

MODELS OF JUDGES IN LITERATURE

MODELOS DE JUIZ NA LITERATURA

MODELOS DE JUEZ EN LA LITERATURA

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1 Introduction. 2 \the models of judge: from mythology to literature. 3 From the dice cast by *Bridoye* (by Rabelais), moving through the decision of *Portia* (by Shakespeare), ending in the syllogism of *Ivan Ilyich* (by Tolstoy). 4 From the greatness of the *Small Judge* (by Sciascia) to the double dimension of *Fiona Maye* (by Mcewan). 5 Conclusions. References.

ABSTRACT

Objective: This paper is a critical essay on the role of judges as shown in literary narratives. It is part of the Law and Literature movement. The paper includes previously-developed analyses of five literary representations of judges and their actions: (1) the character *Bridoye*, from the novel *The Life of Gargantua and of Pantagruel*, by François Rabelais; (2) the actions of *Portia*, from the play *The Merchant of Venice*, by William Shakespeare; (3) the story of *Ivan Ilyich*, from the novella *The death of Ivan Ilyich*, by Leo Tolstoy; (4) the character *il piccolo giudice* (the small judge), from the novella *Open Doors*, by Leonardo Sciascia; (5) *Fiona Maye*, from the novel *The Children Act*, by Ian McEwan. The purpose is to identify different standards of interpreting and enforcing the Law.

Methods: The analysis hereby developed is based on the theoretical and methodological assumptions of Law in Literature studies, also known as instrumental intesection, allied to the idea of “models of judges”, originally formulated by François Ost in the 1980s. This apparatus makes it possible to scrutinize the role of judges, their actions, and, their performances in justice-related institutions in general.

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Results: This paper reaches the conclusion that the literary narratives from the sixteenth to the nineteenth centuries (Rabelais', Shakespeare's, Tolstoy's) feature judges whose roles are driven by luck, by personal motivation, or by a supposed objectivity of the law. On the other hand, the novels from the late twentieth century (Sciascia's) and early twenty-first century (McEwan's) stand out for representing models of judges who had apparently assimilated all the advances of juridical hermeneutics. For them, the interpretation and the application of legal norms should preserve the autonomy of the Law.

Contributions: The argument hereby developed confirms the assumption that certain literary narratives are more important – as well as more interesting – than many traditional guidebooks, especially when it comes to generally understanding legal and social phenomena. Thus, this paper is a critical essay that accomplishes to reveal the power of literature for the discussion of the most important legal theory problems.

Keywords: Law in Literature. Judicial protagonism. Models of judges. Legal interpretation.

RESUMO

Objetivos: Este ensaio inscreve-se no campo dos estudos de Direito e Literatura e propõe-se a investigar o fenômeno do protagonismo judicial a partir das narrativas literárias. Para tanto, reúne análises anteriores de cinco representações da figura do juiz – (1) Bridoye, do romance *Gargântua e Pantagruel*, de François Rabelais; (2) Pórcia, da peça *O mercador de Veneza*, de William Shakespeare; (3) Ivan Ilitch, da novela *A morte de Ivan Ilitch*, de Liev Tolstói; (4) pequeno juiz, da novela *Portas abertas*, de Leonardo Sciascia; (5) Fiona Maye, do romance *A balada de Adam Henry*, de Ian McEwan –, com o propósito de identificar diferentes padrões na maneira de interpretar e aplicar o Direito.

Metodologia: Com base nos pressupostos teóricos e metodológicos dos estudos no Direito *na* Literatura, ou intersecção instrumental, aliados à noção de “modelos de juiz” – formulada, originalmente, por François Ost ainda nos anos 80 –, problematiza-se a representação do juiz, de sua atuação e, de modo geral, do próprio papel desempenhado pelas instituições ligadas à justiça.

Resultados: O estudo constata que as narrativas literárias produzidas entre os séculos XVI e XIX (Rabelais, Shakespeare e Tolstói) apresentam modelos de juízes cuja atuação oscila entre a sorte, a vontade e a suposta objetividade da lei, enquanto os romances do final do século XX (Sciascia) e do início do século XXI (McEwan) destacam-se por trazer

modelos de juízes que parecem ter assimilado os avanços da hermenêutica jurídica, à medida que, para eles, a interpretação e aplicação das normas jurídicas devem preservar a autonomia do Direito.

Contribuições: O argumento desenvolvido confirma a premissa de que certas narrativas literárias são mais importantes – e, seguramente, mais interessantes – para a compreensão de fenômenos jurídicos e sociais do que muitos dos manuais tradicionais. Trata-se, em suma, de um ensaio crítico que revela o potencial da literatura para discutir grandes questões de teoria do Direito.

Palavras-chave: Direito na literatura. Protagonismo judicial. Modelos de juiz. Interpretação do direito.

RESUMEN

Objetivos: Este ensayo pertenece al campo de los estudios de Derecho y Literatura y propone investigar el fenómeno del protagonismo judicial a partir de las narraciones literarias. Para esa finalidad, reúne análisis previos de cinco modelos de jueces: (1) Bridoye, de la novela *Gargântua e Pantagrue*, de François Rabelais; (2) Porcia, de la obra *El mercader de Venecia*, de William Shakespeare; (3) Ivan Ilich, de la novela *La muerte de Ivan Ilich*, de Liev Tolstoi; (4) juez pequeño, de la novela *Puertas abiertas*, de Leonardo Sciascia; (5) Fiona Maye, de la novela *La balada de Adam Henry*, de Ian McEwan, con el propósito de identificar diferentes patrones en la forma de interpretar y aplicar el Derecho.

Metodología: Con base en los supuestos teóricos y metodológicos de los estudios de Derecho en la Literatura, o intersección instrumental, combinados con la noción de “modelos de jueces” – originalmente formulada por François Ost, en los años 80 –, la representación del juez, su desempeño y, en un en general, del papel que desempeñan las instituciones vinculadas a la justicia.

Resultados: El estudio identifica que las narraciones literarias producidas entre los siglos XVI y XIX (Rabelais, Shakespeare y Tolstoi) presentan modelos de jueces cuyo desempeño oscila entre la suerte, la voluntad y la supuesta objetividad de la ley, mientras que las novelas de finales del siglo XX (Sciascia) y de lo principio del siglo XXI (McEwan) se destacan por traer modelos de jueces que parecen haber asimilado los avances de la hermenéutica jurídica, ya que, para ellos, la interpretación y la aplicación de la normas jurídicas deben preservar la autonomía del Derecho.

Contribuciones: El argumento desarrollado confirma la premissa de que ciertas narrativas literarias son más importantes, y ciertamente más interesantes, para la

comprensión de los fenómenos jurídicos y sociales que muchos de los manuales tradicionales. En resumen, es un ensayo crítico que revela el potencial de la literatura para discutir grandes cuestiones de teoría del Derecho.

Palabras clave: Derecho en la literatura. Protagonismo judicial. Modelos de juez. Interpretación de la ley.

1 INTRODUCTION

In Literary Studies, Candido *et al.* (1970) and Silva (1986) establish that the term *protagonist* designates the main character of a piece of narrative or drama. Even though protagonists are usually the heroes of their stories, sometimes they are also represented as antiheroes. It is around the protagonists that the whole plot develops, and all narrative actions depend on them, directly or not, either in stories or acting.

Bringing it to the Legal Science, the term *protagonist* retains its original meaning. However, when adding a derivation – the suffix *ism*, which denotes both intoxication / disease and social, philosophical, cultural movements – and an adjective, thus emerges the expression *judicial protagonism*. It is used to categorize the judge as a character with a central role in the scenario of the Constitutional Rule of Law.

In light of Legal Sociology, for instance, it becomes plain to see how the crescent power of judges and courts exerts influence over the daily life of people, especially since the late twentieth century. This might be due to the (quantitative and qualitative) increase of cases in which people search for justice, as one of the effects developed from the general crisis festering the bases of contemporary society. This might also be a broader social phenomenon, in which the loss of references and values is a symptom developed from the deterioration of the family, the erasure of religion as a moral icon, and the failure of traditional institutions in general.

According to Bauman and Mazzeo (2020, p. 44-60), the image of the “God-Father-King” loses its strength, and, to certain extent, loses its meaning in the contemporary society. The weakening of such omnipotent, omnipresent, omniscient being, who used to represent the warrant of justice, has caused people to feel deeply insecure and unsure. It is in this context, thus, that the Judiciary Power enters the scene to fill the empty role of norms in an *orphaned society*¹, according to Ingeborg Maus (2000).

¹ Maus (2000, p. 184-191) uses the expression *orphaned society* referring to the decay of father figures in modern times. Thus, he highlights to what extent the Judiciary Power has taken over this fatherly role in order to save such fatherless society, which he describes as a victim of infantilism. To do so, this power makes itself unlimited, authoritarian, and omnipotent, defining its very own limits via

It is known that this is due to the expansion of jurisdictional activity after World War II, and pushed further by the rationale of contemporary Constitutions. These documents usually attribute to courts a leading role, rising them to the condition of guarantors of the fundamental rights and the democratic regime itself.

Indeed, the Judiciary Power is seen by many as a *guardian of promises*², in the words of Garapon (1996). One of the effects generated by such protagonism is the phenomenon called *judicialization of politics*. In that, the decision-making processes that used to belong solely to the Executive and Legislative powers are transferred to the Judiciary, and judges become further and further involved in politically-related interventions (TATE; VALLINDER, 1997).

This whole situation has reopened the discussion on the democratic legitimacy of judges and of the limits of their powers. Every time the *jurisdiction spaces* are broadened, the *legislation* sphere is shrunk, which enforces the tension in the relationship between Law and Politics.

Actually, with the appearance of constitutionalism after the second post-war period, there has been a profound change in the role of judges – it is important to recall Montesquieu’s metaphor of the Baron, to whom the judge was the *bouche de la loi*; Or, even, the thought of Tomas Jefferson, to whom a judge should be seen as a “mere machine”. Before the post-war period, judges were limited to mechanically applying the Law, based on Rousseau’s idea of *volonté générale*, which served as basis for an *antijudiciary* French Revolution.

Differently from the Jacobine model – in which the Law was reduced to the written norms, and democracy was the submission to the will of the majority –, the paradigm of a Constitutional State presupposes a reformulation of the concept of Law’s validity in relation to the normativist theory. This generates a visible practical effect: the examination of how valid certain juridical norms are – both in their procedural and substantial dimensions – is given for judges and courts to decide, with the possibility of creating a materially illegitimate Law, as seen in totalitarian regimes.

In this context, where constitutional jurisdiction plays a fundamental role in the setting of constitutional democracies, all eyes are on the person of the judge. However, with few exceptions, there are not enough studies and research about the protagonism of judges and its consequences in Brazil.

What role is played by the judge in judicial decisions? How are juridical norms interpreted and applied in concrete cases? What is the meaning, at the end of the day, of

principles of a supra-positive law created by itself. Thus, it becomes the administrator of public morality.

² Garapon (1996, p. 20), when dealing with the expansion of the powers granted to judges in the late twentieth century, as well as the increase of demands for justice and the increase of litigation cases, together with the mismanagement of these officers in politics – a phenomenon called judicial activism in the United States –, highlights that the Judiciary becomes a guardian of constitutional promises.

conceiving the Law as an interpretative social practice? These are questions that have been historically made in the fields of legal theory and philosophy, however, they have been particularly important in the last few decades due to the judicial protagonism seen in most constitutional democracies.

Thus, it seems that this is precisely where literature – together with its narratives, characters and representations – becomes important. Literature produces and results from social imaginaries, and all its assets may be used for further understanding the social and legal phenomena (KARAM, 2017).

2 THE MODELS OF JUDGE: FROM MYTHOLOGY TO LITERATURE

Since the early 1980s, François Ost has used the concept of *models of judges*. He first explained his idea with metaphors involving mythological characters, to which some images are associated – in order to analyze and discuss the functions of the Judiciary Power members. His innovative proposition is not due to a crisis of reference absence, but of excessive presence, because of how heterogeneous and complex the judicial field had become (OST, 1983, 1991, 1993, 2009).

In attempting to elaborate what he calls a *playful theory of law* (*teoria lúdica do direito*): Ost proposes the models of judges – *Jupiter*, *Hercules*, *Hermes*³ – especially for those professionals who seem impossible to follow models. Each mythological character represents and conceives the Law in a distinctive way:

(1) *Jupiter* is a symbol for the classic positivistic theory, which was built on the images of the pyramid and the codex, and followed the validity of the Law in a hierarchical superior norm and so on, until it reached a transcendental level – or a fictional one, as Hans Kelsen himself acknowledged in his last writings. This theory also considered that the application of norms in concrete cases was the result of a logical, linear, deductive rationality.

(2) *Hercules* represented the North-American realism, especially developed by the theoretical production of Oliver Holmes and Jerome Frank – thus, it is different from the metaphor by Ronald Dworkin. According to this view, the judge is a sort of social engineer, and the norm is the result of decisions made in concrete cases, which leads to the substitution of the pyramid image to the one of a funnel.

(3) *Hermes* recalls the problem of language and intermediation, and substitutes both the pyramid and the funnel by the image of a net, especially due to the complexity of the Law in post-modern society. Here, the role of the judge should be played in a

³ It should be registered the rightful criticism made by Streck (2011) to the known mythological models proposed by the acknowledged Belgian jurist.

reflective and hermeneutical perspective, of meaning circulation, as a gameplay activity in the juridical field.

As is known, the writings by Ost inspired definitively the studies and the research in Law and Literature in Brazil⁴ – especially after the release, in 2005, of the translated version of *Raconter la loi. Aux sources de l'imaginaire juridique* –, particularly for the development of studies inserted in the field known as *Law in Literature* (POSNER, 1988), or instrumental intersection (CALVO GONZÁLEZ, 2008). This area investigates the legal phenomena and the most important questions related to justice as represented in literary narratives throughout history (TRINDADE, GUBERT, 2008).

However, whereas Ost, in his *playful theory of law*, turns to mythological characters in order to conceive the models of judges, the proposal hereby developed is to discuss the judicial protagonism as seen in literature⁵. For that, certain literary representations of judges are analyzed, as well as the characters' actions, and, in general lines, the very role played by justice-related institutions in the plots, as developed in previous studies (STRECK, TRINDADE, 2019).

After all, it is clear how literature is a true repository of sources for critically thinking the Law. Besides that, by means of fiction, values of certain times and places are historically registered in literary writings, since the representations of power, law, and justice, for example, are also part of the social, collective imaginary.

This is especially true when it comes to the greatest literary works. Classic novels or productions are the ones that people rarely say they *are reading*, but usually that they are *reading again*. In fact, this is the first one of fifteen definitions of a *classic* as developed by Calvino (1991). Another one says that classics are books that exert a particular influence and become unforgettable, when they become hidden in the corners of memory, and appear as collective or individual unconscious knowledge. This is one of the reasons why a classic is said to be unlimited. It will always have something to say. It crosses the limits of time and is forever current.

As examples of that, one can find the most different models of judges in Western literature: “Pallas Athena”, of Aeschylus' the tragedy *Oresteia* (458 B.C.); “Philocleon”, of Aristophanes' play *The Wasps* (422 B.C.); “judge Bridoye”, of François Rabelais' novels *Gargantua* (1534), and *Pantagruel* (1532); “Portia”, of William Shakespeare's play *The Merchant of Venice* (1605); “Angelo”, also of William Shakespeare's play *Measure for*

⁴ The history of Law and Literature in Brazil, as well as a worldwide overview, was the object of research developed by Trindade and Bernsts (2017a). In this paper, they dedicated themselves to recall the pioneers of the area, in addition to inventorying the researchers who had contributed for its evolution and also identifying the aspects that – quantitatively – led to its expansion over the previous fifteen years.

⁵ Regarding the legal characters in the literary universe, especially the figure of the judge, it is important to highlight the extensive encyclopedic work of Lamy (2001), as well as the approaches of Fábrega Ponce (2013) and of Amaya (2016).

Measure (1608); the “juiz de paz”, of Martins Pena’s play *O juiz de paz da roça* (1833), “judge Ivan Ilyich”, of Leo Tolstoy’s novel *The Death of Ivan Ilyich* (1886); “judge Solaguren”, of Pedro Prado’s novel *Un Juez Rural* (1924); the “martial court”, of Herman Melville’s novel *Billy Budd* (1924); the “Judge”, of Franz Kafka’s novel *The Trial* (1925); the “Baron of Andergast”, of Jakob Wassermann’s novel *Der Fall Maurizios* (1928); “judge Kömives”, of Sándor Márai’s novella *Divorce in Buda* (1935); “judge Azdak”, of Bertold Brecht’s play *The Caucasian Chalk Circle* (1944); “Hathorfe”, of Arthur Miller’s *The Crucible* (1953); “the magistrate”, of John-Maxwell Coetzee’s novel *Waiting for the Barbarians* (1980); the “small judge”, of Leonardo Sciascia’s *Open Doors* (1987); “judge Cosme”, of Camilo José Cela’s *El Asesinato del Perdedor* (1994); the “presiding judge”, of Bernhard Schlink’s novel *The Reader* (1995); “our judge”, of Marcelo Carneiro da Cunha’s novel *O nosso juiz* (2004); the judges, of the stories published in *Giudici*, by Andrea Camilleri, Giancarlo De Cataldo, and Carlo Lucarelli (2011); and, most recently, “judge Fiona Maye”, of Ian McEwan’s novel *The Children’s Act* (2014).

In this context, and considering that certain literary narratives are more important – and surely more interesting – than many treaties and manuals of Law for understanding legal and social phenomena, this paper brings together the analyses of five representations of judges in literature. The selection takes into consideration how such narratives approach the challenges of taking judicial decisions: *Gargantua and Pantagruel* (written by Rabelais), *The Merchant of Venice* (written by Shakespeare), *The Death of Ivan Ilyich* (written by Tolstoy), *Open Doors* (written by Sciascia), and *The Children’s Act* (written by McEwan).

3 FROM THE DICE CAST BY *BRIDOYE* (BY RABELAIS), MOVING THROUGH THE DECISION OF *PORTIA* (BY SHAKESPEARE), ENDING IN THE SYLLOGISM OF *IVAN ILYICH* (BY TOLSTOY)

In the collection *Gargantua and Pantagruel*, published between 1532 and 1564, François Rabelais explores and criticizes the legal world. His analyses encompass the academic education of jurists and goes further, scrutinizing the way the French legal system worked and how its magistrates performed. This specifically is represented by the character of judge Bridoye, who is featured in the third volume of the series (TRINDADE; BERNSTTS, 2017b, p. 234).

The criticism toward judges is exposed by Rabelais in the excerpt where judge Bridoye is summoned to explain which method he had been using to reach his decisions. This is because judge Bridoye had made a mistake when enacting an arguable

sentence and attributed his mistake to eye problems due to his age. Then, the reader is surprised with the particularity of Bridoye's method: he used to throw dice (TARUFFO, 2012, p. 122).

The method of judge Bridoye included other steps too, it was not restricted to solving problems by luck. He used to postpone the trials as much as he could. Also, as other judges of his acquaintance did, before casting the dice, Bridoye attentively read all the registers of the cases, of both parties. After that, he moved the proceeding sacks. Finally, he would cast the dice to decide the fate of both the plaintiff and the defendant in his cases (RABELAIS, 2009, p. 524-525).

The explanations for those actions are as absurd as the actions themselves: even if the result depended solely on the casting of dice, the judge of Rabelais' narrative considers his decision-making process as the result of thorough case studies, so that both parties could end up accepting the result with ease. As for the moving of the sacks, it was exercise. To finish, Bridoye justifies his action of postponing the trials with the need to "mature" the cases so as truth would come up, which was only possible with time (RABELAIS, 2009, p. 527).

With his very picturesque judge Bridoye, the Renaissance writer represented and criticized the decision-making methods of French magistrates in the fourteenth century. What seems to matter the most in a sentence, after all, is the rhetoric used to making it acceptable for the involved parties, especially the condemned one, so the casualty of the decision (the casting of dice) is a mere detail with little or no importance whatsoever (TARUFFO, 2012, p. 123).

It is possible to see the person of judge Bridoye as a general representation of trials and the way, to certain extent, they have been conducted since the Renaissance to this day. By overuse of rhetoric, in order to justify randomly-made choices, the judge described by Rabelais transforms the solution of problems into a literal lottery, "in which legal decisions are completely connected to the subjectivity of the reader, which makes the judges reach decisions on their cases the way better suits them, that is, discretionarily." (TRINDADE; BERNSTIS, 2017b, p. 234). This deeply harms the ideal of legal safety.

In Rabelais' narrative, the standard for interpreting and applying the Law is based on a certain lottery-like justice as represented by Judge Bridoye. On the other hand, in William Shakespeare's writings⁶, things usually go down a different path when it comes to representing the legal system. This is especially noticeable in the play *The Merchant of Venice* (1605), with the character Portia, who is not really a magistrate, but has

⁶ Another play by William Shakespeare – probably even more important to discuss the ambivalence of the judge's actions – is *Measure for Measure* (1608), in which Angelo represents, firstly, an objectivist posture, and, then, a subjectivist posture, in relation to the application of the law.

characteristics that can be seen as those of a model of judge who makes decisions based on individual interests, that is, according to personal conscience.

The plot of *The Merchant of Venice* develops around a debt collection. The default fine depends on the decision of the creditor, the Jew Shylock, to remove from the body of the guarantor, Antonio, a pound of meat as he pleases⁷. After the deadline for settling the debt has passed, the claim is submitted to the Court.

A legal council is called upon in order to solve the case. Portia finds a way of playing the counselor role, despite not having legal training. She does not throw dice to solve the case, as Rabelais' judge Bridoye would probably do, but she uses her methods to reach not really a just sentence, but a convenient one. Actually, her intentions go beyond protecting Antonio from having one pound of meat cut off of his body, she intends to rid him of paying the debt at all. To do so, the only legal source she uses is her own resolve, and, thus, her conscience.

Portia's rhetoric is impressive to the present people, and it makes them believe the truthfulness of her words. The character developed by Shakespeare understands the case and interprets the contract, questioning it to such extent she ends up cancelling it, making it impossible to be used as the source of a conviction, with a condition that was not even written in the contract: Shylock could even take a pound of meat of Antonio's body, no more, no less, as long as there was no blood shed. Besides hindering the accomplishment of the contract, Portia, in an act of overinterpretation of the laws of Venice, turns the creditor into a defendant, accusing him of undermining the life of the guarantor, a Venetian citizen; With that, Shylock's responsibility passes to the criminal sphere.

The actions of Portia during the trial can be seen as a subjectivist posture, which distorts the meaning of the written loan contract and the Venetian laws in order to protect Antonio, which then hinders the collection of the debt. When twisting the law to make great justice in detriment of a small case of injustice, Portia uses deliberate interpretation; Unsatisfied with that situation and willing to teach Shylock a lesson, Portia also twists the interpretation of the Venetian laws in order to criminally condemn the Jew (TRINDADE, 2014, p. 780).

With her sense of justice, which is clearly a subjectivist one, Portia does not act so differently from Rabelais' judge Bridoye. She does not allow the accomplishment of the legal written norms when interpreting them, and uses her partiality instead, in order to

⁷ It is noteworthy that the conduction and the result of the trial in *The Merchant of Venice* did not correspond to the reality of 17th century England; First, because the penal clause that subjected debtors to physical punishment was no longer in effect since 326 B.C.; Second, because, despite violating any notion of justice, it would be impossible for an English court to question the morality and legality of contracts signed with the royal seal (TRINDADE, 2014, p. 775).

solve the case. Portia is a literary representation of real judges who find in their subjectivity an “ultimate criterion of decision, as if there were no external constraint.” (STRECK, 2017, p. 87).

If the characters created by Rabelais and Shakespeare made decisions according to luck (lottery justice) and personal conscience (subjective justice), it is possible to identify another model of judge in the work of Leo Tolstoy, one that believes to make aseptic sentences based on the separation of interpretation and norm. This is what judge Ivan Ilyich represents, as the central character of the novella *The Death of Ivan Ilyich*, published in 1886.

Ivan Ilyich is described by Tolstoy as a stern person, both in his professional and personal lives. As a judge, he acted strictly according to the legislature; He would eliminate in all judging cases any possibility of interpretation that was not in line with what could be read literally in the law. He did not allow the appearance, in his sentences, of any impression or opinion about any cases (TOLSTÓI, 1997, p. 24).

Summing up, judge Ivan Ilyich operated a mechanical application of the Law: his work was deciding the legal procedures without getting involved with the people and their problems. That is, he solved the cases abstractly, and ignored the practical world (TRINDADE, 2019a).

Ivan Ilyich played his part in a mechanical, unidirectional way (as known as subsumption syllogism), and his purpose was declaring the Law valid, justified solely by the written norms. Thus, he set the Law completely apart from the practical world, and ignored the relevance of empathy, sensitivity, and, above all, humaneness, in order to give the sentences in the cases given to his overruling (TRINDADE, 2019a).

However, when taken by severe disease, judge Ivan Ilyich is forced to rethink his methods. When in the position of a patient and being treated by doctors the same way he used to treat the parties of the cases he judged (that is, with indifference and pretentiousness of omnipotence and omniscience), Tolstoy’s character realizes that logical syllogism was not the most correct way of understanding everything that might be at stake in a lawsuit. Ivan acknowledges that neglecting the humane aspect in benefit of pure deductive logic was not the best way to justify legal sentences.

Hence, if it is possible to associate the behaviors of Bridoye and Portia to those of judges who, in the real world, act based on conscience philosophy, the conduct of judge Ivan Ilyich can be paralleled to judges who are followers of classic metaphysics.

The partiality identified in Bridoye and Portia are not be compatible with a democratic and constitutional perspective of the application of the Law. However, the same can be said of Ivan Ilyich’s logical and aseptic subsumption method. Just as the characters created by Rabelais and Shakespeare represent models of judge that can be easily found in any court today, it is also not difficult to find judges like that of Tolstoy’s, whose performance is based on the belief in the omnipotence of the law. This

is due, in truth, to what the science of Law has stood for over the last centuries, sometimes founded on the subjectivity of the interpreter (philosophy of conscience), sometimes on an alleged objectivity of the law (classic metaphysics).

As is known, in classic metaphysics, there is a predominance of the object over the subject. In the field of law, the influence of this paradigm can be perceived through the text's objectification processes, by separating the actions of interpreting and applying the law. It is a model that certainly left traces in modernity with the exegesis-deduction-subsumption theses (STRECK, 2010, p. 159).

On the other hand, philosophy of conscience, also called modern metaphysics – unlike the classic one, which sought the essence of objects –, starts to look for the meaning of things from the subject's mind (CARBASSE; DEPAMBOUR-TARRIDE, 2010).

Thus, from strict objectivity, we move towards subjectification. In this paradigm, reality is defined based on the subject's awareness, characterized as solipsist one. In the field of law, the decision is nothing more than an act of personal drive or the result of the free conviction of the judge (STRECK, 2017, p.73-76).

4 FROM THE GREATNESS OF THE *SMALL JUDGE* (BY SCIASCIA) TO THE DOUBLE DIMENSION OF *FIONA MAYE* (BY MCEWAN)

In the early twentieth century, Philosophy realized the need to overcome the paradigms of objectivity and subjectivity, which were insufficient for an adequate interpretation of the world. It is in this context that language comes into play, as the very foundation of knowledge. Meaning is no longer extracted either from the object or from the subject's conscience; It is through language that the person is able to understand the world and insert him / herself into it. This turn in the way of conceiving the role of language is known as the linguistic-ontological turn (STRECK, 2017, p. 86).

In the field of interpretation, the linguistic-ontological turn allows for a new form of interaction between the reader, the author and the text. The act of interpreting, in addition to being associated with the act of understanding, is not limited to the author's intention nor the reader's intention. To interpret properly implies carrying out “a dialogical and intersubjective cooperation process between the reader, the author and the (con)text” (TRINDADE, 2019b, p. 450). It means to say that the interpreter is inserted in a chain of previous interpretations of a text and, when interpreting it, he / she cannot ignore this vast horizon of meanings (TRINDADE, 2019b, p. 451).

Regarding the interpretation of Law, despite the fact that there is still a prevalence of objectivity and subjectivity, the insertion of these new concepts by the

linguistic turn is increasingly present, given the flaws in the philosophies of conscience and in classic metaphysics, which insist on solipsist and / or logical-deductive interpretation styles for the Law. Therefore, in present times, hermeneutics must be founded on language, which may establish balance between objectivism and subjectivism (STRECK, 2017, p. 88).

This new proposal of juridical hermeneutics, which seeks to update the legal performance according to the requirements of the democratic Rule of Law, presupposes a new paradigm for the judge. A judge who does not decide according to his / her conscience, based on lottery justice or even through subsumption syllogism. It is necessary to build a model of judge that recognizes the role of language in law; that conceives language as a public good, considering its intersubjective aspect. And this implies the fact that “one cannot really say anything about anything”, as jurist Lenio Streck has repeatedly stated (2014), in his work *Hermenêutica jurídica e(m) crise* (translates to *Juridical Hermeneutics in / and crisis*).

At this point, it is possible to highlight the character called *small judge* (originally, *piccolo giudice*), of *Open Doors (Porte Aperte)* (1987), by Leonardo Sciascia. The events of the novella take place in 1937 Palermo, that is, at the height of the Fascist regime, and involve the trial of a triple homicide. The small judge, as a member of Corte d’Assise, is one of those responsible for trying the accused of this atrocious crime. The judicial apparatus presses for the outcome to be death sentence, mainly because one of the victims had been a renowned lawyer member of the Fascist party. However, despite all circumstances, the small judge is determined not to apply capital punishment as a matter of principle. And so he does, supported by other members of the sentencing council, even if it could have cost him dearly and, probably, the decision could be reformed in the higher court.

The small judge ignores the warnings of the Attorney General, who argued that “the law is the law” and “it is up to us to apply it” (SCIASCIA, 1990, p. 14), and refuses to give up his ideals. Thus, without succumbing to popular outcry or pressure from peers and superiors, the small judge understands the right to life as a fundamental guarantee. Enrolled in the Enlightenment tradition, he embodies, in advance, the role of a guardian of promises (GARAPON, 1996), to be attributed to the Judiciary Power only in the second half of the twentieth century. It is up to him to preserve civilizing conquests and resist any and all forms of arbitrariness of power. And, for that, as evidenced in the novel’s plot, principles are essential.

It should be noted that deciding on principles, in a Dworkin-like conception, means conceiving them as interpretative and decision-making parameters, while observing the continuity of institutional tradition and history (DWORKIN, 2014). In this context, the decision made by the small judge, supported by the other members of the council, reveals a political action based on guarantor principles shared by a political

community. Among these principles is the prohibition of death penalty (KARAM, 2019).

Indeed, Sciascia's work shows criticism of the technical-positivist legal paradigm that made it possible to instrumentalize the Law through the maximization and radicalization of political powers (TRINDADE, 2016). Far from relying on technicality or deciding according to his conscience, or from twisting the law to make one's interests and opinions prevail, the small judge represents a judge who *makes decisions based on principle*.

Another protagonist worth mentioning in this discussion is Judge Fiona Maye, from Ian McEwan's novel *The Children's Act* (2014). The central plot that matters here is Fiona's decision about the fate of Henry, a 17-year-old with leukemia who needs to have a blood transfusion, but resists the procedure because it would contradict his family's religious beliefs. However, diverging from the representation of a solipsist judge, Fiona does not seek to become a "savior" for the boy, but rather to decide what would be "reasonable and legal" (MCEWAN, 2014, p. 39).

Fiona is a judge who works at the High Court in London. Without ceasing to be concerned about impartiality, she is willing to listen to the young man who would be affected by the decision, as well as to carefully analyze the arguments brought by the parties involved. In the sentence, when determining the blood transfusion as mandatory, she also seeks to substantiate her decision without disregarding the court's jurisprudence or even the legal prescriptions regarding the primacy of the minor's well-being.

Thus, Fiona differs from Portia, who exemplified a model of "judge" who twisted the law to meet her interests, using, in a similar way to that of Judge Bridoye, pure rhetoric to support a decision. Also, McEwan's character diverges from Judge Ivan Ilyich, who disregarded any human dimension in his decisions. Fiona decides in a responsible and diligent way, in order to safeguard the autonomy of the Law in face of morals and religion, as well as to balance the public and private *personas* of the case (TRINDADE; KARAM; AXT, 2017, p. 25).

Thus, it is observed that, in the last two narratives evoked here, the image of the judge as a god who makes decisions according to his / her conscience, able to do it at random, is demystified. The paradigm of the democratic Rule of Law requires the presence of a magistrate who is able to assimilate the political responsibility of his / her performance, who understands the public character of language, who does not dissociate the act of interpreting from that of applying the law, and who can *make decisions based on principle*, and not from sheer personal opinion.

For an adequate and effective jurisdictional provision, with strict observance of the constitutional text, legal decisions cannot be based on the unilateral choice of the interpreter. A decision inserted in the context of the linguistic turn demands from the judge a posture mediated by language and derived from the circulation of meaning in a multidirectional way. A judge who, finally, submits his / her willpower “not only to the external dictates and objectives of the legal order, but to the rites in whose context this order builds, performs, and dominates itself.” (TRINDADE, 2019b, p. 458).

5 CONCLUSIONS

The separate analyses of the models of judge seen in the characters Bridoye, Portia and Ivan Ilyich in relation to those of the small judge and Fiona Maye make it possible to recognize an essential difference between them. Rabelais, Shakespeare and Tolstoy present in their works archetypes of judges that link the realization of justice to the ideals of classic and modern metaphysics, which represent, respectively, the predominance of the object over the subject and, on the other hand, the search for the meaning of things from the subject's conscience.

These perspectives dominated several areas of knowledge until the beginning of the twentieth century, when language started to be recognized as the foundation of knowledge and access to the world. This hermeneutic turn is noticeable in the models of judge represented in the writings of Sciascia and McEwan. The small judge and Fiona Maye, the only woman in this corpus, break with the objectivist and subjectivist paradigms and construct their sentences in order to shield the decisions from arguments rooted in subjectivism and completely dissociated from the practical world.

Additionally to that, in this paper, it was possible to associate each of these judges with a paradigm of justice. The judge of Rabelais, when making decisions through luck, adorned by rhetoric, represents a lottery-like justice system, incompatible with the notion of legal security. Portia, Shakespeare's “judge”, twists the law to suit her personal interests, representing a notoriously subjectivist and solipsist justice. The character of the judge created by Tolstoy, on the other hand, stands for a logical and automated justice, which gives up the role of language and interpretation.

On the other hand, from the characters of the small judge and Fiona Maye, the ability to deal – very assertively – with the suspension of prejudices and preconceptions is inferred. The magistrate of Sciascia represents a principled justice, concerned with safeguarding fundamental guarantees and observing the continuity of institutional tradition and history. McEwan's judge, when basing her decisions without disregarding the Court's jurisprudence and exempting herself from expressing her opinions, symbolizes an intersubjective justice, in tune with the hermeneutic proposal promoted by the ontological-linguistic turn and free of solipsist arguments.

This paper reaches the conclusion that the literary narratives from the sixteenth to the nineteenth centuries (Rabelais', Shakespeare's, Tolstoy's) feature judges whose roles are driven by luck, by personal motivation, or by a supposed objectivity of the law. On the other hand, the novels from the late twentieth century (Sciascia's) and early twenty-first century (McEwan's) stand out for representing models of judges who had apparently assimilated all the advances of juridical hermeneutics. For them, the interpretation and the application of legal norms should preserve the autonomy of the Law.

REFERENCES

- AMAYA, Amalia. Jueces ejemplares. In: FALCONÍ TRÁVEZ, Diego (ed.). **A medio camino. Intertextos entre la literaturay el derecho**. Valencia: Tirant lo Blanch, 2016. p. 85-112.
- BAUMAN, Zygmunt; MAZZEO, Ricardo. **O elogio da literatura**. Tradução Renato Aguiar. Rio de Janeiro: Zahar, 2020.
- CALVINO, Ítalo. **Perché leggere i classici**. Milano: Mondadori, 1991.
- CALVO GONZÁLEZ, José. Derecho y Literatura. Intersecciones instrumental, estructural e institucional. In: CALVO GONZÁLEZ, José (dir.). **Implicación Derecho Literatura: contribuciones a una teoría literaria del derecho**. Granada: Comares, 2008. p. 3-28.
- CANDIDO, Antonio *et al.* **A personagem de ficção**. 2. ed. São Paulo: Perspectiva, 1970.
- CARBASSE, Jean-Marie; DEPAMBOUR-TARRIDE, Laurence (ed.). **A consciência do juiz na tradição europeia**. Belo Horizonte: Tempus, 2010.
- DWORKIN, Ronald. **O império do Direito**. São Paulo: Martins Fontes, 2014.
- FÁBREGA PONCE, Jorge. **Abogados y jueces en la literatura universal**. Valencia: Tirant lo Blanch, 2013.
- GARAPON, Antoine. **O guardador de promessas: justiça e democracia**. Lisboa: Piaget, 1996.
- GODOY, Arnaldo Sampaio de Moraes. Direito e literatura. Os pais fundadores: John Henry Wigmore, Benjamin Nathan Cardozo e Lon Fuller. In: SCHWARTZ, Germano (org.). **Direito e Literatura: o encontro entre Themis e Apolo**. Curitiba: Juruá, 2008. p. 21-50.

KARAM, Henriete. Questões teóricas e metodológicas do direito na literatura: um percurso analítico-interpretativo a partir do conto *Suje-se gordo!*, de Machado de Assis. *Revista Direito GV (Online)*, v. 13, n.3, p. 827-865, 2017.

KARAM, Henriete. A pena de morte na literatura: Victor Hugo, Melville e Sciascia. In: TESHINMA, Marcia; YAMAMOTO, Lilian (org.). **Pena de morte**: no direito e na literatura. Londrina: Eduel, 2019. p. 205-240.

LAMY, Alberto Sousa. **Advogados e juízes na literatura e na sabedoria popular**. Lisboa: Ordem dos Advogados, 2001. 3v.

MAUS, Ingeborg. Judiciário como superego da sociedade o papel da atividade jurisprudencial na “sociedade órfã”. *Revista Novos Estudos CEBRAP*, n. 58, p. 183-202, 2000.

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

OST, François. Juge-pacificateur, juge-arbitre, juge-entraîneur. Trois modèles de justice. In: OST, François; VAN DE KERCHOVE, Michel; GÉRARD, Philippe (dir.). **Fonction de juger et pouvoir judiciaire**. Bruxelles: FUSL, 1983. p. 1-70.

OST, François. Jupiter, Hercule, Hermès: trois modèles du juge. In: BOURETZ, Pierre (dir.). **La force du droit. Panorama des débats contemporains**. Paris: Esprit, 1991. p. 241-272.

OST, François. Júpiter, Hércules y Hermes. Tres modelos de juez. **Doxa – Cuadernos de Filosofía del Derecho**, Alicante, n. 14, p. 169-94, 1993.

OST, François. **Contar a lei**. As fontes do imaginário jurídico. São Leopoldo: Unisinos, 2005.

OST, François. Júpiter, Hercules, Hermes: três modelos de juiz. **Juizado da Infância e da Juventude**, Porto Alegre, v. 7, n. 17, p. 109-130, jan./mar. 2009.

POSNER, Richard. **Law and Literature: a misunderstood relationship**. Cambridge/London: Harvard University Press, 1988.

RABELAIS, François. **Gargântua e Pantagruel**. Belo Horizonte: Itatiaia, 2009.

SCIASCIA, Leonardo. **Portas abertas**. Tradução Mário Fondelli. Rio de Janeiro: Rocco, 1990.

SHAKESPEARE, William. **O mercador de Veneza**. Rio de Janeiro: Ediouro, 2009.

SILVA, Vítor Manuel de Aguiar e. **Teoria da Literatura**. 7. ed. Coimbra: Almedina, 1986.

STRECK, Lenio Luiz. O pós-positivismo e os propalados modelos de juiz (Hércules, Júpiter e Hermes) – dois decálogos necessários. **Revista de Direitos e Garantias Fundamentais (FDV)**, Vitória, v. 7, p. 15-45, 2010. Available in: <http://sisbib.emnuvens.com.br/direitosegarantias/article/view/77>. Accessed on: 5 Apr. 2020.

STRECK, Lenio Luiz. **Hermenêutica jurídica e(m) crise**. 11. ed. Porto Alegre: Livraria do Advogado, 2014.

STRECK, Lenio Luiz. **Dicionário de hermenêutica**: quarenta temas fundamentais da teoria do direito à luz da crítica hermenêutica do direito. Belo Horizonte: Letramento, 2017.

STRECK, Lenio Luiz; TRINDADE, André Karam (ed.). **Os modelos de juiz**. Ensaios de Direito e Literatura. 2. ed. São Paulo: Atlas, 2019.

TARUFFO, Michele. **Uma simples verdade**. São Paulo: Marcial Pons, 2012.

TATE, C. Neal; VALLINDER, Torbjörn (ed.). **The global expansion of Judicial Power**. New York: New York University Press, 1997.

TOLSTÓI, Leon. **A morte de Ivan Ilitch**. Porto Alegre: L&PM, 1997.

TRINDADE, André Karam; GUBERT, Roberta. Direito e Literatura: aproximações e perspectivas para se repensar o direito. In: TRINDADE, André Karam; GUBERT, Roberta; COPETTI NETO, Alfredo (org.). **Direito & Literatura**: reflexões teóricas. Porto Alegre: Livraria do Advogado, 2008. p. 11-66.

TRINDADE, André Karam. Pórcia e os limites da interpretação do direito. **Revista Novos Estudos Jurídicos**, v. 19, n. 3, p. 755-786, set-dez 2014. Available in: <https://siaiap32.univali.br/seer/index.php/nej/article/view/6668>. Accessed on: 10 June 2020.

TRINDADE, André Karam. Requiem for Ivan Ilyich: The Problem of Judicial Interpretation in Tolstoy's Literature. **Pólemos – Journal of Law, Literature and Culture**, v. 13, n. 1, p. 191-209, 2019a. Available in: <https://www.degruyter.com/view/journals/pol/13/1/article-p191.xml>. Accessed on: 20 July 2020.

TRINDADE, André Karam. O problema da superinterpretação no direito brasileiro. **Revista de Estudos Constitucionais, Hermenêutica e Teoria do Direito (RECHTD)**, v. 11, n. 3, p. 447-460, set./dez. 2019b. Available in: <http://www.revistas.unisinos.br/index.php/RECHTD/article/view/rechtd.2019.113.10>. Accessed on: 5 Apr. 2020.

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**, Porto Alegre, v. 3, n. 1, p. 225-257, jun. 2017a. Available in: <http://rdl.org.br/seer/index.php/anamps/article/view/326>. Accessed on: 12 May 2020.

TRINDADE, André Karam; BERNST, Luísa Giuliani. Discricionariedade judicial na literatura: lições de direito em Gargantua e Pantagruel, de François Rabelais. **Revista Jurídica**, Curitiba, v. 4, n. 49, p. 231-254, nov. 2017b. <http://revista.unicuritiba.edu.br/index.php/RevJur/article/view/2293/1423>. Accessed on: 25 June 2020.

TRINDADE; André Karam; KARAM, Henriete; AXT, Dieter. Juiz ou Deus? O imaginário social na sociedade órfã. **Revista do Instituto de Hermenêutica Jurídica – RIHJ**, Belo Horizonte, v. 15, n. 22, p. 13-34, jul./dez. 2017.

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