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REDE BRASILEIRA
DIREITO E LITERATURA

**DISCLAIMER – THIS IS A WORK OF FICTION: THE
RELATIONSHIP BETWEEN LAW AND LITERATURE IN THE
NOVELS *THE CHILDREN ACT*, BY IAN MCEWAN, AND *THE
PALE KING*, BY DAVID FOSTER WALLACE**

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ABSTRACT: The aim of this article is to explore a relationship that has not yet been examined in the contemporary debate on law and literature. The law can, indeed, constitute the subject matter of a novel. But as we argue in this article, the law can also determine what counts, and what does not count as a novel. We defend this thesis by analyzing Ian McEwan's *The Children Act* (2014) and David Foster Wallace's *The Pale King* (2011). In the context of contemporary cultural production, the law has the power and the legitimacy to create what we call the space of fiction. As we intend to show, the law can create the demarcation line between fictional and non-fictional narratives.

KEYWORDS: Law; literature; narrative structure; Ian McEwan; David Foster Wallace.

1 INTRODUCTION

“Law and literature” has become a much debated topic in recent decades. This is a particularly fruitful debate because it connects themes that had long been addressed in separate fields of research, whether in

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literary theory or in the theory of law. The recent debate on law and literature has also contributed to the emergence of some new academic journals, including in Brazil³.

What kind of relationship, then, exists between law and literature, capable of giving rise to such an intense debate? As a matter of fact, there is not *one*, but many relevant relationships between law and literature. Thus, we would like firstly to explain which kind of relationship we intend to focus on in our analysis of some passages from *The Children Act* by Ian McEwan, originally published in 2014, and David Foster Wallace's *The Pale King*, posthumously published in 2011.

2 INTERPRETATION, CONTENT, AND NARRATIVE STRUCTURE

The first kind of relevant relationship concerns some similarity between the methodology of legal hermeneutics and the methodology for the interpretation of literary texts. Both legal and literary texts can be *interpreted*. Of course, in principle, any text can be interpreted, even the text, say, of a drug package insert. However, literary and legal texts often speak for themselves. The texts are, so to speak, “autonomous” with respect to the opinions the authors may have about their own work. By this we mean that, for instance, no question relative to the proper interpretation of the Brazilian Constitution, in the Federal Supreme Court (STF), can be resolved by simply asking the legislators what they had in mind when they created the law. The interpretation of a novel, in a similar way, cannot be settled by simply interviewing its author, even though the author may have relevant opinions about his or her own work. The question, in both cases, is not so much about what the authors had in mind, but what the *text* allows us to say.

³ See, for example, *Law & Literature* (ISSN: 1535-685X; ISSN: 1541-2601); *Anamorphosis: International Journal of Law and Literature* (ISSN 2446-8088); *Journal of Law, Art and Literature* (e-ISSN: 2525-9911). In Brazil, there is a TV program on law and literature produced by Unisinos University and presented by Lenio Luiz Streck. The show is called *Law & Literature*: https://www.youtube.com/playlist?list=PLkdJ9gZlZDoml_-ERGj1M2EOfYTOLAMO6. See also Trindade and Bernsts (2017).

This is different, however, as far as the interpretation of a drug package insert is concerned, even though the language of a drug package insert can be as hermetic and complex as the language that we sometimes find in the pages of a novel or in the text of court decisions. The interpretation of a drug package insert does not raise questions of interpretation in the same way that legal and literary texts do, because, in this case, we can consult the authors (or the laboratories) responsible for “publishing” the text and, then, resolve any questions regarding the proper understanding of what the text of a drug package insert means. This, of course, does not prevent – and indeed has not prevented in the past – the text of a drug package insert from becoming part of a literary work or from being part of the text of a court decision (Lunardi, 2011, p. 74; Brazil, 2012).

This first kind of relationship between legal and literary texts has been examined by authors such as Ronald Dworkin. For Dworkin (1985), legal texts must be *interpreted* in the same way we interpret literary works. For this reason, this kind of relationship between law and literature has been sometimes referred to as “law as literature”. Let us call it “relationship [1]” for short. Whether or not relationship [1] constitutes an adequate methodological approach to the interpretation of legal texts, this is not an issue we intend to examine here⁴. In our discussion on law and literature, the legal texts we will focus on are not the texts produced by legislators. We will be concerned here with the texts produced by judges in the courtroom. It is up to judges to interpret the text of the law and to produce their own texts with a justification for their decisions. Let us call it “relationship [2]” for short. The texts that judges produce in the courts bear a special kind of relationship to literary texts in two different ways. The first concerns the *content* of the text, the other concerns their *narrative structure*. Let us call it aspect [2.1] and aspect [2.2] of relationship [2].

⁴ For a recent discussion on legal interpretation in Portuguese, see Shecaira and Struchiner (2016).

Aspect [2.1] – relative to the content of some literary works and the content of court decisions – is quite clear. Writers such as John Mortimer, John Grisham, and Michael Connelly have become famous for publishing novels that depict the environment of the courtrooms. The content of these novels alludes to the same kind of situations that are also alluded to in many court decisions. Some authors go as far as suggest that we might speak here of a literary genre in its own right, sometimes referred to as *legal thriller* or *courtroom drama* (Robinson, 1998, White, 2003, Komie, 2005, Rosenberg, 2014, Sauerberg, 2016). Legal thrillers or courtroom dramas can also exist in the form of movies, television series or plays. But in this article, we will focus on the relationship between law and literature as far as novels are concerned. There are many novels that portray legal scenarios: the work of lawyers, the performance of judges and prosecutors, as well as the participation of witnesses and members of the jury pool. It is for this reason that, in the contemporary debate on law and literature, some authors refer to this specific kind of relationship between law and literature as “law in literature” (Morawetz, 2010, p. 446).

Aspect [2.2] – relative to the narrative structure that we find both in literary texts and court decisions – is not limited to legal thrillers or courtroom dramas. It concerns a much broader variety of literary texts. Indeed, we go as far as to suggest that aspect [2.2] is a feature that virtually any literary novel has. Both literary texts and court decisions have a narrative structure. Legal texts produced by legislators, on the other hand, lack a narrative structure. For this reason – and only for the purpose of our discussion – we distinguish here *legal texts* from *juridical texts*. For the purpose of our discussion, “juridical texts” are not the texts that contain or express the law. Juridical texts are texts that contain court decisions.

Unlike texts produced by legislators, texts produced in the courtrooms have a “narrative structure” because they deal with real people, in concrete situations, at a given time, but in circumstances that are not always favorable to all parties involved. Of course, there are other kinds of texts that also have a narrative structure: newspaper articles, history books, personal journals, biographies, autobiographies and some types of philosophical texts. Indeed, some well-known philosophical works have been written, for instance, in the form of dialogues, such as Plato’s main

works, or in the form of confessions, such as Augustine’s *Confessions* in the Middle Ages, or Rousseau’s *Confessions* in the eighteenth century. The philosophical treatises *Metaphysical Meditations* and *The Discourse on the Method*, written by Descartes in the seventeenth century, also have a clear narrative structure.

But there is a common element in the narrative structure of juridical and literary texts that makes one kind of text virtually indistinguishable from the other, namely: the element of conflict. In most novels it is possible to find, in the very structure of the narrative, something that goes wrong in someone’s life, a disagreement among the characters, some tension that results in fear, hatred, suffering, or even murder. The element of conflict is especially important in works of fiction – including plays and movies – that follow the kind of narrative structure that Aristotle describes in the *Poetics* (Araujo, 2018; Walsh, 2004; Tierno, 2002; Hiltunen, 2001). In *The Children Act*, this is not different: there is at the beginning of the narrative a conflict between Fiona (a judge) and her husband; there is a conflict between Adam’s family and the team of physicians responsible for him at the hospital; there is also a conflict between Adam and Fiona as the story develops. And there are also the conflicts narrated by Fiona when she refers to some of the legal decisions she had to make in the past. Whether or not the conflicts will be resolved, or if there will be some reconciliation at the end of the story, it does not matter. What moves the story forward, and sets the characters in motion, from the beginning to the end of the narrative, is the element of conflict⁵. In juridical texts this is no different. The very existence of a juridical text depends on the existence of some sort of conflict between the contending parties, some dispute between the “characters” summoned to the court. The judge, then, in the end, has to make sense of the relevant facts and events and produce his or her own normative narrative in accordance to the law.

It is important to emphasize, though, that there are literary forms in which the element of conflict is not relevant. In poetry, for instance, the

⁵ The thesis according to which fiction narratives involve the element of conflict is not new. It harks back to Aristotle’s *Poetics* (2015). In the original text of *Poetics* Aristotle calls *hamartía* (ἁμαρτία) an “error” that someone makes (usually the main character of a tragedy) at the beginning of the play. The error, then, gives rise to the situations that move the narrative forward. Cf. *Poetics*, chapter 6 (1450a 34).

element of conflict is not necessary. A poem may try to capture a moment of complete happiness or bliss without reference to some sort of conflict. The kind of literary text that we have in mind in this article, as far as the relationship [2] is concerned, are novels, even though the element of conflict can also be present in short stories, plays and screenplays.

There are other kinds of texts, which also have a narrative structure, but lack the element of conflict. In journalistic texts, biographies, historiographical works, or in most philosophical texts, the element of conflict is merely contingent. A newspaper article can simply report, for instance, the inauguration of a school – period. Sure, the text may become more attractive to the reader if the journalist (or historian) is able to explore the human dimension of the story and highlight the conflicts involved. But this would mean resorting to literary writing skills in the composition of a journalistic text (Cheney, 2001; Boynton, 2005; Weingarten, 2005). Readers of Plato's dialogues are excused for occasionally having had the feeling that, remarkable as the dialogues may be for the history of philosophy, their narrative structure is rather unexciting from a strictly literary point of view. In Plato's dialogues, the philosophical discussion never reaches a climax at which one of the parties insults, assaults and then kills the other. In novels and juridical texts, however, the element of conflict is indispensable. The discussion of philosophical ideas may, indeed, appear, for instance, in the pages of a novel by Tolstoy or in the decisions of a courtroom. But the discussion of philosophical ideas in novels and juridical texts never takes precedence over the human conflicts that appear in the text.

It might be argued, though, that there remains a crucial difference between the literary and the juridical text, namely: one text is about fictional people and situations, while the other is about real facts. This claim, however, does not affect the structural similarity that we find in both kinds of texts. Moreover, in several works in twentieth-century literature, the line between fiction and reality has become blurred (Araujo, 2016). Some well-known works of contemporary literature verge on journalistic accounts of real human conflicts. Truman Capote's *In Cold Blood* (1966) is a case in point. Capote's book has the structure of a work of fiction, but it deals with real persons and events: the trial and execution of two murderers

in the United States. The border between fiction and reality in this work is so tenuous that *In Cold Blood* has been associated with the emergence of a new literary genre, namely: the “nonfiction novel” (Cheney, 2001, p. 14; Boynton, 2005, p. 114, Weingarten, 2005, p. 78). More recently, in 2015, the Ukrainian writer Svetlana Alexievich received the Nobel Prize for Literature for works that are also at the border between journalism and fiction (Gourevitch, 2015, Ahmed, 2015). The book *Voices from Chernobyl: The Oral History of a Nuclear Disaster*, for example, stems from hundreds of interviews the author made with the victims of the 1986 accident in the former Soviet Union (Alexievich, 2005). Alexievich made this point clear – her debt to real people – right at the beginning of her speech at the Nobel Prize award ceremony, in December 2015: “I do not stand alone at this podium... There are voices around me, hundreds of voices” (Alexievich, 2015). Alexievich’s work can be understood as the literary expression of real voices.

The use of narrative fiction to give voice to real persons is more common in contemporary literature than we might perhaps suppose at first glance. The novels *The Children Act* and *The Pale King*, as we intend to show, can also be understood as the literary expressions of real voices. This makes the line between “fictional narrative” and “non-fictional narrative” in these works less clear than one might be tempted to think. It does not mean, however, that we can easily apply labels such as, for instance, “non-fictional novel”, “literary journalism” or “memoirs” to all works of contemporary literature. Yet, works such as *The Children Act* and *The Pale King*, as we intend to show, do contain elements of each of these genres – the non-fictional novel, literary journalism and memoirs. The line between “fictional narrative” and “non-fictional narrative” is itself, very often, a work of fiction. And it is by examining the aspects of relationship [2], to which we have referred earlier, that we become aware of the fictional nature of this line. The thesis that we will defend later in this article is that, in the context of contemporary cultural production, the law has the power (and the legitimacy) to characterize a given narrative as a work of fiction or, as the case may be, as a non-fiction work. Thus, the claim that there is a crucial difference between juridical and literary texts, simply because one deals

with real persons and events, while the other deals with fictional characters and situations, cannot be used as a starting point for a proper understanding of the relationship between law and literature in the context of contemporary cultural production.

3 JURIDICAL TEXTS AND HUMAN CONFLICTS

It should be emphasized now that some juridical texts, produced by judges in the courtroom, do not deal with the typical conflicts and human dramas of great literary works. The text related to the legal decision concerning, for instance, a dispute over the patent of a new bottle opener does not seem to contain the elements of an authentic human drama. This is why we would like to introduce now a new delimitation. The first delimitation consisted – only for the purpose of our discussion – in restricting the use of the term “juridical text” to refer to texts produced by the judges in the courtrooms. This leaves out of our discussion the question relative to the interpretation of “legal texts”, that is, the texts that contain or express the laws created by legislators. The second delimitation consists in restricting now the use of the term “juridical text” to texts produced in the context of Criminal Law and Civil Law. It is especially in these areas of law that we find the typical elements of most literary works: crimes of passion, murder, domestic violence, sexual harassment, rape, quarrels between husbands and wives and lovers, betrayal, disputes over inheritance, libel, blackmailing, and “abandonment of affections”. – The expression “abandonment of affections” (*abandono afetivo* in Brazilian law; not to be confused with “alienation of affections” in Common Law) is now part of the legal vocabulary in Brazilian courts (Freitas, 2017). It refers to a lawsuit filed by a son or daughter whose father or mother did not provide, in the course of family life, due care, or emotional support, or assistance and education.

Crimes of passion, murder, domestic violence, etc. are recurring themes, too, in the Family Division. And it is, indeed, in the lawsuits of the Family Division that we find some of the human conflicts depicted in *The Children Act*. The very title of this novel makes the connection between the content of the novel and the daily drama of the Family Division clear, as

Children Act is also the name of the British legislation that deals with the “welfare” of children in the United Kingdom (United Kingdom, 1989). In Brazil, McEwan’s novel was published as *A Balada de Adam Henry*. In our view, though, this translation is quite misleading. The title should be translated, instead, as *Estatuto da Criança e do Adolescente*, which is the Brazilian legislation that, like the *Children Act* in the United Kingdom, “provides for the integral protection of children and adolescents” (Brazil, 1990). Moreover, both the British and the Brazilian legislation came into force at around the same time: The Children Act in 1989, and the Brazilian “Estatuto da Criança e do Adolescente” in 1990.

It is well possible that the publishing house Companhia das Letras, which published the book in Brazil, favoured the incorrect translation in order to prevent the book from being placed in the section for legal scholarship of Brazilian bookstores. If it was indeed the case – and it should be emphasized that we have no documentary evidence to support this hypothesis – the publisher’s marketing strategy had the effect of preventing the Brazilian reader from realizing, even before opening the book, the clear connection between the content of the novel and the real drama that unfolds every day in the Family Division. Unlike the Brazilian edition, the translation of McEwan’s 2014 novel into other languages did not depart so much from its original title. The Spanish translation, for instance, is *La ley del menor* (literally, “The law of the minor”) (McEwan, 2018). The Russian translation is *Закон о детях* (literally, “Children’s law” or “Law for children”) (McEwan, 2017b). In Germany, the translation uses the vocabulary of the Family Law: *Kindeswohl* (literally, “Child’s welfare”) (McEwan, 2016a). The French translation opted for *L’intérêt de l’enfant* (literally, “The interest of the child”) (McEwan, 2017a). Among the non-English editions to which we had access, only the Italian translation has the same kind of flaw that affects the Brazilian edition: *La ballata di Adam Henry* (McEwan, 2016b). It is also worth mentioning that the wrong translation has some gender implications too, as the title of the Brazilian and Italian editions seem to suggest that a male character, Adam Henry, would be more important in the structure of the narrative than a female character, namely Fiona. In the novel, the narrative unfolds from Fiona’s perspective in the free indirect speech.

In an essay originally published in the newspaper *The Guardian* (McEwan, 2014b) and republished one month later in the Brazilian newspaper *Folha de São Paulo* (McEwan, 2014c), McEwan also draws attention to the connection between the conflicts that take place in the Family Division and the conflicts we find in the narrative structure of many literary novels:

These stories were in the Family Division, where much of ordinary life's serious interests lie: love and marriage, and then the end of both, fortunes querulously divided, the bitterly contested destinies of children, parental cruelty and neglect, deathbed issues, medicine and disease, religious or moral disputes complicating matrimonial breakdown.

[...] the Family Division is rooted in the same ground as fiction, where all of life's vital interests lie. With the luxury of withholding judgment, a novel could interpose itself here, reinvent the characters and circumstances, and begin to investigate an encounter between love and belief, between the secular spirit of the law and sincerely held faith (McEwan, 2014b).

In this passage, McEwan makes it clear that there is between his novel, on the one hand, and the *Children Act* (the 1989 piece of legislation), on the other, an important connection, which concerns the narrative structure of literary novels in general. It might be argued, though, that the text from an interview expresses only the author's own opinion about his or her work. If it is true, as we have suggested at the outset of this article, that a literary text is "autonomous" with respect to the author's own opinions, then McEwan's statement should not be given authoritative weight in the attempt to comprehend the nature of the relationship between law and literature in *The Children Act* (the novel). The text from the interview should be considered, so to speak, "external" to the narrative that unfolds in his novel.

However, we would like to call attention now to two further pieces of text, written by McEwan, that make the connection between his 2014 novel and the real dramas of the Family Division even more significant. These texts not only highlight the connection between McEwan's 2014 novel with the structure of legal and juridical texts, they also implicitly call into question – as other works of contemporary literature do – the attempt to establish a clear-cut line between fictional and non-fictional narratives. The

texts we have in mind here are sometimes referred to as the “pre-textual elements” and “post-textual elements” of a book. The question we are interested in examining, then, is whether or not these texts should be considered as part of the narrative structure of McEwan’s 2014 novel.

4 THE LEGAL BOUNDS FICTION NARRATIVE

The Children Act (the novel) begins with an epigraph that literally reproduces a passage from the *Children Act* (the piece of legislation), namely: “When a court determines any question with respect to [...] the upbringing of a child [...] the child’s welfare shall be the court’s paramount consideration. Section I (a), Children Act (1989)” (McEwan, 2014d). This is one of the “pre-textual element” of the novel *The Children Act*. On the last page of the novel we find the “post-textual element”:

Acknowledgements

This novel would not exist without Sir Alan Ward, lately of the Court of Appeal, a judge of great wisdom, wit, and humanity. My story has its origins in a case he presided over in the High Court in 1990, and another in the Court of Appeal in 2000. However, my characters, their views, personalities, and circumstances, bear no relation to any of the parties in either of those cases. I owe a huge debt of gratitude to Sir Alan for advising me on various legal technicalities, as well the everyday existence of a High Court judge. I’m grateful to him also for taking time to read a draft and make comments. I lay claim to any inaccuracies.

Similarly, I have drawn on a superbly written judgment by Sir James Munby in 2012 and, again, my characters are entirely fictional and bear no resemblance to the participants in that case.

I am grateful for the advice of Bruce Barker-Benfield of the Bodleian Library, and of James Wood of Doughty Street Chambers. I am also grateful to have read *Managing Without Blood*, a thoughtful and wide-ranging thesis by the barrister and Jehovah’s Witness Richard Daniel. Once again, I am indebted to Annalena McAfee, Tim Garton Ash and Alex Bowler for their close readings and helpful suggestions.

Ian McEwan (McEwan, 2014d, p. 223).

The question we would like to address now, then, is this: are the epigraph and the Acknowledgements part of the narrative of *The Children Act*? The thesis that we would like to defend here is that, yes, they are part of the narrative. An obvious implication of this thesis is that the assumption

that there is a clear-cut distinction between the narrative itself and the mere pre-textual and post-textual elements becomes problematic. Pre-textual and post-textual elements are constitutive of the narrative structure as a whole.

We would like to focus now on the text on the last page of *The Children Act*, namely the Acknowledgements. It might be tempting to understand this text as, so to speak, external to the narrative itself, that is, as a mere “post-textual” element in the structure of the book. But this, we believe, is wrong. In some important works of recent contemporary literature, the pre-textual elements (the copyright notice, the disclaimer, dedicatory, epigraph) and post-textual elements (acknowledgements, postface, endnotes, etc.) became part of the narrative. Consider, for instance, the following passage from Chapter 9 of David Foster Wallace’s *The Pale King* (2011). The book was published posthumously in 2011:

AUTHOR’S FOREWORD

Author here. Meaning the real author, the living human holding the pencil, not some abstract narrative persona. Granted, there sometimes is such a persona in *The Pale King*, but that’s mainly a pro forma statutory construct, an entity that exists just for legal and commercial purposes, rather like a corporation; it has no direct, provable connection to me as a person. But this right here is me as a real person, David Wallace, age forty, SS no. 975-04-2012, addressing you [...] on this fifth day of Spring, 2005, to inform you of the following:

All of this is true. This book is really true.

I obviously need to explain. First, please flip back and look at the book’s legal disclaimer, which is on the copyright page [...]: “The characters and events in this book are fictitious”. I’m aware that ordinary citizens almost never read disclaimers like this, the same way we don’t bother to look at copyright claims. [...] But now I need you to read it, the disclaimer, and understand that its initial “The characters and events in this book...” includes this very Author’s Foreword. In other words, this Foreword is defined by the disclaimer as itself fictional, meaning that it lies within the area of special legal protection established by that disclaimer. I need this legal protection in order to inform you that what follows is, in reality, not fiction at all, but substantially true and accurate. That *The Pale King* is, in point of fact, more like a memoir than any kind of made-up story (Wallace, 2011).

In this passage, the narrator, who now speaks as the “author” of the book, directly addresses the reader and draws attention to a connection

between law and literature that has not been explored in the contemporary debate: law as the criteria to distinguish fictional from non-fictional narratives. It is up to the law, in other words, to stipulate whether or not a text counts as a work of fiction. This is usually done by means of some short piece of legal writing such as the disclaimer in the first few pages of a novel. In the American edition of *The Children Act*, the disclaimer reads as follows:

This book is a work of fiction. Names, characters, businesses, organizations, places, events and incidents either are product of the author's imagination or are used in a fictitiously. Any resemblance to actual persons, living or dead, events or locales is entirely coincidental (McEwan, 2014d, p. 4).

Now, there seems to be a contradiction, or at least some kind of tension, between what the disclaimer states at the beginning of McEwan's book and what the "author" explains at the end. After all, it is McEwan himself who seems to suggest, in the Acknowledgement, that, contrary to what is stated in the disclaimer, nothing in the book is "entirely coincidental". He affirms, indeed, that his story "has its origins in a case he [Sir Alan Ward] presided in the High Court in 1990, and another in the Court of Appeal in 2000". One way to deal with this apparent contradiction is to understand the "author" of the Acknowledgement as being himself a character in the narrative, just in the same way the "author" of the Foreword to *The Pale King* can also be understood as a character. The disclaimer, the copyright page and further pieces of legal warning in a book usually concern only the legal department of a publishing house, for "normal readers almost never read" that part of the book. But the "author" of *The Pale King* suggests that the disclaimer, too, should be read. Reading the disclaimer, according to the "author", is a condition for a proper understanding of the narrative. That is why the "author" of *The Pale King* asks the reader to flip back to the beginning and, this time, carefully read the disclaimer. The question that we must answer now, then, is this: why should the understanding of the narrative depend on our reading a short piece of legal writing that "ordinary citizens" usually prefer to skip?

The law extends to diverse aspects of our lives and determines, for example, who counts, and who does not count, as the heir of a house; who counts, and who does not count, as the father and mother of a child; who

counts, and who does not count as the perpetrator of a crime. The law also determines if a piece of writing counts, or does not count, as a valid testament. The law also establishes, as portrayed in *The Children Act*, a limit to the decisions that fathers and mothers can make on behalf of their children. But in the context of contemporary cultural production, and without us realizing it, the law also determines what counts, and what does not, as a work of fiction. Moreover, we must also bear in mind that the first piece of writing that alludes to the title of a new novel is not the blurb and endorsements, or a review published in newspapers, or articles published in academic journals, or other novels. The first text that acknowledges the existence of a new novel is a legal text, namely: the document through which the author and the publisher enter into a contract – and this is not different in the case of self-published books on Amazon. This aspect of “intertextuality” seems not to have been examined in the contemporary debate on law and literature. In order to exist as a book and be purchased in bookshops, or in order to win prizes and be translated into other languages, or be adapted to the cinema, a literary work must bear a relationship to another text, namely the legally binding text that contains the agreement signed between the author and the publisher.

To the extent that the law has the institutional power to establish that a text is a work of fiction, the law also gives the author the “legal protection” that he or she needs to write a true story without incurring the risk of being sued by third parties. The “narrator” is thus distinguished from the “author” – “an entity that exists only for legal and commercial purposes” – by virtue of a legal device, and not by virtue of some feature immanent to the literary work itself. The paradox, however, is that the “Author’s Foreword” in *The Pale King* appears in the middle of the work, that is, in the space of fiction. The paradox is deliberate, for Foster Wallace – the writer – needs the space of fiction, created by the law through the disclaimer, to write a real story, a narrative that, as a matter of fact, is “more like a memoir than any made-up story.”

Both the author of *The Children Act* and the author of *The Pale King* need the space of fiction to narrate a real story. *The Children Act* is the record of the author’s memoirs about various encounters: the author’s meeting with Judge Alan Ward of the Court of Appeal; his meeting with

Judge James Munby through the reading of his sentences; his meeting with lawyers and other people who live in the world of courtrooms. Just as Alexievich recalls, in a literary text for which she received a Nobel Prize, the plurality of “voices” that survived a nuclear disaster, the author of *The Children Act*, too, recalls the plurality of voices he had to meet in order to write a novel. And just like Foster Wallace, McEwan, too, seems to acknowledge, on the last page of the novel, that *The Children Act* is “more like a memoir than any made-up story”, as Foster Wallace puts it. Both authors need the space of fiction, created by the law, to narrate their memoirs. The only difference is that Foster Wallace urges the reader, in the middle of the work, to go back to the beginning, whereas McEwan, on the last page, rewrites in other words the text that the “normal reader” failed to read at the beginning, that is: the disclaimer. But it is the legal warning, in both works, that inserts the text in the space of fiction. This space encompasses both the “Author’s Foreword” in *The Pale King*, and the author’s Acknowledgement in *The Children Act*. It is in this sense that we argue here that the last page of *The Children Act* is an integral part of the narrative. It is not, therefore, a mere external (or post-textual) element, but an element that is internal to the very structure of the novel. It is in this sense, too, that we argue that the demarcation line between “fictional narrative” and “non-fictional narrative” is itself a fictional object. This line, in the context of contemporary cultural production, is co-created by the law, and not by the author of the narrative alone.

Yet, one might argue now that this thesis raises a problem: throughout *The Children Act* the narrative unfolds from Fiona’s perspective in free indirect speech. It is her voice that we hear most of the time. But in the last page of the novel a new voice is heard: Ian McEwan now reveals himself to the reader as the author of the story. However, this problem is only apparent. Indeed, several literary novels published over the last decades have the distinctive feature of containing multiple narrative focuses – the story unfolds from a multiplicity of voices⁶. In this regard, it is worth comparing the last page of *The Children Act* to the last page of a well-

⁶ Examples of literary novels with multiple narrative focuses include: *2666*, by Roberto Bolaño, published in 2004; *The Emigrants*, by W.G. Sebald, published in 1992; *If on a winter’s night a traveler*, by Italo Calvino, published in 1979; *Pale Fire*, by Vladimir Nabokov, published in 1962.

known work of contemporary Brazilian literature, namely *Tale of a certain orient*, by Milton Hatoum, originally published in 1989. The passage that we have in mind here is the moment when, at the end of the book, the narrator explains that the story she had to tell could only have been told through the voices of other people:

How many times I started over again organizing the episodes, and how many times I was surprised to run into the same beginning, or into the dizzying back-and-forth interlinking chapters made up of pages and pages numbered in a chaotic way. Then I stumbled on another problem: how to transcribe the mumbling of some and the foreign accents of others? So many shared confidences from different people in so few days echoed like a chorus of dispersed voices. All that remained was to use my own voice, gliding like a huge, fragile bird over the other voices. (Hatoum, 2004, p. 206).

It is only on the last page of *Tale of a certain orient* that it becomes clear to the reader that the narrative is, in fact, a “report” (*Relato* in the original, translated as *Tale* in the English edition). This report unfolds as “a chorus of dispersed voices” upon which another voice has been projected namely: the unifying voice of the narrator. In *The Children Act*, in a similar vein, Fiona is that unifying voice, “gliding like a huge, fragile bird over the other voices”, that is: the voices of the judges and lawyers and other people the author had to meet in order to tell his story. In this regard, *The Children Act*, too, is a real report that unfolds through the language of fiction.

5 CONCLUSION

As we tried to show in this article, there is not one, but different kinds of relationships between law and literature. One can speak of “law as literature” when one interprets legal texts with the methodology normally deployed in the interpretation of literary texts. Or one can speak of “law in literature” when literary works depict the typical characters and situations of the courtrooms. In this article, we focused on the latter kind of relationship between law and literature – law in literature. Then, we narrowed our discussion on the novels *The Children Act* and *The Pale King*. Our intention, however, was not simply to describe how these novels refer to legal ideas or to some aspects of the world of courtrooms. Our main goal was to draw attention to a kind of relationship that has not hitherto received much attention in the theoretical debate. Law, in the context of

contemporary cultural production, has the power (and the legitimacy) to characterize what counts, and what does not count, as a fictional narrative.

This thesis should now be examined in the light of other recent literary novels and by taking into consideration different approaches in literary theory, which could include, for example, some works by François Ost (2006), Ronald Dworkin (1985), Martha Nussbaum (1995) or Richard Posner (2009). However, our goal in this article was simply to propose a new topic of investigation within the contemporary debate on law and literature. It was not our intention, though, to explore here all the implications that follow from this understanding of the nature of the relationship between law and literature⁷.

REFERENCES

AHMED, Beenish. Until now, a non-fiction writer hadn't won the Nobel Prize in literature for half a century. *Think Progress*, 8 de outubro de 2015. Available at: <https://thinkprogress.org/until-now-a-non-fiction-writer-hadnt-won-the-nobel-prize-in-literature-for-half-a-century-a954f021a756>. Access: 26 Apr. 2018.

ALEXIEVICH, Svetlana. On the battle lost. *Nobelprize.org.*, 7 de dezembro de 2015. Available at: https://www.nobelprize.org/nobel_prizes/literature/laureates/2015/alexievich-lecture_en.html. Access: 26 Apr. 2016.

ALEXIEVICH, Svetlana. *Voices from Chernobyl: The Oral History of a Nuclear Disaster*. Tradução de Keith Gessen. Nova York: Picador, 2005.

ARAUJO, Marcelo de. Intertextualidade, metaficção e autoficção: Fronteiras da narrativa de ficção na literatura do início do século XXI. *Viso: Cadernos de Estética Aplicada*, v. 18, p. 141-161, 2016.

ARAUJO, Marcelo de. A *Poética* de Aristóteles e as humanidades digitais: da análise dos clássicos à criação de algoritmos. *Viso: Cadernos de Estética Aplicada*, v. 22, p. 110-131, 2018.

ARISTÓTELES. *Poética*. Tradução de Paulo Pinheiro. São Paulo: Editora 34, 2015.

⁷ A draft of this article was presented in a symposium on law and literature at the Federal University of Rio de Janeiro, 10 April 2018. The symposium was organized by Inês Dias. The authors thank Fabio Shecaira for some comments on the first draft.

BOYNTON, Robert. *The new new journalism: conversations with America's best nonfiction writers on their craft*. Nova Iorque: Vintage Books, 2005.

BRASIL. Estatuto da Criança e do Adolescente. Decreto-lei nº 8.069, de 13 de julho de 1990. Available at: http://www.planalto.gov.br/ccivil_03/leis/18069.htm. Access: 26 Apr. 2018.

BRASIL. Tribunal Regional Federal (5ª Região). Embargos infringentes na apelação cível nº 357551/03 (2003.84.00.009231-1/03). Embargante: Ranbaxy Farmacêutica Ltda. Embargados: Artur Diego Pinheiro de Oliveira e ANVISA (Agência Nacional De Vigilância Sanitária). Relator: Desembargador Federal Cesar Carvalho. Rio Grande do Norte, 25 de janeiro de 2012. Available at: http://www.trf5.gov.br/archive/2012/02/200384000092311-03_20120206_3716725.pdf. Access: 20 Apr. 2018.

CAPOTE, Truman. *Cold Blood*. New York: Vintage International, 1966.

CAPOTE, Truman. *A sangue frio*. Tradução de Sergio Flaksman. São Paulo: Companhia das Letras, 2002.

CHENEY, Theodore. *Writing creative nonfiction: Fiction techniques for crafting great nonfiction*. Toronto: Ten Speed Press, 2001.

DWORKIN, Ronald. How law is like literature. In: DWORKIN, Ronald. *A matter of principle*. Cambridge (Masst.): Harvard University Press, 1985. p.146-166.

ESCOZA, Cássia. Direito e literatura: reflexões interdisciplinares a partir da obra “The Children Act”, de Ian McEwan. *Anamorphosis: Revista Internacional de Direito e Literatura*, v. 2, n. 2, p. 433-457, 2016. doi: <http://dx.doi.org/10.21119/anamps.22.433-457>.

FREITAS, Hyndara. Indenização por abandono afetivo não diminui traumas, mas dá sensação de ‘justiça’. In: *Estadão*, 25 de março de 2017. Available at: <http://emails.estadao.com.br/noticias/comportamento,indenizacao-por-abandono-afetivo-nao-diminui-traumas-mas-da-sensacao-de-justica,70001712965>. Access: 26 Apr. 2018.

GOUREVITCH, Philip. Nonfiction wins a Nobel. *The New Yorker*, 8 de outubro de 2015. Available at: <https://www.newyorker.com/culture/cultural-comment/nonfiction-wins-a-nobel>. Access: 26 Apr. 2018.

HATOUM, Milton. *Tale of a Certain Orient*. Tradução de Ellen Watson. Londres: Bloomsbury Publishing Plc., 2004.

HILTUNEN, A. *Aristotle in Hollywood: The anatomy of successful storytelling*. Bristol: Intellect, 2001.

KOMIE, Lowell. *The legal fiction of Lowell B. Komie*. Chicago: Swordfish, 2005.

LUNARDI, Adriana. *A vendedora de fósforos*. Rio de Janeiro: Rocco, 2011.

MCEWAN, Ian. *A balada de Adam Henry*. Tradução de Jorio Dauster. São Paulo: Companhia das Letras, 2014a.

MCEWAN, Ian. The law versus religious belief. *The Guardian*, 5 de setembro de 2014b. Available at: <https://www.theguardian.com/books/2014/sep/05/ian-mcewan-law-versus-religious-belief>. Access: 26 Apr. 2018.

MCEWAN, Ian. A lei segundo Ian McEwan. *Folha de São Paulo*. Tradução de Jorio Dauster, 12 de outubro de 2014c. Available at: <http://www1.folha.uol.com.br/ilustrissima/2014/10/1530499-a-lei-segundo-ian-mcewan.shtml>. Access: 26 Apr. 2018.

MCEWAN, Ian. *The Children Act*. New York: Penguin Random House, 2014d.

MCEWAN, Ian. *Kindeswohl*. Tradução de Werner Schmitz. Zurique: Diogenes Verlag, 2016a.

MCEWAN, Ian. *La ballata di Adam Henry*. Tradução de Susanna Basso. Turim: Einaudi, 2016b.

MCEWAN, Ian. *L'intérêt de l'enfant*. Tradução de France Camus-Pichon. Paris: Gallimard, 2017a.

MCEWAN, Ian. *Закон о детях*. Tradução de Victor Petrovitch Golshev. Moscou: Eksmo, 2017b.

MCEWAN, Ian. *La ley del menor*. Tradução de Jaime Zulaika. Barcelona: Anagrama, 2018.

MORAWETZ, Thomas. Law and literature. In: PATTERSON, Dennis. *A companion to philosophy of law and legal theory*. Oxford: Blackwell, 2010. p. 446-456.

NUSSBAUM, Martha. *Poetic justice: the literary imagination and public life*. Boston: Beacon Press, 1995.

POSNER, Richard. *Law and literature*. Cambridge: Harvard University Press, 2009.

OST, François. *Contar a lei: as fontes do imaginário jurídico*. São Leopoldo: Unisinos, 2006.

REINO UNIDO, *Children Act*, 16 de novembro de 1989. Available at: <https://www.legislation.gov.uk/ukpga/1989/41/contents>. Access: 26 Apr. 2018.

ROBINSON, Marlyn. *Collins to Grisham: A brief history of the legal thriller*. *Legal Studies Forum*, v. 21, 18p., 1998. Available at: https://tarltonapps.law.utexas.edu/exhibits/lpop/documents/history_legal_thriller.pdf. Access: 5 May 2018.

ROSENBERG, Anat. The history of genres: Reaching for reality in law and literature. *Law & Social Inquiry*, v. 39, n. 4, p. 1057-1079, 2014.

SAUERBERG, Lars. *The legal thriller from Gardner to Grisham: See you in Court!*. Basingstoke: Palgrave Macmillan, 2016.

SHECAIRA, Fábio; STRUCHINER, Noel. *Teoria da argumentação jurídica*. Rio de Janeiro: Contraponto, 2016.

TIERNO, M. *Aristotle's Poetics for screenwriters: Storytelling secrets from the greatest mind in Western civilization*. New York: Hyperion Books, 2002.

TRINDADE, André Karam; BERNST, Luísa Giuliani. O estudo do “direito e literatura” no Brasil: surgimento, evolução e expansão. *Anamorphosis: Revista Internacional de Direito e Literatura*, v. 3, n. 1, p. 225-257, 2017. doi: <http://dx.doi.org/10.21119/anamps.31.225-257>.

WALLACE, David Foster. *The Pale King*. Nova York: Little, Brown & Co, 2011.

WALLACE, David Foster. *O rei pálido*. Tradução de Maria D. G. da Costa e Vasco T. de Menezes. Lisboa: Quetzal, 2014.

WALSH, Jill Paton. The *Poetics* of Aristotle as a practical guide. *The Lion and the Unicorn*, v. 29, n. 2, p. 211-221, 2014.

WEINGARTEN, Marc. *The gang that wouldn't write straight: Wolfe, Thompson, Didion, Capot & the new journalism revolution*. New York: Three Rivers Press, 2005.

WHITE, Terry. *Justice denoted: The legal thriller in American, British, and continental courtroom literature*. Connecticut: Greenwood Publishing Group, 2003.

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