from which results the transgressor

¹⁰ ECO, Umberto. *Pós-escrito a O nome da rosa*. Trad. de Letizia Zini Antunes e Álvaro Lorencini. Rio de Janeiro: Nova Fronteira, 1985. p. 20.

¹¹ In the words of G. Genette: “A palimpsest is a parchment whose first inscription was scraped to trace another, which does not conceal it in fact, so that one can read it by transparency, the old under the new. Thus, in the figurative sense, we understand by palimpsests (more literally: hypertexts) all works derived from an earlier work, by transformation or by imitation. From this secondhand literature, which is written through reading, place and action in the literary field are, and regrettably, not recognized. We have tried to explore this territory here. One text can always read another, and so on, until the end of the texts”. GENETTE, Gérard. *Palimpsestos: a literatura de segunda mão*. Trad. de Cibele Braga et al. Belo Horizonte: Viva Voz, 2010. p. 5.

¹² JENNY, Laurent. A estratégia da forma. In: *Intertextualidades*. [Tradução de *Poétique - Revue de Théorie et d'Analyse Littéraires*, n. 27, 1976]. Trad. de Clara Crabbé Rocha. Coimbra: Almedina, 1979. p. 44.

¹³ Check: JAUSS, Hans Robert. *A literatura como provocação: história da literatura como provocação literária*. Trad. de Teresa Cruz. Lisboa: Veja, 1993.

character of literature - which, as already pointed out, beginning with the very use of language, materializes in different aspects and levels.

However, whenever the deviation becomes institutionalized - be it at the level of form and content - its potential for deautomatization is exhausted, whenever subversion is canonized, it acquires the status of tradition and ceases to be subversive. From this, results the need for a constant renewal of literary production, a renewal which - considering the conception that a work of literature has meaning only in its relation to other works - would consist, in the last analysis, not in creation, but in *repetition*, in such a way that all writing, as stated by Emir Monegal¹⁴, presupposes and implies *reading*.

But the most interesting contribution of Aesthetics of Reception is to incorporate, in literary studies, the concept of a horizon of understanding, whose origin goes back to Edmund Husserl¹⁵ and which is also developed by Hans-Georg Gadamer¹⁶.

The concept of horizon allows us to contemplate the implication of the individual dispositions of the reader - the contents of consciousness, temporally conditioned intuitions and the history of their experiences - in the structuring and meaning that emerge in the reading process, a process that presupposes understanding, interpretation and in which the origin of any act of writing production would be added.

In short, it is a question of privileging both the historical and cultural context, which includes the inscription and circulation of signs and is concretized on the axis of intersubjectivity - as was already done from the notion of intertextuality -, as well as the experiences lived by each subject in the space-time of their own subjectivity, that is, in their facticity and historicity.

It is appropriate to evoke the paradox of language pointed out by Didier Anzieu: in order to become a subject, says the French psychoanalyst, it is necessary for the human being to acquire the “language of all”, but language being the common code for all the speaking subjects, “those who speak it update it, inflame it, modulate it, transgress it, pervert it to express it, to make oneself recognized, to impose one’s subjectivity”¹⁷.

¹⁴ MONEGAL, Emir R. *Borges: uma poética da leitura*. Trad. de Irlemar Chiampi. São Paulo: Perspectiva, 1980.

¹⁵ Cf. HUSSERL, Edmund. *Meditações cartesianas: introdução à fenomenologia*. Trad. de Maria Gorete Lopes e Sousa. Porto: Rés, [s. d.].

¹⁶ Cf. GADAMER, Hans-Georg. *Verdade y método*, I. Trad. de Ana Agud Aparicio e Rafael de Agapito. 10. ed. Salamanca: Sígueme, 2003.

¹⁷ ANZIEU, Didier. Para uma psicolinguística psicanalítica. In: ANZIEU, Didier et al. *Psicanálise e linguagem: do corpo à fala*. Trad. de Monique Aron Chiarella e Luiza Maria F. Rodrigues. São Paulo: Casa do Psicólogo, 1997. p. 19.

Émile Benveniste also addresses issues quite close to those contained in Anzieu's formulation, by defining subjectivity as the "capacity of the speaker to propose himself as subject"¹⁸, because only language is capable of substantiating the subject in his reality, which is that of being.

It is crucial to recognize, in the assertions of the two authors cited, the influence of Martin Heidegger's thought - "language is the abode of being"¹⁹, that is, the being *is* language, it is the language that enables reality, because it is the medium through which the being is allowed to perceive - this thought promoted a new understanding of language and established the bases of philosophical hermeneutics.

3 THE LITERARY INVENTION: READING, INTERPRETING AND REWRITING

The twist effected in the antinomic concepts of creation and tradition in view of the conception that literary invention²⁰ is linked to reading and translation²¹ - consisting of interpretation and rewriting - can be masterfully illustrated using the story *Pierre Menard, author of "Quixote"*²², by Jorge Luis Borges, that was published in the Magazine Sur, in 1939, and later in the collection entitled *El jardín de senderos que se bifurcan*, in 1941²³.

In this story, the first aesthetic deviation is felt in the very construction of the narrative, which presents itself as a review or critical note, since the text consists of the catalog and the comments that the narrator offers of the critical and literary production of Pierre Menard, a fictitious writer.

Thus, the two plans are present in the story: that of the fictional narrative, which includes the research on Pierre Menard's production; and that of the critical remarks that the

¹⁸ BENVENISTE, Émile. Da subjetividade na linguagem. In: BENVENISTE, Émile. **Problemas de linguística geral**, I. Trad. de Maria da Glória Novak e Maria Luisa Neri. Campinas: Pontes, 1995. p. 286.

¹⁹ HEIDEGGER, Martin. Sobre o «Humanismo». In: SARTRE, J.-P.; HEIDEGGER, M. **Conferências e escritos filosóficos**. Trad. de Ernildo Stein. São Paulo: Abril Cultural, 1973. p. 347.

²⁰ The term *literary invention* will be used to emphasize the particularity of the conception of creation implied in it.

²¹ The idea is developed by E. Monegal in a book dedicated to the theme of reading in Borges - in which he analyzes, among other texts, the short story under examination -, Monegal considers that Borges "postulates that rereading, translating, is part of literary invention. the literary invention" (MONEGAL, *op. cit.*, p. 19).

²² BORGES, Jorge Luis. Pierre Menard, autor do «Quixote». In: _____. **Ficções**. Trad. de Davi Arrigucci Jr. São Paulo: Comp. das Letras, 2007. p. 34-45.

²³ Cf. MONEGAL, *op. cit.*

narrator offers of Menard's creative process, through which the prominent role that reading, interpretation and rewriting acquire in "literary invention" is evidenced.

The survey of the works of Pierre Menard that would have been published is very particular and, by the way, completely Borges-like, being perceived what is denominated stylistic originality of a writer and reminding, among others, the story *The analytical language of John Wilkins*²⁴ (1952), which includes the famous taxonomy of the "Chinese Encyclopedia" that would have inspired Michel Foucault to write *The words and the things*²⁵.

Among the unpublished texts of Pierre Menard - his *underground* production, using a term by the narrator -, chapters 9 and 38 of the first part of *Don Quixote* and a fragment of chapter 22.

The narrator tells that Menard

did not want to compose another *Quixote* - which would be easy - but his *Quixote*. Needless to add that he never took into account a mechanical transcription of the original; he did not intend to copy it. His admirable ambition was to produce some pages that coincide - word for word and line by line - with those of Miguel de Cervantes²⁶.

In order to carry out his project, Menard - who had lived in France at the beginning of the 20th century - had initially considered the hypothesis of "to know Spanish well, to recover the Catholic faith, to fight against the Moors or against the Turk, to forget the history of Europe between the years 1602 and 1918, to be Miguel de Cervantes"²⁷, but soon discarded it, because it considered that

Being, somehow, Cervantes and reaching *Quixote* seemed to him less arduous - hence less interesting - than to remain Pierre Menard and reach *Quixote* through the experiences of Pierre Menard²⁸.

Abdicating, therefore, to find in Cervantes's experiences or in the historical context of the Spanish writer the key of reading that would enable him to rewrite the work, Menard faces the need to restrain his own creative impulses, as explicit in one of the letters addressed to the narrator:

²⁴ BORGES, Jorge Luis. O idioma analítico de John Wilkins. In: _____. *Outras inquisições*. Trad. de Davi Arrigucci Jr. São Paulo: Comp. das Letras, 2007. p. 121-126.

²⁵ Cf. FOUCAULT, Michel. *As palavras e as coisas: uma arqueologia das ciências humanas*. 4. ed. Trad. de Salma Tannus Muchail. São Paulo: Martins Fontes, 1987.

²⁶ BORGES, Pierre Menard..., op. cit., p. 38.

²⁷ Ibidem, p. 39.

²⁸ Ibidem, p. 39.

My solitary game is governed by two polar laws. The first allows me to test variants of a formal or psychological character; the second obliges me to sacrifice them to the 'original' text and to consider irreconcilably this annihilation...²⁹.

This results, as the narrator says, that "the text of Cervantes and that of Menard are verbally identical"³⁰, but he warns that Menard's is "almost infinitely richer"³¹. To demonstrate this, he quotes an extract from Cervantes's text: "truth, whose mother is history, the semblance of time, the deposit of actions, witness of the past, example and warning of the present, warning of the future"³².

In the sequence, the narrator comments that, written by the "ignorant genius" in the 17th century, it is merely a rhetorical eulogy of history, while the same phrase, when written by Pierre Menard, contains a philosophy of history. In Menard's text the phrase reveals an astonishing idea - history is the mother of truth - and this occurs, according to the narrator, because in writing it

Menard, contemporary of William James, does not define history as an inquiry of reality, but as its origin. The historical truth, for him, is not what happened; is what we think happened. The final clauses - [of which history is] *example* and *note* of the present, *warning* of the future - are blatantly pragmatic³³.

Thus, from the most exact and rigorous reproduction of a text, the maximum of difference results, given not so much the historicity that, of course, would be printed in which each one of the texts from the context of its production - which, in the case of Menard's rejoinder, would even include the already incorporated reading of Cervantes's text - which would in itself make possible new interpretations, but, above all, the historicity implied in the meanings attributed to such texts by different interpretive communities³⁴.

This is because, as G. Genette points out,

The time of literary works is not the definite time of writing, but the indefinite time of reading and memory. The meaning of books is in front of us and not behind, it is in us: a book is not a finished sense, a revelation that we must

²⁹ Ibidem, p. 41.

³⁰ Ibidem, p. 42.

³¹ Ibidem.

³² Ibidem.

³³ Ibidem, p. 43.

³⁴ Concept formulated by Stanley Fish, signer of reader-response criticism, in his analysis of the interpretive strategies agreed and shared by members of a given community. FISH, Stanley Eugene. **Is there a text in this class?: the authority of interpretive communities**. Cambridge and London: Harvard University Press, 1980.

receive, it is a reserve of forms that await its meaning, it is “the imminence of a revelation that does not” and that each one must produce for themselves³⁵.

In short, Borges’ tale can be seen as a metaphor for the writer’s conception as a translator or interpreter and for the importance of reading and interpretation in the writing process. Such an understanding is the corollary of the theoretical shift promoted in the field of literary studies - with the abandonment of conceptions that related the phenomenon of creation to the originality, subjectivity and individuality of the writer for the understanding that literary invention results from reading, rewriting - which reflects the prominent position attributed to hermeneutics in the last century.

This context favored the emergence of numerous theoretical questions involving the interpretative act and also provided new parameters for the work of literary criticism, inasmuch as it was necessary to recognize, as U. Eco clarifies, that multiple possibilities of interpretation do not mean admissibility of any interpretation³⁶.

In the field of literary studies, this is not a controversial topic nowadays and certainly deserves the attention of lawyers, as Lenio Streck pointed out so many times in stating that one cannot say anything about anything³⁷.

4 THE ROLE OF THE JUDGE: CREATOR OR INTERPRETER?

In the field of law, the issue of creation is linked to the lacunae of the legal system and to the discretionary power of the judge, and because it is circumscribed within the scope of the interpretation of the law in its application to the concrete case, it refers directly to legal hermeneutics and to the theory of decision.

Although the return to this theme has been constant in the legal debates of the last two hundred years and although its relevance - due to the consequences that the creative freedom of the judges has in the “world of life” - few jurists are dedicated to it directly from a theoretical perspective, resulting in conceptual precariousness and an anachronistic understanding of creation. As examples of exception to the rule, there are articles such as the

³⁵ Originally: “Le temps des oeuvres n’est pas le temps défini de l’écriture, mais le temps indéfini de la lecture et de la mémoire. Le sens des livres est devant eux et non derrière, il est en nous : un livre n’est pas un sens tout fait, une révélation que nous avons à subir, c’est une réserve de formes qui attendent leur sens, c’est « l’imminence d’une révélation qui ne se produit pas », et que chacun doit produire pour lui-même”. GENETTE, Gérard. *La utopie littéraire*. In: _____. *Figures I*. Paris: Seuil, 1966. p. 132.

³⁶ ECO, Umberto. *Interpretação e superinterpretação*. 3. ed. São Paulo: Martins Fontes, 2005.

³⁷ This sentence is also present in the first part of *Hermenêutica jurídica e(m) crise*. Cf. STRECK, Lenio. *Hermenêutica jurídica e(m) crise*. 11. ed. Porto Alegre: Livraria do Advogado, 2014.

one by Eugenio Bulygin, *Los jueces ¿crean derecho?*, which identifies three theoretical aspects on the creation of the law by judges³⁸; and one by Antonio-Enrique Pérez Luño, *¿Qué significa juzgar?*, which presents a didactic taxonomy of the meanings of the term *create* in the scope of law, relating them with different theoretical and juridical attitudes³⁹. More scarce, however, are jurists who, like Pablo Castro Miozzo⁴⁰, deal with the relation between creation and interpretation under the hermeneutical bias.

A panoramic view of the incidences of the creation theme in the field of legal discussions makes it possible to observe that - as in literature - there is in law a constant oscillation between conceptions of prevalence sometimes objectivist sometimes subjectivist and that the bet on the creative freedom of the judge is always associated to subjectivity.

In view of this, we examine two very particular contexts in which the attribution of creative power to the judges takes place.

The first of them is part of the course that leads to the legalism of the school of exegesis and the logical-conceptual orthodoxy of pandectics - related to the phenomenon of codification that marked the 19th century - towards the opening for creative freedom inaugurated at the beginning of the 20th century, by the postulates of the *Free scientific investigation* of François Géný and by the formulations of the theorists of the Free Law School⁴¹.

The criticism of F. Géný - whose aim was the School of Exegesis and the dogma of completeness of the juridical order - is related to the inherent limitations of positive law, which cannot predict the infinity of situations arising from the complexity of social relations, and the need for broadening the freedom of action of judges, who should remedy possible omissions and gaps in existing legal norms.

Thus, his proposal to overcome the absolute bond of the judge to the law did not imply the defense of total judicial freedom. What F. Géný advocated was the idea of free scientific investigation, understood as free because it allowed the judge to seek, outside positive law, the

³⁸ BULYGIN, Eugenio. *Los jueces ¿crean derecho?* *Isonomía* - Revista de Teoría e Filosofía del Derecho, n. 18, p. 7-25, abr. 2003.

³⁹ PÉREZ LUÑO, Antonio-Enrique Pérez. *¿Qué significa juzgar?* *Doxa* - Cuadernos de Filosofía del Derecho, n. 32, p. 151-176, 2009.

⁴⁰ MIOZZO, Pablo Castro. *Interpretação jurídica e criação judicial: de Savigny a Friedrich Müller*. Curitiba: Juruá, 2014.

⁴¹ Aiming at the analysis of specific questions, the Jurisprudence of Interests - whose foundations are located in the School of Free Law and in the ideas presented by Rudolpf von Ihering in *The Work of Law* - as well as the thought of Philipp Heck, its greatest exponent. On the subject, see: IHERING, Rudolf von. *El fin en el derecho* [1877]. Trad. de Leonardo Rodríguez. Panplona: Anacleto, 2005; HECK, Philipp. *El problema de la creación del derecho* [1912]. Trad. de Manuel Entenza. Granada: Comares, 1999.

legal solution to the concrete case, but conditioned by the scientific investigation of the objective elements that, being inherent to the legal order, should support the decision⁴².

The Free Law School, which also has its roots in opposition to the conceptual formalism of the French exegetes and the pandectists, brings together scholars who, although having adopted different premises and formulating each their own theoretical construction, share the idea of impossibility of completeness of any legal system and argue, as Mario Losano points out, that “alongside the formal law, emanated by the legislator, there is a free law, a *freies recht*”⁴³, settled down in the judicial circuit, because the judge, filling the gaps of the system, would assume the function of creating the law.

The relevant divergence between the theorists of the Free Law School lies, basically, in the extent and degrees of creativity attributed to the judges - derived from different conceptions of the science of law, the role of the judge and the legal gap - and the synthesis of the formulations of three of these theorists on creative freedom in the judicial sphere is sufficient to provide an overview of the relevance of the theme of creation in the course of the 19th to the 20th centuries: Oskar von Bülow understands that the judge can independently produce law and, as both legislative activity and judicial activity are based on the ordering will of the State, the basis of the act of the judge is the authority of the State, from which the sentence draws its normative force⁴⁴; Eugen Ehrlich, although it establishing limits to the creative performance of the judge, to which he attributes a supplementary character, in considering that “any investigation of the law is necessarily creative, even when it appears to be mere application, since the application of a general rule to the case necessarily passes through the hands of an individual personality”⁴⁵, makes room for the subjectivity of the interpreter; and

⁴² According to the author: “the work that falls to the judge seemed to me that it can be qualified as free scientific investigation; free research, since it eludes the action of a positive authority, scientific research, at the same time, because it cannot find solid foundations but in the objective elements that only science can reveal. Originally: “el trabajo que incumbe al juez me ha parecido poder calificarlo libre investigación científica; investigación libre, toda vez que aquí se sustrae a la acción propia de una autoridad positiva, investigación científica, al próprio tempo, porque no puede encontrar bases sólidas más que en los elementos objetivos que sólo la ciencia puede revelar”. GÉNY, François. **Método de interpretación y fuentes de derecho privado positivo** [1913]. Granada: Comares, 2000. p. 412.

⁴³ LOSANO, Mario G. **Sistema e estrutura no direito: o século XX**. Trad. de Luca Lamberti. São Paulo: Martins Fontes, 2010. v. 2, p. 160.

⁴⁴ BÜLOW, Oskar von. **Legge e giurisdizione** [1885]. In: BÜLOW, Oskar von; ZORN, Philipp. **Legge e giurisdizione**. Seregno: Herrenhaus, 2012. p. 11-44.

⁴⁵ Originally: “toda investigación del Derecho es necesariamente creadora, incluso ali donde aparece como mera aplicación, [...] ya que la aplicación de una regla general al caso concreto pasa necesariamente por las manos de una personalidad individual” (EHRlich, Eugen. **Libre investigación del derecho y ciência del derecho libre** [1903]. In: EHRlich, Eugen. **Escritos sobre sociología y jurisprudência** [1906]. Trad. de Juan Antonio Gómez García, José Luiz Muñoz de Baena e Gregório Mórchon. Madrid: Marcial Pons, 2005.

Hermann Kantorowicz, who adopts the most radical stance and introduces the basis of the interpreter's voluntarism, defends not only the possibility, but the duty of the judge to create law - either in the face of lacunae of the order or when the meaning of the normative text is not clear or unambiguous -, and may even decide *contra legem*, since he binds the judgment of the concrete case to the will of the judge and goes so far as to preserve his freedom, to postulate that the sentence does not need to be substantiated⁴⁶.

The second context in which the creative function of the judge acquires strength involves the paradigm crisis generated by the discredit in which legal positivism was launched after the atrocities committed by the Third Reich and the constitutionalism inaugurated after the war, and the growing expansion of the judiciary. In this context, new conceptions of law, its social function and the role of the judge have resulted.

In Brazil, the Democratic Rule of Law is established with the promulgation of the 1988 Constitution, which promotes the consolidation of a new constitutional order. In the same year, the Brazilian edition of *Access to Justice*⁴⁷, with which Mauro Cappelletti becomes known and to become notorious among us.

It was, however, with the work *Legislator judges?*⁴⁸ - published in Italy in 1984, and in Brazil in 1993 - that the Italian comparator reasserted his commitment to jurisdictional creativity and placed the subject on the agenda of the discussions of Brazilian doctrinators, under the auspices of the promises and expectations generated by the still new constitution.

It is the postulates of this text that must be redeemed here by the relation that can be established between the attribution of creative freedom of the judges and judicial activism, which cannot be confused with the enlargement of the role played by the courts in the realization of the fundamental rights and also with the judicialization of politics.

In *Legislator judges?*, as the very question mark in the title indicates, the author proposes to investigate whether the role of the judge should be restricted to the interpretation and application of the law or whether it could cover the creation of the law, as well as if the creative performance of judges and courts would make them lawmakers.

⁴⁶ KANTOROWICZ, Hermann (Gnaeus Flavius). La luta por la ciencia del derecho [1906]. Trad. de Werner Goldschmidt. In: SAVIGNY, Friedrich Karl von et al. *La ciencia del derecho*. Buenos Aires: Losada, 1949. p. 323-373.

⁴⁷ CAPPELLETTI, Mauro; GARTH, Bryant. *Acesso à justiça*. Trad. de Ellen Gracie Northfleet. Porto Alegre: Sérgio Fabris, 1988.

⁴⁸ CAPPELLETTI, Mauro. *Juízes legisladores?* Trad. de Carlos Alberto Alvaro de Oliveira. Porto Alegre: Sérgio Fabris, 1993.

What draws attention first is the use of the expression “creativity of the jurisdictional function” to designate the production of law by the judges, consistent with their understanding that all interpretation is creative and with the explicit elision of the conceptual difference between creation and interpretation, because Cappelletti argues that

The real problem is not that of the clear opposition in the nonexistent reality between concepts of interpretation and creation of Law. The real problem is another, that is, the degree of creativity and the ways, limits and acceptability of the creation of Law by the courts⁴⁹.

For him, increasing the creativity of the judicial function is inevitable and linked to the changes promoted by the *Welfare State* and the task that law assumes in the social states, requiring a change in the behavior of the judges.

The question, therefore, falls not on the *possibility* of judges to create law, but on the different degrees of their creative-interpretative performance, as well as on the limits imposed thereon, since the process of jurisdictional creation would arise from the need to fill the intrinsic gaps to the legislative process and would, according to him, take place through interpretation.

So much so that Cappelletti does not give judges full freedom of interpretation and, underlining the distinction between discretion and arbitrariness, points out that “the judge, though inevitably a law creator, is not necessarily a completely unbonded creator. [...] every civilized legal system sought to establish and apply certain limits to judicial freedom, both procedural and substantial”⁵⁰.

When dealing with degrees of creativity, the Italian jurist points out that decisions related to legislation or precedents would imply less creativity than those based on equity, but he does not fail to point out that legislative norms can totally bind the interpreter, in view of their essential need to be free⁵¹.

It is this freedom that would allow the judiciary to recover from the position of weakness that was launched from the state and legislative enlargement promoted by the *Welfare State*, which would result in the necessary rebalancing of forces and reciprocal control between the legislative, executive and judicial branches.

⁴⁹ Ibidem, p. 21.

⁵⁰ Ibidem, p. 24.

⁵¹ Ibidem, p. 25.

As for the risk of judicial creativity turning judges into lawmakers, Cappelletti argues that - although legislative and judicial procedures are both substantially comparable and both are also creators of the law - legislative and judicial methods of creation show it is clear from a procedural point of view what is evident when considering the peculiarities of the judicial activity, in which are involved: the position super parts of the judge, the contradictory nature of the judicial process and the impossibility of the process being initiated *ex officio* by the judiciary⁵².

In his conclusion, Cappelletti explains that the performance of judges must undoubtedly include the functions of interpreting and creating the law, even in cases where they are forced to apply the law, and justifies their position:

Nor could it be otherwise, for interpretation always implies a degree of discretion and choice, and therefore of creativity, a degree that is particularly high in some domains such as constitutional justice and judicial protection of social rights and diffuse interests⁵³.

The passage quoted clearly illustrates the absence of precise conceptualizations. Throughout the text - in its origin this is General Report presented at a congress of judges of the Court of Appeals⁵⁴ -, the terms creativity, interpretation and discretion are employed with an equivalent meaning. Nor is the presence of a more consistent theoretical-philosophical substrate evident. In such a way that its reading requires caution, besides taking into account the context of its production, the audience to which it was originally intended and the particular characteristics of its author. Cappelletti is a comparator, who easily moves from civil law to common law, and his central concern is practical, not theoretical.

In view of this concern, attentive to the excess and creative abuse of the Italian judges, judicial responsibility is the object of reflection of another work of Cappelletti, *Irresponsible judges?*⁵⁵, published in Italy in 1988, being the first Brazilian edition of 1989, therefore before *Legislator judges?*. In this work, he argues for the need for a directly proportional relationship between power and judicial responsibility, given the incompatibility between a democratic system and unaccountable power, and postulates that the model of social accountability is the most appropriate for the Democratic State, because it is in keeping with the idea contained in

⁵² Ibidem, p. 75-76.

⁵³ Ibidem, p. 128-129.

⁵⁴ Ibidem, p. 13.

⁵⁵ CAPPELLETTI, Mauro. *Juízes irresponsáveis?* Trad. de Carlos Alberto Alvaro de Oliveira. Porto Alegre: Sérgio Fabris, 1989.

the checks and balances formula - central to any democratic system of government - and makes it possible to combine the value of guaranteeing the independence of judges with the democratic value of accountability.

It is interesting to note - especially in view of the arbitrariness of any order currently committed by judges and courts and to the *pampricipiologism*⁵⁶ of which they use to disguise the voluntarism - that, in Brazil, the work *Irresponsible judges?* is the least relevant, and *Legislator judges?*, incomparably more prestigious. The disparity in the reception of law scholars and Brazilian jurists in these two works, besides possibly reflecting the propensity to overestimate the creativity of the judges, is perhaps significant of the tendency of devaluation of the social responsibility to which they should be subject.

In any case, what was important to emphasize - when referring to the dimension that creation has assumed in Brazilian law, by questioning the understanding of creation jurists and by problematizing the way they still relate it to an ideal of freedom - is the need to rethink the concept of creation under the theory of law, under a hermeneutic-philosophical bias. In this task, literature theory, through the interlocution provided by studies in Law and Literature, can collaborate.

CONCLUSION

As can be seen, the field of literary studies has been marked in the last two hundred years by the abandonment of theoretical conceptions that related the phenomenon of creation with the originality, subjectivity and individuality of the writer in order to understand that such phenomenon results from the process of reading, interpreting and rewriting.

In the field of law, the bet on the subjectivity and creative freedom of the judge emerges in two specific contexts: in the course of the 18th to the 20th centuries, with the opposition to exegetical legal positivism and the conceptual formalism of pandectics; and in the second postwar period, with the crisis of the positivist paradigm, the new role played by the Constitutions and the normalization of third-level rights, which resulted in the expansion of the judiciary for the protection of social rights and diffuse interests.

Paradoxically, while in the theory of literature the concepts of the horizon of understanding and of intersubjectivity are recognized and recognized - including in the very

⁵⁶ Term coined by Lenio Streck, whose concept is explained in: STRECK, Lenio. *Dicionário de hermenêutica*. Belo Horizonte: Casa do Direito, 2017. p. 149-152.

production of works - the strength of intertextuality and the facticity and historicity inherent in the writer, as well as the conception that the literary invention results from reading, interpretation and rewriting; theoretical constructs prevail in the law, which, shielded by the linguistic turn and the narrative turn, ignore the overcoming of classical hermeneutics, which contributes so that the phenomenon of creation remains, anachronistically, linked to the idea of freedom.

Finally, it is expected that the course carried out here has, subliminally, evidenced the importance of studies of law and literature in relation to providing an update of the understanding of the phenomenon of creation in the legal scope, in order to unlink the concept of creation of the idea of creative freedom - whose main effects are activism and judicial decisionism - and to alert to the conditions and limits posited by literary studies, which attribute to interpretation an essential role in the creative process.

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