

## SIMILARITIES BETWEEN LEGAL FICTION AND LITERARY FICTION: TRIALS AS NARRATIVES ANCHORED TO REALITY

EDNALDO SILVA FERREIRA JÚNIOR<sup>1</sup>

TRANSLATED BY FELIPE ZOBARAN

**ABSTRACT:** The purpose of this paper is to analyze how procedural narratives resemble literary narratives. With that in mind, if the object of study of Law Theory is similar to the object of Literary Theory, it is possible at first to exchange concepts of both areas, through a correlation of “conceptual lenses” that would allow new observations. That said, this essay uses the concept of fiction formulated by Literature in order to demonstrate how much a novel, object of study of the Literary Theory, is close to a judicial trial, one of the objects of study of the Theory of Law. Finally, it is concluded that judicial proceedings are true fictions attached to reality.

**KEYWORDS:** legal narratives; literary narratives; verisimilitude; fiction anchored to reality.

### INTRODUCTION

Before exposing the problem on which this work is concerned, one must understand what kind of relation between Law and Literature it refers to. This is because this field of study is already somewhat old and extremely fruitful, which has developed different approaches, each with its peculiarities, so analyzing the present work with other lenses, even if they are connected to the intersection between legal and literary knowledge can lead to errors and disappointments.

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<sup>1</sup> Lawyer. Bachelor of Law by Universidade Federal de Pernambuco (UFPE), Recife, PE, Brazil. CV Lattes: <http://lattes.cnpq.br/0285349792930508>. E-mail: [ednaldosfjunior@gmail.com](mailto:ednaldosfjunior@gmail.com).

It is therefore necessary, at first, in order to clarify that this work will not use a literary text to illustrate an eminently legal problem. And we must begin with this observation because studying Law *in* Literature has been the most commonly used way by jurists to relate these two areas of knowledge, at least in Brazil<sup>2</sup>. What I mean by “illustrate” is to use a book or the simple excerpt from a novel to describe issues related to the application of Law. For example, a work that uses *Oedipus the king* (Sophocles, 2016), more precisely Oedipus the character, to problematize if the aggravating circumstance prescribed by art. 61, II, e, of the Brazilian Penal Code<sup>3</sup>, should focus on the murder of Laio, even the protagonist not knowing, at the time of the crime, that he killed his father. In such a case, eminently legal issues would be studied, such as the criminal aggravation as a demonstration of greater social reproach towards conduct, as well as the teleology of the legal device cited, in a factual context revealed by a literary work.

And when I say that this is the most common way among Brazilian jurists to relate Law and Literature, it is not my intention to disparage it. This type of study is of great importance and should be used more frequently in the Brazilian academy, including as a teaching method. As the Literary Theory explains, the character in every work embodies values, making them more evident to the reader (Candido et al., 2009), in such a way as to illustrate the application of legal concepts through literary works and the dramas lived by the characters allow the future bachelor to know the value issues involved in the incidence of the law on the lives of people, in an exercise of otherness that is essential for every jurisdictional activity. However, again, studying Law in Literature is not the objective of this work.

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<sup>2</sup> Although in Brazil interest in the relationship between Law and Literature has become minimal in recent years, in Europe and especially in the United States, this theme has been studied for decades. By virtue of this, there are in these places a variety of approaches whose scope is not yet available in the Brazilian academy. However, due to the natural limitations to this type of work, I preferred to reduce my observation to what is produced on Law and Literature specifically in Brazil, space where this work effectively inserts itself. However, in order to produce a good overview of the study of the intersections between Law and Literature in the United States and Europe, focusing on Italy, it is worth mentioning the study by M. Paola Mittica (2016).

<sup>3</sup> “Art. 61. These circumstances always aggravate punishment, when they do not constitute or qualify the crime: [...] II - have the perpetrator committed the crime: [...] e) against ascendant, descendant, brother or spouse.”

Nor is the purpose of this paper to use Literature to reflect on the moral and / or ideological values present in a given society, which, in turn, make up the legal order, given historical contexts. If the previous form of analysis is the most common in the Brazilian legal academy, this second one is perhaps the most unusual one. Among the few works with such an approach, it is possible to highlight *A ciência jurídica e seus dois maridos*, by Luis Alberto de Warat (2000), who, through Cortazar and Jorge Amado, seeks to analyze the epistemology of contemporary law by opposing it to a possible “Epistemology of desires”, found, according to the Argentine jurist, in Literature.

And such a way of studying the relations between Law and Literature is also very beneficial for legal education. The literature of a people is an extremely useful tool to more easily perceive the values that make up a society and, consequently, its legal order. Thus, insofar as it facilitates the understanding of the values of a given society and its legal order, literature is fundamental for the analysis of such values in order to form a democratic jurist (Ghirardi, 2016). The difference in the study of Law in Literature should be emphasized, because it does not observe the values involved in the incidence of a given law, the consequences related to specific people, but the values present in the base of the legal system as a whole, the values involved in regulating the lives of all. However, this is also not the objective of the present study.

What is intended here is to seek, in Literary Theory, contributions to the general Theory and Philosophy of Law. The objective of this work is to demonstrate how much typical concepts of Literary Theory can be used in the study of Law, allowing the latter to contemplate new issues, made visible by the use of the conceptual lenses coming from that theory. For example, some literary theorists, such as James Wood (2012), claim that sometimes in Literature, metaphors are no longer perceived as such because of their repeated use, which would make it necessary to produce new metaphors; in this sense, would it be possible to argue the same thing that the theoretician affirms about literary metaphors, but in relation to legal metaphors – as the metaphor of the clarity of law (Castro Jr., 2009)?

With this in mind, and with the purpose of studying Law and Literature as Literary Theory and Law Theory, the present work seeks to analyze if the literary concept of fiction can be applied in the study of Law, in order to understand how much the activity developed by the operators of law<sup>4</sup> is somewhat similar to that carried out by the authors of literary works.

Sometimes both jobs are treated as completely different and unmistakable. The following passage, written by Kafka - who, in addition to being a writer, was a bachelor in Law – is a good example of such repeated opposition:

Does it not strike your attention that I speak almost as a lawyer? It is the uninterrupted conviviality with the gentlemen of the court that influences me so much. Naturally I gain a lot from this, but the artistic impulse is partly lost (2013, p. 225).

The piece, which belongs to the novel *The trial*, composes the moment of the narrative in which Joseph K., a defendant of a trial he does not know, decides to find the painter responsible for making the portraits of the judges of the locality – the meeting revolves around the fact that, by being close to the jury, Titorelli could influence them in favor of K.. And, in the passage quoted, Kafka immediately opposes the jurist to the artist, since, not for nothing, the artistic impulse is lost when connected to the bachelors in law.

But if we look from another angle – a little more generously – jurists are not that different from artists, at least from writers. Inwardly, jurists relate to reality in the same way as writers: they create an entirely new world, subject to their own rules, which, in an attempt to explain what we mean by ‘reality’, refers to it, but without enclosing oneself to it.

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<sup>4</sup> This, of course, is not the most accurate term. But at least it is more appropriate than jurist. This is because, with the use of the term “operators of law”, I intend to exclude theorists, or, if you prefer, “scholars” from my observation, as well as bachelors who work in less conventional functions, such as public managers and legislators. I want to refer to those professionals closest to the litigation solution, such as judges, prosecutors, and so-called “litigation lawyers”.

## FROM FICTION TO LITERARY THEORY: A NEW WORLD SUBJECT TO ITS OWN RULES

### Todorov and the importance of verisimilitude in the elaboration of the literary text

Although I admit that I have read better poets, Vinicius de Moraes is still my favorite one. And among his poems, *Balada do Manguê*<sup>5</sup> is the one I love the most. In order to portray the poor living conditions of Carioca prostitutes, which Vinicius got to know as a youngster, still when he carried with him the religious guilt that gave rise to his existential poems, the poet, instead of accusing such women, compares them with fragile and weak dahlias.

But beyond the beauty of the poem, it is interesting to see how such a literary work interacts with reality. Influenced by a “real world” data (the marginalization suffered by the prostitutes he knew), Vinicius, through a poem, conceived a scenario where prostitutes are gonococcal flowers, and although the scenario he created does not match exactly with reality, since prostitutes are women, not flowers, his account is accepted and praised by the reader. This reveals a characteristic trait of literary fiction: although it turns to reality, seeking to interpret it, literature is not restricted to the “real world”; in fact, the literary work is completely autonomous in relation to reality.

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<sup>5</sup> “Pobres flores gonocócicas/ Que à noite despetalais/ As vossas pétalas tóxicas!/ Pobre de vós, pensas, murchas/ Orquídeas do despudor/ Não sois Loelia tenebrosa/ Nem sois Vanda tricolor:/ Sois frágeis, desmilinguidas/ Dálias cortadas ao pé/ Corolas descoloridas/ Enclausuradas sem fé,/ Ah, jovens putas das tardes/ O que vos aconteceu/ Para assim envenenardes/ O pólen que Deus vos deu?/ No entanto crispais sorrisos/ Em vossas jaulas acesas/ Mostrando o rubro das presas/ Falando coisas do amor/ E às vezes cantais uivando/ Como cadelas à lua/ Que em vossa rua sem nome/ Rola perdida no céu.../ Mas que brilho mau de estrela/ Em vossos olhos lilases/ Percebo quando, falazes,/ Fazeis rapazes entrar!/ Sinto então nos vossos sexos/ Formarem-se imediatos/ Os venenos putrefatos/ Com que os envenenar/ Ó misericordiosas!/ Glabras, glúteas caftinas/ Embebidas em jasmim/ Jogando cantos felizes/ Em perspectivas sem fim/ Cantais, maternais hienas/ Canções de caftinizar/ Gordas polacas serenas/ Sempre prestes a chorar./ Como sofreis, que silêncio/ Não deve gritar em vós/ Esse imenso, atroz silêncio/ Dos santos e dos heróis!/ E o contraponto de vozes/ Com que ampliais o mistério/ Como é semelhante às luzes/ Votivas de um cemitério/ Esculpido de memórias!/ Pobres, trágicas mulheres/ Multidimensionais/ Ponto morto de choferes/ Passadiço de navais!/ Louras mulatas francesas/ Vestidas de carnaval:/ Viveis a festa das flores/ Pelo convés dessas ruas/ Ancoradas no canal?/ Para onde irão vossos cantos/ Para onde irá vossa nau?/ Por que vos deixais imóveis/ Alérgicas sensitivas/ Nos jardins desse hospital/ Etilico e heliotrópico?/ Por que não vos trucidais/ Ó inimigas? ou bem/ Não ateais fogo às vestes/ E vos lançais como tochas/ Contra esses homens de nada/ Nessa terra de ninguém!” (Moraes, 1980, p. 102-104).

This may be considered the dominant conception today, but it has not always been so. For a long time, it was believed that the work of art would be so much better – and this includes literature – how much better it could imitate reality. No wonder Aristotle (1973, p.440-471) asserts that the poet who represents the impossible goes wrong – perhaps an excusable error, he says, but still an error. For the philosopher, the quality of the literary work must be evaluated by its capacity to imitate reality; the literary work is mimetic. Only with the advent of the Renaissance, more precisely between the 17<sup>th</sup> and 18<sup>th</sup> centuries, did such a thesis begin to lose its force. Insofar as man becomes like God – and not only submissive to God – he is also able to be a creator, now the artist is allowed to conceive from his / her own microcosm (Todorov, 2012).

From that moment, the literary work ceases to be evaluated by its fidelity in the representation of reality, by its *veracity*, and begins to be qualitatively examined through its internal coherence, its *verisimilitude*. When we read a literary work, we do not demand that it necessarily conforms to what we understand as reality. As an example, when we read a book of fantastic literature, or a fable, we accept that “strange things” happen, just as animals speak, even though we are fully aware that in our real world this is impossible. We demand, however, that what is said is appropriate to the world described – and, at the same time, created – by the work. That is, we demand that this literary universe be internally coherent.

Every narrative is composed of a set of acts that are linked by succession or transformation. The succession concerns the merely chronological concatenation of events: a certain fact A, revealed at the beginning of the novel, is linked to fact B, revealed later, in that it limits the creation of the latter. For example, at the beginning of *Posthumous Memoirs of Brás Cubas* (Assis, 2013), the narrator-protagonist tells us that he is dead, so at first it would be an incoherence if we were later revealed that Brás Cubas lives. Transformation, in turn, refers to acts which, when related, reveal some change, which may be of the most different kinds, such

as “negation”, “transformation of mode”, “transformation of intention” (Todorov, 1980)... The work *Othello* (Shakespeare, 1974) well exemplifies this kind of concatenation, because, motivated by the desire for revenge, Iago, on several occasions, plans certain actions, which, later on, come true – as when he plans to arouse Othello's jealousy through the linen handkerchief he offered to Desdemona, and shortly afterwards he does so – which reveals a transformation by virtue of the character's intention.

After all, it is not necessary for the present work to analyze in detail what types of links there are in literary narratives. What is important here is to perceive that the events present in any literary fiction are intrinsically related, so that more likely – and, therefore, better – will be the work that has the least inconsistencies, inexplicable contradictions of data provided by the literary work. The need for it to be inexplicable, in turn, stems from the fact that the coexistence of two seemingly contradictory events do not necessarily mean an incoherence, but it may actually configure two acts concatenated by some of the types of transformation. As Todorov explains: “Interpretation should not demonstrate that all parts and levels of the text tend to state the same idea, but that disagreements, inconsistencies, that is, contradictions can be explained and justified” (1991, 166).

Among the various characters of *Cousin Bazilio: a domestic episode* (Queirós, 2006), for example, we are introduced to Counselor Acácio. Throughout the narrative, Mr. Acácio, who had once been Director General of the Kingdom Ministry, is portrayed as an extremely honest subject, so zealous for good morals and appropriate customs, that he was even unable to conjugate the verb to vomit, preferring, with his always agile and restless hands, make an indicative gesture and apologize for having to *restore*. However, near the end of the book, it is revealed that Counselor Acácio concealed from everyone the relationship he had with his maid, which, in the historical context in which the book was written, would be a vexation, an immorality. Although both facts may seem contradictory, this transformation in the representation of the character is explained and justified by the ideological premise present in the work, which seeks to

criticize the bourgeoisie of Lisbon: despite seeking to pass an image of extremely honest subjects and filled with virtues, the Portuguese bourgeois, in fact, would be futile and morally corrupted. Thus, this apparent contradiction, in fact, is an ideological transformation.

Moreover, the existence of an inexplicable contradiction does not necessarily mean that the reader will not be persuaded. There are literary resources that allow the writer to disguise the inconsistencies of his / her work, so that the reader does not perceive them.

Here is an example of this use, drawn from a commentary in *Marriage of Figaro*: “*the movement makes us forget the unlikelihood.* – At the end of the second act, the Count had sent Basilio and Furta-Sol to the city for two precise reasons: to prevent the judges and from finding ‘the peasant of the ticket’. It is unlikely that the Count, who is now well aware of Cherubino's presence in the Countess's room in the morning, does not ask Basilio to explain his lie, and does not try to confront him with Figaro, whose attitude seems to him to be increasingly suspicious. We know, and this will be confirmed in the fifth act, that her expectation of meeting Susanna is not enough to disturb him so much when the Countess is at stake. Beaumarchais was aware of this unlikelihood (he wrote it down in his manuscripts), but he rightly thought that in the theater no spectator would notice”. Or again: “Beaumarchais himself confessed to his friend Gudin de la Brenelleire ‘that there was little likelihood in the misunderstanding of the night scenes’. But he added: ‘Spectators lend themselves well to this kind of illusion when a funny imbroglia is born from it’” (Todorov, 2003, p. 115).

Finally, what we must understand here is that in a literary work the reader's conviction does not result from the truth of the work, its appropriateness to the real world, but its verisimilitude, its internal coherence, its non-existence – or existence in as few as possible – of inexplicable contradictions. For this reason, the concern of a literate is not to write a true but credible work before the premises that he himself formulates, which are independent of reality.

### **Antonio Candido and literature attached to reality: The independence of the real in narratives "faithful" to reality**

Understanding the importance of verisimilitude for the literary work, one can question whether the complete independence of reality would not exist only in literary works that deny it at all, such as fables. A realistic

work, for example, insofar as it pretends to be a mirror of reality, would not therefore be limited by the facts of the real world? Would not the reader's conviction also depend on how true the work is, and not only on its verisimilitude? The answer to the first question is that, in a way, yes; however, to the second question, it is an emphatic no.

In a way, literary texts can be divided into two types: those that are anchored in reality, and those that are adrift. The anchored texts are those that are concerned with portraying a specific historical and social context<sup>6</sup>. In *Les Misérables*, for example, Victor Hugo (2012) portrays the French society of the 19th century. More precisely, the France that existed between just before 1815, the year of the Battle of Waterloo, and 1832, the time of the June riots, which sought to overthrow King Louis Philippe. This is an authentic literary work anchored in reality. As for the texts adrift, they would be those which are not committed to portraying specific social contexts, floating freely (Candido, 2012, p. 9-14). As in *Alice in Wonderland* (Carrol, 2009), in which Lewis Carrol - a pseudonym of Charles Lutwidge Dodgson - describes a world where rabbits are late, caterpillars and cats talk, and the royal guard is composed of playing cards.

A text anchored in reality, then, will, in fact, be limited by the world it seeks to portray. The ship may only navigate within the radius of distance that the anchor permits. If the literary work intends to portray a certain historical and social context, at first, its events will be restricted to what is or was possible in that society. If the author intends to write a literary work on the Brazilian aristocracy of the beginning of the 19<sup>th</sup> century, it would constitute incoherence that the characters had mobiles and computers, for example, since, at the time, such technologies were not available. So the answer to the first of the questions asked at the beginning of this topic is, “in a way, yes”.

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<sup>6</sup> Note that I used the verb “to portray”, not “to translate”, because although only some works portray specific historical contexts, every literary text reveals the values and customs of a certain society, translating it. No wonder, Antonio Candido (2014) goes so far as to say – perhaps exaggeratedly, perhaps not – that the best translations of Brazil have, for the most part, the literary form.

However – and here comes the reason for the expression “in a way” – this does not mean that the anchored literary text will be truer than the one that is drifting, or that it needs to be. As Candido explains, sometimes works anchored in reality can use stereotypes and caricatures that do not correspond to reality, but are less true (Candido, 2012, 9-14). In *O cortiço*, for example, Aluizio de Azevedo (2009) reproduces several stereotypes of class and race that are not true, that do not match in reality. But even so, such works convince the reader. This shows that, after all, what matters for the quality of the work is its likelihood, even in the case of those who chose to cast the anchor to the sea. Even if we are reading a novel that portrays the real world, if the “lies” revealed throughout the text are consistent with the rest of the work, that is, if, despite being false, they are verisimilar, they will be accepted by the reader.

This is because the traits of reality present throughout the novel are chosen according to the interests of the narrative itself, which thus determines the way in which such real-world traits will be approached:

Even in the case of a direct orientation to reality, the field of reality considered, although limited to a fact, has a context and a focus from which it receives its organization... The actual reality is exposed in broad lines, *the event inscribes exclusively in the main warp and only to the extent necessary for the reproduction of the fundamental psychological situation* (Skaftymov *apud* Todorov, 2003, p. 23, not originally highlighted).

That is, the real world enters into the novel only when it is extremely necessary, and yet it does so in accordance with the premises of the microcosm which is the literary work. Not for nothing, if it is necessary, for the verisimilitude of the work, to caricature certain social traits and to stereotype certain classes, the author will do it, as Aluizio de Azevedo (2009) does with black women, animalizing them, and with the Portuguese, making them victims of the tropics.

And so, for the second question made at the beginning of this topic, the answer needs to be an emphatic no. The literary works anchored in reality do not have to be true, they just have to be verisimilar, just like the

literature that has chosen to be adrift. In fact, there is not even a concern to be true. So much that, when necessary to the verisimilitude of the work, reality can be distorted, caricatured.

### **LAW AS FICTION: THE PREPONDERANCE OF THE VERISIMILITUDE OVER THE TRUE**

One day, in the fifth century BC, in Sicily, two individuals discuss; an accident happens. The next day they appear before the authorities who must decide which one is guilty. But how to choose? The altercation did not occur under the eyes of the judges, who could not observe and verify the truth; the senses can nothing; There is only one way: to listen to the complainants' reports. In this way, the position of the latter is modified: it is not a matter of establishing a truth (which is impossible), but of approaching it, of giving an impression of truth; and this impression will be stronger the more skillful the account is (Todorov, 2003, p. 113).

What we want to demonstrate here is not something original, not even new. Perhaps, among jurists, the similarities between law and literature as regards the importance of verisimilitude are recent and not yet debated. However, such similarity has long been noted and studied. Todorov's excerpt above, originally published in 1971, makes this quite clear. And if we accept less specific and less well-read comparisons in literary theory, it is possible to find even older writings, as when Plato (1993) argues that judges cannot know what actually occurred, that is, the truth; As well as the poets, who are not committed to the true.

Anyway. The aim of this work, and this topic, is to demonstrate that in legal practice, so to speak, one does not have to be truthful, one must be verisimilar, as in literary fictions. And this is why the activity carried out by the author of a literary work is very similar to that developed by the legal operators: the lawyer, when proposing a certain juridical thesis at court, or the judge, in proposing a solution to the deed, writes a text anchored in reality; that is, although it is limited by the reality it portrays, the choice of the facts it reveals, as well as the approach that is given, is subject to verisimilitude, so that when it is necessary to sacrifice the truth for the sake of verisimilitude, not only is it done, but accepted.

### **The judicial proceeding as a close relative of literary narratives**

The Law is composed of a series of prescriptive contents that seek, whenever necessary, to resolve conflicts by absorbing the insecurities coming from them – which does not mean the production of consensuses. The Law is intended to provide conditions for the production of decisions (Ferraz Jr., 2011). If there is dissension between two men over to whom a property must belong, for example, the Law will offer a response. Probably, whoever “loses” the property will not be happy; However, the insecurity feeling stemming from the uncertainty of who would be the rightful owner and therefore bearer of the rights and duties resulting from such a condition will be solved.

However, the Law never has only one possible answer. In fact, sometimes there will be answers already settled in the legal community, which may make it difficult to convince others, but this does not mean that they are the only possible answers. The Law is not a system in a logical sense, which allows deductions protected by a status of complete certainty. In reality, it is composed of a plurality of systems, each producing a response, and there are thus several possible answers (Viehweg, 2008).

These several responses, in turn, can be “qualitatively” evaluated from their appropriateness to the “legal microcosm”: formulating a response to a legal problem requires minimal agreement with the uses and meanings of established legal concepts, which, in theory, cannot be altered by the litigation (the so-called legal dogmas). It is thus perceived that when they are before the magistrate and need to convince him / her that the suggested thesis is rational (Ferraz Jr., 2015), the parties need to demonstrate the internal coherence of the solution presented. That is to say, it is not necessary to demonstrate how much the legal thesis conforms to reality, how true it is, but how coherent it is with the set of legal prescriptions to which the parties submit, how realistic it is; as Garcia Amado explains,

When we defend in any area of legal activity that the correct interpretation of the rule *x* is this or that, or that the true scope of the law and that the constitutional text enshrines such or such, we do not describe preexisting

realities to speech, but we try to persuade the recipient of our speech that reality is as we tell it (2003, p.369).

Imagine the following situation, the 19-year-old youngster "A", who had sold a property shortly after becoming 18 years old, regretted the sale agreement he made and intends to get it back. In order to do so, he argues that the legal business is invalid, due to his incapacity at the time, supposedly ascertainable by his immaturity and complete ignorance of the real estate market. However true this may be and appropriate to reality, it is not consistent with all the legal provisions. This is because, due to what is prescribed in art. 5 of the Brazilian Civil Code<sup>7</sup>, regardless of the experience he possesses, the youngster "A" was fully capable at the time of the sale, since he was already over 18 years of age. However, if the argument were in defense of the annulability of the business because the boy, due to his inexperience, had to make a disproportionate offer, the legal thesis would become coherent, as it is in accordance with the provisions of arts. 157 and 171, II, of the Brazilian Civil Code<sup>8</sup>. Although both arguments are based on the same facts of reality and therefore true, only one would be admissible, since only one of the solutions presented would be consistent with the set of legal prescriptions – that is, it would be plausible.

This is because every judicial process constitutes a narrative composed of all valid and current legal prescriptions, which, in turn, do not necessarily need to be adjusted to reality. Who defines the content of the legal concepts that will be used in the production of decisions is the law itself, since such concepts, alone, have no meaning whatsoever, only being able to be understood as long as they are placed before the legal prescriptions that to which they relate (Ross , 2004). As Ferraz Jr. explains:

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<sup>7</sup> “Art. 5 The age minority ceases at eighteen full years, when the person is enabled to practice all acts of the civil life.”

<sup>8</sup> “Art. 157. The injury occurs when a person, under exigent necessity, or for inexperience, undertakes to render manifestly disproportionate to the value of the opposite payment”; “Art. 171. In addition to cases expressly declared in Law, the legal transaction is void: [...] II - for vice resulting from error, deceit, coercion, danger, injury or fraud against creditors.”

A criminal law, in setting up a hypothesis of conduct – “to abandon a person who is under his care, guard, vigilance or authority and, for whatever reason, unable to defend oneself from the risks resulting from abandonment; penalty [...]” (Penal Code, article 133) – is not only describing it, but typifying it. That is, in the example, it is not a matter of showing what is designated by abandonment, but prescribing what should be understood by abandonment (2014, p. 118).

Thus, when they need to be consistent with the Law, the legal theses revealed during a judicial process only need to be coherent with the universe to which they belong; such as the events revealed throughout any literary narrative, which need to be coherent only with the fictional universe itself that they make up.

Hence, reality matters for legal narratives as much as it matters for literary narratives anchored in reality: there is no demand for truth; within the radius of navigation allowed by the anchor, the focus given to the approach of the facts will be exclusively subdued by the needs of the procedural narrative that one intends to construct (see Aluizio de Azevedo); there is only the requirement of verisimilitude, so that, **(a)** in revealing the facts, the party can not contradict the style adopted by the procedural narrative itself (portraying a specific historical and social context), **(b)** as for the sequence of events, they cannot reveal unexplained inconsistencies. That is, in addition to being a kind of literary genre, in such a way that the lawyer uses as many rhetorical artifices as a writer (Cardozo, 1932), or a set of narratives that, when constructed, constitute reality itself, revealing the diverse values that permeate society (Binder, Weisberg, 2000), the judicial discourses themselves, although they search for the truth as if they were the only device capable of such a deed, are fictional accounts, lacking the need to be true, and only need to be verisimilar, similarly to novels.

**(a)** As it portrays a specific historical and social context, the freedom of the legal narrative is reduced, similarly to what happens to the anchored in reality literary narratives. In this way, a litigant cannot argue that he /she had been coerced by a gnome for the practice of a particular legal business, which would provoke its nullity, under the terms of art. 151

of the Brazilian Civil Code<sup>9</sup>. But that does not mean there is a demand for truth. There is only the requirement that the revealed events should be consistent with the premise the procedural narrative itself has adopted (portraying a specific historical and social context). As well as literary narrative, which fits into a particular style and must obey the rules of that style, at the risk of provoking lack of verisimilitude (Todorov 2003: 118-123). Lack of verisimilitude but not lack of truth, because, as we said before, events do not have to be coherent with reality (at the risk of becoming repetitive, we reiterate the example of Aluizio de Azevedo), but with the universe itself created by the literary narrative, of which such “Law of the genre” is also part of. Even drifting narratives need to obey the so-called “Law of the genre”: a fable in which animals do not speak, for example, will be unlikely.

(b) Besides, the facts will never be questioned throughout a procedural narrative because they are not true. Their questioning occurs only when they are unlikely, that is, when they are incoherent with the internal point of view, just as with literary fiction. As determined by art. 341 of the Code of Brazilian Civil Procedure<sup>10</sup>, in principle<sup>11</sup>, the facts revealed by the author that are not disputed by the defendant will be accepted. Thus, if the author says "A" and there is no counterargument by the defendant, "A" will be presumed true; However, if the author says "A" and the defendant says "not A", incoherence must be solved within the legal narrative that must be solved. That is, the concern with revealed events only arises insofar as it bears inverisimilitude. When there is no internal inconsistency, the facts will be presumed true, even if they are

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<sup>9</sup> “Art. 151. Coercion, in order to vitiate the declaration of the will, must be such as to instil in the patient a fear of imminent and considerable harm to himself, his family, or his property”.

<sup>10</sup> “Art. 341. It is also incumbent upon the defendant to express precisely the allegations of fact contained in the petition, assuming that they are true, uncontested, unless: I – confession is not admissible; II – the initial petition is not accompanied by an instrument that the law considers of the substance of the act; III – they are in contradiction with the defense, taken as a whole.”

<sup>11</sup> Although there are exceptions to this general rule (sections I, II and III of art. 341), they refer to situations in which there is also internal inconsistency and therefore unlikelihood, either in relation to the sets of legal prescriptions that make up the Procedural narrative (sections I and II), or in relation to the very sequence of events in the procedural narrative.

not. In this sense, it seems wise to remember what Arenhart and Marinoni have to say:

it is not the judge's objective to find the (absolute) truth in a trial. While this goal may continue as a mythical and utopian objective of judicial activity (even in order to guarantee the quality of the research carried out by the magistrate and, consequently, the result obtained), it cannot be believed that, concretely, this ideal is carried out in the process, or even that it is intended. However, if this is correct, what would be the function of the evidence in a trial? It is, as it seems, a rhetorical medium, indispensable to the judicial debate. The process should be seen as the stage of discussions; the topical one is the method of the jurisdictional action and the objective is not the reconstruction of the fact, but the conviction of the other procedural subjects (2008, p. 257-258).

Thus, to the extent that the judicial process is concerned not to correspond to reality, but to convince the parties, like literary narratives, it must have verisimilitude, therefore, it is free of inexplicable inconsistencies. In this sense the civil procedural law adopts the principle of formal truth: the true is what is established in the middle of the process, even if it does not correspond to what actually occurred in reality (Alvim, 2012, p. 230).

However, such concern with the verisimilitude over the truth is not exclusive to civil procedural law, but is characteristic of any procedural law, including those concerned with material truth. In the administrative and penal processes, the idea of material truth functions much more as a facilitator of the production of inconsistencies, than as a guarantee that the procedural narrative will correspond to reality. What happens in this procedural legislation is that, instead of only the parties being able to report facts, the law allows the judges also to incorporate events into the procedural narrative, which increases, thus, the chance of producing internal inconsistencies. In this sense, art. 156 of the Code of Criminal Procedure<sup>12</sup> allows the judge to order *ex officio* production of evidence, as

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<sup>12</sup> “Art. 156. Proof of the allegation shall be incumbent upon those who do so, but the court shall be entitled to: I – order, even before the initiation of the criminal action, the anticipated production of evidence considered urgent and relevant, noting the need, adequacy and proportionality of the measure; II – to determine, during the course of the investigation, or before giving sentence, the execution of steps to resolve doubts about relevant points.”

well as to take steps to resolve any doubts; and, as regards the administrative procedure:

The principle of material truth, also known as freedom in proof, authorizes the Administration to avail itself of any evidence that the trial or adjudicating authority has knowledge of, as long as it makes it transfer to the process. It is the search for material truth in contrast to formal truth. While in judicial proceedings the Judge must adhere to the evidence indicated in due time by the parties, in administrative processes the processing or adjudicating authority may, until the end of the trial, be aware of new evidence, even if produced in another proceeding or arising from facts that prove the allegations on screen (Meirelles, 1991, p. 581).

That is, it is not that criminal and administrative procedural narratives are true, and it is fundamental that revealed events correspond to reality. Also in these procedural laws, what matters is mere verisimilitude. However, there is a greater margin for the production of internal inconsistencies with respect to the sequence of revealed events, since the parties are not the only ones that can include events in procedural narratives. But just as in civil proceedings, an event need not be true, but only verisimilar, to be presumed to be true.

#### **CASE ANALYSIS (Grievance Procedure Nº. 00125140-23.2005.8.17 / PE)**

The decision rendered by Appellate Court, Instrument of grievance 00125140-23.2005.8.17.0001, judged by the Court of Justice of the State of Pernambuco (TJPE), is a good example of what is being presented here. According to the decision:

GRIEVANCE INSTRUMENT. UNION. PARTICIPATION IN DEED. IMPOSSIBILITY. NOT SHOWN LEGAL INTEREST. INCOMPETENCE OF FEDERAL JUSTICE. APPEAL NOT PROVIDED.

1. The jurisprudence of the STJ states that the mere economic interest of the Union - based on art. 5th, single paragraph, of Law no. 9,469 / 97 - is not enough to attract the incidence of art. 109, I, of the Federal Constitution. The obvious legal interest must be demonstrated.
2. Joint-stock companies have jurisdiction only in the Federal Court, when the Union intervenes as an assistant or as an agent.
3. Unapproved offense (Brasil, 2012).

As is possible to conclude from reading the judgment referred to above and the contested decision, the original proceeding is a collection action brought by the Constructors Norberto Odebrecht S.A. And Queiroz Galvão S / A in the face of the Brazilian Company of Urban Trains (CBTU). In the middle of the action, in turn, the Union requested its entry into the act as a simple assistant, based on art. 5th, single paragraph, of Law 9,469 / 1997 c / c art. 50 of the Code of Civil Procedure (CPC) then in force, current art. 119 of CPC / 15.

The government has argued that, although the CBTU is a mixed-capital company, the federation owns 99.9% of its shares. In this way, the losses resulting from a possible conviction would be almost entirely borne by the government, which would sufficiently demonstrate its interest in processing the act.

As can be seen, the government's allegations have an absolute correspondence with reality. The government's interest is obvious, since, although the CBTU has financial autonomy by virtue of being a mixed-capital company, indirectly the costs of a conviction would fall almost only on the government. That is, the government's allegations appear to be true.

However, as the court ruled, they are not credible. This is because, according to what the normative documents that compose the procedural narrative, more precisely the jurisprudence of the Supreme Court, the economic interest is not enough to configure legal interest, which is characterized by one of the following circumstances:

- a) to be the holder of a legal relationship subject to effects reflecting the sentence, in which case he may intervene as a simple assistant (CPC, Article 50); Or b) to be joint owner of the legal relationship that constitutes the object in question, in which case he may intervene as a litigation assistant (CPC, article 54) (Brasil, 2007).

Even though the thesis defended by the government may be adequate to reality, it is not credible, since it is inconsistent with the concept of interest formulated by the law itself, which is why the appeal filed by the government was eventually rejected by court. As can be seen, in procedural narratives, the duty of verisimilitude prevails over a possible need for the narrative to be true, as well as in literary fictions.

## CONCLUSION

To seek that the procedural narrative corresponds to reality, to want the process to be true, is something fully possible and even beneficial. This desire led to changes (Foucault, 2003) which, in my view, irrefutably contributed to a more effective and fair jurisdictional provision. The present work, therefore, is not an affirmation that judicial processes should not seek to know what actually occurred, because it is supposedly impossible. Nor is it an attempt to argue that in the procedural narrative everything is allowed, in such a way that reality would have no importance at all. Even because, as explained earlier, in anchored narratives, the navigation radius is small, when compared to drifting narratives; which, in turn, already reveals some importance of what is understood as a real world in the construction of the process.

The aim of the present work is only to verify similarities between the ways in which procedural and literary narratives are written today, in order to make possible the study of Law from literary lenses.

In defending an “epistemology of desires”, Warat (2000) explains that the first step in breaking down the chains that limit our yearnings is to look at the currents themselves, which today go unnoticed. Although the juridical possibilities of ordination are limited by ideological and historical aspects, there is no discussion around such values and conceptions simply because we do not notice them.

And in the midst of such a problem, I believe that Literature can offer good help. Literary narratives are always permeated by a series of values, after all “literature is essentially a reorganization of the world in terms of art” (Candido, 2014, 187), and if reality is full of ideological aspects, it is natural for this to appear in its mirror. In turn, Literary Theory seems to have developed concepts that allow clarifying the values contained in the analyzed narratives. So, if literary fiction and procedural narrative are similar – and one must know if they are indeed, and if so, to what extent –

why not use such typical literary concepts to study procedural narratives, in order to make more evident those values that bind us?

Although Philosophy and the General Theory of Law have been able to, with some success, study the values that make up contemporary legal systems as a set of prescriptions, it seems to me that little progress has been made in the study of the values contained in the specific use of legal concepts. And it is primarily to these former values, not the latter, I refer to.

Knowing these values is essential for the exercise of a democratic legislation. By imposing standards of normality on society, Law excludes customs and violent people (Foucault, 2010). It is therefore necessary, in imposing such standards, that we discuss them politically in order to reduce the damage to the social groups eventually involved; but for this, we must first perceive the political values present in legal concepts. Only after realizing these values and delimiting them will it be possible to discuss their permanence or substitution – only after identifying the current, can it be destroyed.

Anyway. As I said, the objective of the present work is to verify possible similarities between the procedural narrative and the literary narrative, perceiving the judicial processes as fictions anchored in reality. And I believe that it has done enough.

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