



RDL

REDE BRASILEIRA
DIREITO E LITERATURA

CERVANTES, BORGES AND I: WHO IS THE AUTHOR OF THE CONSTITUTION?¹

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ABSTRACT: Literature can teach us a lot about what Law is, such as when we apply the concept of *author* to understand the development of legal statutes. Such concept presents a challenge for the area of Law and Literature: who is the Constitution's author, and how is it possible that the reader of the constitutional text may identify oneself as its author? This problem, (which opposes originalists and living-constitution authors) can be better understood if we take the Constitution as a looking glass (*mise-en-abyme*, or Droste effect): although the framers had made it, it actually reflects the one who looks into it. Therefore, we need to understand the Constitution from the standpoint of the tension between sense and reference (or denotation).

KEYWORDS: Law and Literature; Constitution; Framers; Droste effect; constitutional interpretation.

WHO WROTE *DON QUIXOTE*? THE AUTHOR WITHIN THE TEXT

There are literary works that have become so entrenched in the collective imagination that we do not realize they are not exactly what we think they are, as in the case of the famous monologue of *Hamlet*, in which

¹ This research work was originally presented during the *V Colóquio Internacional de Direito e Literatura* – 5th International Colloquium on Law and Literature – CIDIL – held in Uberaba, Brazil, between October 26 and 28, 2016, and with the financing of CNPq through the scholarship granted to the author, in addition to the support by PROEX-CAPES PUC Minas.

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the protagonist, taken by metaphysical questions and with a skull in his hands, talks about the hesitation facing our ephemeral, transient and miserable condition. In Shakespeare's text, none of this occurs. Or rather, different events occur: in the third act, Hamlet performs the celebrated monologue *To be, or not to be*, and only in the scene of the gravedigger in Act 5 does he hold in his hands the skull of Yorick (Shakespeare, 2004).

Unread books, poorly read books, and forgotten books populate our imaginary, and even the educated man will always have many unread books on his résumé. This may not be relevant, since, according to Pierre Bayard's *How to talk about books you haven't read* (2007), it is more important than reading the books to have an overall view that allows us to understand the insertion of a particular work in the literary canon:

Educated people know this – and, above all, to their misfortune, the uneducated people ignore it –, culture is above all a matter of *orientation*. To be cultured is not to have read this or that book, but to know how to orient oneself within a set of books, therefore to know that they form a set and to be able to situate each element in relation to the others. The interior matters less in this case than the exterior, or, if we will, the interior of the book is its exterior, and what matters in each book are the books on the side. Because of this, not having read this or that book is of no importance to the cultured person, for even if he is not precisely informed about its *content*, he is often able to know its *situation*, that is, the way it is put to relation to other books. This distinction between the content of a book and its situation is fundamental, since this is what allows those who are not frightened by culture to speak without difficulty on any subject (Bayard, 2007, p. 31).

Hamlet is a literary work that we usually get to know without having read it, and so does *Don Quixote de la Mancha*, a book that the criticist Harold Bloom would take to a desert island if he could bring anything, together with the complete edition of Shakespeare and King James' *Bible* (Bloom, 2005). Very few seem to have really read the original *Don Quixote*, although even fewer seem to have the courage or the naivety necessary to recognize it.

Due to not having read *Quixote*, the contemporary reader can scarcely realize that, although it is often seen as the work of a single author, Miguel de Cervantes, the novel is, at least, the work of two people: Cervantes and Pierre Menard. The most recent studies indicate that Jorge Luis Borges can hardly be right, for whom the *Quixote* by Menard is only a recreation line by

line, word for word, *ipsis literis*, almost a plagiarism of Cervantes' *Quixote*. The same recreation, but with a different meaning, Borges thinks. (1998, p. 496). However, it must be acknowledged that at least three chapters of Cervantes' *Quixote* could not have been written by the Spanish author (since they would presuppose knowledge of events that would happen long after Cervantes's death), and Pierre Menard's authorship of those excerpts seems indisputable (notably in chapter eight). A reader with simple textual criticism can perceive this. It is evident, for example, the diegetic change³ in the beginning of the ninth chapter of *Don Quixote de la Mancha*, in which Don Quixote can overcome an enemy (which is also an evidence of the existence of a new author, for in the original *Quixote* the main character is always ridiculously defeated, even if unconsciously). At this point in *Quixote*, Menard realizes that the episode of Don Quixote's meeting with a Biscayan had been left unfinished by Cervantes and, adopting a different narrative style, decided to insert a new chapter to follow up the plot as an *intermezzo* and continue the plot by Cervantes. This is evident in the final passage of chapter 8 and in the initial passage of chapter 9:

at this point and crisis the author of the history leaves this battle impending, giving as excuse that he could find nothing more written about these achievements of Don Quixote than what has been already set forth. It is true the second author of this work was unwilling to believe that a history so curious could have been allowed to fall under the sentence of oblivion, or that the wits of La Mancha could have been so undiscerning as not to preserve in their archives or registries some documents referring to this famous knight; and this being his persuasion, he did not despair of finding the conclusion of this pleasant history, which, heaven favouring him, he did find in a way that shall be related in the Second Part.

CHAPTER IX

Of the good fortune which the valiant don Quixote had in the terrible and undreamt-of adventure of the windmills, with other occurrences worthy to be fitly recorded

In the First Part of this history we left the valiant Biscayan and the renowned Don Quixote with drawn swords uplifted, ready to deliver two such furious slashing blows that if they had fallen full and fair they would at least have split and cleft them asunder from top

³ Diegesis is, according to Genette, "the space-time universe designated by the narrative; therefore, [...] diegetic is what belongs to the story" (1995, p. 273). Or, according to Greimas and Courtés, diegesis "designates the narrative aspect of discourse [and], in this sense, the notion approaches the concepts of history and narrative" ([198?]. p. 121).

to toe and laid them open like a pomegranate; and at this so critical point the delightful history came to a stop and stood cut short without any intimation from the author where what was missing was to be found.

This distressed me greatly, because the pleasure derived from having read such a small portion turned to vexation at the thought of the poor chance that presented itself of finding the large part that, so it seemed to me, was missing of such an interesting tale. It appeared to me to be a thing impossible and contrary to all precedent that so good a knight should have been without some sage to undertake the task of writing his marvellous achievements; a thing that was never wanting to any of those knights-errant (Cervantes Saavedra, 2005, p. 102 e 105).

The text (carelessly published in any issue of *Quixote* without any reference to Pierre Menard's co-authoring, despite the explicit reference to a second author) is clear and does not demand interpretation: who "at this point stopped" was "its author", Cervantes, leaving the truncated history, which is why the reader of the *Quixote*, Menard, the "second author", full of regret for the lack of conclusion for the plot, is meant to continue the story of the knight-errand, from a secondary source, later obtained, and which he himself narrates as if he had heard about:

One day, as I was in the Alcana of Toledo, a boy came up to sell some pamphlets and old papers to a silk mercer, and, as I am fond of reading even the very scraps of paper in the streets, led by this natural bent of mine I took up one of the pamphlets the boy had for sale, and saw that it was in characters which I recognised as Arabic, and as I was unable to read them though I could recognise them, I looked about to see if there were any Spanish-speaking Morisco at hand to read them for me; nor was there any great difficulty in finding such an interpreter, for even had I sought one for an older and better language I should have found him. In short, chance provided me with one, who when I told him what I wanted and put the book into his hands, opened it in the middle and after reading a little in it began to laugh. I asked him what he was laughing at, and he replied that it was at something the book had written in the margin by way of a note. I bade him tell it to me; and he still laughing said, "In the margin, as I told you, this is written: 'This Dulcinea del Toboso so often mentioned in this history, had, they say, the best hand of any woman in all La Mancha for salting pigs'."

When I heard Dulcinea del Toboso named, I was struck with surprise and amazement, for it occurred to me at once that these pamphlets contained the history of Don Quixote (Cervantes Saavedra, 2005, p. 106).

Menard, therefore, is satisfied with simply copying Cervantes, as Borges thought, but he adds amendments in the passages he believes he is able to improve the plot. Progressively, these amendments were incorporated into the official *Quixote* and we gradually forgot that they were additions by Menard.

So far, a half-truth has been said here, with the mimetic appearance of absolute truth. Pierre Menard is, in fact, an invention of Borges, who, in the book *Ficciones*, writes a tale called *Pierre Menard, author of Quixote* (1998). Subverting literary genres, under the guise of criticism, Borges produces fiction⁴. And so we now know, the true author of *Quixote*, alongside the leading role of Cervantes, is actually Borges himself, who takes the pseudonym of Menard. Menard is nothing more than the character narrator, homodiegetic⁵, of Borges' text.

But the complexity of the story leads us to recognize that Menard is a *heteronym* of Borges, and so, in reality, *Quixote* is not the work of two authors, Cervantes and Borges, but three: Cervantes, Borges, and his heteronymous, Menard. Borges, pretending to make literary criticism, actually changes Cervantes' own *corpus* of texts, becoming his co-author, but he does so in the form of an *alter ego*, and so we need to recognize that it is not Borges properly, but Menard, by Borges, who is the (co) author of *Quixote*.

One can subvert the truth by saying only truths, and this is what has just been done here. This *Borges* described here never existed. There was, yes, a Jorge Luis Borges, author of the short story *Pierre Menard, author of Quixote*. But this Jorge Luís Borges is not exactly described above: someone who had assumed a pseudonym and premeditatedly produced a fraud, a counterfeit, becoming a co-author of the current version of *Don Quixote*. There is no addition to the original text of Cervantes, and the text quoted

⁴ Are they in fact different genres, fiction and criticism? We will see next that no, since the criticism on a certain text becomes incorporated in the imaginary of the future reception of such text.

⁵ The homodiegetic narrator is, according to Genette's nomenclature, someone who is present in the plot that is narrated by him, while the heterodiegetic narrator is someone who does not participate in the plot he tells.

above is directly from the mind of the Spanish author⁶. In fact, Borges hoped that the reader would pass the test of subverting the literary genre⁷ and recognizing that it was all one of many fiction works (which is the translated title of the very book Borges wrote).

But this Borges described here wrote the tale with a different intention than the one the real Borges attributed to his work. The Borges described above had written the tale with the intention of deceiving the reader⁸. In other words, the Borges described above is an invention by the author of the present article, a new half-truth, a new mimetic appearance⁹ of absolute truth. *Quixote*, therefore, is not the work of three authors, Cervantes, Menard and Borges, but of four: Cervantes, Menard, Borges and the author of this article.

A new author (the author of this article) of a text about another author (Borges) of another text about an author (Menard) that amends a text of another author (Cervantes): We see here what has become known as the Droste effect, a brand of Dutch cocoa whose marketing campaign consisted of a girl holding a cocoa package in which is printed a girl holding a cocoa package, in which you see a girl holding a cocoa package, an image that replicates infinitely, *mis-en-abyme*, a type of narrative that makes use of recurrence, in which the *mimetized* element is represented on several levels, such as the play performed in the play, in the third act of *Hamlet*, or as the painter Velasquez, who paints himself (painting his own painting) in *Las Meninas*: with a mirror that reflects another mirror. I, who reflect

⁶ Cervantes's play of hiding himself in the text and revealing himself as the author of the text is therefore what makes him probably one of the first modern authors, as Douglas Price (2017) states .

⁷ The subject of gender subversion is of fundamental importance for Law, especially in Brazil. Henriete Karam, for example, makes clear that on the one hand, for the genre of literary criticism, the theme of the (rational) foundation is central; On the other hand, for to the genre of the novel, which substitutes truth for verisimilitude, the central theme is the theme of originality. The question that Karam asks is whether courts, such as the Federal Supreme Court of Brazil, should act more as literary critics than as authors (of the Constitution's novel), and whether they should be more concerned with the basis of their interpretations than with their originality (Karam, 2016; Karam, 2017).

⁸ Chapter 8 of *Don Quixote*, which I referred to as the main alteration introduced by Menard, is not even mentioned by Borges, who states that Menard re-created the 9th, 38th and part of the 22nd chapters (Borges, 1998, p. 492).

⁹ Mimeses, or narration, is a term used by Aristotle in *Poetics* (1148a to 1449a) to describe art as the imitation of nature, and can be translated by *representation, likelihood, fiction, illusion, reference* or even *lie* (Compagnon, 2006, p. 98).

Borges, who reflects Menard, who reflects Cervantes... And maybe the one who reads this article is, also, another reflecting mirror...

It is this recursive plot that, if well understood, can explain¹⁰ much about the author of a Constitution. And, knowing who is the author of a constitution, perhaps we can understand if the meaning and denotation (or reference) of the constitutional text resemble a time bomb or a time machine, or if they are just like the pendulum of a watch.

THE CONSTITUTION AS A MIRROR

This multi-mirror story reveals the *problem*¹¹ of the Constitution. The American Constitution begins with the formula “We, the people”. Political Philosophy has no difficulty in understanding how a handful of white men, landowners and slave traders, could conceive themselves as “the people”. There is no difficulty in explaining how, by a process of self-deception, a ruling class, now rulers, makes opaque the fact that they are not the people, much more diverse and heterogeneous than such a class. The difficulty, on the contrary, is to understand how this diverse and heterogeneous group, formed also by the slaves and their descendants, can identify itself in this formula, “We, the people”, when reading a text that was not written by them. What opacity is this that produces a “We, the people” instead of “They, the elite”? How do the people, by voting, become one with the elite?

This is not an exclusivity of the American Constitution: The German Basic Law says in its preamble that it was promulgated by the people through its constituent power, and the Brazilian Constitution states in its preamble, in a somewhat more modest way, that the Constitution was drafted, in a National Constituent Assembly, by “we, *representatives of the Brazilian people*”. How can there be representatives, with no represented people? For if the people (American, German, Brazilian) did

¹⁰ Exposing from within the folds, plications, plans that hide it in the text, as revealed by the very etymology of the word.

¹¹ On the concept of *problem*, see my article entitled “*A contribuição de Esser para a reconstrução do conceito de princípios jurídicos*” (Esser’s contribution to the reconstruction of the concept of legal principles”) (Galuppo, 1999).

not exist before their Constitution as a people in the constitutional text, who do the representatives represent? One, for example, did not vote in any of the framers: to what extent did the elected representatives represent him / her? And why does this text written by strangers still represent him / her? And why should such a person link to a text that was not written by him / her? The question may be even more difficult if we consider the situation of someone who has participated in the electoral process that constituted such an assembly but whose candidate was not elected. To what extent can such a person feel represented by the members of that assembly and bound by their decisions?

For Jacques Derrida, it is necessary to pay attention not only to the formula that constitutes the preamble of the foundational texts, but also to its signature, if we want to understand what happens in these cases. In the American case, by signing the text of the Declaration of Independence on behalf of a people that did not yet exist (for it is precisely this text that makes the American people distinct from the people of the British Empire), the signatories constituted, invented people they claimed to represent. The foundational texts are, therefore, not merely verifiable acts, but also performative acts, which, cosmogonically and tautologically, create the people who create them:

The signature invents the signer [...]. In signing, the people say – and do what they say they do, but in differing and deferring themselves through [...] the intervention of their representatives whose representativity is fully legitimated only by the signature, thus after the fact or the coup [...] – henceforth, I have the right to sign, in truth I will already have had it since I was able to give it to myself (Derrida, 1986, p. 10).

The framer sees in himself a people that does not yet exist as such, and believes himself to be a mirror that magically reflects the people through the logic of political representation. And the effect produced by this magic consists in deceiving everyone, including himself: the constituent power is the people! But how can he not only reflect himself?

Apparently, the alleged transparency of the author, which allows him to identify with the recipient of the constitutional text, is what

produces the opacity of the constitutional text, without which we would not be able to recognize ourselves as authors of the Constitution. But this hypothesis comes up against another difficulty: if we think of the constituent power in this way, then the Constitution that it produces is also a decoy, a useful hypothesis to think about certain sociological analyses of the Law, but little useful to think the dogmas of Constitutional Law. It is necessary to propose another key of reading, which has already begun to be outlined hereby. The proper literary metaphor for thinking the Constitution is the one of the *mirror*. The mirror that reveals by, that hides by revealing. It hides by revealing because, when we look at it, we discover who is the subject of the constitutional text, but this can only happen because we do not see the mirror itself. When, for example, one looks in the rearview mirror of a car, we only become aware that it is a mirror because we do not see it, and we do not see it because what it reveals is something other than itself (the road behind the car). Therefore, we only become conscious of the mirror because we do not see it, and exactly in this consists its usefulness (a mirror that does not reflect, but instead allows the surface of the mirror to be seen and not seen behind it, would not be useful as a mirror), and that's why it reveals hiding. The people are, at the same time, hidden and present in the Constitution. The people, therefore, are someone like Perseus, who, being unable to look at Medusa face-to-face, looks at her through a reflection in the mirror which, in fact, is her Aegis¹². We still need to know who this Medusa is.

Unlike the Greek myth, the Medusa, in our case, is the very people. But this people is not the people of the Constitution. Michel Rosenfeld reminds us that “constitutional order requires the imposition of limits on the dissemination of the pre-political community identity of the nation [...] Constitutional identity competes with other relevant identities, opposing them” (Rosenfeld, 2007, p. 21). The people of the Constitution opposes the empirical people. But the fact that the Constitution is a denial of the empirical people, the fact that the Constitution says that we are

¹² Aegis was the shield that Athena lent to Perseus, so that he would fulfill his mission to kill one of the Gorgons, the Medusa. After Perseus's victory, Medusa's head was incorporated into the shield and he became the *Gorgoneion*, a deadly weapon, which, when displayed on the battlefield, petrifies with fear those who observe it.

legally different from what we are empirically¹³, does not exclude the fact that this empirical identity is presupposed dialectically by the constitutional identity:

Constitutional identity is problematic because, apart from remaining distinct from and opposed to other relevant identities, it is inevitably forced to incorporate them in part so that [constitutional identity] can acquire sufficiently definite meaning (Rosenfeld, 2007, p. 22).

We are the people (Perseus) who see the Medusa in the Aegis in which the Constitution is transformed, but we are also the empirical people, the Medusa herself, the monster of which the Constitution protects us¹⁴.

In *Pierre Menard* by Borges, the meaning of the text is the text itself, the *mise-en-abyme*. But, as in the case of the rear view mirror, when you see the mirror, not what it reflects, nothing else is seen. Therefore, if the Constitution is a mirror, it can only reflect what we put before it: It can only reflect ourselves. In other words, for the Constitution to operate as such, one must interrupt the reflection to infinity by placing an observer between two mirrors, which then reflect the two sides of this observer. Looking between two mirrors, the observer finally becomes aware that they have a front aspect, but also a rear aspect. The empirical people are discovered in the people of the Constitution. When we see ourselves in the mirror, the fading of the image of the *founding fathers* and of the *framers* occurs, and

the necessary disappearance of that which founds it – whom it resembles, and of those in whose eyes it is no more than likeness. This subject – who is the same – was deleted. And free, finally, from this relation that chained it, representation can be given as pure representation (Foucault, 1999, p. 21).

The framer constituent only creates the mirror, but does not produce the reflection. He saw himself in this mirror the moment he created it, but he cannot be sure what the mirror will reflect in the future. He cannot even

¹³ For example, the Brazilian Constitution says that we seek to build a free, fair, supportive society without poverty or marginalization or social inequalities (Article 3), and this principle remains valid even if it is daily disregarded in social relations. The Constitution, therefore, refers to us as subject constituted by the constitutional norm, and not as a sociological or historically described subject.

¹⁴ In psychoanalytic terms, we are at the same time the repressed id and the repressive *super-ego* of ourselves, the drive of love, but also of death, and the civilization is repressive of that drive (Freud, 2010).

imagine that the object to be reflected has a rear aspect. And so when constitutional texts say “the people”, it is not constituents, or constituents think they are the people, that they speak, for the reflection is not produced only by the mirror, or only by the object itself, but by the interaction of both. The author of the reflection is the subject who stands between the mirrors, and this may help us to better understand how we interpret the Constitution, and how we see the mirror.

TIME MACHINE, TIME BOMB AND PENDULUM: SENSE AND REFERENCE OF THE CONSTITUTION

Literary theory and criticism have always debated the role of the author in the configuration of the text. One of the most discussed theses of twentieth-century literary theory was the author’s death thesis, for which “the reader, not the author, is the place where the unity of the text is produced” (Compagnon, 2006, p. 51). The text takes place in its destiny (the reader), and not in its origin (the author who wrote it). However, this thesis does not imply, in fact, the death of the author, but only the replacement of the traditional concept of author with another:

the death of the author brings, as a consequence, the polysemy of the text, the promotion of the reader, and a freedom of comment hitherto unknown; but for lack of a true reflection on the nature of the relations of intention and interpretation, is it not the reader’s role as a substitute for the author of what one would be talking about? There is always an author: if it is not Cervantes, it is Pierre Menard (Compagnon, 2006, p.52).

This approach produced what Compagnon calls an *anachronistic interpretation* which, considering the text as independent of the semantic intention of the one who wrote it, that is, as something that has existence out of time, interprets it as something demiurgically¹⁵ produced. Against this, Rabelais already warned in the preface of his *Gargantua and Pantagruel* that the fault for finding such semantic intention in the original text would not be his, the author, but of the reader, who deposited it in the text:

¹⁵ The demiurge is a god who, according to Plato, in the manner of an artisan, creates the sensitive world *ab ovo*, from the contemplation of ideas, existing in the intelligible world (Plato, 1996, p. 448).

Rabelais does not criticize those who read a Christian sense in the *Iliad* or in the *Metamorphoses*, but only those who claim that Homer and Ovid had put this Christian meaning in their works. In other words, those who read in *Gargantua* a scandalous sense, like those who find a Christian sense in Homer or Ovid, will be [the only] responsible for this! (Compagnon, 2006, p. 57).

This anachronistic approach thinks the interpretation (of the constitutional text) through the metaphor of the time machine: us readers, we travel until the moment of the creation of the work and we insert there a sense (a bomb) concealed from the eyes of the very author, but that we ourselves know it and then, now, back to the present, we reveal for ourselves at the time of its explosion.

But it is possible, too, to understand the reverse of this speech. It is possible to conceive the (constitutional) text as a Trojan horse, which carries in its womb a time bomb, a hidden meaning inserted by the primordial author (the constituent) and that only now, in the soil of the present, is revealed to us, invading and dominating our daily lives.

In the United States, these two approaches correspond to the two currents of constitutional interpretation, called allegorist (or *Living Constitution*) and originalist. But these two positions are both unsustainable because

If given generation can redefine the first principles, as they please, it means that there is no Constitution. But how to accept, in a modern democracy, that in the name of the fidelity to the original intention, assuming that it is verifiable, the rights of the living are guaranteed by the authority of the dead? (Compagnon, 2006, p. 59).

Therefore, as a human work, a Constitution has the characteristic of inexhaustibility that is present in the great works, which can only be understood if we contrast its sense (*Sinn*) with its reference (*Bedeutung*)¹⁶.

¹⁶ The more spontaneous translation of the term *Bedeutung* would be *meaning*, and the translator of Compagnon's book, on which I base my analysis, prefers to use the expressions *sense* (for *Sinn*) and *meaning* (for *Bedeutung*). However, the analytical tradition of Philosophy of Language has preferred the terms *sense* and *reference* (or *denotation*), respectively, for, as Ferrater Mora says, "in the case of Frege would lend itself to confusion. Any of the words indicated – denotation, *denotatum*, reference – is adequate, but we prefer the latter which, moreover, seems to be the one that has circulated the most" (2001, p. 2479). For an analysis of the problem of meaning in the

Although the distinction between sense and reference goes back to the logic of Port Royal, Gottlob Frege was responsible for disseminating it in the philosophy of contemporary language. As reference (*Bedeutung* in German, or *Denotação*, in Portuguese) refers to what a name indicates, sense (*Sinn* in German, *Sentido*, in Portuguese) refers to the meaning, to what it expresses, and, therefore, to the way of presenting (or using) the name. Taking Frege's two classical examples, the word *Odysseus* (Frege, 1997, p. 157), like all other nouns themselves, has a sense (expresses something), but does not have a reference (does not have the possibility of indicating another being who can have the same name). On the other hand, the reference "star of the morning" and the reference "star of the afternoon" (Frege, 1997, p. 153) are identical (indicate the same reality), but the meaning is not the same¹⁷. Meaning and reference are therefore relatively independent.

As *reference* refers to denotation, sense refers to connotation. By denotation we understand the semantic extension of a term, the elements that can be named by that term, and by connotation we understand the conditions of understanding the term, that is, the conditions for the term to be applied to a particular object. The term "manga", in Portuguese, for example, denotes similar objects (e.g. shirt sleeves of different types), and it connotes distinct objects (the shirt sleeve and the fruit mango). Thus, as *reference* says what a term encompasses at a given moment (what it denotes), sense tells to what objects a term can be applied along time (what it connotes).

According to Compagnon, Hirsch appropriated this distinction and converted it into categories for text interpretation in literary theory:

Hirsch extended the distinction to the text by separating its *meaning* and *significance* from the text. According to Hirsch, meaning designates what remains stable in the reception of the text; It answers the question: What does

literature, albeit in a slightly different perspective from the one adopted here, see the seminal article by Robert Cover (2016).

¹⁷ A third case, adapted from an example by Frege, is perhaps even more enlightening. Imagine the intersection of three lines (AB, CD, and EF). All intersect at the same point, which we will call Z. The intersection of the line AB and CD (point Z) is the same as the line AB and EF (point Z), and therefore have the same reference (*Bedeutung*, denotation), but do not have the same meaning (*Sinn*).

the text mean? Significance is what changes in the reception of a text: it answers the question: What value does this text have? Meaning is singular; the Significance [reference], which puts meaning in relation to the situation, is variable, plural, open and perhaps infinite (Compagnon, 2006, p. 86).

In the case of major works,

every generation understands them in their own way; that is to say that the readers find in them some clarification on aspects of their experiences. But if a work is inexhaustible, this does not mean that it has no original meaning¹⁸, nor that the intention of the author is not the criterion of this original sense. What is inexhaustible is its significance¹⁹, its relevance outside the context of its emergence (Compagnon, 2006, p. 88).

The pragmatic level²⁰ of discourse, its illocutionary content²¹, and its perlocutionary effect, is not identified or contained at its semantic level, in its locutionary content. The distinction between sense (which drives the originalist approach) and reference (which directs the *Living Constitution* approach), in turn, implies that the interpretation of the constitutional text does not seek to reveal only the premeditated meaning of the author, but also the denotation of the text for us (although the original sense has a leading role in the search for this denotation), because

¹⁸ Sense, that is, *Sinn*.

¹⁹ Reference, that is, *Bedeutung*.

²⁰ Semiology, which studies the general system of linguistic signs and their life within social life, understands that human communication involves three levels: the syntactic, which analyzes the relation of signs to each other, the semantic, which analyzes the relation between signs and the objects they designate, and the pragmatic, which studies the relationship between signs and the subjects involved in communication, and therefore the phenomenon of authority. Imagine, for example, the following phrase: “Shut up!”. Regardless of the speaker and the listener, this phrase always has the same syntactic content (it is imperative) and semantic (expressing the speaker’s desire for the listener to remain silent). But that same sentence changes from the pragmatic point of view in terms of its sender and receiver. For example, if a judge says to a defendant, it is an order, and is expected to produce the perlocutionary effect of making the defendant silent, but if the defendant is told by the judge, it is a contempt, and is expected to produce the perlocutionary effect of leading the defendant to a sentence (Galuppo, 2002, p. 109).

²¹ The speech acts have a locutionary content, an illocutionary content and a perlocutionary content (Galuppo, 2002, p. 111-113). The locutionary content of an act of speech is what is said, its semantic meaning, its reference and its syntactic structure. The illocutionary content can be paraphrased as a performative statement (which accomplishes something through communication). For example, “Arrange the kitchen” has the illocutionary content of an order: “I command you to arrange the kitchen” (Greimas, Courtés, [198?], p. 226). But perlocutionary content is not linked “either to the content of the statement or to its linguistic form: it is a second effect, such as that which produces an electoral discourse by arousing enthusiasm, conviction or anger. Unlike illocution, in which an effect is produced by saying, perlocutionary acts produce an effect [...] by the act of saying” (Greimas; Courtés, [198?], p. 331).

numerous are the implications and associations of details that do not contradict the main intention, but whose complexity is (infinitely) more particular, and which are not intentional or premeditated. However, it is not because the author did not think of it that this is not what he meant (what he held, deeply, in thought). The signification accomplished is nevertheless intentional in its completeness, since it accompanies an illocutionary act which is intentional. [...] Having the intention of doing something – returning the ball to the other side of the net, or composing verses – does not require conscience or design (Compagnon, 2006, p. 91).

Sense is more than relevant, since it is a condition of the intelligibility of the text itself, but it does not exhaust the reference of the constitutional text or any text. Let us think, for example, of the rhetorical-stylistic appeal of *irony*: without invoking the author's intention (to mean one thing, when he actually says and denotes another), it is completely incomprehensible. If the sense or meaning were not binding in any measure, then the distinction between creating and interpreting the law would be impossible. If there was only the reference, then every act would be an act of creation of the law²².

Therefore, it is true that we cannot think of the text as *a* coherent text if we do not presuppose the author's own action and the meaning he attributes to the text, but even if the original sense (what the author meant at a given moment) implies a ruling role in the search for reference or significance (the value it holds for us), sense is not exclusive, neither because it is the only way, nor because it is determinant, since the history of the text is also the history of its critical literature, the history of its reception (Compagnon, 2006, p. 80), the history of its commentaries and its interpretation, as the case of Cervantes-Menard-Borges reveals to us. For if sense were the only determinant of denotation, how would we be able to change the text of the Constitution itself (Rosenfeld, 2007, p. 20),

²² Kelsen understands that any act of interpretation operated by a law-enforcement agency is also an act of law-making, because, at best, the interpreter, for example, the judge, has to choose discretionary (or, irrationally, among the various possible interpretations that he can apply (Kelsen, 1992, p. 240). Kelsen's argument is syntactically correct, but it is not pragmatically correct. It could also be said that the activity of the legislative power is not an act of creation, but also of interpretation (and application) of the Constitution (as Kelsen himself admits). But we do not say this, because the immediate intention of the legislator is to create the law (and only he interprets and applies the law rightly), while the immediate intention of the judge is to interpret and apply the law (and thus he / she only creates it in a mediatory way).

by amending it, without betraying the sense intended by the author (ourselves) of killing Medusa? Although in determining the meaning of Quixote's text, Cervantes' premeditation has primacy, its denotation (reference) can only be revealed to us when we think of Menard, Borges, the author of this article and his reader. None of them, alone, is the author of the text from the dogmatic point of view, although they can be the historical writers of the text. It is the game of mirrors and the subject that stands between them that is the author of the text. In the same way, it is the game of mirrors and the subject that interposes between them that is the author of the Constitution.

That is why in his *Pierre Menard, author of Quixote*, Borges states that Menard re-created, not that he copied Quixote:

The text of Cervantes and Menard's are verbally identical, but the second is almost infinitely richer. (More ambiguous, his detractors will say, but ambiguity is a wealth).

It is a revelation to compare *Don Quixote* by Menard with that by Cervantes. The latter, for example, wrote:

... truth, whose mother is history, the semblance of time, deposit of actions, witness of the past, example and warning of the present, warning of the future.

Drawn in the seventeenth century, written by the 'ingenuity layman' Cervantes, this enumeration is merely rhetorical praise of history. Menard, on the other hand, writes:

... truth, whose mother is history, the semblance of time, deposit of actions, witness of the past, example and warning of the present, warning of the future.

History, mother of truth; the idea is astounding. 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. The final clauses – *example and warning of the present, warning of the future* – are blatantly pragmatic (Borges, 1998, p. 496).

It is now clear that, contrary to what the hurried reader might think, Borges is not being ironic in saying that what looks like mere copying is a re-creation, although the text is identical, for if the meaning is the same, the reference was changed, because what "mother of history" denotes for a Spanish author of the seventeenth century is not the same as it denotes for an Argentine of the twentieth century, let alone what it can denote for a Brazilian in the 21st century²³.

²³ There is an evident parallel to that in the work by Ackerman (1991), *We, the People*. According to the author, the denotation of the constitutional text of the USA is deeply

Neither a time machine nor a time bomb: we can only adequately interpret the Constitution if we consider that the interpretive effort is like a pendulum, which alternates between the sense and the reference of the text, and which calibrates the march of the hands of the clock, without hindering them from being the hands of the clock.

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altered in along the three *momenta* of the constitutional history of the USA: from the founding to the Civil War, which he calls *Founding Period*, then from the time of the Civil War to the New Deal, which he calls *Middle Republic*, and the period that follows to the present, which he calls *Modern Republic*. For more details, see his work, especially the third chapter (*One Constitution, Three Regimes*) of the first volume (*Foundations*), and the second chapter (*The Living Constitution*) of the third volume (*Revolution*).

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Original language: Portuguese

Received: 05 May 2018

Accepted: 24 Sept. 2018