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REDE BRASILEIRA
DIREITO E LITERATURA

INTERVIEW WITH LENIO STRECK
LITERATURE HELPS
EXISTENTIALIZE THE LAW



BY HENRIETE KARAM¹

Lenio Streck, with a postdoctoral degree in Constitutional Law at the University of Lisbon (Portugal), is a Professor of Postgraduate Studies in the Law School at UNISINOS and at Universidade Estácio de Sá (UNESA), as well as a Visiting Scholar in several foreign Universities.

Founding member of the Brazilian Law and Literature Network (*Rede Brasileira Direito e Literatura* - RDL) Streck is the author of several works – with emphasis on *Judge models* (*Os modelos de juiz*, Atlas, 2019); *Inside the law* (*Por dentro da lei*, Tirant lo Blanch, 2018); *Law and Literature: From the reality of fiction to the fiction of reality* (*Direito e literatura: da realidade da ficção à ficção da realidade*, Atlas, 2015). He is one of the most important Brazilian jurists in Latin America today, and honors us with this interview, in which he discusses his inspiration from Luis Alberto Warat, the importance of the conceptual apparatus of literary theory and of semiotics for juridical reflection, and also his experience at the head of the television show *Law & Literature* (*Direito & Literatura*), screened weekly in Brazil, in national network, on TV Justiça, since 2008.

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Henriete Karam – *Among the pioneers of the Law and Literature “movement” in Brazil, together with you, there were Luis Alberto Warat, Luiz Carlos Cancellier de Olivo and Dino del Pino. What was your relationship with these “characters”?*

Warat was my thesis supervisor at UFSC and responsible for taking me to the Academy. After I was his student in a specialization course, I left my job, took my newly constituted family (Rosane and Malu, just born) and went to live in Florianópolis to follow the master. One of the things that marked me was to study for an entire semester in the master’s degree the novel *The Name of the Rose*. Each week Warat came with new ideas such as that. Cancellier met at the University, I took part in an event he organized at UFSC, on Law and Literature. He is undoubtedly one of the forerunners of studies in Law and Literature in Brazil. It was a tragic victim of the dark (and Kafkaesque) times we live. Cancellier saw a different relationship between law and literature, different from what you, Andre [Karam Trindade], Dino, Warat and I do. As for Dino, he has been with us since the beginning of the Law & Literature Project. Dino helped us a lot to read the deeper layers of literary works. He saw things we did not see. Well, that’s how it went until he left us. He could always see farther. Dino and Warat were very similar in their differences.

Henriete Karam – *As with hermeneutics in the 1980s and 1990s, studies in law and literature are still viewed with some mistrust on the part of the academic community. The “operators” of the Law, in turn, believe that everything is just dilettantism. The philosopher Ernildo Stein himself has been somewhat skeptical of the validity (perhaps “methodologically”) of this interdisciplinarity...*

That is complex. The other day I was reading about anguish and its arising. Anguish is a modern phenomenon. Anguish existed before, but one did not know what it was when it was there. From Kierkegaard, who we can call the first very existential philosopher, and then with Sartre and Heidegger, it was when the thematic of anguish got the central role. Freud understood this well and sought to explain the importance of anguish. Well. Hermeneutics has an existential character. Of course, I speak of

philosophical hermeneutics, heir of hermeneutical philosophy. Warat, although not a hermeneut, well said that his goal as teacher was to cause anguish in the students. He called it epistemological anguish. I remember writing a paper in the Rio Pardo local newspaper, in which I kept a hedonic column, precisely speaking of epistemological anguish. I had just had my first class with Warat. I got out of the hole. Warat opened a hole in my small certainties. That was 1983.

For hermeneutics and psychoanalysis do that: they unsettle. They take away the certainties of pre-modern cartography. Pascal looks at the sky and sees all those stars and says: how distressed I am. *Dasein*, Heidegger's being-there, comes to know that we know. Why am I saying this? Simple. And complex. I say this because literature has this same role that is exercised by hermeneutics and psychoanalysis. By fiction or by realism or by any literary style, our certainties fall to the ground. Look at the role of dystopias. How they become real, to the disgrace of mankind.

Of course, in law, talking about utopias and dystopias causes noises. This distresses the jurist. The problem is that sometimes he does not even know he's distressed. Sometimes he does not even want to face it. He does not want strangeness. Why are jurists so fond of ready concepts, statements, overviews? Because these give them peace of mind. It is like returning to the womb of pre-modernity, where everything was set and ready. All cartographies ensure certainty. Answers before the questions, here is the land promised by the dogmatic thought of law, heir to the old positivism. Literature helps existentialize the law. Therefore, hermeneutics is always closer to literature. Anguish, in order to be "cured", requires intermediation. It requires the other. You cannot make sacrifices to the gods anymore. Now we are face to face with ourselves. With our own ghosts. With our existence and others'. God is dead, and now we cannot do everything. Or anything.

For law deals with our relation to the world, to things. Democracy, social rights, citizenship: this occurs as an intermediate achievement. Literature does existential intermediation. Hermeneutics, in the sense that I work on the Critique of Law Hermeneutics, too. It is on purpose that Dworkin's central thesis is the chain novel to describe the sentence in law. The role of the interpreter-judge is to make *adjustments*, to *fit*. This is the

point where law and literature are found: in the treatment of epistemological anguish. The jurist, inserted in the theoretical common sense, does not know that he does not know. Literature creates metaphors of this unfinished relationship. It names things. It creates things with words, as Austin would say.

So, in the beginning was epistemological anguish, one might say. Nothing that Shakespeare, Machado, Cervantes and Swift could not handle. Finally, in relation to Stein's distrust of the methodological question of the relation between law and literature, I can say that I understand it, in the same way that I distrust the Philosophy of Law. Perhaps he does not accept that literature is merely an ornament in legal discourse, just as I do not want philosophy to be merely ornamental in law. In this we are together. Philosophy must be in the Law. And not "of". And literature is at the heart of existential law. And not just to make it more erudite or rhetoric.

Henriete Karam – *In Brazil, especially in the last decade, studies and research in Law and Literature have significantly increased. One of the competing factors for this is, certainly, the television show Law & Literature – screened weekly by TV Justiça, on national network – of which I also participate and you are the anchor. As is known, this is a genuinely Brazilian initiative, there is nothing similar in other countries. How has this experience been?*

Wonderful. The show, which is already in its eleventh year, has changed my view of the world. My anguish began to be "cured" in the show. Of course, it has not been fully healed (laughter). So many books I read, so many questions I asked, so many answers I heard. In times of anti-intellectualism, a show like this is a "catch" and, more than that, a cry of resistance. I really like Alasdair MacIntyre, who has a dystopia about the triumph of *Know Nothing*. In times of post-modern fragmentation and times of WhatsApp grottos, a weekly program of *stricto sensu* culture is a remedy against the *Know Nothing* culture. Law is the privileged *locus* for a

kind of card up sleeve against Knowing Nothing. It seems like stupidity is somehow trendy. One only has to look at school supplies used in colleges and prep courses, mostly composed of abstracts, summaries, facilitated books, simplified, tweeted – yes, all of this exists. The other day a guy released a book called *Be Fucking Good in Constitutional Law (Seja foda em direito constitucional)*. What can we say about all this? It is a kind of legal *olavism*, in which there is an enchantment for the obscure, for the simple and banal. So, every time I start the show, I think about how important it is to go against the odds, as the poet T. S. Eliot used to say: *In a country of fugitives, the person taking the opposite direction will appear to run away.*

Henriete Karam – *Is it true that you did not believe in this project at first?*

Yes, I was skeptical. André, still a kid, together with Roberta Gubert and Alfredo Copetti, came to offer me the project. Doubtful, I accepted it. And it was really the right decision. Of course, you, Henriete, and Dino were fundamental. And the support of Dasein – Núcleo de Estudos Hermenêuticos, besides TV Justiça, which, through the then President of STF, minister Gilmar Mendes, embraced the project. And TV Unisinos and its staff. But it there hadn't been the kids' ideas...

Henriete Karam – *Eleven years have passed and the shows continues on, uninterruptedly, counting more than 370 editions. The target audience, to everyone's surprise, is not restricted to students and lawyers. What is your balance of this bet?*

It's very rewarding, precisely because it is a kind of resistance to obscurantism, whether manifested through legal *olavism*, as I mentioned earlier, or be it in everyday irrationalities that reveal themselves increasingly in our political community. I would say that the show is my weekly manifesto against *Know Nothing*, which also carries a character of therapy. Many non-legal persons watch the show. From doctors, engineers to steakhouse attendants. I am often surprised by things like "I watch the

Law & Literature show”; “You should discuss the novel that way”. I think that this scope, this transcendence beyond the legal universe is something that literature allows. For example, Swift and his *Gulliver* is a pleasant read that reaches any profession. A play like *Measure for Measure*, by Shakespeare, too. The short stories by Machado de Assis, then, are a full meal. My task, our task, is to make a link. Literature, as we see it, has worked well for jurists, students, lawyers, and also speaks to those who look for the show without ever having visited the specifically legal universe in its strict sense. The outcome, therefore, is more than positive. I’m a methodological optimist.

Henriete Karam – *Recently, in an academic event, you repeated that the TV show Law & Literature changed your life. Is that true? Why?*

As I said before, yes. Absolutely. It has changed a lot in the way I see the world. I am, you know, a hermeneut, so the importance of dialogue is, to me, obvious. And the program is just that: a dialogue, in its most philosophical sense, more genuine, authentic, and precisely because of this, more meaningful. It would be impossible to list the distinguished guests here, the special shows we had, but anyone who has attended the show knows the level of those who participate. And look, I’m not talking about it, let’s say, in an intellectual or academically elitist sense; I speak in the sense that all those who participate in the show have accepted its underlying proposal: the passionate and disinterested search for truth. There was no way it would not change my life; years and years of learning, years and years facing my own anxieties and worries ... It has changed me, yes. And it has changed my life for the better.

Henriete Karam – *One of the premises of Law & Literature studies, at least in the area known as Law in Literature, is that certain literary narratives are more important for understanding legal and social phenomena than most of the textbooks given to students. How to work with this in the*

classroom? How can literature contribute to the training of jurists and lawyers?

Literature can contribute to education, period. For the training of the jurist is just one more step. Here is an example: take Swift and Gulliver's Travels. Could there be greater lesson for human arrogance? But I go further, since the question is specifically about the law. Anyone who has read Gulliver attentively already makes a point on how inadequate some philosophical or social proposals are, which, at one time or another, appear in the Law as if novelty. I give the example of statements and precedents. In Law, they are thought to be the solution to the problems of interpretation. It would only take a trip to the Academy of Lagado to realize that one cannot imprison the sense of things in propositions.

In this sense, I would also remind you that our proposal to merge horizons between Law and Literature is different and differentiated. Many authors, such as François Ost, speak of this connection from books that specifically address persons and themes of law. In my case and in our case, we have been able to work on literature books that do not specifically deal with "law" objects. Because we work with the structure of legal thinking, such as interpretation, and the constituent paradigms of Law. Take, for example, the way I work with *The Curious Impertinent*, by Cervantes. There is no explicit connection with the Law. But for me, there is the great question of criticism that a modern man like Cervantes can make of essentialism. Now, in the Law, essentialist pre-modernity has caused much damage. And the way Cervantes punishes Anselmo is a good way to see how it is useless to bet on fetishes and believe in essences.

Henriete Karam – *To recognize that fiction can be a way of approaching the law with the practical world or betting on the path that leads from "fiction to reality", isn't this a paradox?*

Only if we take the prima facie statement, ignoring what it actually prescribes. I return to Dworkin: Law as literature, from the chain novel, is exactly paying respect for what establishes the practical world, which

composes our legal world. The paradox is no longer a paradox when one realizes that doing philosophy in law – and this can be done from literature – is to respect practice as it is, not vice versa. The attachment to the empirical, the “real” (in its most ordinary sense), is often to ignore the authentic meaning of practice: this is the true paradox, and a paradox that imprisons the empiricists and skeptics.

Henriete Karam – *On the other hand, jurists believe that the judicial process exists to uncover the truth. In the criminal proceedings, the manuals still allude to the “real truth”. Does this reveal the philosophical sterility of legal thinking? Calvo González and Carlos Cárcova, to give only two examples, bet on solutions based on the conceptual apparatus of literary theory and of semiotics as discourse, fiction, narrative coherence, verisimilitude, etc.*

I smile at this question because, in addition to being fundamental, it reminds me of a point I did not mention earlier and that I could have used as an example. Ah, the “real truth”, so criticized by Warat... and the answer was already in Cervantes, in *The Curious Impertinent*, which I allow myself to return in this answer. Anselmo wanted to test the fidelity of his wife, Camila, and went on to, say, “instigate” her in favor of her friend, Lothario. He insisted so much, so much, that Camila and Lothario fell in love. The point? Anselmo produced a truth that did not exist. It is the essentialist fidelity: the same one that killed Desdemona. It was by imprisoning reality in an object, symbolizing conjugal love and fidelity in a handkerchief, that Othello kills his wife. If the fidelity of the wife was represented by the handkerchief, it was enough that Iago could have the object in his power to manipulate the events in such a way that Othello believed that his wife had been unfaithful, betraying him with Cassio. The truth, for Othello, was in the handkerchief.

Henriete Karam – *What relationships do you identify between Law and Literature studies and your Critique of Law Hermeneutics?*

I pick up the answer I had just given about the essentialist fidelity of the curious Anselmo. Anselmo did not perceive what Heidegger had

defined: the inaccessible as unavoidable, and the inescapable as the inaccessible. Literature and hermeneutics both show that – and again Heidegger returns – the proposition is not the place of truth, but truth is the place of proposition. I can go back to the legal example... to precedents and statements. And with that, I go back to Swift. When a set of subjects proposes something, by means of a statement or a precedent, as if they were in the Lagado Academy, it proposes nothing more than an attempt to arrive at a set of words capable of embracing the world and conferring a final meaning to it – the point, and therefore the inevitable contradiction, is that this is done without knowing, however, what world it is. And then I arrive at hermeneutics: with Gadamer, I say that you cannot say anything about the world before the world is allowed to say something. This is the point.

Henriete Karam – *Hermeneutics is undoubtedly one of the bridges that unites Law and Literature, especially within the scope of Law as Literature. To what extent is it possible to compare the interpretation of legal and literary texts?*

Every act of reception, in language, in art and in music, is an act of interpretation. Reading and applying is interpreting. When we read – prose, poetry, law – we try to understand what we have before us – prose, poetry, law – giving a context that is intelligible to us, giving it a place in that world which was already the world. George Steiner defined interpretation as a chamber of echoes, echoes of historical, social, and technical assumptions that inform the recognition of the new, relating it to what we have read or heard before, and our expectations of this new form of expression that stand before us. Worth for art, for literature, for law. We are condemned to interpret.

Henriete Karam – *You are one of the underwriters of the Direct Action of Constitutionality nº 44, proposed by the Order of Attorneys of Brazil, whose object is the constitutional guarantee of the presumption of innocence, which is processed in the Federal Supreme Court. It discusses the limits of interpretation, with an express reference to Umberto Eco. Would this be a*

good example of how law still has to learn, theoretically, from the field of Literature?

Yes, André Karam Trindade and I were the mentors and main underwriters of this legal piece. Parentheses: in fact, it has even become a dramatic, chaotic, or pathetic “play”, by the way it has been and is being examined by the Supreme Court. We just want the Court to let the text of the Code of Criminal Procedure and that of the Constitution say something. And we use Umberto Eco, when he denounces over-interpretation. We call attention to under-interpretation and over-interpretation. Afterwards we discussed this in several Law and Literature Programs. After all, in a country like Brazil, this theme is recurrent. Every day the courts over-interpret. In literature, over-interpretation can be seen in texts on the *Divine Comedy*, in which there are said to be symbols of the Rose Cross. And so on. André has an example that I like very much: it is possible to discuss if Capitu betrayed Bentinho or not; what cannot be said is that Capitu was a transsexual. I like the book by Eco, and with it I illustrate a personal story: once in Italy, amidst a lecture on hermeneutics, in which we discussed the thesis of a correct answer, a teacher interrupts me and says: “We both see a boat and everyone sees a different boat. So where is the correct answer?”. I answered, candidly: “Teacher, hallelujah. Perfect. It’s a boat. We are together. It’s not an airplane. So now we can begin to see the size of the boat”. I tell this to speak of what, in the Law, I have been saying for twenty years or more; the same as Eco said about *Comedy*: interpreting has limits. Did Capitu betray Bentinho or not? Let’s discuss. But Capitu was a woman. There is no interpretation of the thesis that Capitu was a man. But in law, lawyers can say that Capitu was a man without great scandals and consequences, if I may use this metaphor. Interpretation is not and cannot be hermetic; but there are limits. One can only say about a text what the text itself allows to be said about itself. Hence the Direct Action of Constitutionality: a final decision is final and unappealable. Score. There is no room for utilitarian calculations, *ad hoc* pragmatisms, etc. Where *x* is written, read *x*. In my *Dictionary of Hermeneutics*, I speak of this in the entry “correct answer”. Moreover, in this dictionary, the entry on “solipsism” is centered on the short story

Ideas de canário, by Machado de Assis, written at the end of the nineteenth century.

Henriete Karam – *Is it possible to draw a parallel between legal and literary theories as regards “interpretive paradigms” centered on the author / text / reader intention?*

It is possible, very possible, and for that I return to Dworkin. He goes to literature to reject the constitutional originalism of authors like Justice Scalia, and instead of resorting to the classical interpretation that seeks the author’s intention, he advocates in literature, art, and law the interpretation he calls constructive: an inter-subjective enterprise between author and interpreter. To me, the hermeneutic vein in Dworkin seems undeniable, so that the law-hermeneutic-literature union is evident.

Henriete Karam – *In the book “Por dentro da lei” (“Inside the Law”, Tirant lo Blanch, 2018), which I had the honor to organize and that had your collaboration, you discuss in your article the relation between facts, reports and interpretations, and alludes to the possibility of literature to “save” the Law... How can literature, especially with regard to polyphony, “save” the Law?*

I think that literature can save us – and save the Law – because it has long advanced the solution to problems that we face today as if they were insoluble; because it has pointed out for a long time that many of our solutions do not solve anything. Swift and the problem of precedents; Cervantes and Shakespeare and the real truth; Humpty Dumpty in *Alice* and the solipsistic judge who gives the words of the law the sense he wants; the shell of *The Lord of the Flies* and the place of speech supported by institutionalism; Roquentin, in *Nausea*, and the trap of seeking definitions capable of accounting for all reality in its completeness; Shakespeare, with his *Measure for measure*, and the question objectivism versus subjectivism; the question of what is a principle, which can be well learned in Victor Hugo’s *Last Day of a Condemned Man*; *Crito*, by Plato, which shows how Socrates was a man of principle, against *anarchy* (absence of principles). The list is endless. And so it goes...

Henriete Karam – *Which writers or books have influenced your legal training and thinking?*

Regarding literature, I have already mentioned them. Impossible not to. Swift, Shakespeare, Cervantes. The pioneers of modernity. I like Eco a lot, whom I already talked about. I can also mention Borges. And Orwell. And our Machado. This in literature, not to mention, as a hermeneutic, of Heidegger and Gadamer. And Stein. With respect to legal thinking, it is necessary to mention Dworkin and Kelsen – each in his own way, both understood that you cannot separate law and moral –, and, of course, the late Warat.

Henriete Karam – *And, to finish, what books would you recommend as a must-read for law students? And why?*

As a direct and positive recommendation, all those I mentioned in this interview. Now, and more importantly, as a kind of advice: run from the “schematized”, from the “simplified”, escape the simplifications that mask the complex nature of what we work with. Embrace the anguish. Why? Because when we simplify and simplify that which cannot be simplified, we no longer speak about what we intended; We have built a scarecrow, so that we are no longer taught law in the law schools; our young people have learned from a simulacrum that imitates, and hardly imitates, what was once the law, in the name of a poor political theory and poor metaphysics. What I recommend, then, is that they feel the anguish! As Dworkin would say, the only danger they run is the one of becoming interesting people.