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Dignifying and Undignified Narratives in and of (the) Law

Proceeding of the IVR World Congress 2019
WS Law and Narrative

Ed. by

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Preface

This special volume is the result of two days of fruitful discussions within the Law and Narrative Workshop entitled “Dignifying and Undignified Narratives in and of (the) Law”, which took place at the University of Lucerne in the context of the IVR World Congress 2019.¹

The intention of the workshop – organized in collaboration with the Italian Society for Law and Literature – was to apply the lens of narrative and narrative theory to investigate the broader IVR theme of the relations between dignity, democracy and diversity. ‘Narrative’ has in recent years become a much used, maybe even overused, term across a variety of fields including literature, philosophy, legal theory and clinical legal education. It has also, unsurprisingly, been enthusiastically embraced by law and humanities scholarship.

One of the starting points of the ‘turn to narrative’ in legal studies is the notion that literary narratives can help us to explore alternative views on the human and social condition by disclosing experiences otherwise neglected in law. Literary narratives as well as everyday legal narratives (which include the voices of the more vulnerable parts of society) contribute to revealing implicit and often instrumental elements that are frequently left unstated by legal discourse (Ewick & Silbey 1995: 197-226). In this sense, such narratives can present new sources of knowledge and new perspectives on traditional, doctrinal and/or discipline-bound topics of law (and literature).

A second starting point is Robert Cover’s thesis that law and its narratives can only be understood within their cultural and normative universe, the *nomos* of their origin and existence (Cover 1983: 4-68). The creation of legal meaning cannot be imposed from the outside; it is the product of mediation between the top (the state) and the bottom (the people at the large). The legal narratives that derive from this mediation process contribute to the construction of the identity of the community, for example that of the nation-state, drawing on founding myths, symbolism, and popular imagery.

¹ *International Association for the Philosophy of Law and Social Philosophy.*

Such narratives create a legal order and establish particular legal categories (e.g. citizen, foreigner) that set the parameters for inclusion and exclusion. Yet within any single state, within any single society, *nomoi* can obviously clash. A third narrative paradigm deserving of attention is that of the relations between fact and fiction. For the opportunity to tell one's story and to be heard is a way to be recognized as a human being. Such a procedure also confers dignity on the speaker in honoring his or her autonomy as a legal subject, presenting space for alternative values that the law tends to suppress (Delgado 1989: 2411-2441). But what happens if too little, or, alternatively, too much credibility is given to a specific speaker in, for example, a court of law? Or what occurs when a specific speaker is unable to give voice to his or her experience? When a speaker is hermeneutically challenged and lacks narrative competence, what becomes of his or her narrative as such, and what happens to its reception by its audience, e.g. a panel of judges or administrative agents? (Fricker, 2007). Thus, a prior question must be raised: How can laypeople – especially those who are silenced, marginalized or excluded – act successfully within the law and be heard in legal discourse? Inequalities can be the result of narrative incompetence, or injustice, bias and discrimination, social and otherwise. These directly affect a person's dignity and are detrimental when it comes to the development of social diversity.

In the sense that narratives both re-present and constitute reality, we also need to consider the ways in which narratives operate as instruments of the legal constructs we devise. The narrative approach can help us variously understand how reality and meaning are constructed; how links of cause and time do not exist in nature, but are created by placing elements of fact in a narrative structure, generating different results in solving cases (Amsterdam & Bruner, 2000); and how diverging narrations about the same events reflect the divergent interests, experiences and representations of the world, according to the roles played by the narrators (the client, the attorney and the judge) in a given context (see Shalleck's papers on these issues, this dossier Part II).

This, in turn, affects our understanding of knowledge and truth, as narrative truth cannot be easily assessed by means of received standards of verification. With narratives, in law and elsewhere, what counts is probability and/or plausibility. Moreover, it is important to be knowledgeable about how narrative works to activate our deep frames of (re)cognition. Should we wish to understand narrative as a 'legal category' that plays a crucial role in the process of legal adjudication and the construction of legal reality, or to develop a legal narratology applicable in legal practice, a focus on probability, coherence, likelihood, and plot in law and literature can thus be helpful, even indispensable.

These are the main issues we debated during the workshop, on the basis of a series of thought-provoking presentations delivered by colleagues from Australia, Brazil, France, Great Britain, Holland, Italy, Mexico, Norway, Portugal, Switzerland and the United States. All proposals confronted the challenge of exploring ‘the turn to narrative’ from different cultural backgrounds and through distinct lenses. They challenged the common view of law as an autonomous instance or dimension that intervenes in people’s lives from without. In doing so, they sought to bridge the gap between law and reality by means of a vivid call for understanding how narratives structure human and social experience and action, and for a critical appreciation of their cognitive and aesthetic content.

The papers collected here can be organized loosely in two categories depending on their focus on literary narratives or legal narratives. In the first grouping, Brisa Paim Duarte paper’s on *Normative validity, macronarrativity and micronarrativity in law* deals with narratological issues. It investigates the abuse of the term narrative, trying to establish the possible connections between narrative and the law, and to identify a common ground among different uses in different contexts. Duarte makes a bold attempt at working out a kind of harmony in the cognitive and methodological functions of narrative. She (here, 12) points out that: “Operating between the general (macronarrative) dimension of law’s culture and community, and the particular (micronarrative) dimension of cases, narrative is, then, a fundamental methodological asset in law.”

Then, raising more literary issues, Fernando Armando Ribeiro proposes an enlightening approach to legal interpretation from a reading of William Shakespeare’s *Measure for Measure*. In *Literature, hermeneutics and reflexive interpretation: a legal reading of Shakespeare’s Measure for Measure*, he articulates a view on how literary hermeneutics can help the judge to reflect on (and question!) his or her own pre-understandings, and how this might contribute to the enhancement of the judicial decision. Part of the overarching aim of the essay is to suggest how Shakespearean narrative may provide a better understanding of many ideas supported by non-positivist schools. Ivan Cláudio Pereira Borges’s paper *Concurrent narratives of violence against women*, meanwhile, analyses the differences between narratives of the victims of domestic violence and the Brazilian law on the matter. The essay focuses on the renunciations of representation by the aggressed women in the context of Domestic Violence Protection Orders (DVPOs) in progress at Juizado Especial de Violência Doméstica e Familiar contra a Mulher (Gama-DF), at the Tribunal de Justiça. The number of these renunciations adds up to about thirty percent of total cases. The conclusion is that the act of renouncing reveals important

interests of the female victims that were not taken into account by the Maria da Penha Law.

Ana Carolina Faria Silvestre's paper on *The importance of emotions in the daily professional lives of judges: some insights from the autobiographies of Brazilian judges* marks a transition towards our second grouping, touching as it does on both literary and legal narratives. She emphasizes the importance of emotions in the daily professional lives of judges via analysis of the biographies of select Brazilian judges. This topic is of interest in light of current trends in law-and-emotion scholarship and, more generally, as part of the contemporary affective turn that looks to break down stereotypes about the division between reason/logic and emotion. From the work of Antonio Damasio and Martha Nussbaum, we are aware of the positive role of emotions in judging. Emotions are propulsive forces they have an epistemic role: they drive knowledge. Faria's paper highlights the difficulty for judges to deal with their emotions in the process of judging, in interacting with the parties, and in maintaining balance in challenging situations. The feeling of isolation experienced by the judge, the lack of friendship due to their social role and specific function and also their fear at starting a new job, highlight a lack in the formal training of the judge. Legal education could be a valuable tool for undergraduate students in general, and for judges specifically, to prepare them for the performance of justice. They should be most aware of cognitive mechanisms and be better trained in social interactions – as the site at which emotions arise. Indeed, if the judge is an isolated man or woman in his or her library (the Langdellian model), this could be a real problem.

The following papers by Angela Condello and Yuliia Khyzhniak may both be situated more squarely in the field of legal narratives. They adopt hermeneutical, argumentative, and literary approaches to analyse legal narratives. By scrutinising hard cases, in *The importance of being eventful. On narratives and legal culture* Condello investigates the role of narratives in the shaping of a common culture of human rights. She proposes (here, 70) to analyse narratives as a tool “to prove facts and to orient the act of judging” as – together with argumentations – they are at the core of the truth-making method: “if the main function of the procedural narrative is argumentative, then the choice of the terms used in the presentation of the facts of a case is crucial” (Ibid.). Especially in hard cases, legal narratives contribute to the process of qualification typical of legal reasoning. “How facts are narrated”, writes Condello (here, 74), “is what characterizes the fact as eventful”.

In her paper on *Narrative coherence and change: a literary approach to the jurisprudence of the European Court of Human Rights*, Khyzhniak makes the clear methodological choice to analyze the processes of how changes are incorporated into the case law of the European Court of Human Rights via a

narrative approach. She proposes *coherence* as a first criterion to evaluate this process – a criterion that recalls, to some extent, Dworkin’s chain novel metaphor and which is here employed to explore the interrelation among the different texts of the Court, both in terms of temporality and consequentiality. When coherence among texts is showed, one can highlight the continuity and the legitimation of the new. Khyzhniak proceeds to also quote literary sources on narrative to stress that different versions of texts and reality may readily coexist.

The next essay by Anne MacDuff *Citizenship pledges and national values: narrating and racializing Australian citizenship* addresses the function of legal narratives in the context of citizenship ceremonies as a means of constructing the identity of the community and nation-state. Through the analysis of specific rituals within such ceremonies, the paper shows that, and how, narrating is a cultural tool, as stories enable society to achieve the imagined community by establishing legal categories and qualifications that determine who is to be included and who excluded. According to the Australian Citizenship Act, values needed to become an Australian citizen are commitment to democratic values, loyalty to the nation, and obedience to the law. The Australian citizenship ceremony is thus an attempt to show the achievement of cultural homogeneity. Loyalty is evidenced through the promise to obey the law and to comply with the rules of the ceremony. Displays of cultural diversity are permitted only in limited ways (e.g. via dress but not the use of a different language), and are ultimately to be submitted to the demands and values of the nation-state.

Finally, Shalleck’s paper *How clients and lawyers construct facts: the stories they tell each other and the stories that guide investigations into the world* highlights in which sense narrative theory might be a powerful device for understanding the practice of law, particularly for cases of marginalized or excluded people. She uses some materials developed for the clinical seminar she teaches to present and explore a narrative methodology for fact investigation, thereby inviting to educate lawyers in narrative theory and practices, through which they can realize the potential of that theory in the representation of clients who come to them to resolve legal problems. These narrative practices are designed to further the dignity and autonomy of the client, to pursue alternative stories that may not fit within the dominant legal paradigm or may even challenge it, and to create opportunities for clients to tell their stories and have them heard.

Each of the papers presented in this volume contributes to the enriching of our efforts in narrative theory to deal with concrete dimensions of law and life. Together, they do much to reinforce our conviction that ‘narrative’ should be considered not only a critical tool and means to interpret

legal texts, but also a significant legal category that plays a crucial role in the processes of legal adjudication, case resolution, and social inclusion and exclusion.

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References

- Amsterdam, Anthony G. & Bruner, Jerome S. 2000. *Minding the Law*. Cambridge (MA): Harvard University Press.
- Cover, Robert. 1983. "Nomos and Narrative". *Harvard Law Review*. 4-68.
- Delgado Richard. 1987. "Storytelling for Oppositionists and Others: A Plea for Narrative". *Michigan Law Review*. (8):2411-2441.
- Ewick, Patricia, Silbey Susan. 1995. "Subversive Stories and Hegemonic Tales: Toward a Sociology of Narrative". *Law & Society Review*. (29) 2: 197-226.

PART I
LITERARY NARRATIVES

Normative validity, macronarrativity and micronarrativity in law: some notes from a *Jurisprudentialist* perspective

Brisa Paim Duarte*

Abstract

The mobilization of narrative inputs in current methodological legal thinking usually enhances the constitutive tension between macronarrative internal or centripetal (“dignified”) *normative* arguments and the micronarrative complexity of fragmented, plural, and polyphonic (if not centrifugal) *legal realities* in which deviant types of neglected (and, in this sense, “undignified”) stories are waiting to be seen, heard, and answered to. Exploring this arena by the means of a brief dialogue with *Jurisprudentialism* (António Castanheira Neves), and taking the normative opposition between the macro and the micro, the abstract and the concrete dimensions of/in law as an artificial polarization and dichotomy, this paper discusses the methodological intercrossing between the narrative and the normative in law.

Key words: methodology of law; legal validity; law & narrative; legal judgment.

1. The Narrative Outbreak

The apparent wariness of Marie-Laure Ryan about a situation the author understands as an *overuse* of narrative references, a diagnosis shared in some extent by other narratologists, seems to be not exactly a quantitative, but, rather, a qualitative and methodological issue or discomfort. Her cautious tone goes back to Peter Brooks’ critical remark about the «trivialization» of narratives and narrativity. Ryan states the fact that «[i]n the past fifteen years, as the “narrative turn in humanities” gave way to the narrative turn everywhere [...], «few words have enjoyed so much use and suffered so much abuse as *narrative* and its partial synonym, *story*» (Ryan 2007, 22), while Brooks assumes such a trivialization as a sort of protagonism finally given to a cognitive «tool long neglected» (Ryan 2007, idem;

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Safire 2004)¹, seeing that overuse as another sign of the positive *vitality* of narrativity and the *ubiquity* of narratives in the ordinary ways we make sense of the world(s) we live in, structuring our encounters with reality: a reinforcement of that fact that human temporal experience is «ceaselessly intertwined with narrative» (Brooks 1992, 3) – «almost as if humankind is unable to get on without stories» (Amsterdam and Bruner 2002, 114). Ryan's apparently *soft mistrust*, in turn, seems to have much more to do with a question of trivialization of *normative meaning*: if everything can be seen as narrative, or be attributed some kind of narrative quality, making narrativity a generalized unspecific feature of life... what meaning one can autonomously convey in narrativity, after all? In this way, both the over-spreading of the term *narrative* and the subsequent ready-acceptance of the manifold applications the same term has been given in the current vocabulary of apparently non-narrative or non-specifically narrative fields (such as technical reports and «politics», «cognitive science», «medicine», clinical psychology..., and, of course, one has to include, *law*) are not more than symptoms of a broader phenomenon, the *normative emptiness* of the narrative. Ryan's discursive caution leads then to a consistent analytic effort: not simply to confirm the massive presence of narrative in the intricate aspects of the constitution of beings (subjectivity) and social relations (intersubjectivity), taken as a whole, but to specify narrative structural features and shed some light on what, according to this framework, narrative could and could not positively mean.

Outside any intention of building a plain disciplinary fence to prevent the use of narrative structures or elements by typically non-related fields², Ryan submits narrative itself to a closer (but, in a sense, also an *undogmatic*) look. She assumes narrative not as a static quality that could be present or not *in certain texts*, but a «fuzzy» condition that belongs to no point of reference by default, allowing «several degrees of membership» (Ryan 2007, 28), and, according to this conception, narrativity can be meaningfully assigned to a variable extension of situations and objects since specific semantic and pragmatic requirements are verified, some of them related to issues of content, other to issues of form. The definition provided by Ryan stands out, nevertheless, as somehow narrow, at least in the cognitive sense. She herself seems to recognize that – and, in turn, to undermine the practical importance of dogmatic distinctions outside narratology discourse – as if to know what narrative is and what it is not could be useful only in the clarification of its related field of inquiry, on the one hand, and in the containment of the initially discussed «overuse» of narrative references, on the other. In the later sense, the referred narrowness seems to function as a rather desirable outcome (Ryan 2007, 32-ff).

She states, in summary, that, in a semantic level, narratives have to do with what is concrete, individualized, changeable, non-necessary or physical, plus with what must contain purposeful actions taken forward by mentally-driven motivated agents; and, in a formal level, that they must provide a sense of unity and closure, with some of their elements

¹ Ryan refers at this point to a quotation brought about by William Safire in a narratology article for *The New York Times Magazine*. In this opportunity, Safire reproduces an excerpt from an email exchange with Brooks in which the latter affirms: «[t]he use of the word narrative is completely out of hand! [...] While I think the term has been trivialized through overuse, I believe the overuse responds to a recognition that narrative is one of the principal ways in which we organize our experience of the world – a part of our cognitive tool kit that was long neglected by psychologists and philosophers» (Safire 2004).

² On the contrary, Ryan is very clear when she states that «[as] a mental representation, story is not tied to any particular medium, and it is independent of the distinction between fiction and non-fiction. A definition of narrative should therefore work on different media (though admittedly media do widely differ in their storytelling abilities), and it should not privilege literary forms» (Ryan 2007, 26).

being regarded, inside the limits of «storyworld», as facts, and not simply «advices», «rec-ipes», and other «counterfactual» assertions (Ryan 2007, 29–30). Also, narratives must be able to communicate something meaningful to the audience or readers they reach, they must be able to produce something more than a «bad story», or even something that is not regarded as a story by receivers. In a way, this last requirement universalizes the concept of narrative, making it possible in any practical situation, and, in another, it seems to weaken it, subjugating the emergence of narratives to an unforeseeable pragmatics of interpretation, on the one hand, and limiting its possibility to the indeterminacy of contextual situations in which a narrative may, or may not, circumstantially appear, on the other.

Therefore, delving into Ryan's proposed requirements does not seem to be the most fruitful way to go when what is in focus is an approach to narrative that is transversal and methodological, moreover when the relation between *narrative*, as a compositional operation and *cognitive device*, and *story*, as *an outcome* of this operation³ (a way of framing reality narratively), arises as a much more accepted part of the conceptual structure itself, to the point that narrative and story often appear as indivisible units or entities hardly distinguishable.

At the same time, the role of narrative in shaping human knowledge, culture, discourse, and even the most basic instances and situations of communication, as a particular branch of *rationality*, seems even harder to refuse – as Jerome Bruner already stated at the beginning of his book *Making Stories*, «we are so adept at narrative that it seems almost as natural as language itself» (Bruner 2002, 3). A similar argument was primarily developed by Walter R. Fisher, to whom narrativity is not a type of discourse but a fundamental aspect of intersubjectivity, shaping the structure of meaning in the pragmatics of language and making the very process of communication possible. The «narrative paradigm» he highlights, «a fabric woven of threads of thought from both the social sciences and the humanities», would provide a «“new” logic» «applicable to all forms of human communication» «that recognizes permanence and change, culture and character, reason and value, and the practical wisdom of all persons» (Fisher 1987, 98), going beyond both the typical empiricism of technical-scientific rationalities and the classical platonic approaches to the problem of truth.

If humans make use of narrative constructions – constituting stories – as a way of framing their particular experience of what is called “the reality” normatively, inserting singular, inalienable experiences in some recognizable – that is, shared and transindividual, communicable – structure of *possibility* and *language*, narrative is necessarily a mode of *appropriation*, more than a way of giving an experience of reality a prescribed meaning, it is the creation of such realities through an experience of meaning and *nomos*. Through this kind of appropriation, narrative creates humanity. Which opens the following questions: why is the relation between narrative and typically non-narrative fields still debatable? And why we can, if we can, refer to the *non-narrative* after all? Wouldn't it be the distinction of the narrative superfluous outside narratology? Or the narrative aspects of *law*, in consequence, out of question? Is the «overuse» argument even sustainable?

³ «The purpose of a definition will then be to delineate the set of cognitive operations whose convergence produces the type of mental representation that we regard as a story.» (Ryan 2007, 28).

2. Narrative and Criticism

In fact, it seems that, even if we want to discuss further the connections between narrative and law or the so-called narrative features of law, and outside any essentialist, and, in many ways, outdated intention, Ryan's mistrust in narrative expansion is hardly groundless. This is because the «tendency to dissolve “narrative”», as she states, into other «metaphorical» categories and utterances (Ryan 2007, 22), such as simply «belief», point of view, opinion, fiction, invention, argument, uncertainty, and so on⁴, has become a tendency of its own, as if the transition to a narrative world could favor a simultaneous critical transition to an anti-hegemonic, post-structuralist or post-modern mindset (Garcia Landa 2008, 2; Fisher 1987, 89–90).

This seems to apply particularly to fields in which the *problem of truth* is a central one, and where truth is not normally understood or assumed in terms of unmasked *constitution*, but of necessary *revelation*, *substance*, and *reference*, and, as a result, a narrative input is not usually claimed, the possibility of constituting truth, instead of extracting it from some supra-sensorial level of existence, reason, universality, and abstraction, can only appear as criticism or paradox. So, when it is trivialized – or, better, generalized – in this manner, narrative, used in the «metaphorical sense», seems to function primarily as a general tool to put the central *dogmata* of foundationalism, cognitivism, and objectivism under suspicion, and so the complementary notions of stability of meaning and absolute representational power of references are shaken.

If the primary role expected to be played by narrative in such fields is to reinforce an underlying epistemological and methodological *doubt* regarding not only the authority of the discourse produced, but first the indisputability of the contexts involved and *modi operandi* responsible for their production to take place, and of the contents being produced as a result, while a narrative *believer* sees in this kind of critique an opportunity to defend new possibilities of constitution of meaning, undermine theoretical fixation, and shed some light on the practical nature of the field in question, a narrative *skeptic* can ask herself: are such fields *properly* rational, or, instead, are they *just* a non-reliable, dangerous creation of the mind? In the platonic debate between the two strands, theoretical *vs.* practical, it is easy to lose connection with the narrative aspects in comment and that are planned to be enhanced in the first place.

On the other hand, besides being used as a critical tool, and particularly in law & literature and law & arts/ aesthetics fields, which have been exploring the intentional character of narrative connection more extensively, what does a narrative input mean and what would be its role in legal practice is not univocally assumed, since the reference to narrative happens to give rise to many different assumptions, building a multiform set of repercussions on what concerns narrative's relation to law's own identity and experience. As a result, this variety can lead either to the reinforcement, the deepening, or the rejection of the possibility to trace a common ground between those elements.

⁴ According to Ryan, the «metaphorical uses» turn narrative» into “belief,” “value,” “experience,” “interpretation,” “thought,” “explanation,” “representation,” or simply “content” (Ryan 2007, 22).

Additionally, considering that law & arts fields are marked by strong methodological concerns⁵, law's institutional capacity to give adequate (that is, *just*) answers to juridically relevant problems has always deserved, in the same context(s), a special attention, despite the understandings about the appropriate criteria to determine *valid* normative meanings and to trace the perimeter of the social circle of *juridical relevance* are also hardly uniform or unequivocal. When one intercrosses these two metadogmatic aspects, that is, the *narrative* and the *methodological*, it is possible to notice two main positions:

First, and *macroscopically*, the defense of law's narrative core or law's narrativity is generally built upon and tied up *coherence, fidelity, or continuity* normative claims that manifest themselves in variable forms and degrees, but in whatever fashion they appear they happen to rely on the reinforcement of an institutional aspect that somehow gives rise to a more or less solid comprehension of law's normative unity, as a system and as an organized experience – in this case, a living, non-platonic, *corpus iuris*. Which does not necessarily lead, then, to a weakening of criticism to reinforce mere analytic dogmatic arguments. On the contrary, the arguments for such a normative unity favor criticism in discourse.

These claims are sustained in very different fashions and styles by singular authors and perspectives *outside* formalist tradition and somehow connected to an aesthetic point of view, from Ronald Dworkin's – many times debated – vision of law's integrity linked to the interpretive concretization of principles of «political morality» in a collaborative net of jurists, as a «chain novel» enterprise put together by «fit»-consistency and «value»-coherence arguments (Dworkin 1986a; 1986b, 90, 225-ff; 2011), a position many times regarded as plain orthodoxy, conservatism, and/or formalism (Manderson 2012, 20 (fn. 115); Douzinas and Warrington 1991a, 115 (fn. 1); Douzinas 2000, 247 ff., 328 ff.; West 2011a, 5-6 esp.), to James Boyd White's complex and pluralist comprehension of law's textuality, normative institutionalization, and practice, according to the *ius*-semiotic model of a community or «culture of argument», in which a particular form of legal discourse, as an experience of *life*, arises («a set of ways of thinking and talking» and interacting in a world we share) (White 1985; 1990, xiii). To not forget Robert Cover's critical understanding of law's *corpus iuris* as an experience of *nomos* that takes place in «the context of the organized social practice of violence» that must not be disregarded as merely external or eventual to legal practice (Cover 1985, 1602; 1983).

Second, and in the opposite sense, *microscopically*, the (explicit or implicit) partial or total rejection of narrative paradigm is usually claimed to favor a fragmentation argument that is built upon the adverse assumption, that is, to assign to law a *true* sense of convergence or continuity, a particular and consistent plot, vocabulary, experience, or storyline, would be very difficult, if not even impossible. In this sense, law, as a contingent artifact, would constitute no narrative at all, or, at the most, a fragmented, postmodernist, polyphonic one, in which the degree of narrativity would be very debatable, at least according to common comprehensions of what form narratives tend to assume or what kinds of

⁵ Which does not prevent the methodological concentration of being criticized, and, sometimes, harshly, by authors who can be integrated in a broader, transversal, law & aesthetics perspective, such as Desmond Manderson. See his «courthouse steps» argument in (Manderson 2000, 42–43). I understand, however, that this methodological avoidance – which does not sustain the same authors (Manderson himself included) of proposing important methodological insights – reflects an artificial dichotomy and separation between law as normative intention or “ought to be” and law as “fact”, which a normatively-oriented *ius*-methodological reflection has the proper conditions to overcome.

text can be considered as narrative. The low degree of narrativity (or the «antinarrativity») of postmodern narratives was already stated by Ryan. To her, postmodern narratives are examples of anti-narrativity, since they stand out as «the various distortions to which narrative material is subjected in postmodern literature», not allowing the interpreter «to reconstruct the network of mental representations that motivates the actions of characters and binds the events into an intelligible and determinate sequence». Consistency in any form is then impossible, since even common narrative elements, strategies and concepts can be applied, the interpreter is unable to frame all «these elements into the network of a stable and comprehensive narrative interpretation» (Ryan 2007, 30–31; 2010, 317; 1992, 379).

This vision is also linked to an aesthetic and pluralist view of law, but, here, unlike the macroscopic discourses, the relations between the institutionalism of law, the immediacy of *aesthesis*, and the singularity of ethics are the main substrate, bringing together a psychoanalytic and/or deconstructionist-inspired post-positivist aesthetic discourse that assumes the argument for law's foundation as an autonomous creation of the collective (un)conscious of jurists, a historical and philosophical myth – a fictional narrative by its own merits – specially strengthened after Modernity's *tale* of the overcoming of a precarious *state of nature* through a definitive transition to a superior civil State and society *made* by the means of a «basic narrative category», the *contract* (Douzinas and Warrington 1991, 128). Such a transition was philosophically and normatively justified by the means of the conjunction between the positive and the normative, that is, that positive civil State (with its laws) and an ideal postulate of a normative State with its universal and rational law (*Rechtsstaat*, *l'Etat de droit*⁶), favoring a new institutionalism *against* reality, pushing sameness against pluralism. In this context, the metaphorical figure of a contract would

describe how groups of men came together in a vital, distinct state of lawlessness and difference in a unique, originary space of time and produced a meaning that all would agree on eternally [...] Like the social contract, the private contracts of citizens are given legitimacy and eternal effectivity by the magical effect of one unique, all embracing moment. (Douzinas and Warrington 1991, 115).

So, it would be very difficult to conceive a proper *corpus iuris* if not as a phantasmagorical or mystical dimension, a non-existence jurists (particularly in legal theory and dogmatics) seem to be constantly fantasizing about (a *representation* of a myth of authority)(Douzinas and Warrington 1991, 129–30). In this context, justice, as an ethical imperative (the *Law of law*) could only emerge in the verve of an opposition (Derrida 2005, 17; Douzinas and Warrington 1994, 88), or a moment of *absentia*-suspension («deconstruction») of “institutional” law (Manderson 2010, 12-ff.), it requires first the overcoming of a psychoanalytical element of unconceptualizable *repression* (close to «the return of the repressed» (Lacan 2017, 450), an unconscious strategic mechanism of hiding in plain sight (Goodrich 1996, 122-ff).

Yet, despite the main frameworks just referred, the search for deepening law & narrative connections also allows a more conciliatory strategy, since those macro and micro dimensions, as intentions, do not have to be in opposition, they can be articulated in

⁶ Mainly in reference to Rousseau and Kant's contractualism. The Anglo-Saxon version of “Rule of Law” could also be included, with the proviso that its normative meaning is not necessarily the same. About the ambiguities of these three references, see (Loughlin 2010, 313–24).

a constructive form. In one way or another, or whatever answer may be produced to the problems of law's practical autonomy, validity, and adequacy to concreteness, that search starts from the expansion of the very comprehension of *narrative typical limits*, and of what narrative inputs can provide in a practical sense, enhancing the tension between the "internal" or "centripetal" normative argument and the complexity of a fragmented, plural, and polyphonic, if not "centrifugal", legal reality, in which the possibility of not just "typical", but also neglected or deviant types of parallel or underground (and, in this sense, "counter-" or "undignified") narratives, stories or perspectives come into being and are hoped to be seen, heard, and answered to. But if this can only expose at first sight the distance between the general and the particular, the centripetal and the centrifugal, the macro and the micro dimensions of/in law, such an exposition must not lead to a dogma of reciprocal isolation.

Consequently, the macronarrative "centripetal" character, even if it is based on a *fidelity claim*, as consistency or validity, does not have to entail an underlying aversion to plurality and fragmentation – on the contrary, it necessarily demands a special assimilation – which does not have to mean consumption nor simplification – of complexity. So, that suggested difference/opposition is first an artificial and false polarization and dichotomy, the narrative and the normative are necessarily intercrossed with plurality. Any truth in law is only truth according to the time frames intertwined and to the textual and non-textual materials translated in law's own constitution, it is not given to verifiability but to plausibility, cannot be assigned a logical-scientific quality, it does not mean devotion to some totalitarian version of a *corpus iuris*. But, simultaneously, it does not have to be a synonym of dissolution of a macronarrative -normative intention.

These arguments will be developed, even though briefly, in the next section, where, instead of diving into the two main possibilities mentioned above, I will try to discuss the conciliatory position, suggesting some aspects related to law's narrativity that I think end up being important, if not even crucial, in law's methodology, where narrative can be assumed both in a *cognitive*, and, as I see, in a *methodological* sense as well.

3. Narrative and Methodology

I am adopting as premise a post-positivist and post-normativist (post-formalist) conception of law. Following António Castanheira Neves' Jurisprudentialism, law is here assumed as a specific *communitarian* project and a complex multilevel institutional experience of *axiological-normative* validity. Such a vision recognizes, in a *supra-positive* extent, that, as a civilizationally-culturally constructed normative intention and project of validity, law demands a certain degree of membership and commitment to shared axiological goals, but, at the same time, such goals are not merely given nor they are simply conventional, since they sign the *option* for the continuity of a certain project-ideal of a juridical *commune of persons* in the context of which the same goals are originally constituted, institutionally assumed, and permanently reinvented as normative compromises, grounding juridical *praxis* (Linhares 2012b, 501). These grounds, as fundamentals, once stabilized (even though dynamically) in the heterogenous material unity of a permanently constituting juridical system, manifest themselves as the *tertium comparationis* of intersubjective relations (as controversies), responding to them only *in concrete*, and being normatively renewed, in turn,

through their own methodological projection as normative limits both to the *valid* interpretation of legal materials (norms and statutes, precedents, doctrinal arguments...) and to the *ex-novo* constitution of normative criteria able to *respond* to the juridical specificity of the case *sub judice*. (Linhares 2012a, 23–42; Neves 2013).

As a transpositive principle constituted and sustained in communitarian *praxis*, law is then comprehended as an experience of temporal validity, and not an object or entity simply created top-down by the declaration of will of formal authorities, bare *voluntas* of *potestas*, nor a somehow conceived heteronomous institution. In this sense, *law* and *laws* (in its possible dogmatic specifications in either *imperatives*, *rules* or *norms* (Neves 1998, 46–50) are not synonyms, and jurist's *typical* role (*iuris-diction*) is not to be mistaken as the bare logical and subsumptive formal application of law's given premises under previously "selected" and organized «facts» of a case, namely when such «application» (better understood as a process of *realization*) is confronted with a multidimensional and problematic experience of reality and juridicity that can only arise *interpretatively*, and, in this way, as a construction itself, in its relation both to institutional requirements and to living *praxis*. As the practical nature of the related *problem of proof* makes clear, the case is not a given (Neves 1993, 157–66; Linhares 2001; Bronze 2006, 607–81), so it is already common to think about it in terms of «fact construction», «narrative construction of fact» (Jackson 1991, 59), «narrazioni fattuali» (Taruffo 2010, 203), and so on. On the other hand, the normative ambition of jurisdiction is not satisfied by the tactical and juridically uncompromised implementation of contingent strategies and policies. Despite legislation, for instance, can also have a social-political finalistic character and even be used accordingly (as an instrument to implement social transformations and pragmatic strategies), unless we can submit the intelligibility of legal experience to the contingency of *power*, being a means of official verbalization of such strategical goals is not what makes the juridicity of such legislation possible, is not what makes such laws *law*. In sum, the law, in its intentionality and cultural specificity, is not a place from where one can extract unproblematic solutions to premolded facts, but also not an opportunity to perform all sorts of strategies.

As the third – the *tertium comparationis* – and an experience, law is at the same time institutional and impermanent, the normative scale operating between the past and the present, feeding itself from tradition of history and novelty of cases (subjected to a practical reinvention), and the moment of judgement represents the crucial point of this mediation, since it is the moment when law's normativity, in its problematic character, descends from the abstract and becomes into being only through the mediation of cases, as questions that demand valid and adequate normative responses. As such, analogy is, then, at the heart of rationality and reasoning in law (Bronze 2012a; 2012b). But my goal in this paper is not to address the full scope and grounds of Jurisprudentialist proposal, but, differently, just try to shed some light in the ways such a comprehension of law's practical meaning relates to narrativity.

Here, the term «narrative/ity» must be understood broadly, in relation to the problem of *rationality* and reasoning, and, in a referential level, naming a specific structure of storytelling composition or communicational interpretive strategy which takes place inside or outside the realm of fiction and functions, within law's culture, in combination with other types of practical rationalities, such as those embedded in the activities of performance, translation and analogy. But which also allows to be reconciled with the

axiological-normative specificity of juridical rationality (the normative) without disrupting it. Let's look at these assertions a little bit further.

As a type of rationality, narrativity intervenes directly in the judicial constitution of juridical answers both in the macro and in the micro dimensions which structure law's normative project, and, substantially, in the way these two dimensions of law's experience positively relate to each other. In consequence, we can identify, in the way legal decisions are critically composed, a necessarily constitutive dialectics between a macro-narrativity of validity and a micro-narrativity of *praxis*. To the point it can be suggested, therefore, that narrativity itself (that house of multiple rooms that accommodates both narratives as stories and the rational process of organizing reality behind them) has a crucial part to perform in the *modus operandi* through which the normative contents of law's materials are shaped or interpreted both in a judge's arguments and in legal culture as specific patterns of meaning, patterns to be successively used and (re)appropriated as tools in legal practice, each of them being a different opportunity for a particular type of invention or performance.

In this context, narrativity conforms the routes through which substrates such as rules, principles, precedents, dogmatic constructions, contracts, and so on, are given normative meaning, being interpreted and densified in relation to concrete cases, on the one hand, and the ongoing dynamics of legal system, on the other hand, becoming not simply semantic abstract *topoi*, prone to hermeneutic and cognitive revelation, but juridical transient beings. Complementary, as already introduced, and somehow more intuitively, narrative rationality also plays an important role in the very constitution of the «perspectiva interrogante» (Neves), or the *questioning perspective* understood as the *juridical case*: it intervenes not only in the narrative analysis and constitution of proof, that is, in the *storyline of plausibility* constructed from the particular probative intelligibility of variable materials and respective presumptions of bindiness (Linhares 2012, 72-ff.), but likewise in the formulation of the juridical *question* itself, the kernel of each case, that fraction which demands a juridical response.

This task of formulation – the construction of the case – always demands an analogical exercise, a comparison between different units according to a shared normative scale (searching for the possibility of sameness in difference), and narrativity, integrated in this scale, is the unity shaping the plot of the complex storylines basing legal problems. A legal problem – a question – does not arise as a fact, a logical mirror or caricature of reality filtered in a pre-established pattern of behaviour (submitted integrally to the monologue of a legal system), but it is formed based on a polyglot context (that of the system and that of the case) that can only achieve meaning narratively. Every case is only a case inside a presumed context of reference, and every case only becomes a problem – a question – by reference to a specific assimilation as such according to this same context. In this aspect, narrative entails the constitution of a third – the joint – between *languages* and *stories*. The story of the case is the story of its encounter with the language of *corpus iuris*; the story of *corpus iuris* is one of continuous interpellations by cases and law's ability to be tested against its own normative limits and intentions in order to respond to them rightly and with adequacy. Every answer to a case is an act of *narrative translation* - giving rise to a new unit that originally belongs to both the specific dimensions from which it is formed, and, simultaneously, does not belong to none of them, as a new being. The narrative *conforms* the normative, the normative *informs* the narrative.

Operating between the general (macronarrative) dimension of law's culture and community, and the particular (micronarrative) dimension of cases, narrative is, then, a fundamental methodological asset in law. As a way of *thinking* and *composing*, of rationalizing about what is necessarily *complex* and *multilingual*, narrativity acts, altogether with performance, analogy and translation, in the non-foreseeable space between different unities and circumstances, it makes it possible to meet the conditions to balance law's compromise to guarantee some level of security and stability, by the one hand, which is to be fulfilled by law's dogmatic nature and institutionalization, and, on the other hand, the complementary – not antagonistic – compromise to provide *justice*, which requires a continuous material adjustment of that institutional sphere to the voices of times and the particular problems a constantly moving juridical reality brings about.

Juridical experience is a polarized, but not irreconcilable, path of compromise and disengagement, of holding it back and letting it go, of creating selves according to normative contexts and then undoing and recreating them both. Recovering Jerome Bruner's words, narrative «is organized around the dialectic of expectation-supporting norms and possibility-evoking transgressions» (Bruner 2002, 16). Complementary, this demand for embracing transgression, fragmentation and complexity – or micronarrative plurality – does not necessarily lead to an aversion to that fidelity, or macronarrative, aspect. One presupposes and depends on the other. There is no unilateral answer to prevail, and the only unity law can aspire to, moreover nowadays, is a multilevel unity analogically – and narratively – articulated between tradition and novelty.

All considered, narrativity operates in a delicate space and interval, it is the bridge that articulates *nomos* and stories, history and tragedy, framing new questions in some *recognizable* structure of possibility and language (Boyd White) according to an interpretive community (Fish 1980, 276–77, 355), and, at the same time, giving this experience, which is always, in juridical terms, a *problematic* one, a sort of hybrid meaning, both shared, since it is only constructed *in community*, and so inside its possibilities and constraints, and personal, because it is always propelled and fuelled by temporality, as *novelty*. And, in this sense, narrativity contributes fundamentally to the materialization of law's *humanity*.

References

- Amsterdam, Anthony G., and Jerome S. Bruner. 2002. *Minding the Law*. 2. printing, 1. paperback ed. Cambridge, Mass.: Harvard Univ. Press.
- Bronze, Fernando José. 2006. *Lições de Introdução Ao Direito*. Coimbra: Coimbra Editora.
- . 2012a. 'Praxis, Problema, Nomos (Um Olhar Oblíquo Sobre a Respetiva Intersecção)'. In *Analogias*, 233–63. Coimbra: Coimbra Editora, Wolters Kluwer.
- . 2012b. 'Racionalidade e Metodonomologia (Nótula Sobre Os Pólos e o Sentido de Uma Relação de Co-Responsabilidade Problematicamente Inucleada)'. In *Analogias*, 151–76. Coimbra: Coimbra Editora.
- Brooks, Peter. 1992. *Reading for the Plot: Design and Intention in Narrative*. Cambridge, Mass: Harvard University Press.

- Bruner, Jerome S. 2002. *Making Stories. Law, Literature, Life*. Cambridge and London: Harvard University Press.
- Cover, Robert. 1983. 'The Supreme Court, 1982 Term - Foreword: Nomos and Narrative'. *Harvard Law Review* 97: 4–68.
- . 1985. 'Violence and The Word'. *The Yale Law Journal* 95: 1601–29.
- Derrida, Jacques. 2005. *Force de loi: le fondement mystique de l'autorité*. Collection la philosophie en effet. Paris: Éd. Galilée.
- Douzinas, Costas. 2000. *The End of Human Rights - Critical Legal Thought at the Turn of the Century*. Oxford: Hart Publishing.
- Douzinas, Costas, and Ronnie Warrington. 1991a. "'A Well-Founded Fear of Justice': Law and Ethics in Postmodernity". *Law and Critique*, 1991a.
- . 1991. 'Posting the Law: Social Contracts and the Postal Rule's Grammatology'. *International Journal for the Semiotics of Law - Revue Internationale de Sémiotique Juridique*, 1991.
- . 1994. *Justice Miscarried. Ethics, Aesthetics and the Law*. Harvester Wheatsheaf.
- Dworkin, Ronald. 1986a. *A Matter of Principle*. Oxford: Clarendon Press.
- . 1986b. *Law's Empire*. Cambridge: Harvard University Press.
- . 2011. *Justice for Hedgehogs*. Cambridge and London: Harvard University Press.
- Fish, Stanley. 1980. *Is There a Text in This Class? The Authority of Interpretive Communities*. Cambridge: Harvard University Press.
- Fisher, Walter R. 1987. *Human Communication As Narration: Toward a Philosophy of Reason, Value and Action*. Columbia: University of South Carolina Press.
- Garcia Landa, Jose Angel. 2008. 'Emergent Narrativity'. *SSRN Electronic Journal*. <https://doi.org/10.2139/ssrn.1099358>.
- Goodrich, Peter. 1996. *Law in the Courts of Love Literature and Other Minor Jurisprudences*. London; New York: Routledge. <http://search.ebscohost.com/login.aspx?direct=true&scope=site&db=nlebk&AN=80019>.
- Jackson, Bernard S. 1991. *Law, Fact, And Narrative Coherence*. Liverpool: Deborah Charles Publications.
- Lacan, Jacques. 2017. *Formations of the Unconscious: The Seminar of Jacques Lacan, Book V [Le Séminaire de Jacques Lacan. Livre V. Les Formations de l'inconscient ([1957-]1958)]*. Edited by Jacques-Alain Miller. Translated by Russell Grigg. Malden, MA: Polity.
- Linhares, José Manuel Aroso. 2001. *Entre a reescrita pós-moderna da modernidade e o tratamento narrativo da diferença ou a prova como um exercício de passagem nos limites da juridicidade: (imagens e reflexos pré-metodológicos deste percurso)*. Coimbra: Coimbra Editora.
- . 2012. 'Evidence (or Proof?) As Law's Gaping Wound: A Persistent False Aporia?' *Boletim Da Faculdade de Direito Da Universidade de Coimbra* 88 (1): 65–89.

- . 2012a. ‘Validade Comunitária e Contextos de Realização: Anotações Em Espelho Sobre a Concepção Jurisprudencialista Do Sistema’. *Revista Da Faculdade de Direito Da Universidade Lusófona Do Porto* 1 (1): 1–42.
- . 2012b. ‘Law’s Cultural Project and the Claim to Universality or the Equivocalities of a Familiar Debate’. *International Journal for the Semiotics of Law - Revue Internationale de Sémiotique Juridique* 25 (4): 489–503. <https://doi.org/10.1007/s11196-011-9233-x>.
- Loughlin, Martin. 2010. *Foundations of Public Law*. New York: Oxford University Press.
- Manderson, Desmond. 2000. *Songs without Music: Aesthetic Dimensions of Law and Justice*. Philosophy, Social Theory, and the Rule of Law 7. Berkeley, Calif: University of California Press.
- . 2010. ‘Judgment in Law and the Humanities’. In *Law and the Humanities: An Introduction*, edited by Austin Sarat, Matthew Anderson, and Cathrine O. Frank, 496–516. Cambridge University Press.
- . 2012. ‘Between the Nihilism of the Young and the Positivism of the Old: Justice and the Novel in DH Lawrence [Article]’. *Law and Humanities* 6 (1): 1–23.
- Neves, António Castanheira. 1993. *Metodologia Jurídica - Problemas Fundamentais*. Coimbra: Coimbra Editora.
- . 1998. *Teoria Do Direito - Lições Proferidas No Ano Lectivo de 1998/1999*. Coimbra: Policopiado (A-4).
- . 2013. ‘O Direito Como Validade: A Validade Como Categoria Jurisprudencialista’. *Revista Da Faculdade de Direito Da Universidade Federal Do Ceará* 34 (2): 39–76.
- Ryan, Marie-Laure. 1992. ‘The Modes of Narrativity and Their Visual Metaphors’. *Style* 26 (3): 368–87.
- . 2007. ‘Toward a Definition of Narrative’. In *The Cambridge Companion to Narrative*, edited by David Herman, 22–36. Cambridge: Cambridge University Press. <https://doi.org/10.1017/CCOL0521856965.002>.
- . 2010. ‘Narrativity and Its Modes as Culture-Transcending Analytical Categories’. *Japan Forum* 21 (3): 307–23. <https://doi.org/10.1080/09555801003773711>.
- Safire, William. 2004. ‘The Way We Live Now: 12-05-04: On Language; Narrative’. *The New York Times Magazine*, 5 December 2004. <https://www.nytimes.com/2004/12/05/magazine/narrative.html>.
- Taruffo, Michele. 2010. ‘Il Fatto e l’interpretazione’. *Revista Da Faculdade de Direito Do Sul de Minas* 26 (2): 195–208.
- West, Robin. 2011a. *Normative Jurisprudence: An Introduction*. Cambridge: Cambridge University Press.
- White, James Boyd. 1985. *Heracles’ Bow - Essays on the Rhetoric and Poetics of the Law*. Wisconsin: The University of Wisconsin Press.

———. 1990. *Justice as Translation - An Essay in Cultural and Legal Criticism*. Chicago and London: The University of Chicago Press.

Literature, hermeneutics, and reflexive interpretation: a legal reading of Shakespeare's *Measure for Measure*

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Abstract

In this paper, we intend to approach the relevance and actuality of Shakespeare's thinking concerning legal interpretation. Departing from the play *Measure for Measure* we propose a critical and reflective gaze into some of the most critical matters in legal hermeneutics such as the desuetude of laws, equity, and the limits imposed by our pre-understandings. Therefore, we intend to discuss how hermeneutics and literature can enable the judge to reflect and question his own pre-understandings, thus contributing to the enhancement of the judicial decision. To conclude, we aim to indicate how Shakespearean narrative may provide a better understanding of many ideas supported by non-positivist schools.

Key words: Shakespeare, Law and literature, Hermeneutics, Judicial decision, Prudence.

1. Plot summary

Shakespeare's play *Measure for Measure* centers around the judgment of Claudio, who is arrested under the charge of impregnating Juliet, his lover, before they were married. Although they were engaged and their sexual intercourse was consensual, Claudio is sentenced to death in order to serve as an example to the other Viennese citizens.

The trial is led by Lord Angelo, the temporary leader of Vienna, who was left in charge by the Duke, before leaving the town for a journey. According to the newly established order there was too much freedom in Vienna and non-compliance to old norms was widespread. Angelo takes upon himself the duty to enforce the laws, ridding the city of brothels and unlawful sexual activity. As a judge, Angelo is strict, moralistic, and unwavering in his decision-making. According to him, the old Laws against sexual misbehaviors should be enforced in a strict and straightforward manner.

Isabella, Claudio's sister, a virtuous and chaste girl who is about to enter a nunnery is advised to intervene and to beg Angelo for mercy. At first Angelo seems to peremptorily refuse, but suggests that there might be some way to change his mind. In a second meeting

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he shocks Isabella proposing that he would let Claudio live if she agreed to have sexual intercourse with him. This proposal is promptly refused, but after hearing her brother's pleas she faces a moral dilemma and is forced to take a very difficult decision.

This is the moment when the Duke intervenes. He, who had never in fact left the town, but was there all the time, disguised as a friar, observing the events. He tells her that Angelo's former lover, Mariana, was engaged to marry him, but was abandoned when she lost her dowry in a shipwreck. The Duke forms a plan by which Isabella will agree to have sexual intercourse with Angelo, but then Mariana will go in her place. Angelo would then pardon Claudio and also be forced to marry Mariana according to the law.

Everything goes according to plan, except that Angelo does not pardon Claudio, fearing revenge. Upholding the death sentence, he also requires that the condemned head should be sent to him. Once more the Duke intervenes, and the provost sends to Angelo the head of an executed pirate, claiming that it belonged to Claudio. Isabella is told that her brother is dead, and that she should submit a complaint to the Duke, who is due to arrive shortly, accusing Angelo of immoral acts.

2. Measure and unmeasured in legal interpretation

Angelo, the central character of *Measure for Measure* seems to demonstrate, *a contrario*, important claims of contemporary hermeneutics and the law and literature movement. After all, his actions were based on rational patterns that blindly rely merely on logical assumptions for legal interpretation. The reflexive bias diffused by the narrative legal approach seems to be at odds with the behavior of this judge, and the moral deviations he committed can also be seen as related to his cognitive shortcomings.

In fact, Angelo seems to impersonate, in many ways, a counterexample of the "judicious spectator," that impartiality model conceived by Martha Nussbaum. According to the American philosopher, the "judicious spectator", although not taking part in the events he observes, being able to keep the necessary distance for not having thoughts concerning his own happiness and security, is however very interested and identified with the participants. "Among his most outstanding moral faculties is the power to imagine vividly what it is to be each of the people whose situation he imagines." (Nussbaum, 1995: 73).

Angelo, on the other hand, could be considered a personification of an anti-poetic justice, one that deviates from the "saturation of experience" mentioned by Goethe when referring to the propelling phenomenon of poetry. Indeed, even before being blinded by his desire, Angelo was a callous judge, insensible to reality and the circumstances surrounding him.

In the play, Angelo sentences Claudio to the death penalty for violating a statute that prohibited lust, although remained unobserved by Viennese citizens for a very long time. However, if Claudio had really impregnated Juliet before the wedding, it is worth noticing that she was already his fiancée, and their marriage contract was only missing the final formalities.

An abundance of facts surrounding the case points to the sentence's injustice. From the discrepancy between the Viennese social reality and the normative parameters prescribed by the violated norm, passing through the peculiar circumstances concerning Claudio's actions, until Angelo's own temptations, everything pointed to the disproportion involved in the application of that norm.

Angelo was giving strict and inflexible applicability to a statute that had long been ignored by the people and authorities in Vienna. Here, Shakespeare seems to make a clear reference to the desuetude of law, since the Viennese society depicted in the play seems to adopt sexual customs quite different from the chaste and puritan ones assumed by that old norm.

In this way, Lucio and several other characters seem to attest, in a poignant way, the non-introjection of those normative parameters by Viennese society. It is noteworthy that it becomes the very first question Isabella, Claudio's sister, will present to Angelo. Therefore, the fragility of the social model blueprint becomes evident in the play, as well as the distance between legal parameters and the reality of law, assumed as a realization of the spirit and manifested through living forms of society.

Using the famous Gadamerian hermeneutic category, we could say that Angelo lacks a "historically effected consciousness." According to the German philosopher, this consciousness requires from the subject a new gaze into his historical condition. Aware of his finitude, and all the limitations imposed by his prejudices, the interpreter is led to perceive the possible frailties and contradictions encompassed in his own historical consensus. In other words, the finger we critically point out to the past is also pointed back to us.

Claiming to be a strict observer of the law, Angelo becomes blind to his own experience, so denying one of the most important interpretative elements for modern hermeneutics. According to Husserl's lesson, the domain of experience is no less worthy than the domain of science. On the contrary, it is the realm of ultimate originality upon which true knowledge is founded. Therefore, says the philosopher, "our first concern must be to return from the judgment to the substrate of judgment, receding from the truths to the objects on which the truths are enunciated" (*apud* Bornheim, 2001: 160).

That's the reason why contemporary jurists have emphasized the dialectical confluence of norms and facts as requirements for legal interpretation. As put by Jeanne Gaakeer (2012: 24),

[...] the art of doing law in its different professional guises always requires their attention to the reciprocal relation between fact and norm, as well as to the ways in which the system of substantive and procedural rules and norms is deployed to achieve justice. A characteristic feature, then, of legal methodology in the sense of the perception of the case or legal topic at hand is the constant movement from the facts to the legal norms, and back, a dialectic movement, this going hither and thither, so to speak.

Blind to his own experience, Angelo seems equally deaf to the calls of equity often presented in his interlocutor's mouths. In fact, when investing him as his successor in the first act of the play, the Duke advises him: "Nor need you (on mine honor) have to do with any scruple: your scope is as mine own. So, to enforce, or qualify the Laws as to your soul seems good" (MM act 1, scene 1). Furthermore, Claudio's unjust penalty was lucidly perceived by Escalus who, in a stinging remark, says: "Well, heaven forgive him! And forgive us all! Some rise by sin, and some by virtue fall. Some run from brakes of ice, and answer none. And some condemned for a fault alone." (MM act 1, scene 3).

It is also worth mentioning the important role played by Isabella who, in a witty and eloquent tone warns the magistrate to the manifest injustice of his decision. Isabella even emphasizes that in her brother's case there may have been a violation of the "letter

of the law,” but not of his “spirit” or purpose. In fact, innumerable are the passages in which she seems to require from Angelo a more reflective and coherent interpretation. “If he (Claudio) had been as you and you as he/You would have slept like him; but he, like you/Would not have been so stern.” (MM act 2, scene 2).

Here we can find another intersection between Shakespeare’s play and a milestone of the law and literature movement in it is quest to make literature a path to a better understanding and acceptance of alterity. However, the acceptance of the other will not be approached as a mere postulate or an abstract and imperative vector, but as a consequence of the acute and thriving development of our capacity to recognize the diversity and richness inherent to human life. There is, therefore, from the very beginning, some sort of commitment to concreteness and facticity, since, by means of the literature, we are led to identify ourselves with the various characters enacting in its plots.

By reading literature we think and *intelligere* (*intus* + *legere* = read from the inside to the outside) and are endowed with a more acute capacity to reflect and analyze than the capacity we develop as spectators. The richness of the literary narratives is something that demands from the person interpreting them the constructive effort of the sensitive understanding, of the construction of horizons in which worlds are really delineated, but not simply as the spectrum of its own self. In this sense, Nussbaum states, based on Aristotle, that literature is more philosophical than history, because the latter limits itself to showing what occurred, while the former shows things as they could or should occur:

Unlike most historical works, literary works typically invite their readers to put themselves in the place of people of many different kinds and to take on their experiences. In their very mode of address to their imagined reader, they convey the sense that there are links of possibility, at least on a very general level, between the characters and the reader. The reader’s emotions and imagination are highly active as a result, and it is the nature of the activity, and its relevance for public thinking, that interests me. (Nussbaum, 1995: 5)

The positivist approach of Angelo to reality, despite his efforts to appear a strict legal enforcer, can be evidenced in the following passage of his dialogue with Isabella: “Be you content, fair maid/It is the law, not I to condemn your brother/Were he my kinsman, brother, or my son,/It should be thus with him: he must die tomorrow.” (MM act 1, scene 2).

Witty and critical is Claudio’s remark that, sadly, for some, “the body public be/A horse whereon the governor doth ride/Who, newly in the seat, that it may know/He can command, lets it straight feel the spur” (MM act 1, scene 1).

The play resumes one of Shakespeare’s greatest subjects, the ambition as a denial of prudence and the misleading paths inherent to the exercise of power. Its presence is noticeable from the beginning, synthesized in the words launched by the Duke: “Hence shall we see/If power change purpose, what our Seemers be.” (MM act 1, scene 3).

This is a remarkable point of intersection between hermeneutics and the law and literature movement. After all, this movement offers an approach that is marked by particularization and concreteness, which goes in the opposite direction to the abstractionist and descriptivist vision embraced by legal science of positivist features.

The literary narrative brings us to a closer and more reflective contact with history and the language practices surrounding us. On the other hand, the particularity that evolves it does not refrain from rationality. It only presents a possible and necessary

alternative to the logical domain of thinking, typical of the “natural sciences” (*Naturwissenschaften*). Therefore, it allows us to perceive that rationality should not be held hostage to logic, and concepts can only be conceived in an argumentative context of application.

As we have pointed out, Angelo's behavior points to a deep hermeneutical deficit, and its assumptions seems to go at odds with many of its postulates. In fact, according to philosophical hermeneutics, understanding is always realized as a dialogue, in which the horizon of the interpreter and that of the subject of interpretation are merged, and a new one is born. For Gadamer (2006: 390), the fusion of horizons is what takes place in conversation in which something that is not only mine or from others, but common, is expressed. The interpreter's understanding is part of an event that stems from the actual text that needs interpretation. In the fusion of horizons rests the idea that the truth of the text is not in unconditional submission to the opinion of the author, and not only to the interpreter's preconceptions.

The historical horizon is the possible range of view from a particular point in history, i.e., the result of the dialectical contrast of past and present. In the words of Gadamer (2006: 390): “the interpreter's own horizon is decisive, yet not as a personal standpoint that he maintains or enforces, but more as an opinion and possibility that one brings into play and puts at risk, and that helps one truly to make one's own what the text says.”

This is indeed the essential sense of the hermeneutical turn brought by Heidegger and Gadamer. For them, it is no longer possible to describe interpretation as a subjective outcome. As the interpreter cannot impose his prejudice on the text, he must confront it with reasonable possibilities within a context. In the words of Gadamer (2006: 305):

[...] it is important to avoid the error of thinking that the horizon of the present consists of a fixed set of opinions and valuations, and that the otherness of the past can be foregrounded from it as from a fixed ground. In fact, the horizon of the present is continually in the process of being formed because we continually have to test all our prejudices.

Also, in consonance to the lessons of hermeneutics, the play shows how Angelo's hermeneutic deficit ends up leading him to great moral deviations. After all, for Heidegger, the sense of care (*Sorge*) must be considered a milestone for hermeneutics. That is to say, to bring humans back to their essence. And what else can this mean if not that man (*homo*) becomes human (*humanus*)? As the thinker of the black forest pointed out, only in this way, *humanitas* can remain at the core of philosophy. For humanism is this: meditating and caring in order that man keeps being human and not inhuman, that is, situated outside his essence (Heidegger, 1998).

Finally, allow me to point to the importance of the role of prudence on judicial decisions. Here we may find a powerful element to face interpretative methods from positivist schools. Indeed, a remarkable hermeneutic lesson can be drawn from a comparative analysis of Claudio's judgment by Angelo, from one side, to the one made by the Duke Vincenzo, in the final scene. One can easily perceive here the advantages of equity-based interpretation over the one based on a semantic approach. As we said before, hermeneutics deficit dodges the judgment from justice. After all, *phronesis* is precisely the humanly achievable concept of justice. As Aristotle (1991: VI, 11) has said, “judgment is

the correct determination of what is equanimity.” That is why prudence always refers to fairness and truth.

Thus, as indicated by important scholars, equity contains both an intellectual and moral dimension. As Pierre Aubenque puts it, judging requires accepting to live in an imprecise world, which is incompatible with the excessively radical justice of numbers. In this French author's words, being “mortal, not to judge mortal things with the eyes of the immortal; being a man, allowing himself to have human thoughts” (Aubenque, 2003: 242-243). This reflection seems to sum up the intrinsic connection between hermeneutics and equity.

3. The lack of a historically effected consciousness and the moral deviations of judge Angelo

The hermeneutic situation leads us to always face an object with a previously established view. As every phenomenon is mediated by language, you cannot know anything in its wholeness, but always something as something (*etwas als etwas*) (Heidegger, 2008). The phenomena never show themselves in an objective and a-historical condition, as isolated and ready to be discovered in a raw state mode, but rather tinted by the spectrum of colors that form the observer's range of vision.

From this perspective *Measure for Measure* masterfully portrays the lust for power and the consequences of a blind will to enforce the law, elements that will end up obstructing the authentic dialogue between the interpreter and the text. Unable to assume a reflexive conscience, as indicated by philosophical hermeneutics, Angelo tries to seduce the defendant's sister without realizing he was committing a similar, and even more serious crime than the one he had condemned.

He seems unable to realize that virtue was the reason for his nomination, nor can he realize the draconian and meaningless character of his own decision. That is to say, Angelo lacks the capacity of application, in the hermeneutical sense of the term. I.e, to bring truth to the horizon of the interpreter. And application means to deal with subjects in a concrete way. According to Ricoeur, (2007: 55-56), in the situation of a criminal trial, the rule application, “The application consists both in adapting the rule to the case, by way of qualifying the act as a crime, and in connecting the case to the rule, through a narrative description taken to be truthful.”

The play also points out to the necessity of legal doctrine, i.e, the array of concepts and assumptions built by jurists attempting not only to systematize, but also to adjust the valid normative prescriptions to the required transformative parameters of each time. As teaches Unger, the role of the doctrine should be “to inform and broaden the conversation about the institutional present and the institutional futures of society”. After all, as emphasized by Jeanne Gaakeer (2012: 22), the view of law as a normative set of propositions that are “out there” in an unadulterated form ready for our application is untrue and needs refutation.

In a remarkable lesson, the Dutch professor and judge teaches that,

[...] where practice turns to theory for justification, theory thrives on practical input. In short, the jurist's methodology is never purely deductive or inductive but always the combined effort of the perception and assessment of the facts against the background of what the legal norm (including the academic propositions made for

it) means, and the awareness that the whole process is governed by the dynamics of the interpretive frame that is itself subject to constant developments and challenges of a varied nature (e.g. technological or societal). (Gaakeer, 2012: 24)

In the development of Western ethics, human passion was often associated with the metaphor of the untethered boat in the turbulent, rough, and desolate sea. Passion would put man in such an insecure position, analogous to the boat. In Shakespeare's play, Angelo cannot distinguish good from evil, vice from virtue. Obsessed with the assumed premises (already previously posed by himself) of law enforcement, he does not allow the intersubjective truth, present in the historical situation to apportion any contribution. His truth is, throughout the play, the same one from which he departed. Angelo's ambition and lack of a historically effective conscience lead him blindly and relentlessly forward, without retreat.

Measure for measure shows the imminent risk of deviations surrounding the human soul. In its narrative we perceive how corruption is embedded in Angelo's heart, who was supposed to be an incorruptible judge, and how even an earnest, hardworking magistrate like Escalus was not free from uttering equivocal interpretations. Thus, equity, presented in the trial led by the Duke in the final scene, can be considered a milestone for justice.

In other words, we could perceive in it, the importance of the interconnection of *phronèsis* and metaphor, on the one hand, and (literary) narrative and the equitable, on the other hand, in good judging. Because, as Gaakeer points out once more,

[...] when [...] judges select what they consider as the facts of the case and grasp them together with the relevant circumstances, are authors that try to figure out what happened and then perform the act of configuring a new narrative, and, as Ricoeur says 'to figure is always to see as' (Ricoeur, 1986: 61). (*apud* Gaakeer, 2012: 32).

Furthermore, it is worth emphasizing another literary capacity of which judge Angelo also lacks: the 'negative capability', as called by John Keats to refer to the ability of "a man who is capable of being in uncertainties, mysteries, doubts, without any irritable reaching after fact and reason". Its relevance to the law, especially to judicial decision was well perceived by Gaakeer (2012: 35), when she noted that,

It is normative for the judicial virtue of impartiality that judges must give full attention to all the different aspects of a case, the manifold possibilities for meaning, always asking 'But what if this had been the case rather than that?', and in the meantime suppressing the inclination to come to a final decision (too) quickly.

In this historical moment, when the blows of non-positivist movements draw our attention to the legitimacy of Law, and not its mere legality, Shakespeare's play reveals its contemporary relevance. Inserting us in a self-reflexive dimension, it provides a better understanding of the legal phenomenon. Therefore, its analysis can convey a powerful instrument of transformation, preventing us from a blind subservience to pre-established ideas, and engaging us in the effective historical concreteness from which legal problems are conceived and solved.

References

- Aristóteles. 1991. *Ética a Nicômacos*. São Paulo: Nova Cultural.
- Aubenque, Pierre. 2003. *A prudência em Aristóteles*. São Paulo: Paulus.
- Bornheim, Gerd. 2001. *Metafísica e finitude*. São Paulo: Perspectiva.
- Gaakeer, J. 2012. "Configuring Justice". *No Foundations, An Interdisciplinary Journal of Law and Justice*, 9: 20-44.
- Gadamer, Hans-Georg. 2006. *Truth and Method*. 2nd. ed. Translated by Joel Weinsheimer and Donald Marshall. New York: Continuum.
- Heidegger, Martin. 1998. *Letter on "humanism"*. Translated by Frank A. Capuzzi. Chicago: Cambridge University Press.
- Heidegger, Martin. 2008. *Being and time*. New York: Harper Perennial.
- Nussbaum, Martha. 1995. *Poetic justice*. Boston: Beacon Press.
- Ricoeur, Paul. 2007. *Reflections on the Just*. Translated by David Pellauer. Chicago and London: University of Chicago Press.
- Ricoeur, Paul. 1986. *The Rule of Metaphor. Multi-disciplinary Studies in the Creation of Meaning in language*. Translated by Robert Czerny with Kathleen Mclaughlin and John Costello. London: Routledge.
- Shakespeare, William. 1967. *Measure for measure*. 2nd. ed. J. W. Lever (ed.). London: Arden Shakespeare.

Concurrent narratives of violence against women

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Abstract

This research analyses the differences between the narrative of the woman victim of domestic violence and that of the Brazilian law that provides for this crime. The work focuses on the renounce of representation issued by aggressed woman in the context of Domestic Violence Protection Orders' (DVPOs) in progress at Juizado Especial de Violência Doméstica e Familiar contra a Mulher (Gama-DF), at the Tribunal de Justiça¹. The number of these renounces adds up to about thirty percent of total cases and indicates a disparity between the meanings attributed to such action by law and by women themselves. The conclusion is that the act of renouncing reveals surreptitious and diverse interests of the female victim that were not taken into account in the Maria da Penha Law.

Key words: Woman, Narrative, Renounce, Meaning, Domestic Violence.

1. The legal narrative's meaning of domestic violence against women

The theme of this research is at the limits of the relationship between Law and Literature. The purpose of this work is to analyse women's renounce to the right to file for a criminal complaint after suffering threats or violence from their partner within the marital home. This act was isolated as an eloquent narrative of its own that disputes with the legal narrative the definition of the broader meaning of domestic aggression among heterosexual couples in Brazil, more specifically, in a satellite city of the capital, Brasília. This renounce, which may seem to oppose legal protection itself, appears to

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¹ It is located on Brazil's capital, at its neighborhood, Special Court of Domestic and Family Violence against Women in Gama's forum of Distrito Federal's Court of Justice district.

constitute a symbolic narrative in view of the finding of a high dropout rate verified in the data collection: about 30% to 35% of judicial cases.

According to the so-called Maria da Penha Law², law n. 11.340 / 2006, the female partner in a heterosexual marital relationship may formally represent against her aggressor before the police authority, either preventively or after the violence has occurred. The police, then, verifying that the illegal act is a matter of public order, will refer it to the Court of Domestic Violence in order to take preventive measures or forward it to the Public Prosecutor, who will examine the opportunity of the complaint.

As stated by Robert Cover, *nomos* is “just a small part of the normative universe that must claim our attention. No set of legal institutions or norms exists separately from the narratives that place it and give it meaning” (Cover 2016: 187-188). Law, as maintained by him, is a world of narratives that provide meaning to its norms. There is an interchange between the literary galaxy and the normative galaxy, both expanding in the universe of human reality. The aforementioned law aims to protect the female partner from male violence, but there is a narrative parallel to the legal provisions which is embodied in the renounce to the right to file for a criminal complaint that we believe should be considered.

To reinforce this theoretical framework, follows what Cover stated in his seminal analysis, *in verbis*:

History and literature cannot escape the fact that they are situated in a normative universe, nor can the norm, even when incorporated in a legal text, escape its origin and its purpose in experience, in narratives that are trajectories plotted on the material reality by our imaginations. (Cover 2016: 188)

Under the Maria da Penha Law, on its article 16 (sixteen), disclaimer has a peculiar name: *renounce of representation*. This renounce can only be requested by the victim, if it is done in criminal proceedings which are subjected to judicial representation before the judicial authority (judge) and in a gallery especially designated to investigate the facts involving the representation offered by the woman. This disclaimer is, like any other, a public denial. Not a denial of the facts themselves, but the renounce of a state intervention in the private area of marital relationships through a criminal lawsuit, a formal legal instrument that corresponds to the procedural dimension of criminal law. It is the renounce of the right to file for a criminal complaint.

The renounce of representation issued by women who are victims of domestic violence in Brazil has an apparent frequency of about thirty percent³. By reporting abuse

² The “Maria da Penha Law”, law n. 11.340, published in August 7, 2006, establishes that any case of domestic and familiar violence is a crime that must be investigated through a police inquiry and must be referred to the Public Ministry. The law was named in honour of a woman who was victim of a notorious case of domestic violence in Brazil. Her partner attempted to murder her twice, and she has since been dedicated to the cause of combating violence against women. The legal text was the result of a long discussion process whose starting point was a proposal prepared by a group of NGOs (Advocacy, Agende, Cepia, Cfemea, Claden/IPÊ, and Thêmis). It was discussed by an interministerial working group, led by the Special Secretariat of Women Policies and subsequently sent to the National Congress. It has been in effect since September 22, 2006.

³ The percentage calculation made in the limited scope of this research does not include sufficient data points to support a strong empirical and scientific conclusion necessary to make this statement. This is a suspicion that only takes into account the microuniverse studied. However, it is an indication that the occurrences may be confirmed in the future within a broader field of study.

to the police or judicial authority, women seek state interference to prevent them from succumbing to their partner's violence, but still have the procedural right to renounce, provided there has been no *vis absoluta* – the physical aggression. In this case, even if there is a renounce, the judicial proceeding continues behalf of the public interest until the aggressor is sanctioned, which becomes the subject of an unconditioned criminal lawsuit. Therefore, depending on the material criminal law *sub judice*, the criminal instrumental (procedural) route does not depend on the victim's will to determine whether prosecution will take place. Instead, it will be a decision taken on a case by case basis by the authorities of the Public Prosecution Office and the assigned judge, who will assess the need for a lawsuit depending on the degree of reprehensibility of the conduct according to current law.

Although the renounce provided by this law must take place before a judicial authority, what happens in daily practice on several occasions is the informal resignation immediately made by the victim in the police station. Such spontaneity has numerous reasons, ranging from the victim's surprise at the judicial consequences of her act towards her offending partner to the simplistic and improper use of the police apparatus as an instrument of moral discipline, without aiming her partner's removal from their marital home. In other words, women, in many observed occasions, believe that the role of the state, through police and judicial lawsuits, should be solely to correct the behaviour of their partners, without implying their eviction from home. He continues to live with the victim, either because of her fear of being deprived of his supporting role as the main provider or because of feelings of loneliness or helplessness regarding the care and education of their offspring.

For the purposes of this research, the sociological phenomenon of women issuing renounces in situations of domestic violence among heterosexual couples appeared to be an empirical gateway to justify predictions about the difference between formal legal narratives and the real human community narratives. By renouncing representation rights, in our opinion, women would be giving a new meaning to the juridical element of “violence” as defined in the legal text. This observation arises from the fact that, besides the physical violence described by law, all other types of violence may be overcome and be re-evaluated once other values are considered, as these values would be more important from the point of view of the victim.

The legal dispositive that defines violence against women mentioned above is extremely important, but it doesn't seem to fully translate residual values present in heterosexual marital relationships. This is, perhaps, a sign that this research's proposal of comparing the *Law and the Literature's* approaches is correct in stating that the literary narratives contained in the Protective Measures documents, in oral reports made to the Chief of Police, in the Public Prosecution Office and to the judge reveal implicit elements that are not covered by formal legal narratives.

As the author and tutor of this work, my experience with real cases and the initial confirmations of this research provided the starting point that made it possible to suspect a difference in both narratives. Among the research's findings, it was noticeable that the victims renounced their rights in about thirty to thirty-five per cent of the total number of complaints made at police stations and of the total number of cases where on-going protective measures were determined by the Domestic and Familiar Violence Against the Woman Court of the satellite city of Gama, in the Distrito Federal. In this context, I suggested a scientific initiation project at the law school where I am a professor, which was approved by the institution and taken over by nineteen

undergraduates, all of whom in the third semester, who, with great determination and willingness, began to research both in police stations and in the Domestic and Familiar Violence Against the Woman Court of the satellite city of Gama-DF the cases of renounce of the right to file for a criminal complaint.

The research started by attempting to answer a basic question: *Why do female victims of domestic violence renounce?* On several occasions when this question was asked, listeners attempted to guess based on their common-sense observations, perhaps with some of them having arisen from experiencing similar familiar situation. They remarked the economic dependency of women, among other factors. However, as the research progressed, the data collected, including the elements mentioned, began to point towards more than sociological, psychological and anthropological causes of the phenomenon. They indicated that the legal definitions of violence contained in the provisions of the Maria da Penha law were not a good match for the practical universe of lower middle class and lower class women in that satellite city of Brasília, Brazil's capital. Are there, then, more important social values than the preservation of one's own moral, physical and spiritual integrity threatened by the violence perpetrated by the male spouse? Would the wide range of possible cases of violence against women in the marital relationship provided by law not be enough or more appropriate than other alternatives?

Focusing on these initial questions and perspectives, the students, co-authors of this research, as well as me, in the position of their teacher and tutor, began to outline a method of data collection, which began by interviewing chiefs of police, prosecutors, judges and court clerks. From that point, data collection moved on to the analysis of police reports, final case statements prepared by the police station, reports of justification hearings in the Domestic and Familiar Violence Against the Woman Court and final judgments issued.

As demonstrated by the data tables below, the lawsuits analysed were either in progress or already finished, and their time span ranged from approximately the second half of 2018 to five months of the first half of 2019 at the Domestic and Familiar Violence Against the Woman Court of Gama-DF. On several occasions, students attended justification hearings, some of which resulted in renounces.

In the following explanatory statements, the first step taken was an attempt to identify the legal significance of "violence" against heterosexual women in the domestic environment derived from the aforementioned law n° 11.340/06, better known as the Maria da Penha Law. Then, it seemed appropriate to present the data collected based on the listed indicators, with comments gathered by me and my students. Finally, the theoretical points of the Law and Literature area of analysis were listed in an attempt to bring the data and the conclusions arising from the empirical research closer to the jusphilosophical propositions of the difference of the formal legal narratives and the customary communitarian narratives of the female victims of domestic violence.

The purpose of such procedures was to observe the implicit and instrumental meanings of the informal legal conscience of women victims of domestic violence when they renounce the right to file for a criminal complaint. As it will be demonstrated, their understanding and their interpretation of the violence they suffer have different meanings from those stated in the legal narrative. The renounce of these women is still a

literary expression in the realm of the *Law and Literature* research⁴, as it is an informal narrative, in spite of being included in the proceedings of the judicial process. The women do not express themselves using technical legal language, but their actions reflect an experience that is not covered by the text of the law (Mittica, 2015: 3-36).

Through the various research paths provided by the intersection between Law and Literature, it is possible to identify the meaning or the general sense that a group of people assign to the law that governs them by analysing the language, style, uses and customs that gravitate around the legal system. The positive law, made and imposed by the state, is the one that defines the outlines of the legal figures that are suitable for the application of the legal provision. However, the judicial decision in a concrete case and the meaning of law as a concept within a political community are always increasingly prone to consider the meta-judicial principles that govern general legal understanding. The various sources of literary expression shine a light on this subject.

Regarding the data collection process for this research, the literary narratives of women who suffer domestic violence in Brazil are restricted, for the time being, to written statements of their complaints in police stations and judicial gallery made before a judge and a representative of the local prosecutor's office. Admittedly, much of the victim's thinking on the subject is mitigated in these official documents. It would have been better if we had had access to testimonials made during and after the group therapies organized by professional psychologists who assist the Gama-DF Domestic and Familiar Violence Against the Woman Court. Unfortunately, this option was denied to us by the educational institution that maintains a psychological treatment centre with the parties involved in domestic violence cases in the Distrito Federal (Brazil)'s forums.

The aggressor, more than the victim, is the target of the prosecutor and the judge's actions concerning the juridical-psychological awareness of their acts. Therefore, he is the one subjected by law⁵ and prosecutorial recommendation to following a dynamic therapy to reframe his antisocial behaviour.

Through these techniques it is possible to find out, for example, how women assign meaning to the violence committed by their male partners and how they are expected to react in other similar situations. In these therapeutic processes, many male aggressors rediscover themselves and assume positive attitudes to build a more mature relationship. Several identify their mistakes and find strength alongside others to improve their behaviour within their family and towards the opposite sex.

⁴The idea of an intersection between law and literature first arose with the publication of an essay in the United States called *A List of Legal Novels*, by John Wigmore, in 1908. In the essay, he listed several novels, especially those of Anglo-Saxon origin in which there is an approach of legal subjects. Subsequently, the US Supreme Court Judge Benjamin Cardozo published the famous *Law and Literature* essay in 1925, analysing the literary quality of law (Trindade 2017: 225-57). In the Old Continent, the Italian Ferruccio Pergolesi publishes *Il diritto nella letteratura* in 1927, emphasizing that through a nation's literature it is also possible to know the history of their law. In Germany, Hans Fehr's articles (1923, 1931, 1936) sought to highlight the mixture of law and art; a couple years later, Gustav Radbruch (1938)'s work had the intention of identifying the legal sentiment of nations through comparative studies including cultures of various European countries.

⁵Item VI, article 22, law no. 11.340 / 2006: "Having verified the practice of domestic and familiar violence against women, under the terms of this Law, the judge may immediately apply to the aggressor, together or separately, the following emergency protective measures, among others: (...) VII - psychosocial monitoring of the aggressor, through individual and / or support group assistance."

This data, which was partially accessible to us, as mentioned before, cannot be made widely available for the reasons reported above. These testimonies by both aggressors and victims would have given us a more authentic literary picture of the drama.

Despite the limited access to data, the focus on official information, presented as written statements made by the police and judicial authorities, centred on the renounce of representation, a renounce of the right to file for a criminal complaint, has shown an important starting path to follow. The choices made by the female victims took place after a considerable length of time between the representation at the police station and the hearing before the judge. The whole process, starting from the application of a first-step emergency legal restriction and going until the hearing, takes between a month and a month and a half. Time, of course, consolidates convictions as the women reflect on this process, weighing the gains and losses. This is the reason why the legislator included in article 12 (twelve) of law n° 11.340/06 that the renounce of representation could only be done before a judge.

The first step of our presentation, therefore, will be to present the state narrative established in the legislative process. It is necessary to bear in mind that the text of the Maria da Penha Law originated from a proposal prepared by the Executive Branch, through the Secretariat of Public Policies for Women, with the intense participation of several non-governmental organizations. The resulting norm obtained from the Brazilian parliament does not represent a single, unified expression on behalf of all women, but a set of diverse meanings that were materialized in that particular legislation. It is not, therefore, a narrative exclusive to women as subjects of violence.

Subsequently, an attempt was made to identify a specific narrative of female victims of domestic violence, through the analysis of their documented manifestations, their renounces of representation or their criminal complaints against the aggressor, their male partner. This narrative was constructed with data and indicators via an empirical method of collection. In its majority, the data comes directly from legal mechanisms called urgent protective measures. At this point, the choice of the information sources was guided by the pursuit of an identification of a real narrative of female victims about the meaning they assign to the violence they suffer in this familiar context.

The meaning of violence assigned by the Brazilian legislator within the text of law n° 11.340/06 was a broad one and seems not to have been limited to the apparently narrow frame of behaviours attributed to men in their marital relationship with their wives. In general terms, violence against women can be summarized as any action or omission perpetrated by their partner with the aim of subjecting a woman to a man's interests, inhibiting her spontaneity, hijacking her freedom and making her captive within the domestic space.

Specifically, the law previously mentioned defines the sanctioned conduct in its article 5 (five), providing for its positive (commissive) and negative (omissive) species. This definition is based on aggressive behaviours arising from gender difference which imply harm to female partners in a relationship. Article 6 (six) specifies who has the legal right to protection, which is the woman in a domestic and familiar context. In article 7 (seven), the legislator addressed the behaviours through which this violence happens in the marital relationship. In all these articles, there seems to be no closed legal situation. Other interpretation possibilities remain open, as evidenced by some of the

expressions used, such as “by any other means” and “any conduct which”, among others.

The actions described in this law as violence against women in the domestic environment are those through which the male partner, by action or omission, causes her death, injury, physical, sexual or psychological suffering, or yet incurs in moral or property damage. This is precisely what the legislator has stated in article 5 (five). The criminal behaviour of the partner arises from his explicit devaluation regarding the female gender of his partner. The assumption that the female gender is not as important as the male one seems to be at the roots of these oppressive intentions, which lead to arbitrariness and domination.

The characterization of the domestic environment is not restricted to the physical space of the couple's residence. The legislator wanted the familiar atmosphere to override any limitations in that sense. As such, the definition includes the couple's displacement to occasional or temporary whereabouts, which are then considered domestic for legal purposes.

Article 7 (seven), in its items I to V, set out examples of situations which violence manifests itself and aims to frame and prevent conducts of domination and submission of women to men through any power of embarrassment the man may have, or even arising from any sick satisfaction he may feel in regard to his partner.

The prohibition of actions that offend a woman's physical integrity or health is cogent. In this context, physical integrity means the maintenance of the body's human form as it was immediately before the aggression. Likewise, bodily health means keeping organ functions as they were. The first can be affected by external aggressions, while the second is also affected by indirect aggressions which have an impact on regular psychological and physiological body functions.

Emotional harm and low self-esteem can also be considered as consequences of a man's violent actions against a woman. The corresponding action has, at its core, a violent reasoning component of domination, including the elaboration of subtle arguments which slowly trespass the woman's emotional barriers until she is hostage of her aggressor's will and can no longer think for herself, captive of that man's desires and reasons.

Any actions of a man who submits the sexual freedom of women to his own will, withdrawing the full exercise of her prerogatives in this regard, are considered as violent. This freedom refers to the concept of sexual fulfilment and satisfaction and to the exercise of reproductive rights.

The law hasn't ignored violent actions that affect the professional freedom of women, including their opportunity to choose among different options and their exercise of work rights. Due to the Tory social structure that still prevails in Brazilian society, women are almost always neglected when choosing their profession. They are taught to believe that there are jobs which are appropriate to them as women, considering their marginal, non-primary function in society. In this scenario, the man, still considered the main provider in marital homes (Nolasco 1993; Faustino e Freitas 2019) would have preference in choosing his profession so he could ensure the support of their family. Therefore, the legislator has taken this oppressive context into consideration to ensure women's professional satisfaction.

In this context of patriarchal society still largely dominated by men in its every aspect, women were deprived of personal patrimony, at times made much harder to obtain. The Brazilian legislator also perceived violence in this situation and sought to

describe behaviours of men that violate their partner's patrimonial rights. In other words, actions that aim to prevent women from taking part on legal relations that involve economic or financial aspects, or that aim to undermine said participation. In ordinary Brazilian society, women are often prevented from having documents, personal money, access to financial institution services and a salary equivalent to men's, among other limitations that prevent them from negotiating and collecting their own assets or severely hinder that ability. Any prohibition made by men, whether commissive or omissive, that aims to prevent their female partner from having access to an estate or dispose of it freely is a form of violence against women.

1.1 Entitlement to the right of protection against domestic violence

At first, the law only assigned rights and duties to men and women in heterosexual marital relationships. Recently, the Brazilian Senate has shown a favourable approach to modifications, voting favourably in a process that is still in its initial stages in the Constitution and Justice Committee. The proposed changes include transsexual and transgender human beings as subjects of the rights provided by that legal text (Senate Law Project 191/2017). However, there is still a long way to go before the legislative sanction is reached. For now, the entitlement to the right to physical, psychological and patrimonial integrity provided by law n° 11.340/06 is still limited to heterosexual women.

In our humble opinion, the proposed changes in the entitlement to the rights granted by the aforementioned law to include homosexual couples is out of line with its main assumption, which characterizes domestic violence as one that's based on the substantial superiority in physical strength of men that is used as a tool of oppression against women. This disparity has led to other forms of violence between heterosexual couples, such as professional, patrimonial, sexual, among others.

In this context, the sole discerning aspect of the characterization of violence becomes the domestic environment itself, considered in its broad meaning to include all members of the family. For this reason, nowadays there is also the argument that homosexual couples wouldn't be the only ones entitled to rights according to this law interpretation, but also daughters, granddaughters, daughters-in-law, etc. The Maria da Penha Law, in our opinion, considering these, has lost its substance by incorporating other situations. Of course, it isn't our goal to limit the hermeneutic extent of the law regarding its application to cases of violence committed against other people, as worthy of respect as any. The question is whether the principle of legality in criminal law is being subverted and whether the judiciary has effectively become a social activist to the point of assuming a positive legislator position. These issues pave the way for judicial authoritarianism and opportunism, breaking the constitutional balance between the powers.

Logically, there would be three defining elements of the violent crime defined in the Maria da Penha Law. The first would be violence, as characterized in articles 5th to 7th. The second element would be the environment: the familiar space. This home area is not a fixed location, but one that the family determines as such. The third element would be gender discrimination as a revealing component of the type of violence. As it turns out, women are no longer the sole ones entitled to rights in this legal situation.

1.2 Related Legislation and Public Policies

In recent decades, the Brazilian legal system has been implementing norms that seek to prevent the unfortunate exponential growth of violence against women in its various forms. One of the most recent legislative acts in this sense was law n° 13.104, of March 9th, 2015, which amended existing provisions in the Brazilian Penal Code. It provides the inclusion of *femicide*, a new criminal figure, in the list of circumstances that qualify the crime of homicide and in the list of heinous crimes.

Besides the legal initiatives, the Brazilian government has been maintaining programs and public policies to inhibit the crime of *femicide*, which unfortunately have not yet yielded satisfactory results.

Through the National Human Rights' Ombudsman, located at the *Ministério da Mulher, da Família e dos Direitos Humanos* (MMFDH) – Ministry of Woman, Family and Human Rights –, women who are victims of domestic violence or anyone who has knowledge of such a crime can report it by using the *Central de Atendimento à Mulher* (CAM) – Women's Call Centre, the *Ligue 180* (Dial 180) hotline. The report produced by Ombudsman showed that 73,668 criminal complaints were made through this hotline in 2017. In 53.06% of the cases, physical violence was mentioned, while 28.99% referred to other forms of violence, such as psychological. In the *Distrito Federal* (Brazil) alone there were 3,516 complaints (Brasil 2019).

Femicide seems to result from the accumulation of unresolved minor arguments, which progressively expand to significant unbearability levels and lead to extremes reactions. Currently, the rate of *femicide* in Brazil is considered the highest in the world (Artigo 19 2019). From the statistical data below, it is possible to get a panorama of this unfortunate situation.

TYPE	2016	2017
Femicide	-	24
Attempted Femicide	-	2,749
Trafficking in Women	70	56
False Imprisonment	3,491	3,194
Physical Violence	43,303	39,090
Moral Violence	-	1,849
Patrimonial Violence	-	892
Psychological Violence	-	22,013
Sexual Violence	-	3,696
Slavery	30	28
International Service	-	3
Obstetric Violence	-	74
Threat	13,368 (18.67%)	-
Complaint	11,324 (15.82%)	-
TOTAL	71,586	73,668

Source: Artigo 19. Data on femicide in Brazil.

It is possible to notice that legal action has been unable to stop or slow down the progression of violence against women within the domestic and marital relationship. The records on the evolution of the crime of *femicide* shown above do not display the degree of tolerance from women and the how this attitude effectively collaborates with the process. Law and Literature's contribution to the study of this dilemma is precisely to point out the different interpretations and narratives of violence to seek prevention and to re-educate social actors to form relationships that take human rights into account.

In the next section, we will attempt to narrate our research experience with the judicial records of *renounces of representation* and the presumable interpretation of the data and indicators.

2. The narrative of violence against women expressed by women themselves - the *renounce of representation*

The renounce of the right to file for a criminal complaint issued by the woman victim of domestic violence was given its own meaning within the legal narrative of the state provided by article 16 (sixteen) of law n° 11.340/06, also known as Maria da Penha Law. This *dispositive* integrates her *subjective right* to a physical integrity's protection claim. It involves the withdrawal of the allegation of mistreatment by their male partner in the domestic environment, and, according to the law, can only be done before a judge in a gallery especially scheduled to be determined if it is genuine. That procedure is done in order to guarantee the effectiveness of the law and the protection of women.

However, the act of renouncing doesn't seem to have the same meaning for the female victims as it does within the legal system, taking into account the fact that this option, provided by law, has been used with significant frequency, which indicates that something that was supposed to be an exception is slowly becoming a rule. Within a critical analysis based on the Law and Literature line of research, the renounce has its own narrative, which must be identified in the available literary expression. If this new renounce perspective can be highlighted, it may be possible to prove the difference between women's narrative regarding the axiological character of the domestic violence suffered by the victims and the narrative describing the nature and effects of this violence within the legal framework.

When the female victim renounces her rights, she brings remarkable evidence to the comparative analysis between Law and Literature, as her act seems to demonstrate that, despite the violence she experienced, her interpretation of the fact reveals a certain degree of tolerance for the aggressor's criminal behaviour not provided in the legal text. In other words, the positive licit-illicit binary legal provisions seem lacking when certain counterfactual expectations of women are considered. Further study of the *renounce* should investigate the frequency of violent episodes within a specific couple's relationship to evaluate whether there are tolerance levels of violence experienced by women and if the act of renouncing is occasional, sudden or frequent.

These exceptions are not the object of our current study, despite being related to the subject, but this does not prevent the suspicion that there are alternative views of human and social conditions which reveal options not contemplated by the legal text.

The *renounce*, in our point of view, should be an exceptional behaviour, therefore its frequency should be low, but that is not what the current percentages show. It seems that there has not yet been a full reconciliation of the reality of life and the reality described by the legislation. Robert Cover, in *Nomos and Narrative*, puts it quite appropriately when he says: “Just as the meaning of the law is determined by our interpretive commitments, so can many of our actions be understood only in relation to the norm. Normative precepts and principles are not just demands that fall on us formulated by society, by the people, by the sovereign or by God. They are also signs by which each of us communicates with the others” (Cover 1983).

For the legislator, the domestic violence experienced by women is always objectionable. Given that there are several judicially registered cases of renounce issuing, it seems that this objection did not consider the victim's own evaluation of the situation. It does not mean that there should be an agreement with the acid literature of one of the greatest Brazilian playwrights, Nelson Rodrigues, who once wrote “Neither every woman likes to get hurt. Only normal ones.” On the contrary, it seems to be an unusual and axiological assessment done by women in these cases, it seems to be objectively heavy the coexistence with domestic violence. Women do not take pleasure in suffering, even though people in certain relationships may view pain as a pleasure mode. Most likely, women bear the pain to ensure her own survival or that of her offspring or family.

The fact that the legislator subjected serious cases of domestic violence against women to an unconditional public criminal procedure was a way of managing the levels of renounces issued by women and an attempt to change the values of Tory Brazilian women who view violence as normal in a relationship. It is not only the offending man who needs to be subjected to legal discipline to take women's human rights into account, as even women themselves seem to need the law as a starting point to redefine human values.

Considering the compiled data that will be displayed below, it is possible to assume that the act of renouncing reveals a certain degree of tolerance of domestic violence by women, which, in our view, is unacceptable behaviour as it denigrates them as a person and perpetuates certain Tory beliefs regarding marital coexistence, which are harmful to a psychologically mature and lawful relationship.

As there is no definite collection of women's narratives that could be used to objectively verify differences, this research decided to use narratives that were registered for use in official documents, such as police bulletins and testimonials issued on justification hearings on Domestic and Familiar Violence Against the Woman courts. First, however, it is essential to contextualize the areas in which such narratives take place, as no results can be produced out of context. The first area is the one under responsibility of the 20th Gama police station, in the *Distrito Federal* (Brazil), where domestic violence cases are most commonly reported. Through interviews, it was possible to understand a certain degree of the dynamics present on these circumstances.

2.1 The police authority narrative

The narrative of the female victim of domestic violence who renounces her representation involves, in prior, the evaluation of the police authority, who receives it, in many cases, immediately after the act of violence happened. At this first moment, all the emotional burden of the experience is expressed by the woman without any

discretion or moderation, which makes it possible to gather information about the fact exactly as it was viewed by the victim, considering the subjectivity of her narrative.

This aspect is minimized when the agent, who assists the woman, whether male or female, registers the facts strictly with usual police and legal terms. However, violent behaviours have a denotative rather than connotative significance, due to the frequency they are accounted for; they are already part of police daily life. In other words, the different forms of violence described by women are made explicit without loss of meaning by their narrative.

There are two police stations that report cases of domestic violence against women in the Gama city, the 14th and 20th. The latter concentrates the largest number of incidents. Therefore, the 20th police station was chosen for this research because it is the one with the highest number of relevant police reports and reports to the Public Prosecution Service and the Domestic and Familiar Violence Against the Woman Court at the Gama-DF Justice forum. The chiefs of police kindly took the time to address this research, including the Head Chief of the unit, who allowed us to interview him.

According to the chief of police of the 20th police station, Mr Vander Braga, cases of domestic violence in general are frequent and happen for various reasons. However, the causes most commonly found in incident bulletins can be identified. According to him, these causes are: a) child care responsibility; (b) the arrangements of parental visits when the couple have divorced; c) division and management of common assets; d) altered behaviour as a result of indiscriminate consumption of alcoholic beverages; e) altered behaviour as a result of indiscriminate consumption of drugs. This chief of police's experience has allowed him to attest that the latter two causes are the main factors behind the rise in domestic violence incidents.

The procedures done in that police station follow the Civil Police of the *Distrito Federal's* administrative protocol. The parties to the conflict may arrive separately, which is the most common, or together, and give an oral statement of the facts to the police officer who will take note of it for legal purposes. In many cases, however, the procedure adopted by chief of police Vander Braga differs from those of other chiefs. The victim and the offending party are usually summoned to his presence, and, depending on the facts, he will strive to reach an extrajudicial reconciliation. Alternatively, he may even grant the temporary removal of the aggressor from the marital home before sending the police report to the court and waiting for judicial determinations.

In case of injury, however, after proper expert medical examination at the Legal Medical Institute - IML of the area, such situations are dealt with strictly in accordance with the criminal procedural rules provided by law. A police report will be issued and immediately delivered to the judicial authorities - the public prosecutor and the judge - for the usual procedures.

From the point of view of this chief of police, women's act of renouncing after the registration of violence at the police station does not only happen after the process is sent to the court. On many occasions, the *renounce* is issued before him as a police authority as soon as the woman becomes aware of the legal provisions and consequences. The causes of this *disclaimer* are overwhelmingly related to the socioeconomic dependence of low-income women. They are afraid of the possibility of arrest of their partner, who is the sole provider for the couple and their children. Women's intent to apply for police action is often linked to mild punitive state intervention that is restricted to a warning. It may possibly contemplate temporary

incarceration, but these women do not want to have to follow a court case and do not seek mid or long-term incarceration punishments, as this would take away their control of the situation and prevent the immediate return of their partner to the marital home.

This fact reinforces the argument that for Brazilian women finding themselves in a situation of economic dependence, violence has a different hermeneutic meaning. Violence against them cannot have the legal consequence provided in the Maria da Penha Law, which is her partner's permanent removal from home, from her presence, or even from society as a whole through imprisonment.

The hermeneutic meaning of the law does not seem to have absorbed the counterfactual expectations of the female victims themselves. The absurd idea that "women enjoy being hurt", a popular saying in Brazilian's male chauvinist culture, does not correspond to economically dependent women's expectations. Women seem to ponder according to the circumstances of their lives to find out which alternative is lesser of two evils.

2.2 The judicial authority narrative

The judge responsible for Gama's Domestic and Familiar Violence Against the Woman Court has been in office for 5 years. According to him, the withdrawal of the original statements is common, but it isn't possible to assign numbers or percentages without using a reliable statistical method. Therefore, his protocol secretary, who is responsible for taking notes of the facts as they are described by the magistrate in gallery and for controlling said gallery's agenda, estimates that the female victims renounce their right to representation on about thirty per cent of the cases, on average.

For this magistrate, the Maria da Penha Law is effective and has prevented further violence against women. According to him, in the five years he has been responsible for the Court the number of cases of domestic violence has been stable and represents a total of about 150 lawsuits per month. He is of the opinion that the law and its corresponding provisions have a didactic role in society, as these effective and immediate actions would spread across society in order to cause the reduction of violent actions within family relationships.

However, it should be noted that in Brazil, especially in the *Distrito Federal*, there was an increase in the numbers of *femicides*. Most of the time, those take place in the domestic environment, as shown in the statistics. It is possible to agree with the judge that there is a significant clash between the heteronomous character of the rule in force and the Tory culture that holds women as men's property. However, it is not possible to say that the law has inhibited this process of violence.

The act of renouncing that takes place during a hearing has merited different analyses and has been the object of multiple legal actions. Both the prosecutor and the judicial authority present on the occasion always consider the possibility that the woman might be manipulated by the aggressor to renounce representation and the right to prosecution itself. For this reason, they question the victim during the hearing. In many cases, this procedure has prevented forced renounces or renouncing as a consequence of manipulation. The occurrence of such cases demands immediate new protective measures, determined at the hearing by the judge, which may include the aggressor's arrest.

2.3 The narrative of female victims of domestic violence - Data Collection

The Brazilian women who are victim of domestic violence in the satellite city of Gama, in the *Distrito Federal*, have a story that they need to tell. However, their voices do not find a specific literary medium to expose their most elementary expectations regarding their experience with their partners, children and family, and regarding the violence they suffered. The research needed to find the most authentic narrative medium possible, the one that seemed the closest to these women. This medium could not be news reports, with interviews filled with clichés and controversies. It also couldn't require getting too close to the victims because of the dangers of this approach, starting from their partner's reaction.

As much of this narrative as possible was extracted from official papers. They contain records which were transcribed to documents that are part of police reports and of the judicial process. The phrases and words chosen reveal a mixture of terms transcribed literally as they were used by women in their accounts and terms subjectively chosen by the police officer in charge of the police report or by the local unit's chief of police himself.

The same method is used when the woman testifies before the judge. At the justification hearing, he dictates the content of the woman's testimony to the court secretary. Initially, he asks her to confirm or deny the facts narrated in the police report. If they are confirmed, he allows the representative of the Public Prosecution Office (a prosecutor) the right to speak. The prosecutor then makes further inquiries about the facts. After these clarifications, the judge asks the woman whether she wants to file the lawsuit. According to the answer, it is up to the prosecutor to recommend psychological treatment for the partner or even for the couple. Depending on the case, the judge may end or continue the legal process.

These are not typical literary pieces, such as novels, in which one can effectively observe a narrative plan followed by the author. The women, considered in a legal context like any legal actor, do not produce an original and personal narrative of their own due to the formality of the law. The law requires the translation of subjectivities to linguistic codes of the legal universe. The original narrative, although present in these documents, undergoes a process of codification through which the legal and judicial interpretation of the “domestic violence” phenomenon becomes possible, as well as the consequent application of the law to the concrete case.

More generally, it is possible that the law and law enforcement operators will be able to curb domestic violence against women by acting together, but, as this research aims to demonstrate, there are counterfactual expectations of women that have not yet been captured in this formal legal process. For this reason, we argue that the female victim's act of renouncing the right to representation, in about thirty per cent of the cases, should be understood as a narrative that reflects a value that escapes the legislation. This is the only moment in the legal process when this subjectivity can be found in accounts from the women themselves.

In our opinion, this literary mix does not hinder data collection because the criminal facts narrated are captured and preserved until the end, even when there is a *renounce*. Admittedly, later, at justification hearing, there is always a clash of versions before the judicial authority when the aggressor brings out his motivations in an attempt to justify his actions or his reactions to the woman's attitudes. However, they do not deny their criminal behaviour, which is precisely what the law condemns.

The objective details gathered from representations and statements, such as where and how the violence happened, whether it was physical, psychological, sexual or patrimonial, all according to the parameters of the Maria da Penha Law, can help to infer that, despite the violence suffered, the woman, in certain cases, decides to *renounce* representation rights, taking unregistered criteria into account. As a consequence, there is a particular meaning of the violence suffered by these women that needs further and deeper transdisciplinary research.

The data obtained from lawsuits do not include any identification of the involved parties. It consists of information on age, level of education, profession, number of children, etc. Those are objective indicators by which we sought to build an understanding of competing narratives. The documents used were police reports and minutes of hearing. The former type's source was the police station, while the latter was written by hearing secretaries of the Gama's Domestic and Familiar Violence Against the Woman Court (DF).

I began collecting data in October 2018, using interviews at the 20th police station of Gama-DF. After the creation of a scientific initiation team, he could count on twenty undergraduate students of the Faculty of Law located in the satellite city of Gama-DF to conduct research in the Domestic and Familiar Violence Against the Woman Court. This team of students started their work in March 2019. There were three groups with three leaders each, alternating weekly visits to the Gama Domestic and Familiar Violence Against the Woman Court to research finished and on-going lawsuits involving protective measures and criminal proceedings referring to the subject, in addition to attending justification hearing in the course of litigation. At those audiences, it was possible to hear the involved parties' answers to the prosecutor and the judge's questions. The *renounces* that were issued were screened by these two authorities, who are responsible for identifying any pressure exerted by the male partner.

Most of the cases analysed related to Urgent protective measures, which are provided by law for cases that generally require the aggressor's removal from the marital home to establish a safe distance between him and the victim in order to avoid a *femicide*. At first, I had access to on-going lawsuits, but the largest volume of data was available from lawsuits finished in 2018 and 2019. The analysis of these documents and the respective data collection was done with the help of the students. About 300 cases were analysed under these conditions and the students attended about 60 galleries.

The research team developed a methodology for collecting data from legal mechanisms called Urgent protective measures, gradually adjusting the choice of indicators. Each suggestion was examined according to the following key question: "Which indicators in these proceedings' narratives help telling us whether the renounce of the right to file for a criminal complaint issued by the victim represents a parallel narrative to the one described in the legal text?" For example, does the "age" indicator relating to the woman and the aggressor, allied to their "level of education", "number of children", etc., help to understand why the woman *renounces* after suffering violence? The same indicators were also used in cases exposed in the justification hearing in which students participated for several days and weeks.

The following objective indicators were obtained from police reports: ABOUT THE VICTIM - a) Age; b) Schooling; c) Profession; ABOUT THE AGGRESSOR - d) Age; e) Schooling; f) Profession; OTHER DATA COLLECTED - g) Number of children; h) Type of violence committed; i) Physical condition of the aggressor at the time of the criminal act.

The research team chose these indicators for the following reasons: Regarding the victim's data, a) the victim's age could reveal her vulnerability to the aggressor, particularly an economic and psychological dependence if the woman was very young; b) low levels of education would also raise suspicion about her intellectual vulnerability, as her relationship with the outside world may be dependent on her partner; c) unemployment would increase the likelihood of dependency, which would make her hostage to a partner who is the sole provider for the couple or family.

Regarding the offending partner's data, d) the age could indicate his lack of maturity or, alternatively, an added degree of maturity which, combined with a significant age difference between him and the victim, could lead to an oppressive relationship; e) the level of education of the offending partner could make it possible to evaluate the potential degree of his participation in the labor market, as well as the opportunities he had access to, or whether his inability to do so caused frustration and tension in the domestic environment; f) the aggressor's profession could also contribute to identify assumptions such as: whether he was likely to have a higher or lower salary than the victim, whether his skills were underutilized in the labor market and whether these factors could make him seek illicit means of obtaining income, such as drug trafficking.

Regarding general data and data that refers to both parties, g) the number of children could make it possible to assume that the woman would surrender to the offenses of her partner for the sake of the offspring; h) the type of violence perpetrated could indicate whether it was mild, severe, repeated or occasional; could indicate a pathological or normal relationship, without going into psychology considerations; renouncing in this case could be linked to an unhealthy relationship based on the repetition of a pleasure-pain dynamics; i) the "physical condition of the aggressor" at the time of the violence could reveal if he was under the influence of drugs, such as alcohol, marijuana, heroin, etc. This would not undermine their criminal and civil liability, but it could raise suspicion that the woman's decision to renounce was taken based on an understanding of her partner's situation.

These indicators were available from police reports and were evident choices. We could have elected others, but that would have required more time to be spent on the data sets than what was available for this research.

After data collection, the team met to analyze the numbers and look for statistical conclusions. The numbers and percentages below indicate an interpretative path of the phenomenon of *renounces of representation* issued by women who are victims of domestic violence in the city of Gama-DF, but cannot be taken as conclusive data of the reasons for their actions. Our goal was to demonstrate that there are frequent and non-occasional occurrences of aggression, which indicates an interpretation of domestic violence from the woman's point of view that does not seem to match the hypothesis of the legal text. To prepare the data sets, we used arithmetic averaging and percentage conversion for better handling of the data.

The team divided the data obtained for the "profession" indicator into "active" and "inactive" categories. The "inactive" was subdivided into "household work", "unemployed", "pensioner" and "retired". To have a better idea of a probable reason for renouncing, the "household work" subcategory is the most relevant (quantitatively) because there is inevitably an element of financial dependence on the perpetrator when the woman is limited to caring exclusively for home organization and general family wellbeing. As for those who receive a "pension" or social benefit from the State due to

the death of their former partner, as well as the ones who are “retired”, they have an income despite being inactive. That reduces the possibility of financial dependency influencing their choice of issuing *renounces* and therefore other motivations should be analysed.

By identifying the level of education of the victims, often low, it is possible to deduce that the lack of interpretation and full understanding of what the law provides for cases of domestic violence may be one of the most significant indicators related to the act of renouncing. This directly affects the applicability of the law by making legal operation unclear to its agents.

Considering the number of cases identified containing a renounce of the right to file for a criminal complaint, 56.08% of the victims only had basic primary or secondary education. Of these 56.08%, 29.25% did not complete high school. Still referring to “education”, all levels of schooling were considered, from incomplete primary school to complete tertiary education in college. Complete high school and incomplete primary school are the most relevant indicators (quantitatively) relating to *renounces*. Data labelled as “unspecified” in police reports was also added to the educational indicator, as it means that the person probably had no formal education.

As for the data collected about the aggressors, the results are as follows: the average age of the aggressors is around 33 (thirty-three) years old. Of these, 51% are employed, 34% did not answer, 12% are unemployed and 2% are retired. From the total, 29% completed high school, 29% did not answer, 17% did not complete primary school, 12% completed higher education at college, 10% completed primary school and 2% identified as illiterate.

It seems that we can conclude that, contrary to what one would expect, most aggressors are not uninformed about the social situation and the current Brazilian legislation regarding family relationship issues, as 29% of them concluded at least secondary high school education. Adding up the percentages, another 29% of the aggressors have a low level of education and only 12% have a higher level. Regarding this subject, it seems that formal schooling does not greatly influence the perception and the usual practices of aggressors, which are rooted in Tory traditions.

Likewise, regarding the profession indicator, it is not possible, in this modest research, to relate the occurrence of aggression to the professional activity of each man. Men who are salaried employees, military personnel, lawyers, civil servants or exercise other professions and activities are engaged in aggressive behaviour. But there is likelihood that violence committed by men against women is widespread in society, being something common in the marital relationship regardless of profession and level of education.

Regarding the number of children belonging to households in which there was a case of aggression and, later, a renounce of the right to file for a criminal complaint was issued by the female victim, the data obtained shows that, in families with fewer children, the severity of the aggression is greater.

The data on types of violence reveal that moral aggressions outnumber physical ones committed against women's bodies. The combination of both, recorded in several of the analysed cases, have similar occurrence rates as moral aggressions on their own.

It was also possible to obtain data on the influence of narcotics or drugs on the behaviour of aggressors from the records of the analysed proceedings. This information was provided by the victims as a cause of their partner's mood change in the marital home. However, a reasonable number of aggressors were sober at the time of the

assault, making up about 41.48% of cases in which *renounces of representation* were issued. The cases involving aggressors whose behaviour was considered affected by some kind of hallucinogenic substance added up to 36.6% of the total analysed procedures involving *renounces of representation*. Of those, 66.67% were drunk and the remainder, 33.33%, were under the effect of drugs like marijuana or cocaine.

2.4 The Renounce of Representation as concurrent with the legal narrative

Given this statistical context, in spite of the small number of cases analysed and the tight deadline for observation, it was possible to conclude that the renounce of the right to file for a criminal complaint issued by the female victim in a context of domestic and family violence involving heterosexual partners is a narrative of its own, with a broader meaning than the legal one, which refers to the renounce as an optional behaviour possible in certain cases stipulated in article 16 of law nº 11.340/06, the Maria da Penha Law. In other words, the *renounce* expresses the rights she seeks to protect regarding herself, her family and her offspring.

The research pointed out that women are willing to issue *renounces* in several cases involving psychological violence in particular. As the law does not allow the *renounce of representation* in cases of violence against the woman's body, it is not possible to say what would be her tolerance limit in relation to the physical abuse she could endure from her partner. In any case, this narrative suggests that, considering a woman's human dignity as a person, the female intelligence seems to apprehend violence and transform it into a way of managing the stability of her relationships with her partner, family, and offspring, like an evolutionary process of survival. The goal seems to be unique for each of these focuses of women's interest. Having control over her violent mate would guarantee her provision or even company. Having control over the violence itself would ensure the maintenance of a family as a group of interrelationships of interest. Having control over the violence would also enable her to keep her children under her care and vigilance.

As for the legal narrative, the article that defines the *renounce* only mentions, in an objective way, a female victim's behaviour that is probable and possible. It means that the law formally recognizes the existence of this possibility but does not have the ability to provide for the subtleties of this narrative. Of course, the law could not be required to fully contemplate the female victim's struggle in its prohibitive, obligatory, permissive, or declarative propositions. However, the aim of this research is precisely to demonstrate that there are types of narratives that structure human and social experiences and actions alongside unique cognitive and aesthetic contents that are not provided for or framed by legislation.

The human and social condition of women in these communities, according to this research, reveals that a significant number of them lack formal education or had incomplete and deficient schooling. In addition to this, they are young and have at least one child to care for. This data set indicates a situation of strong economic and patrimonial dependence on their partner, which includes his male views of the world. Breaking this survival relationship can be more disadvantageous than bearing domestic violence.

3. Research Difficulties

This research work has its weaknesses, as any other scientific project that involves selecting, collecting and analysing empirical data. The work, as previously mentioned, sought to obtain data that showed possibilities of parallel conflicts between the legal prefiguration of certain social relationship phenomena and the social reality experienced through narratives of the social actors themselves.

One of the perceived weaknesses is the difficulty in identifying another suitable means of accessing the narrative originally produced by the female victims of domestic violence other than the one that served as the basis for the case's interpretation and whose terms have been registered in official documents such as police reports and minutes of justification hearing from the Gama-DF Domestic and Familiar Violence Against the Woman Court. One of the obstacles found by the research team was the ban issued by the direction of the UDF University Centre regarding the access to the psychological care program that is maintained in the Gama court area, as well as in other court areas of the *Distrito Federal*. This access would have allowed personal interviews with women and men involved in domestic violence lawsuits. Because of this, the judge of the Domestic and Familiar Violence Against the Woman Court took a cautious approach and did not allow the research team to access the written statements issued by these men and women especially for the court, in which they detail the treatment targets reached.

Another difficulty that can be pointed out refers to the number of cases analysed. The research was undertaken by about twenty students during one semester and could not be extended to a second one due to the stress that this would cause to the students, who also have their usual study commitments. The percentage obtained is an estimate and, therefore, would need to be placed in a larger pool of analysed processes for this number to reflect reality more accurately. In any case, the data sets collected point to trends, which can be meaningfully considered as real situations that are part of concrete problems.

In addition to the section of this research that is directly related to lawsuits, another parallel one could be undertaken by conducting interviews directly with women in Gama city, going door to door, in order to learn more about their understanding of violence and whether their counterfactual expectations fit with the definition present in the legal text. This would take longer but could support detailing women's understandings of the subject when they are in the middle of a legal dispute and when they are not. Of course, this would raise the comparative standards of real situations and clarify the perception of the proposed question.

4. Contribution of this study to the repression of violence against women

The beginning of the comparison of technical-legal narratives with those of poetic, dramatic, epic, and lyrical literature came from John Wigmore's 1908 studies in the United States through the essay *A List of Legal Novels*, in which he listed numerous novels of modern Anglo-Saxon style that addressed legal topics. Subsequently, a US Supreme Court judge, Benjamin Cardozo, published in 1925 the well-known essay *Law*

and Literature, in which he analysed the literary quality of Law. The trend spread through Italy, with Ferruccio Pergolesi (1927), Germany and Switzerland, with Hans Fehr (1929, 1931, 1936), authors who sought to analyse this relationship from various points of view. The theme was only revisited in the 1970s, with the publication of James Boyd White's high-impact work, *The Legal Imagination: Studies in the Nature of Legal Thought and Expression* (1973), which initiated a new wave of studies on Law and Literature.

In more recent years, Ronald Dworkin has proposed studying law through literature from the perspective of narrative interpretation, as legal practice would involve a constant process of interpretation (Dworkin 2000: 217). The readings introduce a hermeneutic process which reveals restricted meanings and reality images immersed in a strictly legal context. With this, Dworkin wanted to emphasize the analytical point of view according to which society has its own perspective of the meaning of Law, sometimes quite distant from what has been established in legislation (Godoy 2003: 133-136).

The analysis of the literature within the legal field intends to highlight the alternative views dictated by human-psychological and human-anthropological conditioning, besides the sociological matrix conditioning, exposing options of meaning not captured by the legislation in force. The concern that arises from this kind of approach is that speakers may not be competent to express their feelings and expectations in words that obey a standard code, such as the Law code, which they are unfamiliar with. Therefore, they may not be understood by their juridical audience. The objective pursued by this lay speaker may not achieve the judicial success he expects because of this code discrepancy between the sender and the receiver of the message.

In this context, the researches made in the Law and Literature field can contribute to the repression of violence against women in their domestic environments by performing the most diverse analyses of their narrative of the facts referring to these violent situations. The facts and the context of violence suffered by women can be viewed from a singular feminine perspective. It highlights those events that hurt women the most but does not always include the defining context of these events in its entirety. In any case, considering both facts and context, the only thing that matters is the content described in the legal norm. In this sense, the analysis done by decision-making agents and authorities focuses on the commissive or omissive behaviours provided in the legal text. This focus is made clearer in gallery hearings, where the judicial and the prosecuting authorities always question the behaviour of the aggressor towards the victim according to the law provisions. The motives are not taken into consideration.

The narratives of the facts that surround the daily life of human beings have identities and particularities. The same fact told by several people may generate different data when it comes to gathering, selecting and emphasizing information. Men and women may tell the same fact differently according to their gender expectations. Both men and women act and react according to rational and behavioural parameters based on the personal formation experiences they had since childhood. This does not, of course, mean that they do not have autonomy and responsibility for their choices, only that their preferred reasoning and behaviour decisions are strongly connected with the patterns of a person's life story.

Such a perspective, however, seems to face the negation of the close link between sex and gender (Senkevics, Polidoro 2012: 16-21). From Simone de Beauvoir to Judith Butler, to name but two authors, it follows that male and female bodies would not inherently generate masculine and feminine natures or essences. These would be a

consequence of different understandings based on certain social constructs built around the issue. A symbolic system would have been set up and disseminated in Western and Eastern societies in order to manipulate the division of labour according to sexes, as well as the access to education and the issue of sexual violence, among other differences. However, this research does not aim to delve into this modern rhetorical argument. The data gathered in this research point that women's behaviour as victims and men's behaviour as their aggressors are different not only because each of them plays a different role in the domestic violence environment, but also due to the fact that women and men display different reasoning patterns, different expectations and different actions and reactions in the violence process in Brazilian's cultural context.

In other words, it was possible to conclude that the women analysed respond to domestic violence in a similar way among themselves, just as men act and react violently against women according to certain expectations, beliefs and feelings.

The elements that shape such feelings, expectations, actions and reactions do not seem to be considered by legislation, which always prefers to classify legal figures based strictly on behaviours. Those are generally external bodily expressions, more perceptible to legal characterizations and more susceptible to become part of the composition of a criminal picture, also known as an illicit act.

5. Can the renounce of representation be considered a literature?

To answer this question, we must keep in mind the fact that, according to François Ost (2004), the analysis of the articulation between law and literature has evolved to three points of view since the first transdisciplinary attempts. They are the law of literature, the law *as* literature, and the law *in* literature. In each of these paths subject and object alternate and the objectives are different. Because of this differentiation, the object of our research, the "renounce of representation", seems to belong to the second current rather than the others, and in this sense it is possible to consider the legal act of renouncing as a narrative and, therefore, an important literature for the study of law. Even though there are several meanings for "literature", the narratives of these women are dramas that have not yet formally become novels.

The first current, law of the literature, aims to extract essentially legal discussions from literature, involving subjects such as limits and freedom of expression, individual freedoms and guarantees, copyright, intellectual property, press crimes, the professional practice of writing, etc. For the second one, law as literature, legal texts become the object of literary study through the analysis of discourses, linguistics and communication science, aiming at the interpretation of legal texts and judicial decisions (James B. White, Benjamin Cardozo and Robert Cover). A third field of study is that of law in literature, which is the study of the literary representations of justice and Law. Its forerunners are John Wigmore, Frank Loesch, Richard Weisberg, while Richard Posner and Martha Nussbaum (Karam 2017) are two of its most recent authors.

As previously mentioned, the legal act of renouncing representation rights has acquired narrative status given the reasonably high number of its occurrence: about thirty percent. In our opinion, although it is provided in article 16 of the current law, it does not seem to be something that the legislation considers commonplace, but rather an exception. The rule is to prevent and curb acts of violence against women in the

domestic environment in the context of marital relationships. As such, there may be situations in which it is possible to review the excesses committed between the couple, hence the renounce's provision as an exceptional possibility. It cannot happen often, as it would discredit the very purpose of the legal norm. It would be equivalent to law expiration, emptying the legal sense according to which it was elaborated.

The *renounce of representation* is, first, a right provided in article 16 of law n° 11.340/06, the Maria da Penha Law. It is dependent on the female victim's free will to speak up. Although short, because the law thus constrains it to be, this renounce of the right to file for a criminal complaint is a narrative that reveals implicit and instrumental elements not described by formal law. Its formality does not allow subjective reasons underlying the act of renouncing to appear in the construction of the legal fact, even if the public prosecution service representative and the judge actively seek to find out the reasons for the renounce.

In the present case, it is necessary to consider the renounce of the right to file for a criminal complaint as an expression of the real universe. The legal tradition always follows the narratives of this environment. To understand the *renounce of representation* merely as a woman's display of weakness in the face of threats from her aggressor is to take away her dignity, failing to recognize the authenticity and the voluntary use of her voice in the process of renouncing.

According to Roberta Magalhães Gubert and André Karam Trindade (2008: 11-63), Literature is a means of communication and cultural integration and, therefore, is essential for a community's construction of meaning. Law also fits this purpose. The renounce of the right to file for a criminal complaint as a manifestation and as part of a judicial process can also be considered literature according to this definition, as it takes the role of a form of communication that contributes to building the cultural meaning of a community. Regardless of whether the law is mentioned in the literature or is recognized as a narrative (Trindade 2012), it can be perceived as it is presented in the literary sense of a legal experience as described in various literary spectra, given the different emphases attributed to it by novelists, historians, poets, fictionists, etc. Both Law and Literature work with social reality and it is in this concrete environment that they meet. (Santos 2012: 27-34)

Law, as Cover said, is a system of tension or a bridge linking a concept originated from a given reality to an imagined alternative (Cover 1984: 9). The Maria da Penha Law seems to be only one alternative envisioned by the legislator to understand what happens in the universe of women in general and women who suffer domestic violence in particular. It seems to be common, as stated by the police authority, for women to make use of their right to representation and their right to renounce as instruments to contain the bouts of domination and violence perpetrated by their partner. In addition, renouncing also seems to be an authentic expression of her will motivated by reasons not yet proven but deduced to be her financial fragility, the distance from her family members and the protection of her offspring.

Which other channels could the female victims use to oppose the physical segregation of her partner in prison as a result of domestic violence, if not through the renounce of the right to file for a criminal complaint? This is the only narrative that, for the time being, allows us to take women's voices into account in this context.

6. Is the *renounce of representation* a sufficient narrative for a Law-Literature comparison?

The concern that seems central to us in this line of research resides in the narrative as a form of expression of human and social situations. Women who are victims of domestic violence have an important narrative in the economic and social context of a city where most of the population is composed of people whose income varies between 1 and 5 times the minimum salary. More than half of this population are women, the relationships based on civil unions correspond to about half of those who are married in civil or religious ceremonies and most of the population have migrated from the North and Northeast areas of Brazil. In addition to this, in most cases of violence there is an association with drugs and alcohol consumption.

According to Robert Cover's thesis, "no set of institutions or legal prescriptions exist beyond the narratives that locate them and give it meaning" (Cover 1982). There is a cultural universe that surrounds and gives meaning to the Law, and not the other way around. Law always comes to address social transformations, values that expand or become extinct. Law cannot extinguish its creator - the human being - nor its dignity, otherwise it would become insipid and without application in the real world. Extending his idea, Cover asserts that law emerges from a legal tradition and is therefore an integral part of a complex normative world, that is, it belongs to narratives that have a language and a myth. For him, it is these myths or localized legal narratives that define the paradigms of behaviour. They are like a lexicon of normative action engendered in the normative universe and in the material or real universe. Such paradigms emerge from the confrontation between the constraints of reality and the demands of an ethic (Cover 1982: 9).

According to the District Household Sample Survey of Gama - PDAD / 2015, there were about 141,911 inhabitants in Gama. Most of the population consists of women, who make up about 52.62% of the total. The civil situation of couples shows that about half of those who are united by civil and religious marriage are in civil unions. Around 56% of the population earns between 1 and 5 times the minimum salary.

Table 1.1 – Population by Sex – Gama – DF (2015)

SEX	TOTAL	%
Male	67,241	47.38%
Female	74,670	52.62%
TOTAL	141,911	100%

Source: Codeplan Pesquisa Distrital por Amostra de Domicílios - Gama – DF (PDAD 2015)

Table 1.2 - Marital Status - Gama - DF (2015)

MARITAL STATUS	TOTAL	TOTAL (%)	OVER 14 (%)
Single	50.944	35,90%	42,27%
Civil marriage	7.040	4,96%	5,84%
Religious marriage	333	0,23%	0,28%
Civil and religious marriage	31.265	22,03%	25,94%
Divorced	2.938	2,07%	2,44%
Living apart	3.326	2,34%	2,76%
Civil union	16.131	11,37%	13,39%
Widowed	8.537	6,02%	7,08%
Subtotal	120.514	84,92%	100%
Under 14 years old	21.397	15,08%	-
TOTAL	141.911	100%	100%

Source: Codeplan - Pesquisa Distrital por Amostra de Domicílios - Gama - PDAD 2015

Table 2.1 - Population by place of birth - Gama - DF (2015)

BIRTHPLACE	TOTAL	TOTAL (%)	IMMIGRANTS (%)
Distrito Federal	77.995	54,96%	-
Acre	0	0,00%	0,00%
Alagoas	166	0,12%	0,26%
Amapá	0	0,00%	0,00%
Amazonas	55	0,04%	0,09%
Bahia	7.041	4,96%	11,02%
Ceará	7.817	5,51%	12,23%
Espírito Santo	665	0,47%	1,04%
Goiás	7.207	5,08%	11,28%
Maranhão	4.324	3,05%	6,77%
Mato Grosso	111	0,08%	0,17%
Mato Grosso do Sul	111	0,08%	0,17%
Minas Gerais	12.031	8,48%	18,82%
Pará	443	0,31%	0,69%
Paraíba	5.377	3,79%	8,41%
Paraná	277	0,20%	0,43%
Pernambuco	3.492	2,46%	5,46%
Piauí	7.705	5,43%	12,05%
Rio de Janeiro	1.275	0,90%	1,99%
Rio Grande do Norte	2.439	1,72%	3,82%
Rio Grande do Sul	277	0,20%	0,43%
Rondônia	111	0,08%	0,17%
Roraima	0	0,00%	0,00%
Santa Catarina	0	0,00%	0,00%
São Paulo	2.106	1,48%	3,29%
Sergipe	55	0,04%	0,09%
Tocantins	554	0,39%	0,87%
Abroad	222	0,16%	0,35%
Unknown	55	0,04%	0,09%
Subtotal (DF's Foreigns)	63.916	45,04%	100%
TOTAL POPULATION	141.911	100%	100%

Source: Codeplan - Pesquisa Distrital por Amostra de Domicílios - Gama - PDAD 2015

Table 5.8 - Distribution of households by household income class - Gama - DF (2015)

INCOME CLASS	TOTAL	TOTAL (%)
Up to 1 minimum salary	2.605	6,91%
More than 1 up to 2 times the National Minimum Wage	6.486	17,21%
More than 2 up to 5 times the National Minimum Wage	14.801	39,27%
More than 5 up to 10 times the National Minimum Wage	7.872	20,88%
More than 10 up to 20 times the National Minimum Wage	4.767	12,65%
More than 20 times the National Minimum Wage	1.164	3,09%
Subtotal	37.695	100%
Unrecognized	5.876	-
TOTAL	43.571	100%

Source: Codeplan - Pesquisa Distrital por Amostra de Domicílios - Gama - PDAD (2015)

The *renounce of representation* within this framework of statistical verification of personal and collective data demonstrates that women's renounce of the right to file for a criminal complaint is surrounded by social and economic factors that may suggest an interpretation of the causes and consequences of her act. It is a fertile ground for conjugations and clashes of important indicators that describe the narrative context of this woman in situations of domestic violence in Brazil.

While acclaimed literary narratives may reveal the social situation of a given moment in Brazilian history and in the history of the various regions of the world, the narratives recorded in a police report and a judicial lawsuit must also be taken into account as they are ways of collecting empirical data that reflect a troubled moment in a domestic social relationship.

According to reports collected from the Judge's advisory, the victims are usually absent from gallery, fail to attend the Medical Forensic Institute to have an expert examination of their physical integrity conducted and seek to hinder the process of evidence collecting. Certain victims get to the point of taking all responsibility for the facts at the end of the process, or denying that they happened at all, blaming themselves for slanderous denunciation. This indicates that the victims aim to protect their aggressors.

Regarding the original narrative of the victims, the female civil servants of the court noticed, based on the cases that they accessed as part of their work, that victims do not always tell the truth about violent facts. In general, the falsification of the narrative, according to them, is linked to emotional elements that keep them attached to their partner, despite the violence suffered. The preservation of their subsistence or their housing, the protection of their children and concerns over keeping their sole custody are some of the frequent reasons for retracting the statements contained in the original narratives.

In this police and judicial context, within the limits imposed to the narrative record, we understand that the *renounce of representation* is a short and complex literary narrative, but one that reveals a competition of narratives between the one provided in law n° 11.340/06 and that of women who report to the police and judicial authorities. They go alongside each other, in a constant parallel, each one aiming to emphasize their understanding and the meaning of what they consider to be violence against women in the domestic scenario. To us, renouncing does not seem to be a mere fulfilment of a legal possibility stipulated in article 16 of law n° 11.340/06. The female victim and lay person have been using this legal provision with a perception often parallel to that of the legislator. It is the story of violence told by women of how they judge violence and how they can overcome it.

References

- Artigo 19. 2019. Dados sobre o feminicídio no Brasil. Disponível em: <<https://artigo19.org/wp-content/blogs.dir/24/files/2018/03/Dados-Sobre-Femic%C3%ADdio-no-Brasil-.pdf>> Acesso em: 18 Mai. 2019.
- Brasil. 2018. Central de Atendimento à Mulher – Ligue 180. Disponível em: <<https://www.mdh.gov.br/informacao-ao-cidadao/ouvidoria/RelatrioGeral2017.pdf>>. Acesso em: 28 Mai 2019.
- Brasil. 2019. Senado Federal. Projeto de Lei do Senado 191/17. Altera a redação do art. 2º da Lei nº 11.340, de 7 de agosto de 2006 – Lei Maria da Penha –, para assegurar à mulher as oportunidades e facilidades para viver sem violência, independentemente de sua identidade de gênero. Disponível em:

- <<https://www25.senado.leg.br/web/atividade/materias/-/materia/129598>>. Acesso em: data. Texto Original.
- Cover, Robert M. 1983. "The Supreme Court, 1982 Term – Foreword: Nomos and Narrative". *Harvard Law Review*, 97:4-68. Faculty Scholarship Series. 2705. https://digitalcommons.law.yale.edu/fss_papers/2705
- Cover, Robert. 2016. "Nomos e Narração". Tradução Luis Rosenfield. In: *Anamorphosis, Revista Internacional de Direito e Literatura*, 2:187-188 Jul-Dec
- Dworkin, Ronald. 2000. *Uma questão de princípio*, 217 São Paulo: Martins Fontes.
- Faustino e Freitas, Waglânia de Mendonça et al. 2009. "Paternidade: responsabilidade social do homem no papel de provedor". In: *Revista de Saúde Pública*, 43:85-90. Acesso em 08 jun 2018 doi: 10.1590/S0034-89102009000100011.
- Fehr, Hans. *Das Recht in der Dichtung*, BERN, A. Francke, 1931.
- Godoy, Arnaldo Moraes. 2003. *Direito e Literatura*. In: *Revista Centro de Estudos Judiciários*, 22:133-136, Jul-Sep. Brasília: Conselho de Justiça Federal.
- Gubert, Roberta Magalhães; Trindade, André Karam. 2008. "Direito e Literatura: aproximações e perspectivas para se repensar o direito". In: *Direito & Literatura: reflexões teóricas* 11-63. Porto Alegre: Livraria do Advogado Editora.
- Karam, Henriete. 2017. "Questões teóricas e metodológicas do direito na literatura: um percurso analítico-interpretativo a partir do conto 'Suje-se gordol', de Machado de Assis". In: *Revista Direito GV* 13:827-65, Set-Dez. São Paulo: Fundação Getúlio Vargas (FGV).
- Mittica, M. Paola. 2015. "Cosa Accade di là dall'Oceano? Diritto e letteratura in Europa". In: *Anamorphosis: Revista Internacional de Direito e Literatura* 1: 3-36. Jan-Jun
- Nolasco Sócrates. 1993. *O mito da masculinidade*. 2ª ed. Rio de Janeiro: Rocco.
- Ost, François. 2004. *Raconter la loi: Au sources de l'imaginaire juridique*. Paris: Editions Odile Jacob.
- Pergolesi, Ferruccio. 1927. "Il diritto nella letteratura". In: *Archivio giuridico "Filippo Serafini"*, Volume 8, 97, a cura di Filippo Serafini. Charleston: Nabu Press
- Radbruch, Gustav. 1938. *Psicologia del sentimento giuridico del popolo*. In: *Rivista Internazionale de Filosofia del Diritto*, Roma, Ano XVIII, n. 3, p. 241-251, mai-jun, 1938
- Rodrigues, Nelson. 2002. *Flor de Obsessão*. São Paulo: Companhia das Letras.
- Santos, Silvana Maria Pantoja dos. 2012. "Direito e Literatura: Perspectiva transdisciplinar na abordagem de temas sociais e jurídicos". In: *Revista Interfaces Científicas* 1:27-34. Out.
- Senkevics, Adriano Souza; Polidoro, Juliano Zequini. 2012. "Corpo, gênero e ciência: na interface entre biologia e sociedade". *Revista da Biologia*, 9:16-21.
- Trindade, André Karam. 2012. "Kafka e os paradoxos do Direito: da ficção à realidade". In: *Revista Diálogos do Direito* 2:137-59. ISSN 2316-2112. Disponível em:

<<http://ojs.cesuca.edu.br/index.php/dialogosdireito/article/view/63>>.

Acesso em: 11 nov. 2019. doi: <<https://doi.org/10.17793/rdd.v2i2.63>>.

Trindade, André Karam; Bernsts, Luísa Giuliani. 2017. “O Estudo de Direito e Literatura no Brasil: Surgimento, Evolução e Expansão”. *Anamorphosis: Revista Internacional de Direito e Literatura* 3:225-57.

White, James Boyd. 1973 *The Legal Imagination. Studies in the Nature of Legal Thought and Expression*. Second edition. Chicago: University Chicago Press, 15 dez 1985.

Wigmore, John H. 1908. *A List of Legal Novels*. Acess: 15 jun 2020. Heinonline.org

PART II
LEGAL NARRATIVES

The importance of emotions in the daily professional lives of judges: some insights from the autobiographies of Brazilian judges

Ana Carolina de Faria Silvestre*

With good laws and bad judges, good justice is never served, but with bad laws and good judges, more than once it was possible to serve good justice

Eduardo Couture

Abstract

The main objective of this paper is to shed (a very modest!) light on how Brazilian judges deal with their emotions in their daily professional lives. The primary source is an autobiographical text written by the Brazilian judge Lourival Serejo, a judge of the Court of Justice of Maranhão (a second court instance). The text has been analyzed through emotion regulation and emotion work literature on judges and the results presented here are preliminary.

Key words: Autobiography of Brazilian judges, emotion regulation, emotion work, law and emotions, law and literature.

1. Introduction

The main objective of this paper is to shed (a very modest!) light on how Brazilian judges deal with their emotions in their daily professional lives through a selected text written by a judge. In order to better understand how Brazilian judges have been dealing with their emotions and the emotions of the parties, we can utilize from various artifacts (Maroney, 2019). Here, a non-fiction text has been chosen as a primary source. It was assumed, as a

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hypothesis, that legal actors, in their role as authors, will feel more freedom than they would in, for example, a survey or an interview, to open-heartedly discuss their professional lives, including how they handle their feelings/emotions, and the strategies they use to regulate their emotions and the emotions of the parties¹.

This is a work in progress research and this paper is more focused on presenting the methodology, the theoretical background and the limitations of the project than discussing the preliminary results.

2. Theory and previous research

There isn't a consensus regarding what emotions are as they are complex manifestations. Emotions are the results of the integration of various components (human physiology, biological structures, facial expressions, subjective experience, the subject's psychic and clinical structures, the subjective perception, character, social interactions, cultural script etc). Many attempts have been made to distinguish emotions, feelings, moods, temperaments and cognition. More recently, however, there has been a trend to recognize emotions as biocultural processes and that understanding them demands multiple approaches (Röttger-Rössler and Markowitsch, 2009).

This work assumes emotions as complex phenomena but highlights the social component/interactional dimension of emotions. Emotions/feelings are products of social interactions, so they are conditioned by the social contexts that are always culturally and historically specific (Scheer 2012, p. 193). This research also encompasses backgrounded emotions, "emotions of which emoting subjects are not consciously aware and therefore are explicitly non-regulated" (Barbalet, 2011).

Judicial emotion work is more than a purely individual or personal enterprise. The judge possesses agency (Sewell 1992) but the interactions between judges/ parties/ other legal professionals/ testimonies etc occur in the court. Juridical environment is ruled by explicit and implicit feeling rules, cultural scripts, display rules, legal norms and foregrounded and backgrounded emotions that frame the relation between emotion and judging.

An outburst/expression of anger on the bench in a conflicting situation in court, for example, tends to be perceived as inappropriate because it is expected from the judge to be the calm one (Roach Anleu and Mack, 2019). In a conflicting dispute situation, even a righteously angry judge (Maroney, 2012) tends to experience a negative feeling about her demeanor even when the anger is directed at the right people, for the right reasons, and in the right way (Maroney 2011b). "Emotional reflexivity refers to the intersubjective interpretation of one's own and others' emotions and how they are enacted (...). It is a capacity exercised in interaction with others" (Holmes 2015). Feeling uncomfortable because, as a judge, I got angry at someone who deserved is not only related to my

¹ Another alternative could be to analyze court decisions. However, court decisions are texts produced by the judge from their position as judge, under the constraints of the law and with a specific purpose. In such a document, there is little or no room for the person (judge) to appear, specifically regarding to their emotional experience during their professional day. Therefore, court decisions, despite being a potential artifact of research, were not considered a viable source for this research project.

personal sense of what is right or wrong on the bench but it is primarily rooted on the emotive-cognitive judicial frame (Blix and Wettergren, 2018).

Being a judge demands many kinds of effort, emotion management and also background emotion management (Wettergren, 2019 Bergman Blix and Wettergren, 2019). Judges must routinely manage their own feelings and emotion display and that of others as part of their occupation, in order to achieve workplace and professional goals as performing objectivity/neutrality (Blix and Wettergren, 2019), even when they are aware of that or not.

3. Methods and material

The project in which this paper is included seeks to understand how judges manage their emotions and the emotions of the parties even when they do not categorize what they were experiencing as emotion. Judges do regulate their emotions and also the emotions of the parties in their daily basis professional lives but the question that arises is: Are they aware of that? Do they regard regulating emotions as part of their work?

For the larger research project, seven books written by male magistrates have been identified for analysis up to this point. They include the following genres: a book of chronicles (John Mark Buch, 2016), a diary (Lourival Serejo, 2010), a book of memories, which is not specifically a memoir (John Herkenhoff, 2009), letters to a young judge (Cesar Asfor Rocha, 2009), a memoir (Adhemar Maciel, 2007), a book remembering their years in the judiciary (Eliezer Rosa, 1983) and an autobiography (Cândido Motta Filho, 1977). In 2004, there was a major reform in the Brazilian legal system via the Constitutional Amendment No. 45. It is assumed as a hypothesis, with Scheer (2012), that this reform had a significant impact on the emotional experience of Brazilian magistrates. Hence, all literary autobiographical writings completed before the 2004 reform will not be considered (Eliezer Rosa, 1983. Candido Motta Filho, 1977). Books that partially engage with the time before 2004 will be considered, but the aforementioned changes should be considered within the research as a potential impact factor (John Mark Buch, 2016. Lourival Serejo, 2010. John Herkenhoff, 2009. Cesar Rocha Asfor, 2009. Adhemar Maciel, 2007).

In the present article, only one biography will be analysed. A kind of diary² written by the state judge (at the time of writing the diary) Lourival Serejo, who entered the state judiciary of Maranhão in 1981 and became, by promotion, a judge of the Court of Justice of Maranhão in 2007. The book describes different moments during his career, from his

² “This book looks like a diary, but it is not a diary because it is not about impressions of a personal character, it does not refer to specific people, nor does it go down to particular details like every diary ... this book is made of reflections on the training and the concerns of a judge, from facts occurred. Without mentioning them, I recorded only the lessons learned for the achievement directed to my purpose (...) the concepts emitted also reflect the search for maturity. In the beginning, an angry and dreamy judge; later, more critical and serene”²² (free translation). “Este livro parece um diário, mas não é um diário, pois não trata de impressões de caráter pessoal, não se refere a pessoas determinadas, nem desce a detalhes particulares como todos os diários (...) este livro é feito de reflexões sobre a formação e as inquietações de um juiz, a partir de fatos ocorridos. Sem mencioná-los, registrei apenas as lições tiradas para o aproveitamento direcionado ao meu propósito (...) os conceitos emitidos refletem, também, a busca de maturidade. No começo, um juiz afoito e mais sonhador; depois, mais crítico e sereno”. (Serejo 2010, p. 19).

admission to his inaugural address as a Judge of the Court of Justice of Maranhão (second court instance). This book was chosen as the first source to be analyzed due to the unusual openness with which Serejo speaks of emotions in his book; his emotions and the emotions of the parties. From the outset, it stands out from the other artifacts because the difficulty in dealing with his own emotions and his management of the emotions of the parties appears from the first page. The analysis of the narratives of the judges, in the light of the chosen theoretical framework, will be presented in a series of articles of which this forms the first part.

3.1. Limitations

3.1.1. Major reform of the Judiciary power: Constitutional Amendment 45

The text analysed in this paper has as its backdrop a Brazilian legal reality, which no longer operates in the same manner. Most of the text was written before the major regulation and systematization of the judiciary, which occurred in late 2004, through the constitutional amendment 45. Although this fact should be taken into consideration, it doesn't render this research invalid.

The change in the Brazilian socio-legal landscape is a factor, which directly impacts the emotional experience of Brazilian magistrates and this will be taken into account in this investigation³. For example, the criteria for promotion in their careers became objective. This change was a contributing factor in the mitigation of the stress, which had previously existed. The Organic Law of the Judiciary, in art. 80, stated that the criteria for career advancement would be established by a complementary law, which never arrived. As of the 2004 reform, which defined the objective criteria for promotion, potentially stressful factors no longer exist, but others, which weren't previously considered have arisen, such as output criteria (Resolution 106/2010 of CNJ). Hence, texts published later than 2004, whose narratives partially took place before 2004, must be analysed in a contextualized way.

Because the approach of the study is inductive, and because people do not experience emotions in the same way in the workplace, this study is not intended to broadly generalize how Brazilian judges deal with their emotions, with emotions of the parties and how the emotional regulation strategies used may impact their job. However, it is understood that this work can gain, through specific texts, some valuable insights on the subject.

3.1.2. No autobiographical books written by female judges

Unfortunately, no autobiographical books written by female judges were identified. This must be considered, in advance, as a gap in the research. Today in Brazil, according to the

³ According to Courtine (1984 cited in Orlandi 2005) inter-discourse (constitution) and intra-discourse (formulation) can be understood from the metaphorical image of an axis with two lines. The vertical axis represented by inter-discourse depicts everything that has been said and has been forgotten. Even when we say something for the first time in our lives, we are not the first ones to say that. Many have said that before us. The horizontal axis, the intra-discourse, depicts what we are saying at that given time, under given conditions. It is at the intersection that the discourse is created. The physical location of Serejo's narrative is a provincial region of Maranhão, but the broader context corresponds to the socio-historical and ideological Brazilian Judiciary context. It is the discursive memory and the discursive knowledge that makes the narrative of the individual possible and that sustain his narrative.

Monthly Productivity Module of the National Council of Justice (March / 2017)⁴ the percentage of women in the judiciary is 37.3%⁵. The number of women entering the judiciary increased in the 1980s in Brazil (Fragale Son, R.; Moreira, RS; Sciammarella, AP 2015). The representation of women in the Brazilian judiciary does not differ much from the US, for example, from the data of the US State Court Women Judges '2018. Thus, the absence of autobiographical works of Brazilian judges is not in itself a clear representation of gender in the Brazilian judiciary. However, previous research suggests that female judges' experiences are different from their male colleagues. According to Bonelli (2016) (Sadek 2006) (Junqueira 1999), career advancement opportunities are not the same for male and female magistrates. For example, in 2011, in the São Paulo Court of Justice, there were only 3.7% women judges in the courts of appeal. Career advancement can be limited due to mobility requirements for professionals who have children and who have to deal with their care (Marques Jr. 2011) (Bonelli 2016). The data suggests that there is stratification by gender, with male predominance. One can assume that female judges work under additional time strain, (Bonelli 2016), and that their emotion work is more pronounced than for male judges (Hochschild 2003). We therefor need to keep in mind that the analysis here is limited to a male perspective on emotion and emotion work.

4. Analysis (in progress): some preliminary insights

From the speeches of the judges, up to this point, the following issues have been identified regarding "being judge": Becoming a judge, maintaining balance in challenging situations, changing the behavior of the parties, motivating actions/strategies. Below, we present some clippings of such issues and some initial insights.

a) Becoming a judge

February 29, 1982

With great emotion, indecision and even perplexity, I began my professional career in my first county, in the afternoon of September 4th, 1981. The very first day, I traveled to my homeland, near the region, as if to redo myself there from the shock and meditate on its effects. My first week as a judge was a terrible emotional experience. From my shyness, it was difficult for me to adapt the figure of a judge to myself. In addition, in the first contacts, I was overwhelmed before so much

⁴ Mulheres representam 37,3% dos magistrados em atividade em todo o país. Available at: <http://www.cnj.jus.br/noticias/cnj/84432-percentual-de-mulheres-em-atividade-na-magistratura-brasileira-e-de-37-3>. Last Access at 16/03/19.

⁵ Thereza Grisolia Tang was the first female judge in Brazil; she applied for the public service in December 1954 and occupied the presidency of the State Court of Santa Catarina for just under three months, between December 1989 and March 1990. Cnea Cimini Moreira de Oliveira was the first female member of a superior tribunal in Brazil after being appointed to the Superior Labor Court in 1990.

⁶ 2018 Representation of United States State Court Judges Women Available at: <https://www.nawj.org/statistics/2018-us-state-court-women-judges>. Last Access at: 03/16/19.

responsibility. Around me I beheld a constant expectation of all, concerning my deeds and conduct⁷. (free translation).

Managing emotions is no easy task. This judge, on his first day on the bench, describes his efforts to adapt to the position of the judge (he was shy and this trait of character was, in that context, interpreted as negative) and attempting to meet the expectations of his colleagues and of the community through his actions and conduct. The strategy he used to deal with this experience that ranks as an ‘emotionally terrible experience’ was to travel to his hometown and meditate on that experience.

The reaction to this confronting experience was to withdraw, in order to evaluate what had happened. Although it is unclear whether the judge actually used meditative techniques, he did identify the uncomfortable situation and acted upon it, facing it. The judge practiced self-reflection as part of his emotional work. On one hand, there is the young judge Serejo, anxious to be a judge, facing his first day as a magistrate and trying to adapt to the role of the Judge. On the other hand, the judge qua judge (the ideal judge) and the implicit and explicit feelings/display rules/cultural script/foregrounded and backgrounded emotions that frame judging.

Becoming a judge involves personal aspects/efforts as using an emotional regulation strategy than other but also other dimensions that are independent of the subject's choice or decision. Emotions are complex processes that are decisively dependent on particular social context and the corresponding cultural models of interpretation and behavior, the subject's psyche and clinical structures (Freud, 1896); it they? can be transformed by trauma experiences (Der Kolk, Besser van); it they depend? depends of innate physiological processes anchored in biology, the subjective perception and culture (Röttger-Rössler, Birgitt, Markowitsch, Hans Jürgen). It is therefore very reductive to state that emotional regulation depends solely on the judge's rational decisions, which does not imply that she has no decision-making power in deciding on her emotional regulation.

Today in Brazil, the incoming judges must attend school of the judiciary. This might reduce the emotional impact that the lack of experience and high expectations will have on a new judge in comparison to the description of judge Serejo.

b) Maintaining balance in challenging situations

December 19, 1995

I was quite dismayed, for when? deciding about the custody of a child. The cries and reactions left me indecisive about the correctness of my decision. It takes a lot of

⁷ “Sob forte emoção, indecisão e mesmo perplexidade, entrei em exercício na minha primeira comarca, ao cair da tarde de 04 de setembro de 1981. Logo no primeiro dia, viajei para minha terra natal, vizinha à comarca, como se ali fosse me refazer do choque e meditar sobre seus efeitos. Minha primeira semana como juiz foi uma experiência emocional terrível. Pela minha timidez, era difícil para mim a adaptação da figura de um juiz à minha pessoa. Ademais, nos primeiros contatos, fiquei assoberbado ante tanta responsabilidade. Ao redor de mim, contemplava uma constante expectativa de todos, quanto aos meus atos e minha conduta”. (Serejo 2010, p. 31)

balance for a judge in these times of anguish when you are dealing with the feelings of others.⁸ (free translation).

September 6, 2006

I read the order of a judge rejecting the bail of a boy accused of assault (...) which surpasses this piece - and it saddened me - that the judge let himself be overcome by the wrath of angry citizens against all ‘delinquents who harass the lives of good people’.⁹ (free translation).

The judge must maintain reasonableness, which is the prerequisite of any decision if it is to be correct, says Judge Lourival. It isn’t clear whether reasonableness and impartiality are considered synonyms. Judge Serejo understands that in order to achieve this fundamental goal, the judge should measure consequences, evaluate results and not get caught up in the anxiety of the parties. ‘It takes a lot of balance for a judge in these times of anguish’ and to accomplish that, the judicial officers should undertake considerable emotion work. It takes considerable effort to not get caught up in the anxiety of the parties and to accomplish reasonableness.

In another passage, the judge tells us about the danger of being contaminated by the wrath of angry citizens, i.e. the impact of the emotions of the parties in a case. ‘From that moment, the impartiality of that judge ceased to exist’. In these passages, the anger of “good citizens” against the offender, and the anxiety of the parties are identified as negative and the judge, therefore has to be careful not to allow this to affect him.

A good judge should safeguard the rights of the individual against the state and its institutions and be able to communicate that message (Blix and Wettergren, 2018, p. 142). She cannot prevent herself from listening to the crowd but she needs not to be caught up by emotions of the crowd. The demeanor exhibited by a judge is a key element that may enhance or undermine the legitimacy of judicial authority (Roach Anleu, Mack 2010).

At no point in the text does Judge Serejo refer to sharing (with) or delegating emotion management work (to) other legal actors as lawyers, public prosecutors or police officers. This does not mean that he did not actually do it, but the absence of any reference to actions and behavior of others in the situation he experiences emotions suggest that the management of emotions and feelings of the parties, in the forensic environment, is generally considered to be the responsibility of the individual judge.

c) Changing the behavior of the parties

July 25, 1984

Our contact with the human person, his faults, vices and moral deformation, is perhaps greater than that of a priest. The sad frames of human behavior are constantly exposed in the daily life of a magistrate. Today, I heard two teenagers - a couple -

⁸ “Fiquei hoje bastante consternado, por ter decidido a guarda de um menor. Os choros e reações deixaram-me indeciso sobre o acerto da minha decisão. É preciso muito equilíbrio para um juiz, nesses momentos de angústia, em que está lidando com os sentimentos alheios”. (Serejo 2010, p. 85)

⁹ “Leio o despacho de um juiz indeferindo a liberdade provisória de um rapaz acusado de assalto (...) o que sobreleva nessa peça – e muito me entristece – é constatar que o juiz se deixou suplantar pela ira do cidadão raivoso e revoltado contra todos os “meliantes que infernizam a vida das pessoas de bem”. (Serejo 2010, p. 114)

who repudiated, with a load of indifference, or almost hatred, a sick father, for a fault he committed, perhaps driven by the irritation of the illness itself that let him confined to bed. Next to their sad mother, I could not persuade them to look for their father. There was an early determination on those ungrateful children. That's life!¹⁰. (free translation).

The judge, in addition to managing the emotions of the parties may want to change the behavior of the parties. Here, their intention is not limited to influence or to manage the emotions of the parties, but, in addition, is to be the driver of a positive action for the parties. Judge Serejo briefly tells the story of two teenagers, whom he qualifies as "ungrateful". He tries to convince them to make contact with their father, who is 'prostrate on a hammock' due to illness, but the judge's efforts do not convince the teenagers due to the indifference (or almost hate) that they feel towards their father. In a last attempt to try to convince his counterparts, the judge uses cognitive reappraisal (Maroney 2011a, p. 1504), an emotional engagement strategy, bringing into play a motive that would justify their father's action, which had not previously been considered by them. Perhaps their father had behaved poorly as a reaction to the disease itself, which had left him prostrate in bed, offering a motive that could justify or, at least, help explain the father's actions.

d) Motivating actions/strategies

March 21, 1997

I'm coordinating a course for newly approved judges in an entry exam in the judiciary. In this conviviality I have observed the mood and anxiety of the new magistrates and I have tried to remember when I began my journey on the same itineraries that they will go through (...) the force emanating from this state of mind is contagious¹¹. (free translation).

There are moments of crisis where grievances may build up against the structure of the judiciary or against colleagues or judicial policy, or perhaps no recognition for good work. In order to overcome these demotivating moments, Serejo adopts some positions and strategies. The general attitude should be to direct his or her energies into being a good judge.

Optimism is a trait of emotional intelligence (Goleman 2007, p. 110). An optimistic person sees a weakness as something, which can be changed and therefore finds motivation to move forward. "From the viewpoint of emotional intelligence, optimism is an attitude, which protects people from apathy, hopelessness or depression in the face of

¹⁰ "Nosso contato com a pessoa humana, seus defeitos, vícios e deformações morais, é, talvez, superior ao de um sacerdote. Os quadros tristes do comportamento humano estão em constante exposição na vida diária de um magistrado. Hoje, ouvi dois adolescentes – um casal – que repudiou, com uma carga de indiferença, ou quase ódio, um pai doente, por falta que este cometeu, talvez movido pela irritação da própria doença que o prostrou em uma rede. Ao lado da mãe arrebatada, não consegui convencê-los a procurar o pai. Havia uma determinação precocemente firme naqueles filhos ingratos. Coisas da vida!" (Serejo 2010, p. 41)

¹¹ "Estou coordenando um curso para juízes recém-aprovados em concurso de ingresso na magistratura. Nesse convívio, tenho observado o ânimo e a ansiedade dos novos magistrados e procurado lembrar quando iniciei minha caminhada pelos mesmos itinerários que irão percorrer (...) a força que emana desse estado de espírito é contagiante". (Serejo 2010, p. 90)

difficulties. As with hope, his cousin, optimism provides dividends to life”. (Goleman 2007, p. 110-111).

Another source of strength and courage, which could be perceived as a motivational strategy is to be in contact with aspiring judges. Being in contact with incoming judges, full of excitement and anxiety, positively affects the judge. It is therefore an action, which positively impacts on the judge.

5. Final Considerations

We can conclude at this point of the study that:

“Becoming a judge” can be emotionally demanding. This is not primarily related to the judge’s personal traits of character/individual subjectivity of the aspirant judge but with the cultural script/legal rules/explicit and implicit feelings/ foregrounded and backgrounded emotions that frame the relation between emotion and judging.

Emotion management is part of the judge routine in court. Judges use removal strategies and emotional engagement strategies in their day-to-day work without realizing it and without the awareness that there are costs and benefits related to their use. Beyond managing their own emotions and the emotions of the parties, judges may want to change the behavior of the parties, in addition to their emotional state.

It is interesting to note that the judges in this first analyzed biography do not delegate the task of managing the emotions of the parties to other legal actors such as lawyers or prosecutors, but sees it as their own obligation.

References

- Barbalet, J. 2011. “Emotions beyond regulation: Backgrounded emotions in science and trust”. *Emotion Review* [online], 3(1): 36-43.
- Bergman Blix, S and Wettergren, Å. 2018. *Professional emotions in court: a sociological perspective*. Abingdon; New York: Routledge.
- _____, 2019. “The Emotional Interaction of Judicial Objectivity”. *Oñati Socio-legal Series* [online]. *Judging, Emotion and Emotion Work*, 9(5):726-746. Available from: <https://http://opo.ijsj.net/index.php/osls/index>. Accessed December 22, 2019. DOI: 10.35295/osls.ijsl/0000-0000-0000-1096
- Bonelli, M. G. 2016. Carreiras jurídicas e vida privada: intersecções entre trabalho e família. *Cadernos. Pagu*, 46, jan/abril. Available from: http://www.scielo.br/scielo.php?script=sci_arttext&pid=S0104-83332016000100245&lng=pt&tlng=pt. Last access: 03/17/2019.
- Buch, J. M. 2016. *Diário de bordo de um juiz das causas humanas*. São Paulo: Giostri.
- Fragale Filho, R.; Moreira, R. S.; Sciammarella, A. P. O. 2015. “Magistratura e gênero: um olhar sobre as mulheres nas cúpulas do judiciário brasileiro”. *E-cadernos CES*, 24:

- 57-77. Available from: <http://journals.openedition.org/eces/1968> ; DOI : 10.4000/eces.1968. Last access: 03/20/2019.
- Freud, S. A. 1969. Hereditariedade e a etiologia das neuroses (1896). In Primeiras publicações psicanalíticas (1893-1899). Direção-geral da tradução de Jayme Salomão. Rio de Janeiro: Imago.
- Goleman, D. 2001. *Trabalhando com a inteligência emocional*. Rio de Janeiro: Objetiva.
- Herkenhoff, J. B. 2009. *Dilemas de um juiz*. Rio de Janeiro: GZ.
- Hochschild, A R. 2003. *The commercialization of intimate life: notes from home and work*. Berkeley, University of California Press.
- Holmes, M. 2015. “Researching emotional reflexivity”. *Emotion Review*, 9 (1): 61-66.
- Junqueira, Eliane Botelho 1999. A profissionalização da mulher na advocacia. Rio de Janeiro, Fundação Carlos Chagas, Relatório de pesquisa.
- Maciel, A. F. 2007. *Memórias de um juiz federal*. Belo Horizonte: Del Rey.
- Maroney, T. A. 2019. “Empirically Investigating Judicial Emotion”. *Oñati Socio-Legal Series* [online]. *Judging, Emotion and Emotion Work*, 9(5):799-830. Available from: <https://http://opo.iisj.net/index.php/osls/index>. Accessed December 22, 2019. DOI: 10.35295/osls.iisl/0000-0000-0000-1096
- _____, T. A. 2012. “Angry Judges”. *Vanderbilt Law Review*, 65: 1207-1286. Available from SSRN: <https://ssrn.com/abstract=2099634>
- _____, T. A. 2011a. “Emotional Regulation and Judicial Behavior”. *California Law Review* [online], 99 (6): 1481-1552. Available from SSRN: <https://ssrn.com/abstract=1785616>. Last access: 10/08/2018.
- _____, 2011b. “The Persistent Cultural Script of Judicial Dispassion”. *California Law Review* [online], 99 (2): 629-682. Available from SSRN: <https://ssrn.com/abstract=1656102>. Last access: 10/08/2018.
- Marques Jr. Gessé 2011. Mobilidade espacial e profissional entre juízes e juízas paulistas. São Paulo, UFSCar, relatório final de pesquisa CNPq.
- Mota Filho, C. 1977. *Dias lidos e vividos*. Rio de Janeiro: Livraria José Olympio.
- Orlandi. E. P. 2005. *Análise de discurso: princípios e procedimentos*. 6. Ed. Campinas: Pontes.
- Roach Anleu, S. and Mack, K. 2010. “Performing impartiality: judicial demeanor and legitimacy”. *Law & Social Inquiry*, 35 (1): 137-173
- _____, “A Sociological Perspective on Emotion Work and Judging”. *Oñati Socio-legal Series* [online]. *Judging, Emotion and Emotion Work*, 9(5):831-851. Available from: <https://http://opo.iisj.net/index.php/osls/index>. Accessed December 22, 2019. DOI: 10.35295/osls.iisl/0000-0000-0000-1096
- Fragale Filho, R.; Moreira, R. S.; Sciammarella, A. P. de O. 2015. Magistratura e gênero: um olhar sobre as mulheres nas cúpulas do judiciário brasileiro. *E-cadernos CES*, 24. Available from: <http://journals.openedition.org/eces/1968>. DOI : 10.4000/eces.1968

- Rocha, C. A. 2009. *Cartas a um jovem juiz: cada processo hospeda uma vida*. Rio de Janeiro: Elsevier.
- Rosa, E. 1983. *A voz da toga*. Goiânia: AB editora.
- Röttger-Rössler, B., Markowitsch, H. J. (eds). 2009. *Emotions as bio-cultural processes*. New York: Springer.
- Sadek, M. T. 2006. *Magistrados: uma imagem em movimento*. Rio de Janeiro: FGV.
- Sewell, W.H. 1992. "A theory of structure: Duality, agency and transformation". *American Journal of Sociology* [online], 98 (1): 1-29.
- Scheer, M. 2012. "Are emotions a kind of practice (and is that what makes them have a history? A bourdieuan approach to understanding emotion". *History and Theory*, 51 (2): 193-220.
- Serejo, L. 2010. *Formação do juiz: anotações de uma experiência*. Curitiba: Juruá.
- Van Der Kolk, Besser. 2014. *The Body Keeps the Score: Brain, Mind, and Body in the Healing of Trauma*. New York: Viking Penguin.

The importance of being eventful. On narratives and legal culture

Angela Condello*

Abstract

The essay is built around the following argumentative structure: firstly, I focus on the specific type of narratives involved in legal trials and especially on the eventful character they should have in order to be presented as relevant within a legal argument. In order to do so, I sketch the main aspects of the process of qualification typical of legal reasoning (§ 2). Secondly, I consider the interaction between factuality and normativity – typically involved in narrativity - considering in particular those cases named ‘*hard cases*’, where the eventfulness of the facts generates the need for the legal order to justify its effects on reality, by resorting to a supreme and presupposed normative orientation, as a radical foundation of the validity of the whole order (§ 3).

Key words: Narrativity, Fact, Norm, Case, Eventfulness.

1. Forethought

Across both common law and civil law systems, we are witnessing a quite puzzling debate on the changes currently affecting the system of sources and the methods of legal science. More specifically, the debate concerns the different functions played by the general and abstract proposition (on the one end) and the jurisprudential decision (on the other end). It concerns, in other words, an old question traditionally discussed in legal doctrine, seen under the light of the cross-breeding of legal cultures. The disclosure of how the hierarchy of sources has changed (and still changes) is directly bond to the way legal statements are interpreted and treated and, more in general, it should be analyzed from the perspective of legal argumentation. Actually, there might be no real crisis of legislation, as it is often claimed, but only a misinterpretation of the current interactions and relationships between facts and norms.

In order to shift back towards a complexification of such interactions and relationships, in this paper I resort firstly to the intuition of Robert Cover on the entangled interconnection between *nomos* and narrative, and not only in terms of a basic of work on legal narratology. Indeed, and furthermore, I consider it as a relevant step towards a theoretical confusion, reciprocity and integration between the level of factuality and that of normativity. For Cover (1983), the narratives that shape our world are intrinsically

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part of our perception of the normative world (*nomos*) that surrounds us. He situates law squarely within the realm of storytelling and attributes to storytelling also a (possibly) normative function, refusing to draw disciplinary lines between these dimensions. Although his essay became popular mainly for claiming that the normative world or *nomos* that we inhabit cannot be neatly separated from other narratives that shape our sense of reality, I consider it fundamental because of yet another, similar and adjoining intuition. Namely, because he proved that between *nomos* and narrative there is a permanent tension, for which they approach each other but do not overlap. Such a movement towards each other (of *nomos* towards narrative, and viceversa) is a phenomenon falling within the field of legal argumentation. Cover does not suggest to confuse or identify *nomos* and narrative, but quite on the contrary he suggests to observe their interaction which does not necessarily, as aforementioned, entail an overlap. Obviously, here one could object that narratives are, *per se*, normative – in that they are rooted in social interactions which are, in turn, informed by both implicit and explicit rules. Yet here I want to keep the focus on Cover's dichotomy to try and stress why and how it can still be useful from a legal theoretical perspective. Turning back at the opening remark mentioned above, and against these first brief considerations, it appears that, in order for legal systems to function properly, such void or gap between these two different grammars (norms, narratives) must be preserved. Conversely, and somewhat wrongly, the tendency to confuse the two levels, flattening legislation on jurisdiction and viceversa, is nowadays widespread and is often interpreted, as aforementioned, as some sort crisis of the legal science.

In the following paragraphs, I develop a twofold argument: firstly, I focus on the type of narratives involved in legal procedure and on the specifically eventful character they should have in order to be presented as relevant within a legal argument, sketching the main aspects of the process of qualification typical of legal reasoning (§ 2); secondly, I consider the interaction between factuality and normativity in those cases which have been termed '*hard cases*'. Hard cases are characterized by a higher level of complexity in the interaction between *nomos* and narrative, for which the facts of the case present characteristics that make the judicial syllogism more complicated. For this reason, in such cases, the arguments produced in order to deliberate can function as patterns for the interpretation of future cases: in this sense, since they aim at producing new balances between interests in conflict at a specific time and within a specific context, they can reveal portions of the idea of justice that orients a legal culture. As a matter of fact, in order to resolve hard cases, legal practitioners have to consider the general principles, as well as the values and the very foundations of a legal order. Thus, the eventful nature of the narratives that generate hard cases and complex legal questions activates the need for legal orders to justify themselves and (especially) their authoritative force. In the judgments aimed at resolving them, the eventfulness of the facts of the case generates the need for the order to root itself and to justify its own effects on reality. Against this background, hard cases can work somehow like a Kelsenian *Grundnorm*: they legitimate themselves by resorting to a supreme and presupposed normative orientation, as a radical foundation of the validity of the whole order (§ 3).

2. To count *as*: the eventful character of law's narratives and their qualification

With the argumentative pattern presented in the precedent paragraph on the background, let us first bring our focus on the very meaning of the term 'narrative', to then specify which narratives we are addressing in the present essay. In the definition of 'narrative' that we find in the *Routledge Encyclopedia of Philosophy*, aesthete Gregory Currie points out that narratives are first, and foremost, *instrumental*: a narrative is a structure that serves to organize and present a series of facts into a logical sequence: «Narrative – he writes - in its broadest sense, is the means by which a story is told, whether fictional or not, and regardless of medium» (Currie 1998). Indeed, and quite obviously, if we assumed a (too) wide account of the term 'narrative', we would end up detecting them everywhere. Narratives are clearly present in (to mention just a few): novels, films, historical texts, and newspaper articles; broadly speaking, those are all narratives in the above sense. Narrower accounts of the term 'narrative' require the mediatory presence of an author or narrator. The narratives involved in legal discourse certainly fall within this less broad class and constitute a specification of it. Considering the distinction between «Grand Narratives» (those that disappeared with postmodernity, according to Lyotard) and the contextual narratives aimed at recounting series of eventful facts within specific contexts, these last are the narratives at the center of the present essay. I will also refer to them with the expression «procedural narrative» which I borrow from civil procedure Italian scholar Michele Taruffo (2009, 32), in order to indicate the series of facts recounted within the context of a legal trial.

If 'narratives', in the definition given by Currie, are always instrumental to reach some goal,¹ then the narratives within the law, and especially the narratives that present the facts of the case in order to reach a judgment, are *instrumental* to reach a *specific* goal. In order to analyze their specificity, we must consider that the «procedural narratives» of the law are performed within a context of conflict and are aimed at reaching a resolution for such conflict. They are fundamental portions of legal argumentation and, for this reason, *how* facts are presented is crucial in the law. Because of their contextualization inside the procedure, jurist Michele Taruffo claimed that we make experience of the procedural narratives of the law through a «suspension of disbelief» that recalls that described by Coleridge when speaking about poetry and literature (Taruffo 2009, 33). Narrativity in law is never free from its form, function and potential uses: it is always context-laden. For this reason, the presentation of series of facts in the form of narratives within a legal procedure does not correspond to mere storytelling. There is no such thing as «mere» storytelling (Bruner 2002). The presentation of facts as eventful is instead always characterized by a *performative* force which we should consider under the light of philosophy of language and linguistics (Abignente 2012; Searle 1969; Condello and Searle 2017). The narratives presenting the facts of a case within a trial are bound to

¹ This definition should not at all be interpreted in a reductionist way. Within the field of narratology, there is a wide and transdisciplinary literature on the different meanings and uses of the term 'narrative', intended first of all as an activity aimed at fixing the meaning of singular terms, as well as (at a different level) a way to link individuals to society (for instance, through the institutions resulting from speech acts).

their context (Di Donato 2019): they are not *whatever* series of facts, but only *those* series of facts that *count as* narratives. Drawn through the terms of philosophy of language, we could say they have a status function, i.e., they have a particular value/status (i.e., the status of narratives) inside a particular frame/context (i.e., within legal procedure). They are *presented as* narratives to *function as* narratives in order to prove facts and to orient the act of judging. Procedural narratives are, thus, tiles within legal argumentation: in the field of the probable, the plausible and the credible (Abignente 2012, 2), narratives stand at the core of the truth-making method. The field of argumentation and interpretation within which narratives are presented is strictly bound to the consequences produced by the law, by its effects: which is why all narratives must be performed as such and for precise reasons, under commitments.

Argumentation is the field of the plausible, of what is presented *as* credible in order to measure its level of correspondence with legal norms. Symmetrically, credibility (together with plausibility) is also a characteristic of narratives. And yet, this field of plausibility, uncertainty and probability (both at a normative and at a narrative level) produces effects on reality and on daily life. Such intrinsic contradiction generates the need to motivate decisions and to justify all legal operations: hence, the fundamental role played by language in coping with this structural contradiction. In such a context, narratives prepare the process of subsumption of facts within norms. They are the modes of presentation of some facts that are, as already anticipated, eventful: even the choice of the details to be narrated, and the style chosen to narrate, are influenced by the need to present the facts of a case so that they can *count as* relevant facts. In this field of the plausible, argumentation is an art correlated with dialectic (Perelman-Tyteca 1969, 1): where things are uncertain, opinions, values and interests are (or could be) contradictory. Narratives are also dialectic in this sense: they present facts as relevant between two or more parts holding different points of view. They support opinions and convictions. Through the performative act of narrating series of facts *as* relevant, language establishes that something *counts as* something else: in this case, that a series of facts *counts as* an eventful narrative. Procedural narratives are therefore the product of a linguistic construction (Wittgenstein 1953, Austin 1962, Searle 1969): they are *fixed as* narratives. Each case, through its narrative, questions one or more norms or jurisprudential trends; it questions a certain regularity (Wittgenstein 1953). To perform such function, narratives must be presented according to a precise choice of the data (Perelman-Tyteca 1969, 115 ff). The singularity of each narrative questions the *nomos* in a specific way; and the use of language made to reconstruct it as a relevant and eventful series of facts projects a certain perspective on reality, a certain view of the world and a certain idea of justice – given the constant dialectic movement between *nomos* and narrative which reciprocally define each other. If the main function of the procedural narratives is argumentative, then the choice of the terms used in the presentation of the facts of a case is crucial (Pether 2010, 315 ff). In the constructive-performative operation involved in the presentation of the facts of a case, «signifiers, tropes, and narratives» are tiles, components of a broader project that can resonate in the judge and in the audience(s) producing various effects, both just and unjust (Pether 2010). From the perspective of the history of law and language scholarship, the construction of a narrative constitutes always, also, the possibility to adumbrate one kind of subjectivity and to promote another (Pether 2010, 315 ff). And not only does the choice of what terms and what tropes to

use in the presentation of narratives play a crucial function, but also what is excluded, what is *silenced*. What *is not* recounted and presented is inasmuch relevant as what *is*, instead, recounted and presented (Constable 2005): there are also possibilities of justice and injustice that lie in silence, in the correlations among law, language, subjects, violence and society. Examining legal narrativity from this perspective means looking at facts as much as rules, forms as much as substance; it means looking at the language used as much as the idea expressed, evaluating why certain stories are problematic and require a surplus of argumentation (Brooks and Gewirtz 1998). Examined in this manner, law emerges as an artifact revealing a culture through the presentation of the interaction between facts and norms, on the one hand, and the solution found in each singular case, on the other hand. The agreement on the premises, the choice and presentation of facts considered as relevant for the facts of a case, depend on the shared commitment towards certain rules (Perelman-Tyteca 1969, 66). The whole argumentative process is the result of a selection and thus reflects a certain culture and a certain balance between values. The language(s) of the law are «legible surfaces» of a lived world (Goodrich 1990, viii): the argumentative dimension, in which procedural narratives serve to present the factual element of a certain conflict, reflect a determined idea of the function of the law and a cultural account of the law.

It has been claimed that in all its expressions, the law shows an intimate connection with rhetoric and argumentation (Reichman 2010, 377). Narratives shape and represent facts, both reflecting and defining legal cultures, since (in a circular dynamic) stories construct the facts that comprise them (Amsterdam and Bruner 2002); this, as already pointed out in James Boyd White's *The Legal Imagination*, means «to conceive of the law as a rhetorical and social system, as a way in which we use an inherited language to talk to each other and to maintain a community, suggests in a new way that the heart of law is what we always knew it was: the open hearing in which one point of view, one construction of language and reality, is tested against another» (White 1973, 104). The uncertainty, plausibility and probability at the foundations of legal argumentation are thus constitutive of the legal culture of a certain community: since there could be multiple readings of the law, different circumstances generate different ways of (re)presenting the facts of a case (Reichman 2010, 383). In elucidating the ways that rhetoric actively shapes a legal world, critical engagement with legal rhetoric has consistently affirmed a central tenet of language. Since the use of language has the capacity not just to describe the world, but – through the choice of terms and style – also to actively call the world into being, the narration of facts within legal procedure is by all means a way of *making* them, *shaping* them, and *directing* the argument towards a certain orientation. Legal discourse creates the very world that it describes: at the heart of this performative force of legal language, lie political concerns that can involve questions of race, gender, sexuality, class, and power (Reichman 2010, 384). Argumentation makes a text's multiple meanings possible: in particular through the narrative form, some facts are presented as eventful in view of the application of norms, in the continuous and dynamic relationship between *nomos* and narrative (Condello and Toracca 2015, 428 ff).

The narration of the facts of a case, especially in situations where a new or different interpretation of norms is suggested, entails operations such as the selection of details, the stress on certain aspects, the focus on some themes. All these narratological techniques define factual characteristics and qualify them according to their actual or potential connection with a norm. Especially when cases present a higher level of event-

fulness, when they are to some extent extraordinary, the factual characteristics become normative in themselves. They are «promoted» at another level, so that we often mention the name of the case to refer to a certain interpretation of norms or values (e.g., *Brown, Soraya, Cappato*). The sequence of facts, when represented as an eventful story, fixes the unique character of the case. Legal narratives are among the cornerstones of legal science, since they contribute to presenting, selecting and ordering how things were in view of the decision. To this extent, they are the basic grammar of all hermeneutic activity involved in legal judgments (Gaakeer 2017). Narratives are where *is* and *ought* cross each other. In the *Living Handbook of Narratology* (2014), Greta Olson (2014) writes:

Narration plays a central role in legal discourse and permits law to be communicated, adjudicative acts to be justified, and their principles to be explained. Documents such as charges of indictment, formal disciplinary complaints, legal briefs, appellate judgments, and legal commentaries contain narrative elements, as do orally transmitted opening and closing statements, cross-examinations, and judges' announcements of the sentence.

Especially when cases present a peculiarly eventful character, i.e., when they pose specific or complex problems of interpretation and application of norms and principles, language, argumentation, and narrativity are instruments of political engagement that can orient and inform policies and that define a culture at a certain time. In this capacity of depicting certain frames at certain times, in other words in this capacity to define the cultural attitude towards law and justice of a certain community, law resembles literature in its being a mainly linguistic device, working through tropes and depicting reality (Sarat 2010, 43). The power of rhetoric and the appeal of narrative are integral parts of the way we conceptualize, organize, historicize, and communicate ideas about the world and our place in it: observing the form of the procedural narratives in legal cases creates an opportunity to focus on the interconnections between theories of language, of subject formation, and of law on the one hand and their consequences on the cultural orientation of communities on the other hand (Sarat 2010, 35). As mentioned already in various passages above, narrativity is the form that filters the details that can be relevant in order to build a correlation between *nomos* and reality. Narrating, i.e., reconstructing a series of events that are legally relevant, is an act that involves a selection. A selection that is aimed at meeting the qualification of the facts as legally relevant, under a scheme which is that of the *nomos*. This passage is crucial in order to understand how narrativity actually works: in the distinction and relationship between the story or series of events presented, and the discourse that presents it, the qualificatory nature of the law plays a central function.

If the facts of a case do not fall under a model or norm that produces certain consequences, if they do not meet a scheme of qualification that differentiates them from irrelevant (other) facts, then they would not be recounted or represented within the type of narratives we are discussing here, i.e., those procedural narratives reconstructing the facts of a case within a legal procedure. Eventfulness is central to the qualification of facts within a procedure and consequently for their narration.

The eventful character of facts concerns the separation between factuality and normativity, and it is a product of the law (Gazzolo 2019, 228). For instance, the death of a person is a fact that becomes relevant only when it falls under a category of facts

qualified by the law: thus, it might fall in that category when it occurred under specific circumstances or when it might have been caused by the act of another person (homicide). And, as a matter of fact, only when the death of a person has occurred under certain circumstances does it produce consequences – similar events, in other words, produce different consequences: some of them can be qualified as legally relevant, while others cannot. Thus, not all eventful series of facts are *qualified* (or *qualifiable*) by the law: what might be the most tragic event in the life of a mother, or of a son (death), might still fall silently in the archive of the (legally) forgotten events; and yet, there might remain traces at a social relevance, since events acquire also a social relevance within various discourses.

On the contrary, a likewise painful event like the death of man connected to a potential suicide (see case «Cappato» recently decided by the Italian Constitutional Court), when it involves a problem of qualification and a relative problem of the presentation of the series of events preceding the eventful fact, becomes extremely relevant from the legal perspective. The eventful character of the procedural narratives is, to this extent, quite *artificial*: it is technically eventful only if it can produce consequences at a legal level. Given the strict interconnection between facts and their qualification, we could say that procedural narratives are influenced by their potential further qualification and they cannot be detached from it. The scholarly differentiation between *Sein* and *Sollen* theorized by Kelsen in his *Pure Theory of Law* (1934; 1969) can help understanding the nature of the interconnection thus represented: within such differentiation, law (in particular legal procedure) is concerned not with the series of events *per se*, but with its qualification, its meaning, and with the consequences it could produce in the interconnection with the normative sphere. The «importance of being eventful», from the legal point of view, is the result of the the potential interaction with the schemes of qualification: not just the (whatever) facts, but the facts that might count in view of their value and meaningfulness. The determination of facts as legally relevant is what produces consequences; this is a specificity of the law. In literature, where narrativity also plays a central function, the problem of qualification and relevance is absent.

Eventfulness is, thus, *artificial*: it constructs the facts and makes it possible to define them as potentially falling under legal qualification. Events, otherwise, would be meaningless. If narrativity, for the aforementioned reasons, has been defined as a cultural device, capable of conveying knowledge and orienting opinions, narrativity within the law and specifically the narrative character of the facts recounted in procedures is even more of a cultural device. The eventfulness and its representation bring ordinary facts into the life of the law, endowing them with normative meaning, since the significance of narratives originates in the process of subjecting ordinary data to the basically rhetorical and narrative structure of the procedure aimed at *making* the procedural truth. Narrativity translates the necessity to establish what can be *considered as* the truth. The eventfulness is produced according to the qualification and, for this reason, only facts that are legally non-trivial, i.e., that involve a relevant change of a precedent state of affairs, fall under the category of «eventful». In view of the outcome of the case, how the narratives are presented, by whom and through which selection of details and aspects – influence the final decision of adversarial trials (Jackson 1988). The form, completeness and adherence of the stories recited in trials and their compliance with norms determine whether they will be regarded *as* plausible in that they are context-laden: it is an audience culturally connotated that must be persuaded. In the frame of a trial, narration involves

– besides ordinary series of eventful facts – *if-plots*: hypothetical narratives can also integrate the narrative space within argumentation. The reconstruction of facts underlines their eventfulness also in relation to other potential realizations of the same event, evidentiating the unique character of one series of facts among others.

Against this background, qualification is a crucial passage not only because it allows the inclusion of a specific situation under a classificatory scheme, but also because it is in view of such qualification that some narratives can generate a short circuit: they were not foreseen, or they present some extraordinary aspect that makes the qualification more complicated. As I shall discuss in the further considerations, these narratives produce a critical situation that often translates them into exemplary cases, characterized by such a degree of eventfulness that they are capable of producing an «earthquake» in the qualification and end up being considered, themselves, as norms. This gradual and potentially increasing eventful nature is at the core of the redefinition and re-orientation of the identity of legal cultures.

3. Shades of eventfulness: shaping legal cultures

Obviously, facts can be eventful for different reasons. As anticipated in the conclusive remarks of the precedent paragraph, it is through narration that facts can be (re)presented as relevant since they produce a collision with the universe of the *nomos*. Some facts are more eventful than others: within specific contexts, the sequence of facts reconstructed in the procedure is such that a surplus of interpretive activity is required (see also, as far as the specific eventfulness of literary narratives is concerned, Hühn 2013 and Olson, 2014). How facts are narrated - what literary theory would name the 'form' (Lukács 1971) - is what characterizes the fact as eventful. When the eventfulness of the facts of a case is at a higher level, the distinction between *ought* and *is* becomes more blurred, for instance when specific cases acquire the force of a paradigm: like in the famous case *Brown* in the United States (1954) or, for instance, in the Italian Constitutional Court *Cappato*, recently decided (2019). There, the level of eventfulness is such that the singular sequence of events gains normative force itself: with regard to this type of cases, we could say that the *sequence of events* and *its form* end up working as paradigms for other cases. Hence, the title of the present essay, «The Importance of Being Eventful», a genuine pun through which I intend to claim that, under particular conditions, the differentiation between *nomos* and narrative is blurred to the extent that narrativity can work *as* normativity. And if, from a theoretical point of view, the distinction between facts and norms remains always quite sharp, the representation of facts in the argumentation can produce a certain confusion between the two dimensions. Indeed, in narratology studies the term 'event' refers to a particular change of state of a certain condition, in which the sequentiality of facts – i.e., their serial and relevant connection – constitutes the narrative *as* eventful, by differentiating it from other series (and less relevant) of interconnected facts (Hühn 2013). Sequentiality – i.e., how facts occurred, how and why they were interconnected – is a consequence of the ordering function of time within narrativity. Not only have things happened in a specific way, but their eventful-

ness is a direct consequence of their timing (Condello and Toracca, 2015; Condello 2018).

Let us take the example of two cases decided by the European Court of Justice concerning a religious discrimination suffered by two women in their workplace (*Achbita v. G4S5* and *Bougnaoui v. Micropole SA*). In these two cases (2017), the ECJ has dealt with the complex problem of how to interpret, in light of European law, the dismissals of two Muslim women that had refused to take off their veil during working hours. The cases both involved the conflict between rights and freedoms; they both presented specific factual characteristics that made them fall into the category of *hard* cases. In *Achbita v. G4S5* the ECJ decided to exclude the direct discrimination and sent the files to a different level of jurisdiction to verify if there was any indirect discrimination. In *Bougnaoui v. Micropole SA* the Court decided not to qualify the type of discrimination and focused more on the fundamental role of the religious freedom of the woman, sanctioning the idea that her religious belonging could harm the clients of the company for which she was working. When the cases are particularly eventful, so that they require a surplus of interpretation and a variation in the range of application of norms, the outcome of the single conflict is measured on the unique characteristics of the singular situation. Both cases, and both decisions, reflect a certain idea of the balance between rights and freedoms in Europe: and yet, they are also different. Standing at the intersection between the narration of the events, the norms, and having occurred at a specific time within a specific space. That series of eventful facts, at a precise time, entails the definition of concepts such as 'dignified life'. Diverse shades of eventfulness lead to defining the content of concepts relevant in legal cultures at a specific time and in a specific space (Condello and Rinaldi Ferri, 2018). Particularly eventful cases lead to establishing new relations between factuality and normativity (Perelman and Tyteca 1969, 355); on top of the performative character of ordinary language, and of legal language in particular, *hard* cases showing specific factual characteristics that make them *eventful* require an «interpretive exposure» that tells something about the context in which the hard cases are decided. By becoming exemplary, the series of events might be generalized and provide illustration for other cases, encouraging imitation (Perelman and Tyteca 1969, 350). When the level of eventfulness is such that a surplus of «interpretive exposure» is required, it often means that there might be a fundamental disagreement between the parts and a fundamental contrast between interests represented in the conflict. The solution found for the hard, eventful case shows a certain equilibrium and balance between values, either working as a new exception or confirming a previous regularity. The higher level of eventfulness requires the adjustment of the content of norms and can achieve a new function of the case, as normative, fixing a continuity through the eventfulness of the singularity (Perelman and Tyteca 1969, 356). Particularly eventful facts can validate or invalidate a determined rule: argumentation is, to a considerable extent, concerned with getting audiences to be conscious of the invalidating fact - that is, to recognize that the facts admitted by a certain audience or community contradict rules which the same audience or community also admits.

Why can we say that cases whose narratives present a higher level of eventfulness contribute to «shape legal cultures», as suggested by the title of the present paragraph? When questioned by facts which present a complex character that makes them eventful and, for this, also difficult to be associated to a norm or jurisprudential trend, legal interpreters are basically questioned about the very function of the legal order at a certain

time. In order to find coherent answers, as the cases aforementioned have proved, judges and interpreters could resort to different principles and to different argumentative processes. The responses to the questions posed by particularly eventful cases, i.e., by *hard* cases, define the content of legal concepts and question their uses. The justificatory process in those situations is more complex and it requires – together with the surplus of «intepretive exposure» - a higher performative commitment in the use of language. Often, the particularly eventful cases ask for a re-interpretation of certain terms and concepts (e.g., «dignity») and such performative acts must be justified through argumentation. In the justification of the different treatment of similar cases, or of the similar treatment of different cases, language plays a crucial function (Perelman and Tyteca 1969, 356). When phenomena, both ordinary and extraordinary, both eventful and uneventful, are subsumed under a singular concept, their assimilation or differentiation requires justification:

the stronger the desire to subsume the examples under a single rule without modifying it, the greater the importance of the role played by the use of language for assimilating the different cases. This is especially true in law. In the making of a legal decision, the assimilation of new instances is not just a matter of passing from the general to the particular. It also contributes to the foundation of juridical reality, that is, of norms, and, as we have already seen, new examples react on earlier ones and modify their meaning. It has rightly been emphasized that through what is called *projection* this assimilation of new cases that were unforeseeable or not taken into consideration when the law was elaborated is effected quite easily, without recourse to any technique of justification. Language is often one step ahead of the jurist. In turn, the jurist's decision—for language does not impose a decision on him, but facilitates his task—may react on the language. In particular, his decision may have the result that two words which could, at a given time, be regarded as homonyms will be interpreted as stemming from a single concept (Perelman and Tyteca 1969, 357).

The decision in such cases instantiates the legal culture at a certain time and within a certain legal order, shaping its identity through the treatment of the narratives (Bamberg 2012). The decisions taken before complex and eventful cases define the «juridical mitosis» of a certain age (Cover 1983, 15), by constituting a community about what is *just* and *unjust*, about what is *right* or *wrong*. The operation of «juridical mitosis» is never monolithic or neutral. Many discourses converge: since language, and especially legal language, is characterized by multiplicity of meaning. Never only one, but always many worlds are created by the performative force of the interpretation and argumentation about the exceptional character of some cases. To this extent, different shades of eventfulness interpellate the law in its self-positionement and self-definition as authoritative system. In finding answer to complex and eventful cases such as *Brown* (US Supreme Court, 1954) or *Cappato* (Italian Constitutional Court, 2019) a reflexive process is involved that defines the direction of a legal culture in relation to its tradition and its future projections. Reflexivity is a direct consequence of the eventfulness of the narratives presented in the case: the facts, when they count as meaningful facts, interpellate legal interpretation in the present but they might require references to past or fictitious time-space dimensions, making other facts relevant for the decision,

pointing towards the meaningful character of the relationships linking facts and situations. It is also against this backdrop that the very act of narrating, in recent decades and especially in narratology studies, has established itself as a privileged site for *identity* analysis (Bamberg 2012). The narratological approach has proved very effective in literary studies, since it seems that the emphasis on stories leads to reflect on how people, as agentive actors, position themselves and how they imagine the society they live in. The reflexivity is common to both literary and legal narrativity (Condello and Toracca, 2015): in presenting facts as eventful, stories construct a sense of what the law means or should mean, and also project a certain representation of the world (Cover 1983). Legal discourse is inextricably bound to its historical context and eventful narratives and cases *represent* such bond:

the insight that legal discourse is not autonomous but inextricably bound to its historical context can be attributed to many sources including Friedman (1969), who argued that a legal system is indivisible from the legal culture through which it is understood, and Cover (1983). Cover contended that while law may give the appearance of autonomy and rationality, it is never free from the narratives that lend it sense: “No set of legal institutions or prescriptions exists apart from the narratives that locate it and give it meaning. [...] Once understood in the context of the narratives that give it meaning, law becomes not merely a system of rules to be observed, but a world in which we live” (Cover 1983: 4–5). On the one hand, law is rendered comprehensible through narrative. On the other hand, law is embedded in the cultural narratives that frame it. Hence legal prescriptions cannot be separated from the narratives that situate, explain, and legitimize their prerogative. As a consequence, Cover argues that not only do trials represent contests between narratives, but so do all legal texts as they are interpreted, re-interpreted, and applied over time. Arguments for a given interpretation then rest on founding myths about whence the law derives its authority to enact the state’s rule or violence (Olson 2014).

In its most general sense, the «legal culture» addressed here could be defined as a way of describing relatively stable patterns of legally oriented social behaviours and attitudes (Nelken 2004, 28). If we assume, following Cover and drawing back on the preliminary remarks in this essay, that the law reflects a tension between what is and what might be (Cover 1983, 39), then the *direction* taken at certain stages in legal adjudication – in its being context-laden and because of its specifically performative character - can be capable of describing the hermeneutic horizon proper of a determined legal culture at a certain time. In front of eventful narratives, in fact, the level of commitment is higher in attributing a certain value to a certain norm, because the tension between contrasting interests might be at its highest. In the «normative universe», legal meaning is created by simultaneous engagement and disengagement, by the choice between contrasting possibilities (Cover 1983, 123). Different shades of eventfulness interpellate legal meanings at different levels: in front of hard cases, the definition of meanings entails subjective commitment and the understanding of the questions posed by the series of facts. Such operation requires, itself, a turn towards how that norm came to be, what objectives it aims to realize, and what values are central at a certain time and within a certain context. Eventfulness is thus a fundamental aspect of factuality as well as of legal culture, since, because of it, legal meaning is debated and the *nomos* is opened to new possibilities and new worlds.

References

- Abignente, Angelo. 2012. *Argomentazione giuridica*. In Atlante della Filosofia del diritto, edited by Ulderico Pomarici, Vol. II. Torino: Giappichelli.
- Amsterdam, Anthony G. and Bruner, Jerome S. 2002. *Minding the Law*. Cambridge: Harvard University Press.
- Austin, John L. (1962). 1975. *How to do things with words*. Cambridge: Harvard University Press.
- Bamberg, Michael. 2012. "Identity and Narration". In *The living handbook of narratology*, edited by Peter Hühn, Peter et al. Hamburg: Hamburg University. URL = <http://www.lhn.uni-hamburg.de/article/identity-and-narration>.
- Brooks, Peter and Gewirtz, Paul. 1998. *Law's Stories: Narrative and Rhetoric in the Law*. New Haven: Yale University Press.
- Bruner, Jerome S. 2002. *Making Stories. Law, Literature, Life*. Cambridge: Harvard University Press.
- Condello, Angela. 2018. "Exemplarity: Story, Time and Gesture of a Threshold". *Law and Literature* 30: 3, 437-448.
- Condello, Angela and Rinaldi Ferri, Benedetta. 2018. *Umanità come percorso individuativo. Diritto, esperienza, differenza*. In *Femminismo ed esperienza giuridica. Pratiche, argomentazione, interpretazione*, edited by Anna Simone and Ilaria Boiano. Roma: Efestò.
- Condello, Angela and Toracca, Tiziano. 2015. *L'esemplarità come forma normativa. Alcune riflessioni tra diritto e letteratura*. In *La vita e le forme. Il diritto e le altre arti*, Atti del VI Convegno Nazionale ISLL, Urbino 3-4 Luglio 2014. Edited by Luigi Alfieri and M. Paola Mittica, 423-442.
- Condello, Angela and Searle, John R. 2017. "Some Remarks about Social Ontology and Law: An Interview with John R. Searle". *Ratio Juris* Vol. 30 No. 2, 226–231.
- Constable, Marianne. 2005. *Just Silences*. Princeton & Oxford: Princeton University Press.
- Cover, Robert. 1983. "The Supreme Court, 1982 Term. Nomos and Narrative". *Harvard Law Review* 1983-1984, 4-68.
- Currie, Gregory. 1998. *Narrative*. Routledge Encyclopedia of Philosophy, Taylor and Francis, <https://www.rep.routledge.com/articles/thematic/narrative/v-1>.
- Di Donato, Flora. 2019. *The Analysis of Legal Cases: A Narrative Approach*. London: Routledge.
- Gaakeer, Jeanne. 2017. "The Perplexity of Judges Becomes the Scholar's Opportunity". In Special Issue - Law's Pluralities, edited by Greta Olson and Franz Reimer. *German Law Journal* Vol. 18 No. 02, pp. 331-362.

- Gazzolo, Tommaso. 2019. *Fatto. Realtà empirica e qualificazione giuridica*. In *Dimensioni del diritto*, edited by Alberto Andronico, Tommaso Greco, Fabio Macioce. Torino: Giappichelli.
- Goodrich, Peter. 1990. *Languages of Law: From Logics of Memory to Nomadic Masks*. London: Weidenfeld and Nicolson.
- Jackson, Bernard S. 1988. *Law, Fact and Narrative Coherence*. Merseyside: Deborah Charles Publications.
- Hühn, Peter et al. (eds.). 2013. *The living handbook of narratology*. Hamburg: Hamburg University. URL = <http://www.lhn.uni-hamburg.de/>.
- Kelsen, Hans (1934). 2009. *Pure Theory of Law*. Translated by Max Knight. Clark: Law-book Exchange.
- Lukács, Georg (1914-1915). 1971. *Theory of the novel*. Cambridge: MIT Press.
- Nelken, David. 2004. "Using the Concept of Legal Culture". *Australian Journal of Legal Philosophy*, 29, 1-26.
- Olson, Greta. 2014. "Narration and Narrative in Legal Discourse". In *The living handbook of narratology*, edited by Peter Hühn et al. Hamburg: Hamburg University. URL = <http://www.lhn.uni-hamburg.de/article/narration-and-narrative-legal-discourse>.
- Perelman, Chaim, and Olbrechts-Tyteca, Lucie (1958). 1969. *The New Rhetoric. A Treatise on Argumentation*. Notre Dame: University of Notre Dame Press.
- Pether, Penelope. 2010. *Language*. In *Law and Humanities: an Introduction*, edited by Austin Sarat, Matthew Anderson, Catharine O. Frank. Cambridge: Cambridge University Press.
- Reichman, Ravit. 2010. *Narrative and Rhetoric*. In *Law and Humanities: an Introduction*, edited by Austin Sarat, Matthew Anderson, Catharine O. Frank. Cambridge: Cambridge University Press.
- Sarat, Austin, Anderson, Matthew and O. Frank, Cathrine (eds.). 2010. *Law and Humanities: an Introduction*. Cambridge: Cambridge University Press.
- Searle, John Rogers. 1969. *Speech acts. An Essay in the Philosophy of Language*. Cambridge: Cambridge University Press.
- Taruffo, Michele. 2009. *La semplice verità. Il giudice e la costruzione dei fatti*. Roma-Bari: Laterza.
- Wittgenstein, Ludwig. 1953. *Philosophical Investigations*. Transl. by Elizabeth Anscombe. New York: Macmillan Publishers.
- White, James Boyd. 1973. *The Legal Imagination*. Chicago: University of Chicago Press.

A departure in the jurisprudence of the European Court of Human Rights as part of a narrative structure

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Abstract

This paper analyses a departure in the jurisprudence of the European Court of Human Rights from a narratological perspective. In particular, a departure is being considered as part of a larger textual structure—a chain of cases—instead of being restricted only to the text of a particular judgment which contains a departure. At the level of a chain of cases the narrativity of judgments is revealed through certain characteristics (theme, narrator, etc.). In order to demonstrate how these characteristics help to understand the logic of a departure, the paper analyses how a departure is textually constructed in one of chains of cases of the European Court of Human Rights.

Key words: Departure, Narrative, *Law and Narrative*, European Court of Human Rights, Chain of cases.

1. Introduction

The approach of the European Court of Human Rights (hereinafter, ECtHR, or Court) to changing its case-law is usually addressed from a legal perspective. The latter implies attention to the content and quality of the legal arguments employed to depart from the established case-law. However, the ECtHR is an international court which has its own manner of developing the jurisprudence of the European Convention on Human Rights (hereinafter, Convention), and it seems that this manner does not resort only to the legal content of judgments. A departure also has a textual manifestation which relates to the way in which the Court writes about it. This textual perspective on a departure has been somewhat ignored in the ECtHR studies.

This article is aimed at showing the textual aspect of departing from established case-law by using a narratological approach to the Court's jurisprudence. The choice of this approach can be explained by the fact that in the process of interpretation of the

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Convention the Court tells stories about the way it deals with different legal issues; and in order to give certainty and logic to such stories the Court uses certain narrative techniques. Thus, by telling about these issues the Court creates various narratives—chains of cases or jurisprudential lines. Departure is always part of these narratives and its textual shape depends on *what* was previously said and *how* it was said in a specific narrative. In order to demonstrate this, I will analyse a particular chain of ECtHR cases as a narrative which contains a departure from previous interpretations of the Convention.

This article consists of three sections. The *first* section gives a legal perspective on the problem of departure. More precisely, it shows in what way the textual construction of a departure is influenced by the special legal manner of departing employed by the ECtHR. This section also explains the terminological choice of the concept of ‘departure’.

The *second* part of the article locates this study within the *Law and Narrative* field of research. This section is mainly devoted to the analysis of the characteristics of the ECtHR’s chain of cases which allow the showing of its narrativity. Discerning and explaining these characteristics enable the following examination of the narrative structure of the specific chain of the Court’s cases in the next section.

And finally, the *third* section contains the analysis of the chain of the Court’s cases on transsexuals’ right to full recognition of their post-operative gender. The section is aimed at showing—in a specific example—how a departure is textually constructed within a certain narrative structure.

2. What is a departure in ECtHR jurisprudence? (legal perspective)

The ECtHR’s development of Convention provisions is a complex process of balancing between the need for adaptability and striving for stability in interpretation. Within this process, a departure from established case-law is a mechanism which allows the Court to introduce changes in the understanding of the human rights protected by the Convention. The main theme of this contribution is to explain the textual side of this mechanism. However, before addressing this main topic, it is necessary to clarify which legal phenomenon is discussed here. This need is justified for two reasons. The first is a *terminological* one. The second is in the special *manner* of departure employed by this particular court. That *manner* is ‘shaped’ and determined by a way of following previous judgments inherent in the ECtHR. These two reasons, as well as why they are important to the topic of the present article, will be discussed in this section.

2.1 Terminology

In the existing literature there is no uniform terminology with regard to the ECtHR’s practice of changing case-law. In this connection, it is essential to argue *why* the term ‘departure’ is being used in this paper. Some scholars employ another term—‘overruling’ (Mowbray 2009; Popović 2011: 91), which is not strictly applicable since it has clear connections to the legal obligation of a court to follow its previous decisions (Lamond 2016), which is not the case for the ECtHR. Judge Pellonpää in his article on continuity and change in ECtHR case-law uses probably the most neutral concept in this regard—‘change’ (Pellonpää 2007). However, in some parts of his article the word ‘departure’ appears as well (Pellonpää 2007: 410). One of the most comprehensive studies of this

issue by Katia Lucas-Alberni, conducted in French, uses the term ‘revirement’ (Lucas-Alberni 2008) which can be translated in English as ‘turnaround’.

In the light of the existence of this diverse terminology, this contribution will resort to the term which the Court itself uses in its judgments. When the ECtHR explicitly announces a change in case-law it employs the verb ‘depart’¹ and sometimes uses the noun ‘departure’.² Also, ‘depart’ seems more appropriate than ‘overrule’ with regard to non-binding precedents according to the general doctrine of precedent (Bronaugh 1987: 242).

As we can see from these arguments for using a certain concept to denote a change in the Court’s interpretation of the Convention, this concept depends on the manner in which the Court follows its previous judgments. To put it more clearly, the concept used to signify a change is dependent on the concept that is used to denote stability in interpretation. Returning to the above, for example, ‘overruling’ cannot be used with regard to the ECtHR. ‘Overruling’ is a concept employed to signify the change of a legal position of a court within the doctrine of *stare decisis* that is not relevant to the ECtHR. The fact that the ECtHR does not have a legal obligation to follow its previous judgments has not only terminological consequences, it also affects the actual *manner* of changing the jurisprudence by the Court. Thereby, the ECtHR has a *special manner* of departing from previous interpretations of the Convention; and this manner is determined by the Court’s attitude towards previous interpretations.

2.2 The special manner of departing

It should be noted that this article is not aimed at defining and analysing a *legal* essence of how the Court departs from established case-law. My only aspiration here is *to show in what way the textual construction of a departure is influenced by the special legal manner of departing*. In the analysis of a text of judgments, this article proceeds from the premise that there is a certain amount of effort being invested by the Court in making the departure smoother. This effort is mainly manifested in *how* the Court writes its texts. But talking about this effort is only possible when we admit that the Court usually follows its own previous judgments. Consequently, a departure is an ‘anomaly’ for a jurisprudential line since it implies disagreement with past texts and thus a textual resistance to them. To understand whether this is true, we need to resort to the examination of how the ECtHR follows its interpretations of the Convention laid down in prior cases.

Sometimes the Court itself enunciates *expressis verbis* the basic principles on how it deals with its case-law. The first case where the ECtHR mentions a precedential value of previous judgments is *Ireland v. the United Kingdom* (1978):³

The Court’s judgments in fact serve not only to decide those cases brought before the Court but, more generally, to elucidate, safeguard and develop the rules instituted by the Convention, thereby contributing to the observance by the States of the engagements undertaken by them as Contracting Parties (Article 19).⁴

¹ See, for instance: *Cossey v UK* (1990) Series A no 184, para 35; *Beard v UK* App no 24882/94 (ECtHR, 18 January 2001), para 81.

² *Cossey v UK* (1990) Series A no 184, para 35; *Martinie v France* ECHR 2006-VI, para 28.

³ It should be highlighted that this quote suggests the normative power of judgments rather than their precedential value but as will be explained further, in the ECtHR, these two aspects are closely related to each other.

⁴ *Ireland v UK* (1978) Series A no 25, para 154.

Then the Court became more explicit in *Cossey v. the United Kingdom* (1990) by stating that,

the Court is not bound by its previous judgments; indeed, this is borne out by Rule 51 para. 1 of the Rules of Court. However, it usually follows and applies its own precedents, such a course being in the interests of legal certainty and the orderly development of the Convention case-law. Nevertheless, this would not prevent the Court from departing from an earlier decision if it was persuaded that there were cogent reasons for doing so.⁵

In the case of *Beard v. the United Kingdom* (2001) the ECtHR slightly changed its formula regarding the issue:

The Court considers that, while it is not formally bound to follow any of its previous judgments, it is in the interests of legal certainty, foreseeability and equality before the law that it should not depart, without good reason, from precedents laid down in previous cases.⁶

An even bolder statement regarding precedent can be found in the case of *Pretty v. the United Kingdom* (2002):

The applicant's counsel attempted to persuade the Court that a finding of a violation in this case would not create a general precedent or any risk to others. It is true that it is not this Court's role under Article 34 of the Convention to issue opinions in the abstract but to apply the Convention to the concrete facts of the individual case. However, judgments issued in individual cases establish precedents albeit to a greater or lesser extent and a decision in this case could not, either in theory or practice, be framed in such a way as to prevent application in later cases.⁷

What one can conclude from the above-cited passages is that the ECtHR is not legally bound by its case-law. Thus, the doctrine of *stare decisis* is not applicable to the Court. However, for several reasons⁸ the ECtHR is striving to be consistent in its interpretation of the Convention. This aspiration of the Court to create consistency in Convention interpretation is also present in the judges' reflections on the matter of following previous judgments. The first President of the new permanent Court, Luzius Wildhaber in his study on precedent in the ECtHR observes that '[t]he normal course, in the European Court of Human Rights just as elsewhere, is to follow a precedent' (Wildhaber 2000: 1538). Another former judge of the Court, Dragoljub Popović also acknowledges the usual practice of following past judgments:

⁵ *Cossey v UK* (1990) Series A no 184, para 35.

⁶ *Beard v UK* App no 24882/94 (ECtHR, 18 January 2001), para 81.

⁷ *Pretty v UK* ECHR 2002-III, para 75. In this quote, one sees a significant distinction between two roles the ECtHR plays. The first and primary Court task is to apply the Convention to the concrete facts of the individual cases and the second one is to develop the content of the rights protected by the Convention in a more abstract way. See for instance: (Gerards 2018: 506–507). This paper does not deal with this distinction directly. However, it should be noted that within this paper a departure relates to a change in the interpretation of the provisions of the Convention, that is to a change of the principles and standards.

⁸ These reasons by themselves are not the subject of this paper.

The Court has so far usually and constantly followed its own precedents. The pattern applied by the Court while developing such a practice corresponds for the most part to the one known in the Anglo-Saxon legal family (Popović 2011: 77).

In the light of the absence of a legal obligation to follow previous judgments and the international character of the Court, there are different terms employed by scholars to describe the manner in which the ECtHR uses its jurisprudence and ensures stability in Convention interpretation. Indicatively, authors have suggested the terms a ‘limited doctrine of *stare decisis*’ (Sundberg 1987: 631), ‘non-binding precedent’ (Balcerzak 2004: 139), ‘precedent binding *quasi de iure*’ (Liżewski 2017), ‘principle of *res interpretata*’ (Arnardóttir 2017; Bodnar 2014; Giannopoulos 2019). From the whole range of the suggested terms, the principle of *res interpretata* stands out as it is the only one which is about the external value of precedent. The principle of *res interpretata* is not directly about the issue of following previous judgments in the Court, that is the internal value of precedent. This principle is about the effect of the Court’s judgments on the Member States which were not a party to proceedings in a particular case. According to Article 46 § 1 of the Convention final judgments of the Court are only binding on the States that were parties to the proceedings.⁹ This means that the final judgments of the Court have *res judicata* status and are binding *inter partes* (Bodnar 2014: 226). However, the ECtHR judgments should be taken into account by all the States even if they were not parties to the proceedings. Consequently, they have also *res interpretata* status:

States that were not a party to proceedings in a case before the European Court of Human Rights should take into account judgments and decisions issued with respect to third states. Indeed, judgments and decisions establishing a new legal principle or standard should have a persuasive authority for other states. They should be an incentive for state parties to change their law or practices in order to avoid similar issues being brought against them. Such judgments should have a *res interpretata* effect, a notion to be distinguished from the typical *res judicata* effect of judgments (Bodnar 2014: 223).

But what is important for this paper is that *res interpretata* may also be considered in the light of internal precedent value as noted by some researchers:

The principle of *res interpretata* rests on the simple truth that despite the fact that ECHR law contains no doctrine of binding precedent, once the ECtHR has pronounced on an issue, it is to be expected that the Convention will be interpreted and applied in the same manner if the Court is confronted with the same issue again in a different state (Arnardóttir 2017: 823–24).

Res interpretata demonstrates the idea of an ‘interpretative envelope’ which the Court creates around the Convention. According to this principle, the Convention could not be seen otherwise than in this ‘envelope’ of the Court’s jurisprudence. We cannot take the Convention out of the ‘envelope’, but in order to comprehend what this ‘envelope’ means the Member States should be able to see it holistically with a minimum of dissonance. As such, *res interpretata* also relates to the efforts of creating consistency in Convention

⁹ Art. 46 § 1 ECHR reads as follows: ‘The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties.’

interpretation. As a former President of the Court Dean Spielmann observed regarding this principle,

...the European Court is very conscious of this broad impact of its judgments. From this follows the need for a case-law that meets a high degree of consistency, and develops in an orderly and persuasive manner (Spielmann 2013: 4)

For our purposes, an important conclusion from the above analysis is that no matter what we call it, the Court is trying to create consistent case-law by attaching a certain normative weight to previous interpretations and not departing from them without reason. But what is also true is that the ECtHR is honest in admitting the fact that case-law may be changed, and the manner of such a change affects the Court's image as an institution.

The combination of a relative freedom to change case-law and the aspiration to follow previous judgments leaves a lot of room for a textual design of judgments which should balance the two options. As a consequence of this, it is sometimes hard to categorise the ways in which the Court introduces changes into the jurisprudence. Hence, within ECtHR studies, one often encounters the opinion that the ECtHR's manner of departing from the previous approach lacks clarity 'as to which judgments and decisions are intended to denote a change in the case-law' (Pellonpää 2007: 420) and as to the articulation of such a change in a judgment (Mowbray 2009: 201). In this sense, within this topic, the main research interest revolves around the legal reasons which the Court employs for departing and around a clear articulation—in a judgment—of the fact that a departure has been made. However, the special manner of departing makes a textual construction of judgments a promising perspective for understanding the ECtHR's approach to departures. Thus, in this article I am more interested in how the mechanism of departure is determined by the manner in which the Court *writes* about a specific category of cases; and how narrative logic helps the Court to articulate the departure. The next section will show what characteristics one can use to detect the narrativity of the Court's chains of cases and how these characteristics enrich one's vision of departure.

3. Chain of cases as narrative

In this article the narrative analysis of a chain of cases is conducted within the framework of *Law and Narrative*—an interdisciplinary field which combines different approaches to legal narrativity (Cover 1983; Delgado 1989; Weisberg 1996; Brooks 2006; Slaughter 2007; Bricker 2016; Stern 2018; Olson 2018; Gaakeer 2019; Di Donato 2019). The perspective which is taken here relates to a type of inquiry which assumes the narrativity¹⁰ of judicial opinions given their feature of making references to previous cases in order to justify a present decision (Bricker 2016). In addition, my vision of a chain of cases is greatly inspired by the famous metaphor of the 'chain of law' proposed by Ronald Dworkin (1982).¹¹ In Dworkin's chain each judge is like a novelist in a literary exercise, the novel being written by many novelists in turn. Thus, the task of each judge is to continue her predecessors, keeping in mind the *collective novel* written so far and in that way being a partner 'in a complex chain enterprise' (Dworkin 1982: 542–43). However, unlike

¹⁰ "Narrativity" denotes a degree to which a text or object possesses qualities that elicit thinking structures that help to explain it as a narrative' (Olson 2015: 44).

¹¹ For a discussion of Dworkin's essay see (Fish 1982).

Dworkin's essay, the focus of this article is not on the judges as writers and their interpretative activity but on the collective novel as a text written by them.

The concept of a chain of cases makes it possible to see a particular legal issue within the ECtHR case-law as a holistic enterprise. To find out how a certain legal problem has been treated by the Court one should look at a sequence of judgments¹² which deal with this particular problem. Such judgments are instances of the legal interpretation of the Convention that come one after another. These instances of legal interpretation are bound together by constant appeals to previous judgments—by retelling what has been decided in the past and telling what impact this past has on the Court's present decision. These appeals to the past are storytelling elements and without them one would not have been able to grasp a certain legal issue in the wholeness of its development within the Court's case-law. This is what Andrew Bricker calls the 'latent narrativity of judicial opinions':

In effect, the courts justify legal outcomes by invoking precedent, thereby placing decisions within a specific legal-narrative structure. Judicial opinions thus possess a kind of latent narrativity: the causal logic of precedent simultaneously employs the building blocks of plot and legal storytelling while repressing, through an appeal to reason and analogy, the historical-narrative basis of precedent itself (Bricker 2016: 322).

In this way, all the legal formalities—which surround the use of previous judicial opinions in courts—obscure more basic features of the courts' logic employed to justify their present decisions. This logic is a narrative logic that implies cause-and-effect relationships applied to a sequence of events (Fludernik 2009: 2). When dealing with a specific legal problem, judges use narration in order to put this problem in a certain context, to place it within a temporal dimension connecting this problem to the past and probable future. Narration attaches a form and weight to judges' arguments.

Narrativity inherent in judicial opinions is best seen exactly at the level of a chain of cases which can be represented as a certain narrative structure. On the basis of the analysis of the texts of the Court's judgments, I have educed a range of their characteristics which allows showing their narrativity. These characteristics help to discern better how a chain of cases functions as a textual phenomenon. These are: *temporality*, *theme*, *narrator*, *metanarrative comments*, *possibility of alternative narratives*, and *narrative certainty*. This list is by no means exhaustive, but it is sufficient for analysing the chain of cases as a narrative within the framework of this article.

Below, these characteristics will be disclosed in more detail in order to illustrate how one can see the Court's activity in creating texts from a different perspective by paying more attention to the logic of the narrative development and less to the content of legal argumentation. This analysis is conducted on a metalevel compared to the legal analysis of ECtHR cases and allows looking at judgments as parts of a larger textual structure.

¹² I aim at working with judgments only, that is with majority opinions of the Court. Such a choice can be explained by the fact that separate opinions of the Court are not textual parts of narratives about certain legal issues. They cannot be mentioned directly in majority opinions. At the same time, they can be present in majority opinions implicitly in a sense that a majority opinion can use wording from previous separate opinions in similar cases, but without directly citing them. However, separate opinions are not included in the subject under consideration in this particular article.

3.1 Temporality

A chain of cases is the way in which the Court is describing a *temporal experience* of considering a certain legal problem. To create ‘one piece’ from events scattered in time and different generations of judges means to be able to describe this experience as changing while continuing as one. That is what narrative organisation does—it provides a certain structure in order to bring a logic into development of the Convention provisions. Peter Brooks put this feature of the narrative in this way:

Narrative plots appear to be a certain formal organization of temporality, and need to be seen in their structuring cognitive role: a way of making sense of time-bound experience (Brooks 2006: 24).

Every legal problem within the Court’s jurisprudence is stretched in time and this stretch is reflected in every judgment. In each of the judgments within a chain, the task of the Court is not only to decide this particular case but also to place this specific situation in some sort of a sequence. This placing may be a continuation if the Court has already dealt with this type of case or it may be a beginning if the Court faces a certain legal problem for the first time. The manner in which the Court constructs a judgment should be pondered not only in the light of this particular case but also in the light of the whole story of this type of cases. In this sense even if the Court deals with a certain issue for the first time, the text of the judgment will probably later become part of a larger text which will be formed by including further similar cases. And it seems that at times the Court becomes hostage to the text of the first case in a chain—it is impossible to throw words out of an already existing story, so the next part of that story should anyway be adjusted to the previous ‘chapter’.

3.2 Theme

Each of the chains of cases within the ECtHR jurisprudence has its *theme*. The theme of a chain is a legal issue which the Court addresses and which concerns a certain provision of the Convention. The essence of a theme determines the way in which this chain of cases will be developed. A theme is especially important for departure and for the textual shape of this departure within a particular chain. The nature of a specific legal problem, its sensitivity, its significance in various social spheres—all this contributes to the manner in which the Court develops a narrative.

3.3 Narrator

The narrator is the central figure which organises the whole narrative discourse. Uri Margolin defines the narrator in the following way:

... the term ‘narrator’ designates the inner-textual (textually encoded) highest-level speech position from which the current narrative discourse as a whole originates and from which references to the entities, actions and events that this discourse is about are being made (Margolin, n.d.)

Being non-fictional narratives, the chains of cases of the ECtHR nevertheless create an illusion of the presence of a teller figure. When one reads judgments, one unavoidably notices an active participation of the Court as a teller of the narrative. For instance, such

phrases are indicative: ‘the Court has examined the Government’s argument’,¹³ ‘Accordingly, the Court is of the opinion that ...’,¹⁴ ‘The Court has considered first’,¹⁵ etc. It looks like the opposite of a more impersonal manner which is usually a characteristic of majority opinions—‘it is ordered’, ‘it has been interpreted’, etc. This passive voice is a textual choice which allows the removal of the actor and her responsibility for what was said (Dunn 2003: 514). And obviously the passive voice significantly decreases the narrativity of a text. However, the ECtHR judgments not only avoid the passive voice but sometimes even represent a very personal mode of narration, as here for instance: ‘The Court can also imagine that a party may have a feeling of inequality...’¹⁶ or here: ‘The Court has no doubt that this caused the first applicant deep anxiety.’¹⁷ These phrases make the reader imagine a certain person with certain psychological processes behind these words as they appeal to feelings and empathy. Certainly, the ‘Court’ as a textual speaker has its real corresponding actor—the ‘Court’ as a group of specific judges who produce a judgment. Thereby the ‘Court’ as such is not a purely fictional entity, it is instead a group of real people. At the same time, this real collective composite entity is not tantamount to the solid holistic textual figure who entirely belongs to the text and who appears in our imagination as a kind of single personality. Thoughts and feelings of real judges within the group cannot achieve an absolute level of unity in order to become a single figure which is able to feel, to imagine, to empathise. In this sense the Court as a creator of the narrative is an illusion of unity, an illusion which pertains to the text.

The figure of the Court as narrator is especially significant when one assesses a change in the Court’s approach to a certain legal problem. Monitoring the image of the narrator and its dynamics throughout the process of narration contributes to understanding of how the Court switches from one opinion to another and what language techniques it uses to construct this change. For instance, one of the important elements of the narrator’s image is the narrator’s relation to the characters (Margolin n.d.). The Court as narrator tries to create a certain vision of the characters and to form a specific attitude towards them. By playing with the readers’ attitude to a specific character, the Court builds the ground for altering its approach to a certain problem. One of the important characters in the ECtHR narratives is an applicant. Even between the judgments of a Chamber and the Grand Chamber, when the latter overturns the decision of the former, one can sometimes see a shift in the Court’s attitude towards an applicant. By way of example, we can compare the Chamber’s judgment and the Grand Chamber’s judgment in the *Lautsi* case.¹⁸ This case concerned the mandatory display of the crucifix on the walls in public schools. In 2009, the ECtHR held in *Lautsi v. Italy* (Chamber’s judgment) that the mandatory display of the crucifix in Italian public school classrooms violates Article 2 of Protocol No 1 (right to education) taken jointly with Article 9 of the Convention (freedom of belief and religion). This judgment provoked an ardent debate and was not accepted by the public, especially in Italy.¹⁹ Thus, the case was referred to the Court’s Grand Chamber, which overturned the ruling of the lower Chamber in 2011.

¹³ *Vilho Eskelinen and Others v Finland* ECHR 2007-II, para 42.

¹⁴ *Selmouni v France* ECHR 1999-V, para 89.

¹⁵ *V. v UK* ECHR 1999-IX, para 72.

¹⁶ *Kress v France* ECHR 2001-VI, para 81.

¹⁷ *Mubilanzila Mayeka and Kaniki Mitunga v Belgium* ECHR 2006-XI, para 70.

¹⁸ *Lautsi v Italy* App no 30814/06 (ECtHR, 3 November 2009); *Lautsi and others v Italy* ECHR 2011 (extracts).

¹⁹ See for instance (Mancini 2010: 6–7).

By comparing those paragraphs from the two judgments which pertain to the applicant, one can see the manner in which the Court as narrator creates for us—readers—a representation of this character. In the Chamber’s judgment one reads:

The applicant alleged that the symbol conflicted with her convictions and infringed her children’s right not to profess Catholicism. *Her convictions are sufficiently serious and consistent* for the compulsory presence of the crucifix to be capable of being understood by her as being incompatible with them. *She sees the display of the crucifix as a sign that the State takes the side of Catholicism.* That is the meaning officially accepted in the Catholic Church, which attributes to the crucifix a fundamental message. Consequently, the applicant’s apprehension *is not arbitrary.*²⁰

Above, the Court describes the figure of the applicant as someone whose perception and concerns deserve attention. In those lines it seems that as if the Court tries to step into the applicant’s shoes in order to see the problem through her eyes. That gives the impression we can trust the applicant and that we can empathise with her just as the narrator does.

The judgment of the Grand Chamber has quite a different tone in the paragraphs which concern the applicant and her perception of the matter:

There is no evidence before the Court that the display of a religious symbol on classroom walls may have an influence on pupils and so it cannot reasonably be asserted that it does or does not have an effect on young persons whose convictions are still in the process of being formed.

However, *it is understandable that the first applicant might see* in the display of crucifixes in the classrooms of the State school formerly attended by her children a lack of respect on the State’s part for her right to ensure their education and teaching in conformity with her own philosophical convictions. *Be that as it may, the applicant’s subjective perception is not in itself sufficient* to establish a breach of Article 2 of Protocol No. 1.²¹

Here, the Court appeals to some objective evidence which can presumably prove that there is an influence on pupils, therefore the applicant no longer appears reliable. The narrator still can imagine what the applicant might think and feel in such circumstances but simply discards the applicant’s position as unnecessary for consideration since this position is arbitrary. In particular, the last sentence of the passage sounds somewhat condescending and indifferent towards the applicant and her perception.

This switch in the narrator’s attitude to a character contributes to changing the whole perception of the case and arriving at a different outcome. Obviously, behind this language game, there is a legal argument, but it was presented by manipulating the image of the applicant for the purpose of moulding readers’ impressions about this person.

3.4 Metanarrative comments

Another characteristic of narrative which pertains to the figure of the narrator is metanarrative comments which are:

²⁰ *Lautsi v Italy* App no 30814/06 (ECtHR, 3 November 2009), para 53; emphasis added.

²¹ *Lautsi and others v Italy* ECHR 2011 (extracts), para 66; emphasis added.

stage directions, references to previous or later sections of the narrative, and self-reflexive passages—these all invoke the narrator figure and the act of narration as well as the very process of narration (Nünning 2001: 29).²²

These metanarrative remarks address aspects of narration in a self-reflective manner (Neumann, n.d.) that can be illustrative for understanding how the narrator herself perceives the process of narrative development. As for the ECtHR, such comments are indicators that the Court is going to change its approach to interpretation as it usually becomes more reflective on the narrative as such when a departure is being articulated:

Building on its dynamic interpretation of the Convention, the Court considers that *the time has come* to hold that in certain circumstances the rights guaranteed by Article 8 of the Convention may be construed as including the right to respect for a company's registered office, branches or other business premises ...²³

Here, the words 'the Court considers that the time has come to hold that' knock us out of the rhythm of the narration of this particular case and take us to a metalevel where the Court reflects on the process of narration as such. It feels as if the Court opens the door a little to the inner writing process behind the actual text. These remarks help to enhance the coherence of the whole narrative as well as to link together different parts of the narrative. They contain a hidden appeal to the building blocks of the story which came earlier, since the Court contrasts past and present—then was not the right time, now the time has come. This already gives a certain structure to the whole narrative and in this sense serves as a connecting device.

3.5 Possibility of alternative narratives

To see narrativity in the Court's texts one should first look at the Court's activity as a writing enterprise which relates to creative choices. As Jeanne Gaakeer once beautifully put,

[...] language in the sense of speech and of writing and reading narrative is a continuous process of deciding what can and will be said, and what will—literally—not be spoken of. In short, language usage is in itself a selective interpretation. There are always roads not taken (Gaakeer 2019: 195).

The nature of the Convention and the peculiarities of its language give the Court a lot of possibilities in terms of creative choices:

the Convention provisions are termed not as precise and detailed rules but rather as broad standards to be clarified through judicial interpretation by the Convention institutions (Prebensen 2000: 1125).

And since the end result of interpretation may be very different from the initial words of the Convention, then this end result could also potentially have had other versions. That is, textual building up of the Convention could have been done in other ways, with other interpretational instruments and possibly other legal results. In its judgments, the Court

²² Cited according to (Fludernik 2003: 4).

²³ *Société Colas Est and Others v France* ECHR 2002-III, para 41; emphasis added.

has been developing a particular line of Convention interpretation over a long period of time. This line is familiar to us and it seems that there could not be another. But if we look at the Court's judgments where important departures took place or where these departures were possible but were not made, it becomes clear that the decision could have been made differently. It becomes especially clear if we look at separate opinions which offer alternative versions of a judgment. This other version is an alternative narrative. In the course of the Leicester study, which is the study of separate opinions in the Strasbourg Court, the judges interviewed were asked about the usefulness of separate opinions. One of the judges,²⁴ among other reasons for writing a separate opinion, named the following:

I think it's also important to let the outside world know that even if the majority say it's a violation/no violation, another position is also possible and reasonable. And I think that's important so you can instil the idea that the reality is a difficult one (White and Boussiakou 2009: 177).

A narratological perspective in reading the Court's texts contains an important message about judicial activity— that a judge's work is more about creative choices than about being doomed to the one inevitable version of a decision. This feature of narrative was highlighted by Anthony Amsterdam and Jerome Bruner:

Narrative, moreover, differs from purely logical argument in that it takes for granted that the puzzling problems with which it deals do not have a single 'right' solution— one and only one answer that is logically permissible. It takes for granted, too, that a set of contested events can be organized into alternate narratives and that a choice between them may depend upon perspective, circumstances, interpretive frameworks. In a word, it leaves room for the possibility that things have changed. It is this feature of narrative that makes it invaluable in relating the past to the present and the abstract to the particular (Amsterdam and Bruner 2002: 141).

The co-existence of different versions of this 'difficult' reality, which the judge interviewed talks about, makes a narratological perspective highly suitable when one tries to understand the path that a departure passes over from the moment of the emergence somewhere 'in the depths' of the jurisprudence up to the moment of its actual incorporation into the jurisprudence. Sometimes in the text of a judgment a departure is 'up in the air', but still not articulated by the Court (it is postponed, for instance).

However, along with the co-existence of several possible versions of a narrative in majority and separate opinions there is an opposite ambition which characterises a majority opinion only—to write in a consistent manner and to create an impression that only this particular version is the possible and correct continuation of a previous narrative. That brings us to the next characteristic.

3.6 Narrative certainty

In a chain of cases nothing can be accidental. There cannot be a single alien element that contradicts the logic of the integrity. As Gerald Prince put it, '[t]he hallmark of narrative is assurance. It lives in certainty: this happened then that; this happened because of that' (Prince 1982: 149).

²⁴ In the Leicester study, it was agreed that no judge would be quoted by name in any published material. (White and Boussiakou 2009: 170).

From the perspective of this narrative certainty we should look at the Court's wording regarding departures. Changes in the jurisprudence may be predictable or unexpected to some extent but nevertheless they have to be incorporated into the jurisprudence and have to become a part of the whole. The introduction of departures should not only be legally justified, it should also be a continuation of the Court's previous texts. The process of the incorporation of a departure should imply narrative continuity in the sense that the present judgment should be a textual continuation of previous judgments. When this narrative continuity exists, despite all the peripeteia which a particular legal issue in the Court has experienced over time, it is hard to say that we are dealing with two kinds of stories about this issue or that at some moment, its story started from scratch again. Real events that happen in social life and have an impact on the Court's judgments could be inconsistent and outpace development of the jurisprudence, but the texts of judgments still try to tell readers a coherent narrative where each new turn is based on the past and rooted in established principles. In a sense, narrativisation²⁵ is an important tool for gaining certainty, consistency, and consequently legitimacy. In a sense, certainty and consistency are created by judges or as Hayden White put it— they are 'imaginary':

I have sought to suggest that this value attached to narrativity in the representation of real events arises out of a desire to have real events display the coherence, integrity, fullness, and closure of an image of life that is and can only be imaginary (White 1980: 27).

All the above-mentioned characteristics allow approaching specific chains of cases within ECtHR jurisprudence as narratives. Seeing the Court's judgments through the lenses of these characteristics facilitates the vision of the connections which exist between the texts of judgments. A chain of cases on a specific legal issue is a construction in which such connections acquire their shape and structure since at the level of the chain the Court argues its way of dealing with a specific legal problem. A chain of cases, in this sense, becomes an important argumentative unit within which the Court approaches a particular issue. A narratological approach to a chain shows how the totality of various sentences from different Court judgments turns into a single narrative; it allows seeing which exact structures create unity from a number of judgments scattered in time. This vision illuminates the place of a departure within the narrative of a chain of cases as well as the mechanism which the Court uses to create a departure at the textual level.

4. The narrative manner of introducing a departure: an example of an ECtHR chain of cases

To change a legal position of the Court is a difficult and long process. The complexity of making a departure can be viewed from different perspectives—social, political, legal—all of which are largely discussed in the literature whenever the Court deviates from the previous jurisprudence. However, this study strives to look at this complexity from another perspective—a textual one, that is somewhat ignored in the research pertaining

²⁵ "Narrativization" describes the procedure in which a text is processed in someone's mind in response to its narrativity, or story-like qualities' (Olson 2015: 44.)

to departure in ECtHR case-law. Perhaps the textual dimension of a departure is the most obvious one—in order to change something, you have to change your manner of writing about it. Certainly, in the Court, this textual aspect is closely connected to the legal aspect since it has a lot to do with legal argumentation. Difficulties in the textual construction of a departure relate to the fact that deviation from prior judgments questions their authority. However, as was shown above, the ECtHR is not legally bound by its previous judgments therefore such ‘struggle’ with the past is not purely of a legal nature, it is more about the language which is used to overcome a prior position. In this sense, the most important ‘textual aim’ while departing is to make a departure a logical continuation of previous texts, to make it part of an existing narrative. There are multiple ways to do this.

To show how a departure is being built up textually, it is necessary to consider not only a specific judgment which contains a departure but also the previous judgments which constitute the narrative about the particular legal issue. Accordingly, in this study, it is proposed to examine a textual construction of a departure at *two levels*.

The *first level* pertains to the whole narrative. Hence, one should take a whole chain of cases and trace how a narrative is being developed: what type of story underlies this narrative, whether the narrative is reflective and how active the narrator is, whether a change had already been mentioned even before it occurred, etc.

The *second level* concerns an exact judgment where a departure has been introduced. Within the structure of a narrative, a departure is a plot twist at which the reader discovers something new about a story which has been told before. Therefore, in every judgment with a departure from a previous approach there are textual parts where earlier moments in a narrative are somehow reconsidered: disputed, ridiculed, rejected, etc. These parts are the moments of the highest tension between the past and present, between predecessors and followers where the past authority is always questioned, but the manner of this questioning varies.

In this section we will look at these two levels in one chain of the Court’s cases. The chain which is discussed here concerns a certain legal problem in which the Court changed its opinion to the opposite compared to the initial one. The way of changing the case-law in this chain is manifested not just in the reason employed to overcome a previous approach but also in the manner of overcoming. This manner relates not only to an exact case where a change has occurred but to a whole narrative and its specific structure.

Here, as a chain of cases following four judgments will be considered: *Rees v. the United Kingdom* (1986), *Cossey v. the United Kingdom* (1990), *Sheffield and Horsham v. the United Kingdom* (1998), and *Christine Goodwin v. the United Kingdom* (2002).²⁶ It should be noted that all of them were examined by the Grand Chamber. These cases involve consideration of several legal issues, but this paper will specifically deal with only one of them—the issue of whether the state has a positive obligation under Article 8 of the Convention to alter domestic legislation in order to fully recognise an individual’s post-operative gender. The main obstacle to such full recognition was a characteristic of the United Kingdom’s system of civil status registration. This system is non-integrated, so that a person can be issued, for example with a passport with a new identity, but not with a new birth certificate. Moreover, the birth register is public, and birth certificates mention the

²⁶ I deliberately exclude the case of *B. v. France* [*B. v. France* (1992) Series A no 232-C] from this chain as this case was distinguished by the Court from the cases against the United Kingdom.

biological sex which the individuals had at the time of their birth.²⁷ Thus, any changes incorporated in the register would constitute a falsification of the facts contained therein.²⁸

In the first three cases of the chain the Court did not recognise the existence of the state's positive obligation. Only in the *Christine Goodwin* case, did the ECtHR finally change its approach, and it was recognised that the UK had violated Article 8. Accordingly, the first level of our analysis will include the whole chain of four cases and the second level will be represented only by the *Christine Goodwin* case where a departure actually took place.

The narrative begins with the *Rees* judgment and it seems that the whole narrative was to a large extent determined by the argumentation of this case. One of the first and main reasons for a non-recognition of a violation of the Convention was the diversity of practices in the Contracting States and thus an absence of any common ground between them with regard to changing personal status by transsexuals:

It would therefore be true to say that *there is at present little common ground between the Contracting States in this area* and that, generally speaking, the law appears to be in a transitional stage. Accordingly, this is an area in which the Contracting Parties enjoy a wide margin of appreciation.²⁹

Then, a large part of the Court's assessment is occupied by the detailed analysis of the UK's system of civil status registration. The Court shows that to meet the applicant's demands the whole system should be completely changed and this would have a lot of important consequences for the whole population of the country.³⁰ In this connection, the Court cannot extend the positive obligations of the State arising from article 8 to that degree.³¹ However, what is most important for the whole narrative in this judgment is the promise which was made at the end of the Court's analysis:

However, the Court is conscious of the seriousness of the problems affecting these persons and the distress they suffer. The Convention has always to be interpreted and applied in the light of current circumstances (see, *mutatis mutandis*, amongst others, the Dudgeon judgment of 22 October 1981, Series A no. 45, pp. 23-24, paragraph 60). The need for appropriate legal measures should therefore be kept under review having regard particularly to scientific and societal developments.³²

Thereby a possibility of a departure was mentioned from the very beginning of this narrative. The Court tells that probable scientific and societal developments give the hope for a change in the Court's opinion. In this sense, the ECtHR is promising its audience that a departure will come at some point and a new approach will be introduced. Perhaps in view of the high sensitivity of the theme of this narrative the Court decided to make this flash forward—to tell about the later event earlier than it will appear in the story. On the one hand, it helped to alleviate the discontent of the proponents of a decision different from the Court's, and on the other hand, secured a safe basis for a future change in the ECtHR approach.

²⁷ *Rees v UK* (1986) Series A no 106, para 40.

²⁸ *Ibid*, para 42.

²⁹ *Ibid*, para 37; emphasis added.

³⁰ *Ibid*, para 42.

³¹ *Ibid*, para 44.

³² *Ibid*, para 47.

Since we already know what happens in the future, the next chapter of this story is expected with even greater interest. And the story indeed got its further development after four years in *Cossey v. the United Kingdom*. There, the Court directly discussed the issue of following the previous case and the possibility of a departure from it. Eventually, the ECtHR concluded that *Cossey* is not materially distinguishable on its facts from *Rees*.³³ Therefore, in *Cossey* all the arguments from the previous case are retold, but as *Rees* promised to track scientific and societal developments the Court had to continue that line into *Cossey*. But it turned out that at that moment there were no significant scientific developments with regard to a better understanding of the cause of transsexualism compared to the time of the *Rees* judgment, as well as there being in the legal domain

the same diversity of practice as obtained at the time of the *Rees* judgment. Accordingly, this is still, having regard to the existence of little common ground between the Contracting States, an area in which they enjoy a wide margin of appreciation [...].³⁴

And despite the fact that the decision was again not in favour of the applicant, the narrator continued stressing that the Convention's provisions are open for development and this category of cases is especially appropriate for review:

The Court would, however, reiterate the observations it made in the *Rees* judgment (p. 19, para. 47). *It is conscious of the seriousness of the problems facing transsexuals and the distress they suffer. Since the Convention always has to be interpreted and applied in the light of current circumstances, it is important that the need for appropriate legal measures in this area should be kept under review.*³⁵

In *Sheffield and Horsham v. the United Kingdom* the ECtHR appealed to the same arguments. First of all, according to the Court, there were still no important developments in the area of medical science.³⁶ Then, with regard to legal developments, the Court appealed to the comparative study submitted by *Liberty*³⁷ which showed the legislative trends towards legal recognition of transsexuals. But the Court did not find this argument convincing enough:

However, the Court is not fully satisfied that the legislative trends outlined by *amicus* suffice to establish the existence of *any common European approach* to the problems created by the recognition in law of post-operative gender status. In particular, the survey does not indicate that there is as yet *any common approach* as to how to address the repercussions which the legal recognition of a change of sex may entail for other areas of law such as marriage, filiation, privacy or data protection, or the circumstances in which a transsexual may be compelled by law to reveal his or her pre-operative gender.³⁸

In this way, the Court tells that existing legislative trends are not sufficient to prove that there is a common approach among the States with regard to the issue under

³³ *Cossey v UK* (1990) Series A no 184, para 34.

³⁴ *Ibid*, para 40.

³⁵ *Ibid*, para 42; emphasis added.

³⁶ *Sheffield and Horsham v UK* ECHR 1998-V, para 56.

³⁷ *Liberty* is an independent membership organisation which protects human rights and is based in the United Kingdom (<https://www.libertyhumanrights.org.uk/>).

³⁸ *Sheffield and Horsham v UK* ECHR 1998-V, para 57; emphasis added.

consideration. The paragraph cited above mentions an absence of a common approach twice. Moreover, the next paragraph of the judgment resorts again to this argument thus giving it even greater significance:

For the Court, it continues to be the case that transsexualism raises complex scientific, legal, moral and social issues, in respect of which *there is no generally shared approach among the Contracting States* [...]³⁹

As in the *Rees* judgment, here too the Court is also trying to show that the United Kingdom is striving to minimise the use of birth certificates as a means of identification and that transsexuals are allowed to be issued with other official documents which contain their post-operative gender identity. But here, the narrator's attitude towards the State has slightly shifted, it acquired a critical aspect which it had not had in the previous cases:

Having reached those conclusions, the Court cannot but note that despite its statements in the *Rees* and *Cossey* cases on the importance of keeping the need for appropriate legal measures in this area under review having regard in particular to scientific and societal developments (see, respectively, pp. 18–19, § 47, and p. 41, § 42), *it would appear that the respondent State has not taken any steps to do so*.⁴⁰

This did not affect the final decision in the case as the Court still did not recognise a violation of Article 8, but it shows that this narrative is slowly reaching its plot twist where a departure from the previous legal position will finally happen. Especially since at the end of the analysis the Court again promised such a departure: 'Even if it finds no breach of Article 8 in this case, the Court reiterates that this area needs to be kept under review by Contracting States.'⁴¹

Before going to the final case in the chain where the ECtHR departed from the prior approach, it is necessary to look at this preceding narrative and to describe its features. The most conspicuous thing about it is that a departure had been predicted by the Court even before it actually occurred. It is a story about waiting—this is the message we get from the similar cases before *Christine Goodwin*. It feels the same as when a writer is giving us hints of what will happen in the following chapters. But it is also a very convenient way to inscribe a departure in the case-law without possibly questioning the authority of the previous judgments since you have already warned your audience about a probable different position.

Another feature of this narrative is that from its content one can imagine what a future departure will look like and what kind of argument it will be related to. Through all three cases the Court is carrying out the argument about certain scientific, social, and legal developments which should ideally give rise to a formation of a common approach among the States with regard to the complex scientific, legal, moral, social issues which transsexualism raises. As the absence of this common approach was the main obstacle for the Court on the way to recognition of transsexuals' rights then the main plot twist in *Christine Goodwin* should concern this exact argument.

When one looks at the judgment in the *Christine Goodwin* case, the first thing which is striking is the length and structure of the Court's assessment. The Court's analysis is longer and has a certain structure with a separate part for each argument that we had not

³⁹ Ibid, para 58; emphasis added.

⁴⁰ Ibid, para 60; emphasis added.

⁴¹ Ibid, para 60.

seen before in the previous judgments. In a sense, every argument of the previous judgments is being reconsidered here.

The Court highlights three significant arguments from the previous cases which it takes into consideration in this case: ‘medical and scientific considerations, the state of any European and international consensus and the impact of any changes to the current birth register system’.⁴² These are the main obstacles for the Court in overcoming the previous approach. These arguments compose the manner in which the previous texts were written, and this manner should be somehow altered in order to let the new manner work. As was explained earlier, the difficulty of overcoming previous judgments is in their authority and in the barely zero opportunity of pointing out directly to a mistake in a previous position. The Court rarely says straightforwardly that there was an error in its previous assessment—it has more sophisticated ways to change its position.

With regard to the first argument—the birth register system,—the ECtHR emphasised that some exceptions had already been made to its historic basis as in the cases of adoption or legitimisation.⁴³ Besides, the Court also noted that some proposals had been issued by the government for reform which would allow to slowly change the existing system of the civil status register. In view of these alterations, this argument was declared no longer relevant. The important aspect is though that—according to the Court’s analysis— this argument *was* relevant in the past and thus something has changed in the system itself which makes the Court change its legal approach.

However, regarding the other two arguments the ECtHR chose a different manner of dismissal. In order to overcome the argumentation of the previous cases the Court becomes critical and indirectly attacks the prior approach. The Court is not simply saying that these arguments are no longer relevant, it is stating that *they have never been relevant*. In relation to medical and scientific considerations, the ECtHR is relatively gentle in claiming that

[t]he Court is not persuaded therefore that the state of medical science or scientific knowledge provides any determining argument as regards the legal recognition of transsexuals.⁴⁴

However, when it comes to the argument about the common approach the Court gets more sophisticated in the manner of rejecting it and uses a slight irony towards the previous way of approaching the problem. As if on purpose, the Court specifically reiterates that the previous judgment paid great attention to the lack of a common approach:

In the later case of *Sheffield and Horsham*, the Court's judgment laid emphasis on the *lack of a common European approach* as to how to address the repercussions which the legal recognition of a change of sex may entail for other areas of law such as marriage, filiation, privacy or data protection.⁴⁵

And then the Court straightforwardly says that there is still no such approach, but it does not matter since it is not achievable:

⁴² *Christine Goodwin v UK* ECHR 2002–VI, para 80.

⁴³ *Ibid*, para 87.

⁴⁴ *Ibid*, para 83.

⁴⁵ *Ibid*, para 85; emphasis added.

*While this would appear to remain the case, the lack of such a common approach among forty-three Contracting States with widely diverse legal systems and traditions is hardly surprising.*⁴⁶

At that, unattainability of such an approach is expressed through irony towards the previous texts which is manifested in the choice of words— ‘is hardly surprising.’ On the whole, all the rhetoric the Court employs with regard to the argument about a common approach shows that the process of waiting for a change during all the previous cases was rather annoying that is also manifested in the fact that the narrator acquires a more personal and emotional attitude to the issue in the instant case:

*The Court is struck by the fact that nonetheless the gender re-assignment which is lawfully provided is not met with full recognition in law, which might be regarded as the final and culminating step in the long and difficult process of transformation which the transsexual has undergone.*⁴⁷

It should be said that to ‘substitute’ the essential argument about a common approach the Court came up with the argument about the international trend, namely:

[...] the clear and uncontested evidence of a continuing international trend in favour not only of increased social acceptance of transsexuals but of legal recognition of the new sexual identity of post-operative transsexuals.⁴⁸

Thus, by pointing to such an international trend the Court rejected even more the argument about a common approach advanced by the previous texts.

And naturally, in *Christine Goodwin* the Court largely relied on the basis for a departure which was accurately created in the prior cases:

*In the previous cases from the United Kingdom, this Court has since 1986 emphasised the importance of keeping the need for appropriate legal measures under review having regard to scientific and societal developments (see references at paragraph 73). Most recently in the Sheffield and Horsham case in 1998, it observed that the respondent State had not yet taken any steps to do so despite an increase in the social acceptance of the phenomenon of transsexualism and a growing recognition of the problems with which transsexuals are confronted (cited above, paragraph 60). Even though it found no violation in that case, the need to keep this area under review was expressly re-iterated.*⁴⁹

It seems that the chain of cases about the legal status of transsexuals is one of the most prominent examples of the Court’s manner of changing case-law. It is definitely a highly tense narrative where the long wait ended in a surge of dissatisfaction with the predecessors, which seemed to permeate the judgment in the *Christine Goodwin* case. However, this dissatisfaction did not result in direct criticism of the previous approach, but rather in a quiet chuckle at it, which is usually not typical of court decisions.

⁴⁶ Ibid, para 85; emphasis added.

⁴⁷ Ibid, para 78; emphasis added.

⁴⁸ Ibid, para 85.

⁴⁹ Ibid, para 92; emphasis added.

5. Concluding remarks

While trying to understand the manner in which the ECtHR changes its jurisprudence we can resort to various angles and perspectives given the complexity of the functioning of such an intricate mechanism as the ECtHR. Leaving behind the scenes the usual ways to address this issue, this paper is striving to reveal the logic of *how the Court tells* its audience about the process of deciding cases, including a departure from previous interpretations of the Convention. This manner of understanding a departure involves switching the imagination on and seeing the Court's activity as a creative enterprise. From the perspective of a writer, formulating a departure can constitute a problem that relates to the shape which thoughts acquire on paper. In this sense, the manner of telling is as important as *what* is being told. In how the Court conveys its decision process to an audience, one can see the narrative techniques that give shape and certainty to the Court's texts.

In this article, the narrative structure that the Court creates is shown on the example of a chain of cases. In the course of Convention interpretation on a specific legal issue the Court tells about its interpretative activity by creating stories, different not only in their legal content but also in the manner of their presentation. If the Court departs from its own previous approach to a legal problem, this departure becomes a part of the already existing narrative. Therefore, the essence of a specific departure can be discovered only in the context of the whole narrative.

The chain of cases analysed in this article demonstrates a particular way of telling a story and introducing a change into the ECtHR case-law. The narrative about transsexuals' right to full recognition of their post-operative gender is quite structured from the beginning, which can probably be explained by the sensitivity of its topic. A flash forward regarding a possible change in the Court's approach in the future added coherence to this narrative. Because of the flash forward, the feeling of waiting for a departure permeates all of the judgments in the chain. In this way, the Court created safe ground for the future change; and we have seen that this ground was extensively exploited in *Christine Goodwin* judgment where the Court departed from its previous approach. At the same time, in the *Christine Goodwin* the ECtHR could not avoid a certain confrontation with the past texts. The tension with the prior judgments and their authority was resolved partially through irony towards the argumentation of the previous cases. Thus, the departure from the prior position made us take a different look at the whole narrative as presented by the Court earlier.

All these features, which are specific for the narrative about transsexuals' right to full recognition of post-operative gender, represent only one textual way of building up a departure in a chain of cases. Further examination of other chains within the Court's case-law will allow the discovery of other ways of departing employed by the Court and will create a fuller picture of the development of jurisprudence by the ECtHR.

References

- Amsterdam, Anthony G., and Jerome S. Bruner. 2002. *Minding the Law*. Cambridge, Massachusetts: Harvard University Press.
- Arnardóttir, Oddný Mjöll. 2017. “*Res Interpretata*, *Erga Omnes* Effect and the Role of the Margin of Appreciation in Giving Domestic Effect to the Judgments of the European Court of Human Rights.” *European Journal of International Law* 28 (3): 819–43.
- Balcerzak, Michal. 2004. “The Doctrine of Precedent in the International Court of Justice and the European Court of Human Rights.” *Polish Yearbook of International Law* 27: 131–44.
- Bodnar, Adam. 2014. “*Res Interpretata*: Legal Effect of the European Court of Human Rights’ Judgments for Other States Than Those Which Were Party to the Proceedings.” In *Human Rights and Civil Liberties in the 21st Century*, edited by Yves Haeck and Eva Brems, 223–62. Dordrecht: Springer.
- Bricker, Andrew B. 2016. “Is Narrative Essential to the Law? Precedent, Case Law and Judicial Emplotment.” *Law, Culture and the Humanities* 15 (2): 319–31.
- Bronaugh, Richard. 1987. “Persuasive Precedent.” In *Precedent in Law*, edited by Laurence Goldstein, 217–47. New York: Oxford University Press.
- Brooks, Peter. 2006. “Narrative Transactions—Does the Law Need a Narratology?” *Yale Journal of Law & the Humanities* 18 (1): 1–28.
- Cover, Robert M. 1983. “The Supreme Court, 1982 Term—Foreword: Nomos and Narrative.” *Harvard Law Review* 97 (1): 4–68.
- Delgado, Richard. 1989. “Storytelling for Oppositionists and Others: A Plea for Narrative.” *Michigan Law Review* 87 (8): 2411–41.
- Di Donato, Flora. 2019. *The Analysis of Legal Cases: A Narrative Approach*. Abingdon: Routledge.
- Dunn, Pintip Hompluem. 2003. “How Judges Overrule: Speech Act Theory and the Doctrine of Stare Decisis.” *Yale Law Journal* 113 (2): 493–531.
- Dworkin, Ronald. 1982. “Law as Interpretation.” *Texas Law Review* 60: 527–50.
- Fish, Stanley. 1982. “Working on the Chain Gang: Interpretation in the Law and in Literary Criticism.” *Critical Inquiry* 9 (1): 201–16.
- Fludernik, Monika. 2003. “Metanarrative and Metafictional Commentary: From Metadiscursivity to Metanarration and Metafiction.” *Poetica* 35 (1/2): 1–39.
- . 2009. *An Introduction to Narratology*. Abingdon: Routledge.
- Gaakeer, Jeanne. 2019. *Judging from Experience. Law, Praxis, Humanities*. Edinburgh: Edinburgh University Press.
- Gerards, Janneke. 2018. “Margin of Appreciation and Incrementalism in the Case Law of the European Court of Human Rights.” *Human Rights Law Review* 18 (3): 495–515.

- Giannopoulos, Christos. 2019. "The Reception by Domestic Courts of the *Res Interpretata* Effect of Jurisprudence of the European Court of Human Rights." *Human Rights Law Review* 19 (3): 537–59.
- Lamond, Grant, "Precedent and Analogy in Legal Reasoning." *The Stanford Encyclopedia of Philosophy* (Spring 2016 Edition), Edward N. Zalta (ed.), URL = <<https://plato.stanford.edu/archives/spr2016/entries/legal-reas-prec/>>.
- Lizewski, Bartosz. 2017. "Judgment of the ECHR as a Precedent Binding *Quasi de Iure* and the Effectiveness of the European Convention on Human Rights (Theoretical Perspective)." *Studia Prawnicze*, 2 (210): 7–29.
- Lucas-Alberni, Katia. 2008. *Le revirement de jurisprudence de la Cour européenne des droits de l'homme*. Brussels: Bruylant.
- Mancini, Susanna. 2010. "The Crucifix Rage: Supranational Constitutionalism Bumps Against the Counter-Majoritarian Difficulty." *European Constitutional Law Review* 6 (1): 6–27.
- Margolin, Uri. n.d. 'Narrator'. In *The Living Handbook of Narratology*, edited by Peter Hühn and et al. Hamburg: Hamburg University. <<http://www.lhn.uni-hamburg.de/>>.
- Mowbray, Alastair. 2009. "An Examination of the European Court of Human Rights' Approach to Overruling Its Previous Case Law." *Human Rights Law Review* 9 (2): 179–201.
- Neumann, Birgit. n.d. "Metanarration and Metafiction." In *The Living Handbook of Narratology*, edited by Peter Hühn and et al. Hamburg: Hamburg University. <<http://www.lhn.uni-hamburg.de/>>.
- Nünning, Ansgar. 2001. "Mimesis Des Erzählens: Prolegomena Zu Einer Wirkungsästhetik, Typologie Und Funktionsgeschichte Des Akts Des Erzählens Und Der Metanarration." In *Erzählen Und Erzähltheorie Im 20. Jahrhundert. Festschrift Für Wilhelm Füger*, edited by Jörg Helbig, 13–47. Heidelberg: Winter.
- Olson, Greta. 2015. "Futures of Law and Literature A Preliminary Overview from a Culturalist Perspective." In *Recht Und Literatur Im Zwischenraum / Law and Literature In-Between*, edited by Christian Hiebaum, Susanne Knaller, and Doris Pichler, 37–69. Bielefeld: Transcript Verlag.
- . 2018. "On Narrating and Troping the Law: The Conjoined Use of Narrative and Metaphor in Legal Discourse." In *Narrative and Metaphor in the Law*, edited by Michael Hanne and Robert Weisberg, 19–36. New York: Cambridge University Press.
- Pellonpää, Matti. 2007. "Continuity and Change in the Case-Law of the European Court of Human Rights." In *Promoting Justice, Human Rights and Conflict Resolution through International Law / La promotion de la justice, des droits de l'homme et du règlement des conflits par le droit international*, 409–20. Leiden: Brill.
- Popović, Dragoljub. 2011. *The Emergence of the European Human Rights Law. An Essay on Judicial Creativity*. The Hague: Eleven International Publishing.
- Prebensen, Soren C. 2000. "Evolutive Interpretation of the European Convention on Human Rights.: In *Protection des droits de l'homme: la perspective européenne : mélanges à la*

mémoire de Rolv Ryssdal = Protecting Human Rights : The European Perspective : Studies in Memory of Rolv Ryssdal, edited by Paul Mahoney, Franz Matscher, Herbert Petzold, and Luzius Wildhaber, 1123–37. Köln: Heymanns.

- Prince, Gerald. 1982. *Narratology: The Form and Functioning of Narrative*. Berlin: Mouton.
- Slaughter, Joseph R. 2007. "Narration in International Human Rights Law." *CLCWeb: Comparative Literature and Culture* 9 (1). Accessed June 6, 2019. <https://doi.org/10.7771/1481-4374.1031>
- Spielmann, Dean. 2013. "Judgments of the European Court of Human Rights: Effects and Implementation." Keynote speech presented at the Conference at the Paulinerkirche Göttingen Georg-August-University, Göttingen, September 20, 2013. Accessed June 15, 2019. <https://www.echr.coe.int/Documents/Speech_20130920_Spielmann_Gottingen_ENG.pdf>
- Stern, Simon. 2018. "Narrative in the Legal Text: Judicial Opinions and Their Narratives." In *Narrative and Metaphor in the Law*, edited by Michael Hanne and Robert Weisberg, 121–39. New York: Cambridge University Press.
- Sundberg, Fredrik G. E. 1987. "The European Experience of Human Rights Proceedings: The Precedent Value of the European Court's Decisions." *Akron Law Review* 20 (4): 629–47.
- Weisberg, Robert. 1996. "Proclaiming Trials as Narratives: Premises and Pretenses." In *Law's Stories: Narrative and Rhetoric in the Law*, edited by Peter Brooks and Paul Gewirtz, 61–83. New Haven: Yale University Press.
- White, Hayden. 1980. "The Value of Narrativity in the Representation of Reality." *Critical Inquiry* 7 (1): 5–27.
- White, Robin C.A., and Iris Boussiakou. 2009. "Voices from the European Court of Human Rights." *Netherlands Quarterly of Human Rights* 27 (2): 167–89.
- Wildhaber, Luzius. 2000. "Precedent in the European Court of Human Rights." In *Protection des droits de l'homme: la perspective européenne : mélanges à la mémoire de Rolv Ryssdal = Protecting Human Rights : The European Perspective : Studies in Memory of Rolv Ryssdal*, edited by Paul Mahoney, Franz Matscher, Herbert Petzold, and Luzius Wildhaber, 1529–45. Köln: Heymanns.

Citizenship pledges and national values: narrating and racializing Australian citizenship status

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Abstract

The ‘pledge of commitment’ is a central element of Australian citizenship. This paper explores how the performance of the pledge narrates the citizen subject. It argues that the citizen subject is narrated as embodying three national values: loyalty, unity and social cohesion. This paper then argues that these values are racially coded. Narrating Australian citizenship in this way creates a more precarious form of citizenship for migrants generally, and Muslims in particular. The paper concludes by encouraging legal scholars to be more critical of citizenship law, paying particular attention to the narration of the citizen subject at ceremonial occasions.

Key words: Citizenship Law, Narration, Citizenship Pledge, Cultural difference, National Values.

1. Introduction

Ceremonies are events where the law is performed. Indeed, performance is essential to the meaning and operation of law. Peters writes that ‘Law unfolds in rites and ceremonies, orchestrations, liturgies, images, staging itself for the spectators of the state’ (Peters 2008: 189). Performance makes the authority of law visible. In Peters’ words, ‘[p]erformance is law’s tool, assisting law in its work of subjecting us to its authoritarian commands’ (Ivi: 190). For example, Peters argues that the origins and legitimacy of the law are performed through the trial.

Legal ceremonies also narrate individuals as both legal subjects and members of a culture (Althusser 2014; Manderson and Turner 2006; Umphrey 2011; Chase 2006). Chase explores how dispute processes draw on ceremonies and rituals to narrate social identities and express the ‘longings and passions’ that are central to a particular culture (Chase 2006: 4). Chase argues that ceremonies and rituals of law ‘symbolize the location of authority’ and capture ‘how individuals conceptualise their relationship to authority’ (Chase 2006:

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4-5). Ceremonies narrate legal subjects not only by telling stories about existing identities, but also by creating those identities (Ewick and Silbey 1995: 202). Narrated identities draw upon and reinforce the social power structures of the story teller (Ewick and Silbey 2003: 1332).

This paper critically analyses the performance of the 'pledge of commitment' during Australian citizenship ceremonies. I argue that the pledge narrates the Australian citizen as embodying three national values; loyalty, unity and social cohesion. Although the government asserts that these three national values are culturally inclusive, this paper argues otherwise. Analysing the performance of the pledge in its social and political context, the pledge reinforces suspicion about migrants generally, and Muslims in particular. The aim of this paper is to expose the racially and culturally discriminatory national values that have become associated with Australian citizenship.

The argument proceeds in three parts. First, the paper outlines the content of the pledge, as well as how and where the pledge is performed.

Second, the paper analyses what the performance of the pledge communicates about citizenship as a legal status. I argue that in performing the pledge, candidates for Australian citizenship (conferees) enact three national values: loyalty, unity, and social cohesion. This narration occurs not only through the content of words used in the pledge, but also in the way that the pledge is performed. This paper explores how government officials constrain the voice and actions of conferees during the ceremony to ensure that these national values are the focus.

Third, this paper argues that these three national values are racially coded. In Australia, the pledge of commitment is only made at citizenship ceremonies, and only migrants are required to attend citizenship ceremonies. The targeted nature of these ceremonies interpellates migrants as both the same as, but also different from, Australians who acquire citizenship in other ways. While the pledge is an opportunity for migrants to demonstrate that they are Australian because they embody these national values, the pledge also signals that migrants are different as they are the only individuals required to do so. Australians who are citizens by birth, descent, adoption or resumption are not required to make the pledge. This targeted treatment narrates migrants, and particularly Muslims, as individuals whose cultural and religious differences are incompatible with these national values. The implication is that even after Muslims and other migrants make the pledge, demonstrate these values and are conferred citizenship status, suspicion about their commitment to these national values lingers. This suspicion legitimises an escalation of surveillance and public scrutiny. The citizenship pledge, and the citizen subject that it narrates, creates different classes of Australian citizens. Migrants, and indeed any person who is perceived to belong elsewhere, are interpellated in ways which render their claim to citizenship status conditional and precarious.

It is timely to examine how Australian citizenship is narrated. The Australian government is increasingly restricting access to citizenship. Racialised meanings of citizenship conveyed through official ceremonies can also embolden suspicion about cultural difference, reinforce negative stereotypes, and fuel hostility amongst citizens. It is therefore important to expose the racially exclusionary national values embedded in citizenship, a legal status generally considered to promote cultural inclusion and equality.

2. Australian citizenship and the pledge of commitment

First, this section briefly introduces the Australian citizenship pledge of commitment. As pledges are only performed at citizenship ceremonies in Australia, the ceremonial context is also outlined.

The Australian government states that ceremonies ‘should be formal and meaningful occasions conducted with dignity, respect and ceremony’ (Citizenship Ceremonies Code 2019: 9). Ceremonies ‘should be designed to impress upon conferees the responsibilities and privileges of citizenship’ and ‘the significance of the occasion’ (Ibid).

To ensure that the ceremony is formal and meaningful, the government tightly prescribes what is required before, during and after the ceremony. The rules that outline the exact manner in which the citizenship ceremony is to proceed are currently set out in the *Australian Citizenship Act 2007* (Cth) (hereafter ‘the Act’), the *Australian Citizenship Regulations 2016* (Cth) (the ‘Regulations’), and the Australian Citizenship Ceremonies Code (the ‘Code’). While the Act and the Regulations outline some elements of the pledge, the Code goes into the greatest detail about how state officials should conduct the citizenship ceremony. The Code, however, does not have the status of law and so it provides guidelines which are not legally enforceable.

Citizenship ceremonies in Australia are usually organized by Local Councils, and until recently due to COVID 19, conducted at least every 2-3 months (Ivi: 8, 19). Except when there are less than 20 conferees applying for citizenship in that area, every Local Council must hold ceremonies on days of national significance such as Australia Day (26 January) and Citizenship Day (17 September) (Ivi: 20). Local Councils nominate a ‘Presiding Officer’ to conduct the citizenship ceremony (Ivi: 6, 12). The Presiding Officer must be an Australian citizen who has been approved by the Australian government (Ivi: 6, 12, Australian Government 2019a). Some individuals have standing authorization as Presiding Officers, such as federally elected Members of Parliament and Mayors of Local Councils.¹ Representatives of all three levels of Australian government (Federal, State or Territory, and Local) must be invited to the ceremony (Ivi: 13). Other individuals may be given official invitations, for instance community leaders, representatives of community organisations, and Aboriginal or Torres Strait elders or leaders (Ibid). The pledge, in all but the most unusual circumstances, must be held in ceremonies conducted within Australia and ‘in public’ (Ivi: 8, 10, 17, 22).² The public nature of the ceremony means that citizenship ceremonies are conducted in halls, parks, government offices or community venues, rather than in churches, commercialised spaces, homes or even courtrooms.

During the ceremony, the Presiding Officer usually stands in front of the gathering, with the conferees seated opposite. Invited guests, such as friends and family, are seated behind the conferees (Ivi: 25). The Presiding Officer starts with a welcome (Ivi: 32), which may include an acknowledgement of Indigenous peoples as Australia’s first peoples or a welcome to country by an Indigenous elder (Ivi: 27, 32). The Presiding Officer may then give an opening address (Ivi: 32). If the Minister is not present at the ceremony, the Presiding Officer must read the Minister’s welcome message (Ivi: 12, 32, 36). Updated from time to time, the current wording of the Minister’s message broadly acknowledges the contributions that migrants have made to the Australian nation. The message also repeats

¹ Australian Citizenship LIN 19/066 (Persons who may receive a Pledge of Commitment) Instrument 2019.

² *Australian Citizenship Act 2007* (Cth) section 27, *Australian Citizenship Regulations 2016* (Cth) section 10

the values that individuals need to commit to and defend if they wish to become Australian citizens. Those values are freedom, the rule of law, and democracy. The message also states that Australian citizens believe that ‘all people are equal, regardless of their cultural background, gender, race or religion.’³

After reading the Minister’s welcome message, the Presiding Officer may then give their own speech, and may also invite official guests to make a speech (Ivi: 32, 36). The Code suggests that speeches ought to be ‘brief and appropriate’ (Ivi: 37). The Code gives further guidance about what is appropriate. Specifically, the speeches of official guests must avoid issues that may be contentious from a ‘political, racial or sectarian point of view’ (Ivi: 36, 37). The Code suggests that speeches may note the contributions that new citizens make to Australia, or the benefits of citizenship (Ivi: 37).

After the speeches, the Presiding officer must read aloud the preamble of the Act to the conferees (Ivi: 38). The preamble reads as follows;

The Parliament recognises that Australian citizenship represents full and formal membership of the community of the Commonwealth of Australia, and Australian citizenship is a common bond, involving reciprocal rights and obligations, uniting all Australians, while respecting their diversity.

The Parliament recognises that persons conferred Australian citizenship enjoy these rights and undertake to accept these obligations:

- (a) by pledging loyalty to Australia and its people; and
- (b) by sharing their democratic beliefs; and
- (c) by respecting their rights and liberties; and
- (d) by upholding and obeying the laws of Australia.⁴

The conferees are then invited to stand and make the pledge of commitment (Ivi: 32, 38). The wording of the pledge of commitment mirrors the preamble and is prescribed in the Act. There are two forms of the pledge, one version of made ‘under God’, the other version with references to God omitted. The words of the pledge are;

From this time forward, [under God],
I pledge my loyalty to Australia and its people,
whose democratic beliefs I share,
whose rights and liberties I respect, and
whose laws I will uphold and obey.⁵

To administer the pledge, the Presiding Officer reads aloud each line, and requests that the conferees repeat back that line together, before reading out the next line (Ivi: 7). Making the pledge is the last step before conferees are granted the legal status of citizenship (Ivi: 8). The Presiding Officer must verify that each conferee has repeated the pledge (Ivi: 12, 38-39).

After making the pledge, some ceremonies hold an additional affirmation ceremony. If an affirmation is part of the citizenship ceremony, then the words of the pledge are repeated aloud a third time (Ivi: 41). During the affirmation, both the new citizens

³ Available on the Department of Home Affairs website. At the time of writing, the current Minister’s message can be found here: <<https://immi.homeaffairs.gov.au/citizenship-subsite/files/minister-coleman-ministers-message.pdf>>. Last accessed 28 November 2020.

⁴ *Australian Citizenship Act 2007* (Cth) preamble and schedule 1.

⁵ *Australian Citizenship Act 2007* (Cth), Sch 1.

and everyone present is invited to stand and repeat the pledge together. As before, the Presiding Officer reads out a line, and the audience repeats back that line, before the Presiding Officer moves onto the next line. The Presiding Officer then makes a closing address (Ivi: 32). Often, the citizenship certificates are signed by the Presiding Officer and distributed to the new citizens that same day (Ivi: 39). Sometimes refreshments follow, and new citizens may be given a gift (Ivi: 26). The government suggests that if a gift is given, then a professional photo of the occasion would be appropriate (Ivi: 26, 31).

The Code also provides guidance on how to conduct the ceremony, including suggestions about the visual and physical aspects. The Code requires that certain symbols such as the Australian flag, the Aboriginal flag, and the Torres Strait Islander flag ought to be displayed (Ivi: 24-25). An official portrait of the Queen and the Coat of Arms must also be visible, and the national anthem should be played or sung (Ibid). Commercial advertising, political material and religious symbols are not permitted to be distributed. Neither can such material be incidentally displayed in a manner that the participants might perceive the material to have government endorsement (Ivi: 26). Whenever possible, the organisers of a citizenship ceremony are encouraged to invite officers from the Australian Electoral Commission to attend the ceremony, so that new citizens can immediately register on the electoral role and vote (Ivi: 5, 42). Recognition of Australia's Indigenous peoples is not required, but encouraged (Ivi: 27, 32, 35). To attend the ceremony and make a pledge leading to the conferral of citizenship as a legal status, a person must be on the list of conferees for that specific ceremony and must be able to present satisfactory evidence of identification to officials before the ceremony commences (Ivi: 34, 44). Otherwise, their attendance and participation does not have legal effect. There is no dress code specified, however, conferees are encouraged to dress in a manner that 'reflect[s] the significance of the occasion.' (Ivi: 25). Local Councils have been encouraged to develop their own dress codes (Ibid).

Finally, it is important to note that only citizens who have acquired Australian citizenship by conferral (previously called naturalization) are required by law to attend the citizenship ceremony to make the pledge. Individuals who acquire citizenship by other means, such as birth, adoption or by descent, are not required to make the pledge. Indeed, the citizenship ceremony is the only time that the citizenship pledge is performed in Australian society.

3. Narrating citizenship, narrating national values

This paper argues that the performance of the pledge narrates certain national values as central to the Australian citizen subject. While the role of the citizenship ceremony has been critically examined in the UK, including a comparative study (Byrne 2003), there is limited research on the practice in Australia and its recent developments. Indeed, a closer examination in Australia is timely because over the past 15 years, there has been increased public attention placed on the role of both the pledge and its performance, with an increasing number of detailed revisions of the Code.

The Australian citizenship pledge as it is currently performed ensures that citizenship status and identity is associated with three core, national values. Those values are loyalty to Australia, national unity, and social cohesion. The performance of the pledge not only ensures that conferees promise to uphold these values in the future, but it also

demonstrates that they already embody those values. It is only after successfully performing these values will a migrant be conferred Australian citizenship.

3.1 Loyalty to Australia

Loyalty is enacted not only through the words of the verbal promise made in the second line of the pledge, but also through physical compliance with the rules and protocols throughout the entire ceremony.

At all times, government representatives lead the ceremony, and the conferee is expected to comply with all official directions. The Code requires officials to assess compliance by attesting that they have witnessed each conferee reciting the pledge (Ivi: 12, 38-39). The official then completes an official pledge verification form (Ivi: 30).⁶ Where a conferee has not been observed to repeat the pledge, or at the very least mouth the words since it would be practically impossible to hear their individual voice, he or she will not be conferred citizenship. There is no chance during the ceremony for the conferee to express their own expressions of loyalty to Australia. Indeed, other than repeating the pledge, there is no opportunity for the conferee to speak at all. The performance of the pledge is orchestrated by government officials and only government officials or their invited guests are given the opportunity to speak.

3.2 National Unity

While there is no explicit reference to national unity in the words of the pledge, scholars have observed that nation-states often use oaths of allegiance and pledges to build solidarity and national unity through simultaneous action and sound (Kertzer 1998; Turner 1982; Goffman 1959). Unity is achieved through the performance of the pledge, spoken together by the conferees out loud, which creates an auditory experience of unity (Macduff 2015). The Australian government has explicitly acknowledged that the purpose of the pledge in the ceremony, declaring that ‘The Pledge joins all Australians in a statement of unity’ (Australian Government 2008: 3). The national context of the pledge is signaled through the presence of national symbols, the Minister’s message, and the many references to the Australian nation, the Australian community and the Australian people.

Increasing the number of witnesses to the pledge amplifies the sense of national unity experienced. The government encourages conferees to bring guests to the ceremony. Local Councils often hold their ceremonies outside, in open spaces. The more accessible the ceremony is to the everyday ‘passer-by’, the greater the sense of unification that the performance generates. The Code suggests that ceremonies be held in town halls or parks (Code 2019: 23). Most recently, the government has encouraged Local Councils to hold their ceremonies on days which coincide with other events likely to draw a general passing audience of Australians, such as Australia Day (Ivi: 20). The government urges that ‘every effort’ should be made to encourage the local and national media to attend ceremonies, and information is given to the Local Councils on how to facilitate this (Ivi:

⁶*Australian Citizenship Act 2007 s 20(b).*

30). Since 2015, citizenship ceremonies held on Australia Day have been televised nationally.⁷ These initiatives have increased the potential size of the audience to include the entire nation, which heightens a sense of national unity.

3.3 Social Cohesion

The third value demonstrated by conferees is their commitment to social cohesion. While the government has officially described Australian citizenship status as ‘a common bond’ since at least 1993 (the Act, preamble), the concept of citizenship as a common bond found a particular articulation through the policy of social cohesion.

Although not explicitly acknowledged, the government emphasis on ‘social cohesion’ replaced its policy of ‘multiculturalism’. In the 1980s, the Australian government supported multiculturalism as a policy that accommodated the cultural diversity of migrants (Koleth 2010; Lopez 2005). However from the 1990s, in Australia as elsewhere, this policy began to attract strong criticisms for being too divisive (Holton 1997; Koleth 2010). In particular, the concern was that migrants would expect the Australian nation to recognize their own laws and cultural practices, leading to ‘ethnic tribalism’ (Blainey 1984).

In one particularly strong statement that reflects the government’s understanding of how any recognition of diversity must be subject to a firm commitment to national institutions, former Treasurer Peter Costello stated that

Australia is often described as a successful multicultural society. And it is in the sense that people from all different backgrounds live together in harmony. But there is a predominant culture just as there is predominant language. And the political and cultural institutions that govern Australia are absolutely critical to that attitude of harmony and tolerance. Within an institutional framework that preserves tolerance and protects order we can celebrate and enjoy diversity in food, in music, in religion, in language and culture. But we could not do that without the framework which guarantees the freedom to enjoy diversity. (Costello, 2006)

The statement conveys the view that any recognition of cultural diversity must be contained by loyalty to the pre-existing social and political structures. This view is now captured in the policy of social cohesion and symbolised by citizenship. In the information booklet provided to migrants interested in becoming Australian citizens, the government states that in Australia: ‘While we celebrate the diversity of Australia’s people, we also aim to build a cohesive and unified nation’ (Australian Government 2020: 9) and that, ‘Australia successfully combines ethnic and cultural diversity with national unity. Citizenship is the common bond uniting us all’ (Ivi: 2).

The performance of the pledge enacts a model of social cohesion, specifically how cultural diversity is contained by a commitment to national values. On the one hand, some expressions of cultural diversity are permitted. The government recognizes religious diversity through the provision of secular and non-secular versions upon which conferees may make the pledge (Ivi: 39). The Presiding Officer also might refer to the contribution that new citizens make in their welcome speech (Ivi: 37). Additionally, the government

⁷ See Australian Broadcasting Corporation ‘Australian Day: Flag Raising and Citizenship Ceremony 2019’. <http://www.abccommercial.com/librarysales/program/australia-day-flag-raising-and-citizenship-ceremony-2019>.

promotes citizenship ceremonies by visually noting the cultural distinctiveness of the conferees. Images in official publications providing information on citizenship often foreground a diverse range of skin tone and hair colour, as well as national, cultural or religious dress (Ivi: 9, 21, 30, 37, 42, 47).

Yet while some signs of the cultural diversity of conferees are acknowledged, the ceremony also carefully reinforces the appropriate limits of its expressions. Expressions in the form of linguistic diversity are not permitted. There is no opportunity, for instance, to make the pledge in a language other than English (Ivi: 38). Participation in the ceremony itself conveys the importance of an overarching obedience to the laws of the nation state, and as discussed above, the demonstration of national values of loyalty and unity.

The performance of the pledge is not only a mechanism through which a particular social understanding of citizenship is narrated, in the same way that a story is told. It is also a mechanism through which the meaning of citizenship itself is constructed and validated. The next section will analyse these three specific national values by situating them in the Australia's wider social, cultural and political context.

4. Citizenship, Australian national values and a politics of cultural difference

The performance of the pledge constructs a narrative where the legal citizen subject enacts three national values. While these national values are presented as culturally neutral and universally accessible, this section argues that these values operate in a racialized and exclusionary way. The Australian government's increasing emphasis on the importance of the pledge suggests it has become a critically important site through which citizen subjects are constructed. However, this site reveals an irresolvable paradox. On the one hand, it is a site through which the cultural diversity of migrants is neutralized, producing migrants as non-threatening members of the nation. On the other hand, the performance of the pledge constructs migrants as objects of national suspicion. This paradox generates a precarious form of citizenship status with significant social consequences.

The performance of the pledge narrates these three national values to conferees in a specific context. As only migrants are required to make the pledge, then it is only migrants who must demonstrate that they can embody these values before acquiring Australian citizenship status. The targeted nature of the requirement reinforces a racialized understanding of Australian citizenship. Fozdar and Low for instance, have recently argued that public narratives about citizenship values and the importance of 'abiding by the law' particularly exclude the Muslim Other (Fozdar and Low 2015). They argue that while the requirement that people must 'follow our laws' appears to be an objective and rational basis for being accepted as a member of the Australian community, it follows a period of increased suspicion towards migrants (Ibid). This suspicion builds on a history of representation of Muslims by the Australian media as deviant. The Australian media has represented Muslims as violent criminals, terrorists, religious fundamentalists and misogynists (Poynting et al 2004; Kahir 2006; Poynting and Mason 2006; Foster 2011). The representation of Muslims as religious fanatics in particular has created suspicion as to whether Muslims can put their religious beliefs to one side and accept the authority of the Australian nation, its laws and its social and cultural values.

The language of complying with the law is a neutral and rational requirement, yet it conceals its racialized operation in the Australian social context. The normative standard of obedience to the law is built on a concealed social assumption that some races (and cultures) are more law-abiding than others. The narrative of a 'law-abiding' citizen conveys a racism which is 'coded', rather than overt (Fishkin 1995).

The Australian government maintains that the acquisition of Australian citizenship status is inclusive and 'open to all' regardless of race or culture. With its explicit commitment to inclusion and non-discrimination on the basis of race, cultural or national origin, it is unlikely that the government or the courts would ever acknowledge the racially exclusionary construction of national values. To be sure, the criteria for citizenship set out in the Act does not make any distinctions based on racial or cultural origins. However, this paper argues that through targeting migrants, the performance of the pledge racializes the Australian citizen subject. The pledge reinforces the narrative that racial and cultural difference makes migrants less compatible with national values and consequently, less suitable for Australian citizenship. In this way, the national values performed during the pledge provides a standard against which the behaviour of migrants can be criticised. A discussion of two examples illustrates this point: the justification for the introduction of the citizenship test and the introduction of the citizenship stripping provisions. These two examples demonstrate how Muslims are narrated as being particularly incompatible with Australian national values, and therefore are unsuitable Australian citizens.

4.1 The citizenship test and Sheik Al Hilali.

In 2006, public criticism of a Muslim cleric was used to generate political support for the introduction of a citizenship test. In October that year, Sheik al Hilali was in news headlines for making misogynistic comments. While his comments were derogatory, he was targeted by the Australian media for criticism. Criticism of the Sheik focused on his inadequate demonstration of Australian citizenship. In particular, the media noted that since the Sheik had become an Australian citizen by conferral, he ought to be familiar with the Australian values in the pledge of commitment (Cadman 2006). The Sheik was also criticized for his refusal to speak English in public (Bolt 2006). His refusal to speak English was highlighted in relation to his participation in the citizenship ceremony, with critical comments in editorials such as 'did he sing 'Advance Australia Fair' in English?' (Mitchel 2006).

The criticisms about the Sheik's inability to comply with Australian values was understood to be due to his Islamic faith. As a religious leader, the Sheik was a representative of all those who shared his faith. This leadership status enabled the media to generalize criticism about the Sheik to criticism of Islam, and therefore criticism of all Muslims. Commentators argued that the Sheik's actions served as a problematic exemplar and a 'lightning rod for negative commentary' (Ferguson 1994: 103). Criticisms of the Sheik but also Muslims more generally were used to justify arguments for restricting access to citizenship (Macduff 2018).

The inability of migrants to follow Australian values was a reason used to justify the introduction of a test before migrants could apply for Australian citizenship by conferral. In parliamentary reading speeches discussing the citizenship test amendment, 10 parliamentarians explicitly referred to Sheik Al Hilali. There were also a handful of parliamentarians who made indirect references to the Sheik, which suggests that this incident was broadly influential (Ibid).

4.2 Citizenship stripping and Syrian freedom fighters

The second example that demonstrates how Muslims are narrated as incompatible with Australian values concerns the recent expansion of citizenship stripping provisions. In 2015, a number of Australians travelled overseas and participated in the Syrian civil war. The government considered the involvement of Australians in this overseas conflict troublesome due to the terrorist threat these ‘freedom fighters’ posed should they return to Australia. To address this national security concern the Australian government sought to expand the grounds upon which a person could be deprived of Australian citizenship (Australian Government 2015: 1).

At first, the government proposed that a wide range of terrorist and security offences would lead to a repudiation of allegiance to Australia and Australian values. There was, however, strong criticism of the proposed amendments. These criticisms led to some changes, in particular, a narrowing of the range of offences that would lead to the deprivation of citizenship. However, the amendments that were ultimately passed still expanded the grounds upon which Australian citizenship could be revoked (*Australian Citizenship Amendment (Allegiance to Australia) Act 2015* (Cth)).

Currently, the Act provides that a dual citizen who engages in acts of terrorism overseas, or who is committed of a terrorist offence in Australia, may lose their Australian citizenship (see *Australian Citizenship Act 2007*: sections 3). While legal scholars have criticized these amendments (Pillai and Williams 2017), the most relevant issue for this paper is how these events have narratively associated terrorist activities with a rejection of Australian values and Australian citizenship. In turn, these associations invite opportunities for the ongoing public surveillance and scrutiny of fellow citizens for anti-citizenship conduct. As the government and the general public identify terrorist organizations as predominantly Muslim, the burden of suspicion has fallen on Muslims to continually assert their commitment to national values and to Australian citizenship.

5. Conclusion

The analysis of the narratives communicated by the performance of the citizenship pledge at ceremonies is interesting because of what it conveys meanings about citizenship status. The growing interest that the Australian government has shown in the performance of the pledge suggests that it is an important site through which to operate a covert racialized agenda about national values. Despite the official claim is that the meaning of Australia citizenship is inclusive, this paper argued that the performance of the pledge facilitates racialised understandings of Australian citizenship status. The consequences are significant. Not only does this covert racialization of citizenship make it more difficult for migrants to acquire Australian citizenship, but the citizenship status acquired by migrants is conditional and precarious. This might even be described as ‘second class’ citizenship.

Certainly, citizenship ceremonies are not the only events where Australian citizenship is narrated. While this paper has argued that the performance of national values by citizens is tightly controlled at Australian citizenship ceremonies, alternative and more inclusive narratives of citizenship and national values do occur. However, as Ewick and Silbey note, while narratives of exclusion and narratives of resistance often draw upon the same power structures and relationships, narratives of resistance do so in order to reveal

the hidden political agenda (Ewick and Silbey 1992). Resistance, they argue, is in making these relationships visible *as narrations*, that is, as something that is formed through language and so could be different. Once it is recognized that the citizen subject and its associated national values are constructed through narratives, then a different notion of what citizenship means can be imagined. The critical task then, is to locate counter narratives in the tactical engagements of the everyday (Ewick and Silbey 1992; Isin and Nielsen 2008). In Australia, that would involve exploring the lived experiences of citizenship as resistance to the national values of loyalty, unity and social cohesion as discussed in this paper.

References

- Althusser, Louis. 2014. *On the Reproduction of Capitalism*: London and New York: Verso.
- Australian Citizenship Act 2007* (Cth)
- Australian Citizenship Amendment (Allegiance to Australia) Act 2015* (Cth)
- Australian Citizenship Regulations 2016* (Cth)
- Australian Government. 2020. *Australian Citizenship: Our Common Bond* <https://immi.homeaffairs.gov.au/citizenship-subsite/files/our-common-bond-testable.pdf>.
- Australian Government, 2019a. Citizenship LIN 19/066 (*Persons who may receive a Pledge of Commitment*) *Instrument 2019*
- Australian Government. 2019b. *Australian Citizenship Ceremonies Code*. Canberra: Commonwealth of Australia. <https://immi.homeaffairs.gov.au/citizenship-subsite/files/australian-citizenship-ceremonies-code.pdf>. Last accessed 8 December 2019.
- Australian Government. 2008. *Moving Forward, Improving Pathways to Citizenship*. Canberra: Commonwealth of Australia. <<https://docplayer.net/22228880-Moving-forward-improving-pathways-to-citizenship.html>>. Last accessed 8 December 2019.
- Australian Government. 2005. *A National Action Plan to Build Social Cohesion, Harmony and Security* https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/rp1011/11rp06#_Toc275248140.
- Australian Government. 2015. *Explanatory Memorandum, Australian Citizenship Amendment (Allegiance to Australia) Bill 2015*. <https://parlinfo.aph.gov.au/parlInfo/download/legislation/ems/r5507_ems_210d7d3c-a0bf-4ea0-9e7c-1bc3d4b48d5e/upload_pdf/EM%20Citizenship%20Allegiance%20Bill%20-%20amended.pdf;fileType=application/pdf#search=%22allegiance%20to%20australia%20citizenship%20freedom%20fighters%22>. Last accessed 13 November 2020.
- Blainey, Geoffrey. 1984 *All For Australia*. Sydney. Methuen Hayes.

- Bolt, Andrew. 2006. "Backing a Bigot". *The Sun Herald* (Melbourne). 3 November 2006, 25.
- Cadman, Alan. 2006. *Commonwealth Parliamentary Debates*. House of Representatives, 31 October 2006, 14.
- Chase, Oscar. 2006. "Law, Culture, and Ritual". New York: New York University Press ProQuest Ebook Central, <https://ebookcentral-proquest-com.virtual.anu.edu.au/lib/anu/detail.action?docID=208166>..
- Costello, Peter. 2006 *Worth Promoting, Worth Defending*. Speech delivered to the Sydney Institute, 23 February 2005 < <https://www.peter-costello.com.au/speeches/2006/2111-worth-promoting-worth-defending-australian>>.
- Ewick, Patricia and Silbey Susan S. 1991. "Conformity, Contestation and Resistance: An Account of Legal Consciousness". *New England Law Review*. 26: 731- 750.
- Ewick, Patricia and Silbey Susan S. 1995. 'Subversive Stories and Hegemonic Tales: Towards a Sociology of Narrative'. *Law and Society Review*. 29(2): 197 – 226.
- Ewick, Patricia and Silbey Susan S. 2003. "Narrating Social Structure: Stories of Resistance to Legal". *American Journal of Sociology* 108(6): 1328 –1372. Doi <https://doi.org/10.1086/378035>
- Fisher, Shelley F. 1995. "Interrogating 'Whiteness', Complicating 'Blackness': Remapping American Culture". *American Quarterly*. 47(3): 428 – 466.
- Foster, Nena et al. 2011. "Fractured Multiculturalism: Conflicting Representations of Arab and Muslim Australians in Australian Print Media". *Media Culture Society* 33(4): 619 – 629. Doi: [10.1177/0163443711399034](https://doi.org/10.1177/0163443711399034).
- Ferguson, Robert. 1994. "Becoming American: High Treason and Low Invective in Republic of Laws". In *The Rhetoric of Law* edited by Sarat, A. and T. Kearns, 103 133. Ann Arbor: University of Michigan Press.
- Fozdar, Farida and Mitchell Low. 2015. "They Have to Abide by Our Laws ... and Stuff: Ethnonationalism Masquerading as Civic Nationalism". *Nations and Nationalisms*. 21(3): 524- 543. Doi:10.1111/nana.12128.
- Goffman, Erving. 1959. *The Presentation of Self in Everyday Life*. New York City. Anchor.
- Hage, Ghassan. 2000. *White Nation: Fantasies of White Supremacy in a Multicultural Society*. New York. Routledge.
- Holton, Robert. 1997. *Immigration, Social Cohesion and National Identity*. Canberra. Parliament of Australia.
- <https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/RP9798/98rp01>. Last accessed 8 December 2019.
- Insin, Engin and Nielsen, Greg (eds). 2008. *Acts of Citizenship*: London and New York. Zed Books.

- Kabir, Nahid R. 2006. "Representations of Islam and Muslims in the Australian Print Media 2001- 2005". *Journal of Muslim Minority Affairs*. 26(3): 313- 328. DOI:[10.1080/13602000601141281](https://doi.org/10.1080/13602000601141281).
- Kertzer, David. 1998. *Ritual, Politics and Power*. New Haven and London. Yale University Press.
- Koeth, Elsa. 2010. "Multiculturalism. A review of Australian policy statements and Recent Debates". https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/rp1011/11rp06#_Toc275248140.
- Lopez, Mark. 2005. "Reflections on the State of Australian Multiculturalism and the Emerging Multicultural Debate in Australia 2005". *People and Place*. 13(3):33.
- Macduff, Anne. 2015. "Performing Citizenship, Embodying Obedience". In *Citizenship and Democracy: Contemporary Questions*, edited by Kim, Rubenstein and Glen Patemore. 131- 151. Canberra: ANU ePress.
- Macduff, Anne. 2018. "The Citizen's Other: Australian Political Discourse On 'Australian Values'. Migrants and Muslims". *NOFO*. 15: 46 – 73.
- Manderson, Desmond and Sarah Turner. 2006. "Coffee House: Habitus and Performance Among Law Students". *Law and Social Inquiry*. 31(3): 649 -676. Doi: doi.org/10.1111/j.1747-4469.2006.00025.x. Last accessed 8 December 2019.
- Mitchel, Denis. 2006. "Letters to the Editor". *The Daily Telegraph*. 31 October 2006, 16.
- Peters, Julie. 2008. "Legal Performance Good and Bad". *Law, Culture and the Humanities*. 4: 179 – 200. Doi: doi.org/10.1177/1743872108091473. Last accessed 8 December 2019.
- Pillai, Sangeetha and George Williams. 2017. "The Utility of Citizenship Stripping Laws in the UK, Canada and Australia". *Melbourne University Law Review* 41(2): 845 – 889.
- Poynting, Scott et al. 2004. *Bin Laden in the Suburbs*. Sydney: Institute of Criminology.
- Poynting, Scott and Victoria Mason. 2006. "Tolerance, Freedom, Justice and Peace"? Britain, Australia and Anti-Muslim Racism Since 11 September 2001". *Journal of Intercultural Studies*. 27(4): 365 – 391. doi: [10.1080/07256860600934973](https://doi.org/10.1080/07256860600934973).
- Scanlon Foundation. No date: 'What is Social Cohesion?' <https://scanloninstitute.org.au/what-social-cohesion>.
- Turner, Victor. 1982. *From Ritual to Theatre: The Human Seriousness of Play*. New York City: Performing Arts Journal Publications.
- Umphey, Martha Merrill. 2011-2012. "Law in Drag: Trials and Legal Performativity". *Columbia Journal of Gender and Law* 21(2): 114 – 129.

How clients and lawyers construct facts. The stories they tell each other and the stories that guide investigations into the world

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Abstract

This paper uses narrative theory to reformulate understanding of the lawyering activity of fact investigation. It contributes to new understanding of legal practice rooted in narrative understanding of law. Using materials from a clinical case study, it illustrates how narrative theory generates a methodology of fact investigation. Narrative-Driven Fact Investigation draws on three fundamental themes from narrative legal theory. First, stories construct facts. Facts are shaped by the stories told about them by different actors within a legal proceeding. Second, the context of a legal dispute and the context of the stories told within the dispute shape the meaning of the facts narrated by different participants. Third, this methodology furthers the dignity and autonomy of clients through the telling of stories from the client's perspective and engaging clients in the process of investigating what happened in a case. Narrative-Driven Fact Investigation includes approaching the activity through the concept of case theory, as well as specific practices rooted in the aspects of narrative.

Key words: Lawyering, Legal stories, Narrative, *Law and Narrative*, Narrative-Driven Fact Investigation.

1. Introduction

Narrative theory is a powerful device for understanding and shaping the practice of law, particularly for marginalized or excluded people. Lawyers must be educated in narrative theory and must learn narrative practices through which they can realize the potential of that theory in the representation of clients who come to them to resolve legal problems. In earlier work, I have examined how facts get constructed through the dynamic between client and lawyer as they tell and listen to stories of the client's problem(s) and of the legal norms, rules, and practices that might be implicated in and by those stories.¹ I have identified specific narrative practices to guide lawyers in their representation, as it takes shape

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¹ See Ellmann, et al. 2009, Chapter 4, *Narrative Theory and Narrative Practices*: 139-226.

through the dialogue between lawyer and client.² These narrative practices, which inform the recurring minute interactions between lawyer and client, are designed to further the dignity and autonomy of the client, to pursue alternative stories that may not fit within the dominant legal paradigm or may even challenge it, and to create opportunities for clients to tell their stories and have them heard. I now extend this exploration of the construction of facts within legal culture from the context of storytelling in the lawyer-client relationship to the context of story construction that occurs in the process of a lawyer's investigating a case.

2. Narrative Theory and Clinical Thought

I approach this exploration of how legal narratives operate within legal culture – here fact construction within investigation of a legal case – from the stance of clinical thought, using clinical method (Shalleck 2017). This method, with its initial philosophical roots in Legal Realism in the United States (Di Donato 2020: 42-45), has now generated a multi-dimensional lawyering theory that seeks to both explicate and transform the daily dynamics of all aspects of client representation, from the initial meeting of lawyer and client through the presentation of a legal matter for adjudication or other resolution. Lawyering theorists approach this project through identifying, elaborating, and critiquing the actual activities of lawyers rather than by beginning from abstract models. Thus, they produce lawyering theory through an iterative process involving both analyzing the activities of lawyers and creating dynamic and changing models of practice. The method requires both attending to particular, local details of legal practice, as well as the conventions within relevant communities of practice, and developing working paradigms that reveal how discrete practices cohere in ways that, with some regularity and predictability, offer useful descriptions of what lawyers do or could do differently.³

As they have created lawyering theory, clinical theorists have simultaneously developed and elaborated pedagogical methods and models for transmitting and shaping the thought and behavior of future lawyers.⁴ While they seek through these pedagogical methods to teach lawyering theory and practice, clinical professors also have the fundamental goal of instilling in students' habits of reflection about and critique of dominant forms of legal practice (Bryant, Milstein and Shalleck 2014: 13-31). They seek to generate an awareness of how conventional practices may reinforce dominant legal regimes and how those

² Ivi: 157-199.

³ Clinical theorists share with the New Legal Realists an understanding of law as not only abstract statements of norms and rules in codes or judicial pronouncements, but also law as experienced in the everyday lives and understandings of people. Both move from a focus upon law on the books to law in action (Di Donato 2020: 46-47).

⁴In the first comprehensive text for clinical education – *The Lawyering Process: Materials for Clinical Instruction in Advocacy* (1978) – Gary Bellow and Bea Moulton integrate both early lawyering theory and pedagogical theory to produce a theoretical and practical statement of this vision of clinical thought. (Bellow and Moulton 1978). In *Clinical Legal Education – a 21st Century Perspective* (1984), Anthony Amsterdam identifies new mindsets critical to lawyers that emerge from attention to clinical method (Amsterdam 1984). Drawing on decades of pedagogical innovation, *Transforming the Education of Lawyers: The Theory and Practice of Clinical Pedagogy* presents a comprehensive contemporary understanding of the pedagogical theory and practice of the clinical method (Bryant, Milstein and Shalleck 2014).

marginalized within society and law may be treated differently, denied justice, or remain unheard or invisible within a legal system. Thus, the educational project includes teaching students to learn how to construct alternative forms of daily practice to address inequality or exclusion in situations where they encounter clients who have suffered these harms.

From the beginning of the creation of the clinical method, clinical scholars have approached the development of lawyering theory and pedagogical theory as intertwined. At the most basic level, they know that educational practice shapes at least in some ways legal practice and the norms and values it embodies. At a deeper level, they recognize that legal education is an important site for creation of meaning in the culture of law practice.⁵ Third, clinical theorists have productively used the context of teaching a lawyering practice as a site for a more controlled analysis of each lawyering activity that occurs within legal practice. At its core, clinical pedagogical method puts students in the position of being lawyers who take action as lawyers – in both real life and simulated situations – and reflect on that experience before, during, and after taking action. Teachers have the opportunity to guide students' learning as they act and as they come to understand the multiple meanings of that action. Thus, through their pedagogy, clinical theorists have a distinctive opportunity both to be part of and observe their students' experience of acting as lawyers and to analyze that experience in a structured, intentional way over time. Teaching operates as a way for creating clinical theory.

3. Using Narrative Theory and a Clinical Case Study

From this clinical stance, I begin this exploration of how narrative theory can help us both understand and critique the ways lawyers investigate the facts of a legal matter. I use narrative methodology in all aspects of my clinical teaching. I begin this current inquiry by using my teaching of fact investigation in a clinical course as an entry point for exploring how narrative theory can be transformative in at least two ways in understanding a lawyer's investigation of a case. First, narrative theory aids in explaining what lawyers do in their regular practice of representing clients in legal matters. As Flora Di Donato explains, narrative theory can

reveal the models that we take for granted, the prototypes and structures that underpin legal practices, so as to understand how shared meanings use conventional legal discursive practices to create and maintain a dominant legal regime in specific contexts and structures (Di Donato 2020: 45).

Second, using narrative theory in the teaching of fact investigation can expand the available methodologies lawyers have for conducting fact investigations, methods that have the potential to enhance the dignity and autonomy of clients in the representation that lawyers provide.

I provide here only a brief, skeletal version of teaching fact investigation within a clinical course. I focus on teaching fact investigation only within the seminar component

⁵ Clinical theorists share with the New Legal Realists this insight about legal pedagogy as a site for law creation (Mertz 2016: 7, 12, 13-17).

of a clinical course.⁶ Under the supervision of faculty, students in the course are concurrently doing actual fact investigations in their representation of clients.⁷ I use only a few, pared down materials I developed for a semester-long simulation in the clinical seminar. The simulation is a clinical case study using a fictional scenario developed from actual experiences. The materials in the simulation provide a basis – a kind of evolving, dynamic case study – for teaching a narrative methodology for fact investigation. This simulation/clinical case study involves a client – Jenna Jeffries – whose child, Amberly, has been taken into foster care on an emergency basis by a state child welfare agency, the first step in a child neglect proceeding in which a judge will eventually determine if Jenna Jeffries has neglected her daughter Amberly.

3.1 The Clinical Case Study

When the students (in teams of two) meet Jenna for the first time, she has just learned that a social worker for the state agency, along with the police, has taken Amberly away and Jenna is awaiting an emergency (shelter care) hearing to decide if Amberly can come home while the child neglect case proceeds. In the seminar, fact investigation follows two other units. The first is a unit on building the lawyer client relationship (commonly known as interviewing), where the major themes are establishing connection between lawyer and client and learning the facts in the client's story. As a fundamental part of this unit, the students interview an actress playing the role of Jenna. The seminar introduces students to narrative theory through theoretical readings on narrative theory, lawyering theory, and critical theories of race, gender, and poverty; written exercises involving planning for and reflecting on the interview; critique of their performance by their teacher; and classroom discussion and exercises focusing on analyzing the lawyer-client relationship. Thus, students start to use narrative theory in building their relationship with the fictional Jenna as they also learn about narrative theory in the classroom setting of the seminar. They begin to understand the relationship of narrative and construction of facts through theory and practice. The **first document** below is a short version of the information about Jenna that we provide to the actor-clients before the initial meeting with the student lawyers. Beyond this document, the actors get no instructions on how to behave as Jenna in the simulation/clinical case study. They are the interpreters of the document as they inhabit

⁶ The seminar is one of three components of what constitutes a clinical course within the law curriculum. First is a weekly clinical seminar, in which we provide students with frameworks for approaching standard lawyering activities, for example, client interviewing, counseling, case theory development, and fact investigation. As part of the class, we use a simulated case, in which students have multiple opportunities to do the lawyering tasks they are learning in class. In each simulation, students perform a discrete task that is part of representation of clients in cases (often the performance is recorded). Actors play the role of the client. Students plan and analyze the task both before and after doing it. Professors provide critique of students' performance of the task. The students' experience in performing, planning, and reflecting on their experience is then integrated into the seminar class. In the second component of the clinic, students represent real clients under the supervision of a faculty member. Third, there are weekly case rounds in which the students explore their experiences across the cases that all the students are handling. For a detailed overview of the components of a clinical experience and how they fit together to create clinical methodology, see Bryant, Milstein and Shalleck. 2014: 1-12.

⁷ In doing this lawyering work, they get to both do and reflect with their teachers on how the approaches to fact investigation learned in class operate in the far more complex and chaotic conditions of actual practice.

the role of Jenna. The **second document** is the neglect petition that the government has filed alleging neglect of Amberly, which both students and Jenna have at the time of the first lawyer-client meeting.

Through planning for the meeting, individual faculty feedback about the meeting, written reflections, and class sessions before and after the simulated initial meeting, students explore the themes of connection and client story, while they learn concrete practices (skills) for establishing the lawyer-client relationship and for eliciting, listening to, and understanding the account given by the client. At the end of this unit, we give the students the document that the actor-clients had so that, as we move forward in examining other aspects of lawyering, all the students have the same information given to the Jennas (although the actors have interpreted and communicated this information differently in each simulation).

In the second unit, students learn the process of constructing with the client case theories that embody the possible stories they think, at this point, that they may want to tell in the case.⁸ They learn that narrative theory is basic to the process of constructing case theories. A case theory offers an account of the situation the client faces in light of the law to explain facts, relationships, and the circumstances of the client and other parties to achieve the client's goals. It presents a guide to further decisions and action in the case. Case theories unite possible client narratives with possible legal theories. The **third document** contains excerpts from the law regarding the definition of a neglected child and the criteria for removing a child from a parent's care during the pendency of neglect proceedings. The case theories will go through multiple iterations and modifications as the representation proceeds through the stages of the simulation/clinical case study. The **fourth** document is a small part of the assignment for the class on case theory, designed to highlight the variability and malleability of possible case theories at this stage of client representation. Students suggest three alternative case theories to guide representation of Jenna at the upcoming shelter care hearing, where the court will decide if Amberly can return home while the neglect case proceeds. The themes for the case theory class include the tentativeness of the student-lawyers' understanding of the client's story, the mutability and partiality of the client's story, uncertainty about the facts, the role of procedural and substantive law, and the importance of maintaining alternative stories. We emerge from that class with three case theories, among the many possibilities that the students have generated in their assignments and in the seminar setting, for use in the subsequent units.

With this foundation, we approach the third unit, Factual Investigation, which we situate at the stage of preparation for the shelter care hearing, which concerns the temporary removal of Amberly from her home during the pendency of the neglect proceeding.⁹ For this class in which students learn about investigating what happened in the case, the students use the three possible case theories that emerged from the prior class on case theory.

⁸ As Flora Di Donato (2020: 75) explains the relationship of case theory and narrative theory: "This method of putting facts and law together in a narrative framework also corresponds to what clinicians call the case theory. The process of developing a case theory is an iterative one, a spiral – to a degree reminiscent of a hermeneutic circle – that goes back and forth from facts to norms and vice versa, devising possible ways to tell the story to different audiences". For a fuller discussion of case theory and narrative, *see* Chavkin 2002; Delgado 1987; Dinerstein 1991-1992; Lopez 1984, 1989; Shalleck 2018; White 1990.

⁹ Document 4, the case theory assignment given the students following their interview with Jenna, illustrates the ways that these themes in narrative theory can be actualized in the development of case theories.

Case Theory 1: Ms. Jeffries and Mr. Bryce are hardworking parents teaching their children to be responsible members of society. They have created a stable home for their children amidst financial insecurity and have made sacrifices and work opposite schedules to ensure someone is always home for their children. Kyle's treatment of Amberly was in keeping with the family's approach to discipline, which is reasonable and moderate.

Case Theory 2: Amberly, a typical teenager who has been challenging authority, acted out against her stepfather when he tried to punish her. She exaggerated the discipline out of anger and in an attempt to assert her independence. She is safe in her home with her family who love her. Her removal adds confusion and instability to an already-difficult time in her life.

Case Theory 3: Geneva Taylor, a close friend of Jenna Jeffries, has long disapproved of Kyle Bryce, Sr. She exaggerated the events that occurred between Amberly and Mr. Bryce and between Ms. Jeffries and Mr. Bryce in order to ensure that CFSA would step in. Amberly's life should not be further disrupted and she should be returned to the family that loves and cares for her.

The students' assignment for the Fact Investigation class is the **fifth** document.

3.2 Materials from the Jenna Jeffries Clinical Case Study/Simulation

Document #1 - Information for actors playing Jenna Jeffries Before first meeting with her lawyer

Jenna's background: family and friends

You are 34 years old. You have been married to Kyle Bryce for 5 years. It's a common-law marriage – there was not a license, but you had a small informal ceremony and you and Kyle hold yourselves out as and consider yourselves married. You and Kyle have two children together (Kyle Bryce, Jr., age 3 and Krystle Bryce, age 5). You also have a daughter from a previous relationship who lives with you (Amberly Jeffries, age 11). You live at 4700 C Street, SE, Apt. #402, Washington, DC.

Your parents are alive and well and living in Pittsburgh, Pennsylvania. You don't see them much because of your work schedule and they don't really like Kyle because he was in jail for a brief period a long time ago. (He served about six months in prison for some petty drug crimes – marijuana, you think, but he completed his probation years ago.) They haven't come to visit since shortly after Kyle Jr. was born, though you and the kids talk on the phone with them now and then. Amberly's father has never been involved with Amberly. As for other family members, you have a second cousin, Roje Nickels. You rarely see her, although you talk about once a week.

A close friend who has been like family is Geneva Taylor. Although you and Geneva are not blood relatives, you have known each other since childhood. You lived with her, her sister, and her mother for a few years when things were not going well between you and your parents. Geneva is older than you are and has a good government job. She's a bit of a know-it-all. Geneva lives about six blocks away from your apartment. Your kids call her Aunt Geneva.

The other person you talk to regularly is your friend from work, Esther Alvarez. Esther is friends with both you and Kyle, as she has worked with both of you and spends time with you outside of work.

Jenna's background: work

You and Kyle both work for Mama's Kitchen, a 24-hour diner. You work as a waitress during the 11 a.m.-8 p.m. shift, and Kyle works as a short-order cook during the midnight-9 a.m. shift. These shifts work pretty well for the family—you get the kids ready in the morning and drop them off at school, and Kyle Sr. picks them up from school, looks after them in the afternoons and feeds them dinner. Your work hours make it difficult for you and Kyle Sr. to spend much time together. Things are hectic in the mornings, and when you get home from work, Kyle Sr. generally tries to get a couple hours of sleep before going to work. While this is hard, you don't know how else the family would manage, as childcare is expensive. You live month-to-month as it is.

Jenna's background: relationship with Kyle

Your relationship with Kyle Sr. is pretty good. He's good with the children and treats Amberly like his own child. He works hard at Mama's Kitchen and at home. He makes repairs and does a fair amount of the housework. He's sensitive to little things, like when you need to sleep on the weekend, and knows how to make you laugh when you're down.

Kyle has matured a lot over the last few years since you got married and had kids. He used to drink too much, and the two of you would fight when he got drunk. On one occasion - before you were married (about six years ago) - Kyle had gone out drinking with his buddies. They came back to your apartment and woke you and Amberly. You demanded that Kyle's friends leave the apartment, which they did. Kyle was furious—he called you a bitch and told you that you had no right to kick his friends out. He told you not to humiliate him in front of anyone again. You told him that this wasn't about your disrespecting him, it was about his disrespecting you and Amberly. He wasn't listening so you pinched him—hard—mostly to get his attention. He grabbed you by the hair and by the arm and forced you into Amberly's bedroom, slamming the door behind you. You stayed in Amberly's room that night. You were so furious that the next morning you filed for an order of protection against him. Kyle was angry, too, and he left the apartment to stay with a friend.

When you and Kyle went to court on your assigned date two weeks later, you were sent to meet with an attorney negotiator. The negotiator said that Kyle could consent to a civil protection order (CPO) without admitting that he'd done anything wrong, and he would not have any criminal record; he said that then you would get the court order you wanted, and there wouldn't have to be a trial. By that time, Kyle had moved back in and apologized to you. You didn't feel like you needed the order, but you felt that you wanted Kyle to know that you were serious. Kyle consented to the CPO, which lasted a year.

Things went well, and you and Kyle exchanged wedding rings in your backyard with Roje, Geneva, Esther and few other friends a few months after the court date. You have occasional fights, and once or twice a year, the fights include shoving each other. The rest of the time you get along. Kyle has not gotten into any trouble with the law since you and he have been together.

You and Kyle agree on child-raising issues and both believe that if you "spare the rod, you spoil the child." You both spank the children, with your hands, a bedroom slipper, or a belt, if needed. (You know that some people don't approve so you don't volunteer this information, but you

don't hide it. You believe that your childrearing decisions are entitled to privacy.) Kyle Jr. and Krystle are generally happy and obedient, and they need only occasional disciplining. Amberly is generally well-behaved and has been doing well in school. She's accustomed to Kyle Sr. and calls him "Dad." She's also great with the younger kids and is very responsible. But she's begun to have a bad attitude once in a while. On a couple occasions when Kyle Sr. has tried to discipline her, she's talked back to him and reminded him that he's not her 'real' father.

What happened two days ago

Last night, you were at work when Amberly called you, crying hysterically. She said that Kyle Sr. had been drinking a beer and ordered her to feed the kids some dinner. Amberly said that she told him that she was doing her homework. She said that he grabbed her roughly by the arm and pushed her towards the kitchen. When she pushed him back, he went and got a belt from the bedroom closet, and then hit Amberly with the belt on her legs.

You tried to calm Amberly down, but you didn't want to say anything to undermine Kyle's authority with the kids. You were about to ask Amberly to pass the phone to Kyle Sr. so that you could talk to him yourself. Just then your supervisor, Ms. Ridley, walked by and shot you a warning look. Ms. Ridley had become irritated with you earlier this week because the kids had called. She had told you that personal phone calls should be made before or after your shift.

You told Amberly that you couldn't talk to her until you got home. Amberly said that she wanted to go to her Aunt Geneva's house. Thinking that this would be a good way to put off having to deal with the situation until after work, you told Amberly, "That's fine. Go to your aunt's house; tell your dad I said you could go." Your neighborhood is not the safest in the city, but the kids know it well, and many of the neighbors know them.

When you returned home, you called Geneva to talk to Amberly. Geneva told you that Amberly showed up at her doorstep earlier with the son of one of Geneva's acquaintances (he goes by "J.R."), who's a known drug dealer with a criminal record. Geneva was furious when Amberly appeared with J.R. Amberly explained that J.R. had come with her because he wanted to make sure she got to Geneva's safely. Geneva told you that Amberly was upset when she arrived and told Geneva what had happened with Kyle.

Geneva then told you that she knew Kyle was no good. Geneva reminded you that she had never approved of Kyle and that she had always thought he was an immature drunk. Geneva blamed you for what had happened to Amberly. Geneva said that none of this would have happened if you had left Kyle long ago after one of his fights with you. Geneva said that this was the last straw. Geneva said that it wasn't her responsibility to care of your children and so Geneva had called Child and Family Services Agency (CFSA), the child protection services agency. She told them that Amberly had been beaten by her stepfather, that you had told her that she could leave the house at night, and that a known drug dealer had accompanied her to Geneva's house. Geneva told CFSA that she could not take in another child, having four of her own, and she wasn't going to clean up the mess you had made. A CFSA social worker then went to Geneva's apartment with a police officer and placed Amberly in a temporary foster home.

You were devastated by what Geneva told you. You were so angry with her for having done this that you hung up the telephone.

After hanging up on Geneva, you immediately found and called the CFSA office. You explained to a worker who answered what had happened, but that worker said there was nothing you could not do until you went to court. You said you were worried about Amberly and asked where she

was and if you could talk to her and visit her. The worker said she did not have any information about Amberly's whereabouts. Again, she told you that you would have to wait until court.

After hanging up with CFSA, you were consumed with anger. You do not believe that Kyle inappropriately disciplined Amberly, based on what he and Amberly told you. However, you yelled at Kyle for letting things get out of hand. He did not seem drunk, but it had been a while since the incident. He yelled at you for having given Amberly permission to leave.

What happened earlier yesterday

Someone came to your apartment and served you with some papers [the neglect petition]. The papers said that you abandoned or abused your child, and that a court hearing is scheduled for three days from now about where Amberly will be. Shortly thereafter, you got a call from the office of the attorney appointed to represent you who asked you to come into the office in the morning.

You called Esther at home to let her know what was going on with Amberly. Esther can't believe this has happened and wants to help. She offered to tell the judge what good parents you and Kyle are. You do not think that you want to involve her in this matter. You are worried that the attorney might bother Esther at work or that Esther might have to take time off from work (and lose pay) to come to court.

The meeting with your attorneys

You are about to meet with your attorneys. You want to know what you can do to see Amberly and get her back with her family as soon as possible. You're very worried about Amberly's being scared and thinking that she's done something wrong. You just want things to go back to how they were.

Document #2 – Neglect Petition

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
Family Court

PETITION

To the Family Court
SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

In the Matter of:

Child's Name: Amberly Jeffries		Address: 4700 C Street, SE #402 Washington, DC
Date of Birth: 8/11/Y-11	SF#: 365128 N#: 2016 NEG 532	
Child's Present Location: Child and Family Services Agency		

It is respectfully represented unto the Court by your Petitioner:

Victoria Brown

that the child is within the jurisdiction of this Family Court and that the name(s) and residence(s) of the parents/guardian or nearest relative of the said child is/are as follows:

Name and Relationship: Jenna Jeffries, Mother	Address: 4700 C Street, SE #402 Washington DC
Name and Relationship:	Address:
Name and Relationship:	Address:

AND IT IS FURTHER REPRESENTED BY PETITIONER THAT SAID CHILD IS NEGLECTED IN THAT THE CHILD IS A CHILD:

- (i) who has been abandoned or abused by his or her parent, guardian, or custodian, or whose parent, guardian, or custodian has failed to make reasonable efforts to prevent the infliction of abuse upon the child. For purposes of this sub-subparagraph, the term “reasonable efforts” includes filing a petition for civil protection from intrafamily violence pursuant to section 16-1003;

AND IT IS FURTHER REPRESENTED BY PETITIONER THAT THE FACTS IN SUPPORT OF THIS PETITION INCLUDE THE FOLLOWING:

Amberly Jeffries was born on 8/11/Y-11 and is 11 years old. Prior to the petitioning of this case, Amberly resided with her mother, Jenna Jeffries, her mother’s boyfriend, Kyle Bryce, Sr., and Amberly’s half-siblings, Kyle Bryce, Jr., and Krystle Bryce, in Washington, D.C.

On D-2, around 8:00 p.m., the CFSA hotline received an abuse report from Geneva Taylor. Ms. Taylor is a friend of Amberly Jeffries’ mother, Jenna Jeffries. Ms. Taylor called to report that Amberly Jeffries had just arrived at Ms. Taylor’s house because Amberly’s mother’s boyfriend, Kyle Bryce, Sr., had verbally and physically abused her. Specifically, Ms. Taylor stated that Amberly had arrived unexpectedly at Ms. Taylor’s home around 7:00 p.m., having walked all the way from Amberly’s home (about six blocks away). Ms. Taylor was very concerned because Amberly arrived without her mother and with J.R., a young man who is a known drug dealer with a criminal record. Ms. Taylor reported that Amberly was crying hysterically and reported that Mr. Bryce had beaten her repeatedly with a belt. Ms. Taylor stated that Amberly had welts on her legs.

Ms. Taylor told the hotline that this was not the first time that Mr. Bryce had been violent. Ms. Taylor reported that Ms. Jeffries had told her that Mr. Bryce had been violent toward Ms. Jeffries in the past. She said that Amberly’s mother should have known that she could not trust him around her children.

Finally, Ms. Taylor told the hotline that she could not keep Amberly and that she was calling to make sure the girl was properly cared for.

On D-2, your Petitioner met with Amberly Jeffries at Ms. Taylor's home. Amberly reported that on D-2, at around 6:00 p.m., Mr. Bryce, who was intoxicated, ordered her to feed her half-siblings some dinner. Amberly stated that she told Mr. Bryce that she could not feed them until she finished her homework. Amberly reported that Mr. Bryce then grabbed her roughly by her arm and shoved her towards the kitchen. When she pushed him back, Mr. Bryce got a belt from the bedroom, and then repeatedly beat Amberly with the belt on her legs. Amberly stated that she then called her mother to report Mr. Bryce's behavior, and Ms. Jeffries told Amberly to go to Ms. Taylor's home.

During this meeting, your Petitioner witnessed several welts on Amberly's legs. When relaying the incident, Amberly was upset. She stated that she did not get along with Mr. Bryce. He treats her okay when he is sober but mean when he is drinking. Amberly also reported that she does not like Mr. Bryce because he treats her mother badly. Amberly said that she is left alone with Mr. Bryce (and her half-siblings) while her mother works her 9-hour shift at a diner 5 days a week.

Said child comes within the jurisdiction of the Court pursuant to D.C. Official Code Section 16-2301(9)(A)(i)(2003).

WHEREFORE, your Petitioner prays the Court hear the matter herein set forth and determine whether said child should be dealt pursuant to the applicable sections of the District of Columbia Code, as amended by PUBLIC LAW 91-358, July 29, 1970.

 D
Date

Victoria Brown
Signature of Petitioner

DISTRICT OF COLUMBIA, ss:

The above-named petitioner being duly sworn, upon oath states that he/she has read the foregoing petition and knows the contents thereof, and that the facts contained therein are true to the best of his/her knowledge and belief.

Victoria Brown
Signature of Petitioner

Subscribed and sworn to before me this D

By: Andrew Singletary
Assistant Attorney General

Document #3 – Excerpts from applicable law

1. The term “**neglected child**” means a child:
 - i. who has been abandoned or abused by his or her parent, guardian, or custodian, or whose parent, guardian, or custodian has failed to make reasonable efforts to prevent the infliction of abuse upon the child. The term “reasonable efforts” includes filing a petition for civil protection from intrafamily violence.

2. The term “**abused**”, when used with reference to a child, does not include discipline administered by a parent, guardian or custodian to his or her child; provided that the discipline is reasonable in manner and moderate in degree and otherwise does not constitute cruelty.
3. In determining whether **shelter care** is necessary, among the factors deemed relevant are
 - a. Protection of the child
 - (1) The nature and seriousness of any alleged abusive or threatening conduct toward the child, and the potential for further harm to the child prior to the fact-finding hearing;
 - (2) The existence of illness or injuries to the body of the child who was in the custody of the parent, guardian or custodian for which no satisfactory explanation is given;
 - b. Lack of Care or Supervision.
 - (1) The child’s age and maturity;
 - (2) The child’s existing living arrangements;
 - (3) The duration of existing living arrangements and the child’s adjustment to them; and
 - (4) Evidence or likelihood of serious harm to the child’s physical or mental health resulting from existing living arrangements.
 - c. Alternatives to Shelter Care. Before a child is placed in shelter care, the judicial officer must determine that:
 - (1) No alternative resources or arrangements are available to the family that would adequately safeguard the child without requiring removal; and
 - (2) No relative or other third-party custodian is available who can protect the child and provide for his or her welfare.
 - d. Evaluating Harm from Removal. In making a shelter care determination, the judicial officer shall evaluate the harm to the child that may result from removal. In making such evaluation, the judicial officer shall consider such factors as:
 - (1) The child’s attitude toward removal and ties to the parent, guardian or custodian, as well as the child’s relationships with other members of the household;
 - (2) The disruption to the child’s schooling and social relationships which may result from placement out of the neighborhood; and
 - (3) Any measures which can be taken to alleviate such disruption.

Document #4. Excerpt from Assignment for Case Theory Class

Based on what you know up to now from all the materials that have been distributed to you, your experience in the simulation, and the ideas contained in the reading and developed in class, construct **three possible case theories** you might use in representing Jenna Jeffries as you prepare for the possibility of a **Shelter Care hearing**.

Write each theory on a separate page. Each case theory should be no more than 50 words.

After each case theory, identify

1. The sections of the statute, rules, or other law that were important as you structured the case theory (whether or not they appear explicitly in the case theory);
2. The key facts you have included;
3. The characters who appear in the case theory – the characters can be particular identifiable individuals, people identified by role, or institutions or objects that take on a human-like quality;
4. The theme(s) you want to emerge;

5. The goal(s) that you want to achieve with the case theory;
6. Any aspects of the social, cultural or political context that you thought about in making your choices in constructing the case theory.

Document #5. Excerpt from Assignment for Fact Investigation Class

In this class, we will explore the importance of facts; different approaches to fact investigation, development and interpretation; the interrelatedness of case theory and fact development; and the relationship of Jenna Jeffries' account to your approach to fact investigation. Recall the point at which you are currently in your representation – the shelter care hearing. Both your case theory and your investigation plan are still in their earliest formative stages. Your assignment requires you to revisit three of the tentative case theories we developed in the case theory class. Here are the three theories:

Case Theory 1: Ms. Jeffries and Mr. Bryce are hardworking parents teaching their children to be responsible members of society. They have created a stable home for their children amidst financial insecurity and have made sacrifices and work opposite schedules to ensure someone is always home for their children. Kyle's treatment of Amberly was in keeping with the family's approach to discipline, which is reasonable and moderate.

Case Theory 2: Amberly, a typical teenager who has been challenging authority, acted out against her stepfather when he tried to punish her. She exaggerated the discipline out of anger and in an attempt to assert her independence. She is safe in her home with her family who love her. Her removal adds confusion and instability to an already-difficult time in her life.

Case Theory 3: Geneva Taylor, a close friend of Jenna Jeffries, has long disapproved of Kyle Bryce, Sr. She exaggerated the events that occurred between Amberly and Mr. Bryce and between Ms. Jeffries and Mr. Bryce in order to ensure that CFSA would step in. Amberly's life should not be further disrupted and she should be returned to the family that loves and cares for her.

For each of the three case theories:

1. Identify and name 5-7 discrete, specific, concrete facts that you think you know that would support this possible case theory.
2. Identify 5-7 possible avenues for further fact investigation of these facts. Describe what else you might want to know in order to test this hypothesized case theory. What questions do you have about the facts you think you know? How does your thinking about the facts you think you know or want to find out matter in assessing your case theory?

As you identify facts related to each case theory, consider why each is important for that case theory and how you might go about answering the questions you have about those facts. What are the factual inquiries you would make?

4. Constructing Factual Narratives: Themes from Narrative Theory

These documents from a fictional case study/simulation, developed as part of a pedagogical method for teaching lawyering, provide a way to explore broader issues in the role of narrative in law. This inquiry into lawyers' activity proceeds by locating the process of fact investigation in the particular context of the case study to illustrate the potential of

narrative theory in developing understanding of fact construction in law. Importantly, it departs from a focus on how judges deploy facts within their adjudicative function to the work of lawyers, critical and often neglected actors within legal culture, and to their interaction with clients. We can see in these documents how a lawyer and client can shape and reshape the facts of what happened to the client's daughter as the lawyer works to learn and establish for purposes of the legal proceeding, as well as for the client's experience of the legal proceeding, what occurred between Amberly and her step-father.

I propose that starting from a focus on narrative as a framework for fact investigation suggests an approach to developing narrative practices that could provide guidance and structure in engaging in fact investigation. I discuss three key themes regarding narration of facts in a legal proceeding that emerge powerfully when examining the lawyer's process of investigating what happened between Amberly and her step-father in the context of representing Amberly's mother, Jenna, as the state seeks to declare that Jenna neglected Amberly. For each theme, I illustrate how a narrative approach to fact construction operates within the Jenna Jeffries case study.

4.1 Stories Construct Facts

The first theme that emerges in these materials is one most central to narrative analysis of legal practice – stories construct facts; facts do not construct stories. As Anthony Amsterdam and Jerome Bruner say, “In some profound, often puzzling way, stories *construct* the facts that comprise them” (Amsterdam and Bruner 2000: 111). Flora Di Donato identifies two key features of this dynamic of fact construction within legal representation in cases. The first emphasizes the importance of how the narrator is situated as an actor within the legal system.

The adoption of the narrative lens highlights how diverging narrations about the same event reflect the divergent interests, experiences and representations of the world, according to the roles played by the narrators – the client, the attorney and the judge – in a given context (Di Donato 2020: 34).

The second feature focuses on how narratives structure and organize the way that facts emerge, gain meaning, and operate in a legal proceeding.

Narratives are the main tool by means of which objective constraints (places, dates, names) can be modelled as ‘facts’ in the legal process (Di Donato 2020: 75).¹⁰

From the first interaction between Jenna Jeffries and her lawyer, the lawyer faces in stark and familiar form two divergent narratives from two opposing parties of what

¹⁰ Amsterdam and Bruner (2000: 111) emphasize this aspect of fact development: “As a practical matter, the administration of law and even much of its conceptualization rest upon ‘getting the facts.’ Every recognized legal situation (whether problem or solution) is taken to involve a distinctive state of facts (actual or potential). In each such situation, some arbiter or agency or adviser is presumed to be able to decide what the facts *are*, at least for the purposes at hand. (...) *Relevant facts*, ‘found’ or hypothetically imagined, are presumed to frame the issue in debate, delimit the choices of action that can be pursued, determine the visitation or the vindication to be authoritatively pronounced. (...) The traditional supposition of the law has been that questions (...) can be answered by examining free-standing factual data selected on grounds of their logical pertinency. But increasingly we are coming to recognize that both the questions and the answers in such matters of ‘fact’ depend largely upon one’s choice (considered or unconsidered) of some overall narrative as best describing *what happened* or *how the world works*.”

happened to Amberly. The government's petition (Document 2) alleges *facts* to establish that Amberly is a neglected child under the applicable legal definition. Jenna then recounts to her lawyer how and why the government got it wrong (and all the things that getting it wrong might mean).¹¹ Beginning with the initial dialogue with Jenna, her lawyer learns from Jenna's perspective her account of the events recounted in the petition. Learning Jenna's account encompasses several components. The lawyer wants to find out how the government has misconstrued or mischaracterized what happened to Amberly; what Jenna thinks might have happened from the time of the interaction between Amberly and Kyle through the filing of the petition; what matters to Jenna in her understanding of those events; and what Jenna wants to happen to resolve the legal matter.¹² The lawyer must also begin building a trusting relationship with Jenna so that Jenna is comfortable both recounting her own understanding of the events and situating those events in the context of the circumstances of her family, and challenging the authoritative version contained in the petition.¹³ Furthermore, the lawyer must appreciate that Jenna's understanding is in a process of development and anticipate that Jenna's account may change as her knowledge, judgment, and feelings change (Ellmann et al. 2009: 150).

We know to expect from opposing parties divergent factual narrations of events, not just opposing views of the legal meaning of events that occurred.¹⁴ We can see from Jenna's account in the first meeting between lawyer and client, however, far more than two divergent factual narratives – one in the government's petition and one is Jenna's rebuttal. Drawing on narrative theory, we can identify, even in these skeletal accounts of the events during the time period that seems to form the boundaries of the legally relevant story – the time between the interaction between Kyle and Amberly and the filing of the petition – many embedded sub-stories. For example, there is the story of what happened between Kyle and Amberly in their home. Of Amberly's reaching out to her mother on the telephone. Of Amberly's journey through the neighborhood to Geneva's house. Of what happened between Amberly and Geneva when Amberly arrived at Geneva's home. Of Geneva's views of Kyle and Jenna. Of Geneva's contacting the child protection agency. Of the caseworker's investigation at Geneva's house. Of Amberly's placement in foster care. And, of Jenna's unavailing attempts to contact Amberly. These sub-stories have different narrators (sometimes multiple narrators), cover different time periods, involve different actors, include different settings, have distinctive plots, convey many emotions, and suggest different desired outcomes. Each of these stories includes elements of observation by people who participated in an event, as well as elements of imagination, assumption, supposition, and opinion.

Narrative theory helps lawyers be acutely aware of just how many overlapping, intersecting, or divergent stories there may be, within even this legally defined time span. It

¹¹ Document 1 presents the information provided to the actors who play Jenna about what happened in the case and the background to the situation. Each actor decides how to play Jenna in each simulated interview and, therefore, how and what to narrate to the lawyer. In addition, the same Jenna may act differently and her accounts may differ in interviews with different students depending upon her interactions with the student lawyers interviewing her.

¹² In addition, the lawyer might also need to explore what Jenna wants to happen regarding related matters not directly implicated within the confines of the legal matter.

¹³ How lawyers present themselves, listen to clients, treat clients, and present information to clients – these and other factors affect what clients tell them (Ellmann, et al. 2009).

¹⁴ The opposition is even sharper and to be expected in situations where the government seeks to deprive a person of rights, such as in coerced removal of a child to state custody.

also reorients lawyers to see not just facts arranged in certain ways, but intertwined stories told from different perspectives that are woven together to achieve different purposes. The government has constructed one story in the petition that consists of sub-stories that they have assembled in a way that seems to cohere into one unified account that leads to a result – that Jenna has neglected Amberly and that Amberly needs to be placed in foster care.¹⁵ Jenna’s lawyer must now begin to contest the petition and achieve the outcome that Jenna desires. Viewed conventionally, Jenna’s lawyer would, after reading the government’s account and hearing Jenna’s account, begin to identify defects in the government’s version of the facts and seek out different facts.

Using narrative theory, however, the lawyer would approach the task of contesting the petition by exploring the many facets of the sub-stories in Jenna’s account of events, those in which she participated and those that she has imagined. This activity is the beginning of constructing the possible stories Jenna will present in the course of the proceedings. In an iterative fashion, the lawyer, interacting with Jenna, will simultaneously deconstruct the government’s stories and reconstruct Jenna’s. For lawyers, the differences between how the government has constructed its account and how to construct Jenna’s possible accounts have particular salience as each story presents a different way to characterize the client’s situation in light of the legal significance of the facts contained in each account.¹⁶ The facts in each story will be shaped in large part by the legal meaning of and consequences that flow from that story.¹⁷ Jenna has many possible stories that could cohere in different ways.

4.2 Context

The second theme of narrative theory that emerges from the materials is the importance of context. Context includes both the legal dispute itself, which provides a distinctive framework to the events described, as well as the context of the particular events included in the accounts contained within the legal dispute (Di Donato 2020). In these materials, the context of a child neglect proceeding creates a grave sense of threat to essential rights and basic dignitary interests, as well as embodying stunning state intrusions into family life. For the state publicly to declare Jenna to be a neglectful mother and to remove Amberly from her mother’s care, custody, and control goes far beyond Jenna’s being judged by family members or friends regarding her parenting or the functioning of her family. Jenna faces the vast powers of the state quickly and drastically to disrupt the delicate and carefully calibrated functioning of her family.¹⁸ This legal context transforms experiences that could be common aspects of everyday life – a rebellious teenager, a method of discipline, struggles to make ends meet economically, conflict between spouses or family members – into a crisis of fundamental dimensions that could transform the lives of Jenna and her family.

¹⁵ The story in the petition creates a “nexus” between the occurrences within the different sub-stories (Di Donato 2020: 24).

¹⁶ Document 3 introduces some of the pertinent law that applies to the case.

¹⁷ “The contribution of clinical method (...) has been to identify, question and inquire deeply into the complex, embedded practices through which legal rules and doctrines take on meaning in the world through the interpretive activities of lawyers” (Shalleck 2017).

¹⁸ These legal powers implicate strong legal norms, including ones of constitutional dimension.

In addition, the social and interpersonal context of each of the sub-stories contained within the narratives driving the proceedings shapes the meaning of the overall narrative. “Legal narratives may be considered in their dynamic dimension, located within social practices and the contexts of specific actions” (Di Donato 2020: 57). For example, within these materials, the context of family functioning under conditions of great stress carries great cultural meaning. We see that the question of how families outside the conventional norm constitute themselves affects the narrative of the event. Amberly has a biological father who is completely absent from her everyday life and a step-father, Kyle, who is very present. She lives in a family with two siblings who are biological offspring of both parental figures in the home. Jenna and Kyle never formally married, but operate as if they were. We also see the context of domestic violence that is part of the history of Jenna and Kyle’s relationship and affects Geneva’s views of them. The additional context of discipline within a family also has strong, contested cultural meanings.¹⁹ Furthermore, the context of the conditions of Jenna and Kyle’s employment operates powerfully in the events of possible legal narratives, if seemingly in the background. Jenna is not able to intervene in the dispute between Amberly and Kyle quickly because she fears being fired. Jenna and Kyle have built their work schedules into their ability to provide care for their children in a financially sustainable way. These (and other) intersecting contexts taken alone or combined shape the meaning of each fact within both the government’s and Jenna’s narratives.²⁰

Context is construed (...) as a real and at the same time symbolic place where the interactions between the parties come to life and take shape, modeling the narrations that give the dispute its structure. (...) Within the narrative analysis of legal cases, the notion of context gives due consideration to the broader context where the story of the client originates. Thus, to study the proceedings in court interactively and in their context means to examine not only the dispute itself, but also its origins and the inter-individual and social relationship in which it was unleashed, so that the proceedings can be considered as a variable of the context (Di Donato 2020: 80).

4.3 Furthering the Participation, Dignity, and Autonomy of Clients

The third theme from narrative theory that these materials stress is the potential and power of narrative theory to help lawyers further the dignity and autonomy of clients who are powerless, marginalized, or excluded. The law of child neglect and abuse, as well as the broad institutional structures regarding child welfare within which this law operates in the United States, are notoriously instruments of devastating or dismantling individual families, frequently harming the very children that child welfare institutions claim to protect, and of systematically damaging vulnerable communities, predominantly along lines of race and poverty.²¹ The well-documented operation of law and social institutions in

¹⁹ In the United States, regional, racial, ethnic, and religious communities view corporal punishment quite differently.

²⁰ As part of the course, students study critical theories regarding race, gender, and economic inequality to provide a framework for understanding the operation and assessing the meaning of the circumstances of Jenna and her family.

²¹ There is an enormous literature analyzing and criticizing the role of the child welfare system. Two prominent examples are *Shattered Bonds: The Color of Child Welfare* (Roberts 2002) and *What’s Wrong with Children’s Rights* (Guggenheim 2005).

this area is sharply at odds with conventional views of government as providing needed protection to vulnerable children from bad parents.²² Narrative theory gives lawyers for the parents a valuable tool to include clients in fashioning the legal story to tell in contesting this governmental action, in claiming the clients' humanity, in affirming the autonomy of the clients in deciding how to protect their own families, and in translating the experiences of clients to skeptical or hostile decisionmakers.²³

The first stage of constructing a legal story involves the story proposed by the client to her or his lawyer. (...) The Client (whose role is completely ignored in classical analysis) is capable of playing an active part in the construction of her or his own case, thus conditioning the results. The client is not a mere information giver but is capable of taking initiatives and executing strategies agreed upon with the lawyer (Di Donato 2020: 76).

This inclusion of the client in important decisions in the proceeding thus gives the client a critical role not only in the proceeding itself, but also in shaping the cultural meaning conveyed through the case.

While client-centered representation begins with the first meeting between lawyer and client, it takes on particular importance in constructing from the client's point of view possible narratives to drive the proceeding forward (Ellmann, et al. 2009). The three possible case theories identified above are all created from Jenna's point of view, are fashioned around her understanding of the experiences included within them, and designed to achieve her goals.²⁴ Each version weaves together various sub-stories in different ways and highlights particular aspects of her experience that are important to her sense of herself and her family or to her strategic sense of how to present her claims within the legal system. The first case theory emphasizes the ways that Jenna – with Kyle as partner – has structured a stable and caring family life for Amberly in light of difficult economic and employment circumstances. Understood within the context of this situation, their methods of discipline are meant to make Amberly responsible. The second emphasizes the child development issues facing a parent of a teenager, particularly one who is challenging authority, here the role of a stepparent in her life. Understood in this way, Amberly's account of what happened with Kyle might not be true, or at least overly dramatized, and Jenna's concern with tempering her rebelliousness with discipline could be part of helping her daughter navigate this difficult stage of her life. The third case theory shifts the focus to Geneva, who has played the primary role in bringing this incident into the legal system. For her own motivations and based on her hostility toward Kyle, Geneva has used an incident between Amberly and Kyle to stoke long-simmering intra-family disputes by initiating a governmental enforcement action. All of these stories draw upon both the lawyer's understanding of the legal parameters of a winning story and the client's

²² Lawyers representing parents, usually mothers, whose families are being disrupted or destroyed and whose children are being taken from them are frequently disparaged themselves, subject to biases about the representation they provide and assumptions about governmental efforts supposedly meant to protect the welfare of children.

²³ "Legal narratives may have both a conservative and a subversive or transformative value. (...) people may use them to conform to preferred narratives in society, but also to express counter-conforming experiences and ideas" (Di Donato 2020: 56-57).

²⁴ See Document #4 the assignment that the students are given when they have to construct possible case theories.

understanding of possible ways to build a convincing story that furthers the many objectives that she brings to this proceeding.

In addition to highlighting the role of the client in constructing legal narratives, these three possible case theories also illustrate how the other two themes about narrative theory help in understanding legal practice. First, the theme of fact construction.²⁵ In the three possible case theories, we see how particular facts take on different significance and move in and out of salience depending on the story. For example, Amberly's refusal to help make dinner in Case Theory #1 undermines the smooth functioning of a family in which the parents' work schedules make the most basic aspects of family life possible, but in Case Theory #2 this same act illustrates her teenage willfulness. It barely matters in the third case theory, except as Geneva's pretext for portraying Kyle as abusive. Thus, in each narrative, the details surrounding this part of the incident would be recounted and assembled differently.

Similarly, in each case theory, different characters take on different roles. For example, while Kyle is a character in all the case theories, he appears differently in each one. In Case Theory #1, Kyle is a hardworking parent operating under stressful conditions to make the entire family function for the good of everyone, including Amberly. In the second case theory, he is primarily a stepparent facing the hostility of his stepdaughter who is struggling herself to accept that her own father has abandoned her. His actions, which otherwise fit within normal family routines, become the site for Amberly's rebelliousness. In Case Theory #3, Kyle is the object of Geneva's wrath at Jenna and the instrument for her attack on Jenna's family. As in the last example, different details regarding Kyle would be included in Jenna's story and they would be assembled to illustrate different facets of his character. With these two examples, we can see how the plot, the characters, and the motivations of the various actors in each narrative shape the delineation and characterization of the facts to be included.

The three case theories also illustrate the theme of the importance of context. For example, the family's economic situation and the role of Kyle and Jenna's work schedules are at the center of the first case theory, but provide only a minor part of the context for the second and third. The meaning of being a stepchild is critical to the second case theory, and perhaps matters some in the first, but is largely superfluous in the third. The context of prior domestic violence might hover in the background in the first and second case theories, perhaps creating a need for Jenna to minimize its significance in the family's current functioning, but characterizing that violence as a minor or former part of family functioning becomes essential in the third case theory to impugn Geneva's motives. Each context brings to the fore, generates a need to re-characterize, and resituates the facts in the story.

5. Narrative-Driven Investigation

Proceeding from the foundation in case theory development, this case study/simulation moves on to those activities in which lawyers seek to find out more about what happened in the world that bears on the case. The stories contained in the potential, still-tentative

²⁵ See Document #5, the assignment that the students are given for the fact investigation class that emphasizes how factual inquiry is rooted in the story telling of case theory.

case theories provide a guide to the attorney in seeking out and learning those facts that will help in telling the client's story effectively to the decision-maker,²⁶ and, at different moments in the case, to opposing counsel, a witness, or others with a role in the legal proceeding.²⁷ The case theories give meaning and structure to decisions about what witnesses to talk to, what documents or objects to seek, what places to visit, what actions to probe deeply, or what background to explore. An example illustrates how these stories matter in generating different explorations of an event.

5.1 Stories as Guides

We begin with an event that is critical to the accounts in all of the three case theories from the case study/simulation: What is important for the lawyer to know about Kyle's hitting Amberly with a belt? The incident with the belt has turned this event in life into a legal proceeding of great import. The ways the facts associated with this incident emerge and get delineated and characterized will be part of any overall story to be told. Each story is built on and creates a different nexus among the facts. The possible stories within which this event is situated give direction to the lawyer in investigating the facts associated with these critical moments in the case.

Jenna has told the lawyer what she knows about the event but she was not present when it occurred. Jenna has told the lawyer what Amberly told her on the telephone about the incident, but that is all the lawyer knows beyond the account in the government's petition. Perhaps there is more that Jenna can learn. She could talk with Amberly about the incident once the lawyer arranges for this conversation to happen.²⁸ Jenna could talk with the other two children about what they saw. Jenna could tell the lawyer more about her conversations with Kyle about the event. Each of these choices about the client's seeking out information poses potential problems for both lawyer and client, and it is important for the lawyer to discuss with the client how the options might affect the legal proceeding and how Jenna feels about them. For instance, could Jenna be seen as trying to influence or pressure Amberly, or even the other children? How does Jenna feel about her conversation with Amberly, as its significance rests in their relationship with each other and the other relationships within the family, as well as in the legal proceeding?

What about the lawyer's having these conversations with the various participants in or observers of the event? While rules of professional responsibility bar the lawyer from speaking with Amberly,²⁹ they do not forbid a conversation with the other children. Does Jenna want to involve the other two children in a way that possibly transforms them into

²⁶ In order to prevail in the case, the lawyer must be able to assemble facts in a story bound up in the law that effectively persuades the decision-maker that Jenna did not neglect Amberly. *See, e.g.* Chavkin 2002: 40.

²⁷ If the story will be told in a hearing, the information must also comport with the rules of evidence and procedure.

²⁸ The information Jenna got from the caseworker about not being able to talk to Amberly before the court hearing does not comport with the law.

²⁹ American Bar Association Model Rules of Professional Conduct, Rule 4.2: Communication with Person Represented by Counsel. "In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order." Amberly would have court-appointed counsel in this action.

witnesses in this legal proceeding, even if they never have to testify? If the government is likely to speak with them as part of its investigation, how does the government's conduct affect both the lawyer's and Jenna's decision about having a conversation with them? What does Jenna think about the lawyer's talking with Kyle? How do her concerns about her relationship with Kyle affect her concerns about the child neglect proceeding? In all of these conversations, how do the lawyer and Jenna think about characterizing the event? What story – explicit or implicit – frames the way either asks questions, listens, or otherwise engages in conversation?

In addition to seeking out information from witnesses to this particular event, the lawyer can take actions to find out more. Assuming that Kyle actually did hit Amberly with a belt, what does the belt look like? What material is it made of? What kind of buckle does it have? The differences between a soft, thin fabric belt with little or no buckle and a wide leather belt with a heavy metal buckle may matter in different ways in different accounts. While Jenna can describe the belt to the lawyer, does the lawyer want to see the belt? Because the details about the belt could matter in characterizing Kyle's action of hitting Amberly, the lawyer might want to draw upon his or her own observation.³⁰ What more about these particular moments does the lawyer want to know depending upon each case theory? For instance, in the story about Amberly's rebelliousness, the lawyer might want to pursue in detail Amberly's attitude and behavior in her refusal to help with dinner that preceded Kyle's using the belt. In the story about Jenna and Kyle as hardworking, responsible parents who have made careful, measured decisions about the use of physical discipline, the lawyer might want to know how this incident fits with the general patterns of punishment and norms of behavior within the family. Did these events conform to or deviate from these norms?³¹ These and myriad other questions reveal how the context of the legal proceeding and the context of each of the different stories that could be told about the belt affect how the lawyer proceeds with learning facts about Kyle's hitting Amberly that will need to be framed carefully in any of Jenna's accounts in this proceeding.

The lawyer's investigative decisions about pursuing facts salient to other aspects of the plot that may be part of only some of the possible stories are critical, too, as the lawyer needs to assess the viability of each different account. To evaluate the story about the importance of Geneva's vindictiveness in shaping a distorted view of Kyle adopted by the government, the lawyer would need to learn much more about the history of Jenna's relationship with Geneva, about Geneva's propensity to exaggerate problematic aspects of Kyle's past behavior, and much more. To assess the plausibility of the portrayal of Amberly as a teenager challenging authority, the lawyer might look to her behavior outside the family – in school, with friends – to see if, when, and how she challenges authority. To make the constraints created by Jenna and Kyle's work shifts at the diner feel like a

³⁰ Also, the lawyer might be considering entering the belt into evidence.

³¹ Another critical element of the plot – the welts on Amberly's legs – raises analogous questions. Amberly did not mention the welts to Jenna on the phone but did tell Geneva about them. The details of the welts may matter, too. Welts can be many things from minor temporary swelling of the skin caused in many routine, unremarkable ways to serious indications of force or trauma. Did Amberly have welts? How many? Where? What did they look like? Who saw them? Geneva? The case worker? Are there pictures of the welts? In addition, the welts take on different meanings in the different stories Jenna may tell. Amberly's exaggerating mild swelling matters in the case theory about her rebelliousness. Geneva's exaggerating mild swelling matters in the case theory about Geneva's vindictiveness. The possible stories shape which aspects of the welts the attorney will pursue.

dominant force in tightly structuring a family life that runs smoothly, the lawyer might speak to their friend Esther, who works there and knows them, to other co-workers or maybe to the owner or manager. There might be documents, such as weekly work schedules or work rules, totally disconnected from the particulars of Jenna or Kyle's behavior, which would provide external validation of their account.

In these examples of using possible case theories to identify investigative possibilities, design investigative strategies, and frame investigative decisions, we can see how a narrative approach to lawyering creates some order and coherence in the process of investigating facts. As the lawyer deconstructs an account from one party – the government – that appears to be stable and coherent and then reconstructs multiples possible accounts from the perspective of the client, the lawyer looks for and works with facts as they take on shape and meaning within those stories.³² The process is an iterative one. As the lawyer uses stories to search for and characterize facts, what the lawyer learns about the situation and the people often produces modifications in the story embedded in the case theory. The stories, as they develop and change through the process of investigation, continue to tether the ongoing decisions about what and how to investigate.

Beyond bringing order or coherence to the process, narrative-driven fact investigation also enhances the space for alternative stories that challenge the prevailing stories. Conventional stories may be the stock stories told in a certain area of legal practice. They may be the stories suggested by a dominant or static understanding of the law in a given area. They may be stories based in stereotypical views of the characters in a story, particularly those marginalized or stigmatized in the legal system. By beginning from case theories grounded in the experiences and perspectives of a client, fact investigation is more likely to expand the range of stories that can effectively be told in a legal proceeding, narratives that are grounded in convincing accounts of what happened or what should happen in the world.

Using stories in this way also promotes the autonomy and dignity of clients as they work with their lawyers to resolve the problems associated with the court proceeding. Just as the stories contained in the case theories that ground investigative choices embody the client's perspective and further the client's objectives, narrative-driven investigation of the facts needed to realize those case theories can promote client participation. Investigation becomes a site for the client actively to shape the case, along with the lawyer, by finding ways to develop possible factual accounts that encompass the client's understanding of the situation and proceed toward the outcome the client desires. Narrative-driven investigation affords a generative and useful framework for learning, molding, and assembling the facts of a case to tell a story that the client has fashioned collaboratively with the lawyer.³³

³² In *Clinical Legal Education – A 21st Century Perspective*, Anthony Amsterdam describes this way of thinking as including 1) reasoning in terms of aims and objectives, i.e. presenting a factual situation theorizing how it could be solved and the objectives achieved; 2) formulating hypotheses for the purpose of acquiring pertinent information; and 3) decision-making based on considering risks and cost-benefit factors (Amsterdam 1984). See also Amsterdam and Bruner 2000: 111; Di Donato 2020: 69-70.

³³ See Di Donato (2020: 76): “The client is not a mere information giver but is capable of taking initiatives and executing strategies agreed up with the lawyer.”

5.2 Narrative Practices

Narrative-driven fact investigation not only offers a generative framework for using stories as the organizing principle for investigative strategic thinking and decision-making, but also suggests regularized investigative practices. These practices arise out of two complementary aspects of narratives. First, practices emerge from what Amsterdam and Bruner call “an austere definition” of what constitutes a story – those “essential features that give it its form and that serve to convert ‘things in the world’ into *story*” (Amsterdam and Bruner 2000: 112-114).³⁴ Second, we can look to the characteristics of narrative to devise investigative practices.³⁵ Taken together, these essential features and characteristics of narrative help the lawyer think more clearly, intentionally, and creatively in framing investigative questions and pursuing investigative strategies. As to each story, the lawyer carefully attends to

- Scene(s);
- characters;
- motives, beliefs, and feelings;
- actions that comprise the plot;
- the people or institutions that move the story forward in its trajectory;
- the structure of the plot from its steady state through resolution;
- how time proceeds from the beginning to the end (however those are marked);
- tension between the ordinary and a deviation;
- the normative meaning(s); and
- the emotional texture.

Using these features and characteristics of narrative as tools for exploring each story embedded in the case theories leads easily to questions to guide investigation.³⁶ From these questions, the lawyer can devise an investigation strategy for exploring what in the world yields possible answers to those questions, generates more questions, or excites curiosity. The investigative process becomes more structured and guided, less intuitive and haphazard. Each of the three case theories generates different questions when approached through these aspects of narrative. For example, as to each of the case theories,

³⁴ Amsterdam and Bruner’s definition: It needs a *cast of human-like characters*, beings capable of *willing their own actions, forming intentions, holding beliefs, having feelings*. It also needs a *plot* with a beginning, a middle, and an end, in which particular characters are involved in particular events. The unfolding of the plot requires (implicitly or explicitly):

- (1) An initial *steady state* grounded in the legitimate ordinariness of things,
- (2) that gets disrupted by a *Trouble* consisting of circumstances attributable to human intervention,
- (3) in turn evoking *efforts* at redress or transformation, which succeed or fail,
- (4) so that the old steady state is *restored* or a new (*transformed*) steady state is created,
- (5) and the story concludes by drawing the then-and-there of the tale that has been told into the here-and-now of the telling through some *coda*.

Di Donato (2020: 56) adopts a similar definition in analyzing legal cases.

³⁵ Di Donato (2020: 25-27) draws on Jerome Bruner’s work in identifying characteristics of narrative: Narrative diachronicity; Consequentiality; Particularity; Intentional state entailment; Hermeneutic composability; Canonicity and breach; Referentiality; Belonging to a genre; Normativeness; Context sensitivity and negotiability; and Narrative accrual.

³⁶ I have engaged in an analogous project of reformulating lawyering practices regarding building the lawyer-client relationship using a narrative approach (Ellmann, et al. 2009). See Chapter 4, *Narrative Theory and Narrative Practices*: 139-226).

consider some of the questions that the definition and characteristics of narrative suggest. Who are the main characters and what role(s) do they play: Jenna; Kyle; Amberly; the family; Geneva? What are their motives: love; resentment; vindictiveness; fear of economic insecurity; protectiveness? How has each moved the action forward: getting off a phone call while at work; sending Amberly to Geneva's after dark; hitting with a belt; calling child protective services? Who are the minor characters and what do they contribute: Esther; JR? Is someone, such as the child protective services worker, a major or minor character? When does the story begin: when Jenna and Kyle first formed a family; when they decided on a discipline policy; when they set up coordinate work schedules; when Amberly refused to help with dinner; when Jenna could not talk to Amberly on the phone while at work; when Kyle hit Amberly; when Geneva called child protective services? The other questions based on these aspects of narrative then follow. What is the trouble and who caused it? What was the situation before the trouble occurred? How should the story end? Why does that ending matter and for whom? Does the ending address the trouble? What is ordinary and what extraordinary about the events? How does time appear? Which parts of the plot move slowly? Which quickly? What is left out? Which aspects of each story evoke what emotions in whom? What moral questions or lessons does each story raise or answer? As to each of these questions, the lawyer needs to find out more about what happened in order to make that story coherent, plausible, and persuasive.³⁷ On learning more about that aspect of the story, the lawyer asks new questions, possibly revising some parts of the account with the whole story possibly changing in structure, content, or focus. Exploring each of these aspects of the evolving stories requires listening for possible answers from Jenna's perspective and in light of her goals for this legal proceeding.

Detail and specificity distinguish an investigation strategy and plan from the stories in possible case theories. In devising an investigation strategy and plan grounded in narrative theory, the lawyer needs to seek out specific details from the situation in the world in order to make the particular aspects of each story effective in convincing a decision-maker.³⁸ While law seems to be fundamentally general and abstract, a narrative approach to law validates the ways that law, while drawing on abstract principles or general rules, needs a narrative that descends into details that are specific to the particular people and the particular situations bound up in the legal proceeding.³⁹

When the lawyer applies these inquiries to each case theory, the answers can be compared in an organized way. For example, is a scene in one story that is absent from another particularly evocative or compelling? How do characters come across differently in each story? How do the motives and beliefs of the characters in the different stories affect the plausibility of each overall story? Which account of the trouble is most comprehensible or compelling? How does the characterization of the trouble relate to the rules, policies, and values in the law? Which details in which stories stand out and why? How do the emotions evoked by the different stories affect the potential decision-maker?

³⁷ For a full discussion of the rhetoric of narratives – of what makes them persuasive – see Amsterdam and Bruner 2000: 134-39.

³⁸ Bruner considers particularity to be one of the characteristics of narrative. "A story line is pieced together by descending into details. The narrative deals with events and questions that are not general or abstract, but specific concerning people" (Di Donato 2020:26).

³⁹ The details must also be provable in accord with rules of evidence if the story is to be told in a legal proceeding.

Will the audience, particularly the decision-maker, resonate with the moral of the story?
How does the moral of the story comport with the moral of the law?

6. Conclusion: Toward a Narrative-Driven Lawyering Theory

To some extent, these narrative practices re-characterize the conventional activities of lawyers when they investigate a case. In this process, they shed new light on what lawyers have taken for granted, helping them see more clearly or in new ways what they have been doing intuitively. This clarity may help them do their work better. Narrative practices may also help shape new practices that can contribute to the quality of lawyering, by reformulating and placing in new perspective the familiar. Lawyers may see new potential in what has been at best implicit in conventional practice. They may be better able to realize fully the potential of their own intuitions, perhaps by following narrative practices more methodically or perhaps by unleashing their own creativity. They may be able to recognize possibilities that would have eluded them using a more conventional approach. Stories open other, expansive ways to understand and approach law. Importantly, narrative practices also increase lawyers' capacity to approach and conduct investigation from the client's point of view and include clients in the process of fact investigation. Therefore, developing narrative-driven investigation further offers great potential for the future. Just as with other lawyering activities, creating over time a fuller description of narrative-driven investigative practices contributes to innovative ways for lawyers to conduct their investigations within the legal realm and to better engage clients in the process of constructing their stories, a process that can further the dignity and autonomy of clients within the legal system.

References

- Amsterdam, Anthony. 1984. "Clinical Legal Education – a 21st Century Perspective." *Clinical Law Review*. 34: 612-619.
- Bellow, Gary and Moulton, Bea. 1978. *The Lawyering Process: Materials for Clinical Instruction in Advocacy*. Mineola, NY: The Foundation Press.
- Bryant, Susan, Milstein, Elliott S., and Shalleck, Ann C. 2014. *Transforming the Education of Lawyers: The Theory and Practice of Clinical Pedagogy*. Durham, NC: Carolina Academic Press.
- Chavkin, David W. 2002. *Clinical Legal Education: A Textbook for Law School Clinical Programs*. Cincinnati, OH: LexisNexis.
- Delgado, Richard. 1987. "Storytelling for Oppositionists and Others: A Plea for Narrative." *Michigan Law Review*. 8: 2411-2441.
- Di Donato, Flora. 2020. *The Analysis of Legal Cases: A Narrative Approach*. Abingdon: Routledge.

- Dinerstein, Robert D. 1991-1992. "A Meditation on the Theoretics of Practice." *Hasting Law Journal*. 43: 971- 989.
- Ellmann, Stephen, Dinerstein, Robert, Gunning, Isabelle, Kruse, Katherine and Shalleck, Ann. 2009. *Lawyers and Clients: Critical Issues in Interviewing and Counseling*. St. Paul, MN: Thomson Reuters.
- Guggenheim, Martin. 2005. *What's Wrong with Children's Rights*. Cambridge, MA: Harvard University Press.
- López, Gerald P. 1984. "Lay Lawyering." *University of California Law Review*. 1-60.
- Lopez, Gerald. 1989. "The Work We Know So Little About." *Stanford Law Review*. 42: 1-13.
- Mertz, Elizabeth. 2016. "Introduction, New Legal Realism: Law and Social Science in the New Millennium." In *The New Legal Realism: Translating Law-and-Society for Today's Legal Practice*, edited by Elizabeth Mertz, Stewart Macaulay and Thomas Mitchell, 1-25. New York, NY. Cambridge University Press.
- Roberts, Dorothy. 2002. *Shattered Bonds: The Color of Child Welfare*. New York, NY: Basic Civitas Books.
- Shalleck, Ann. 2017. *Verso Una Giurisprudenza del Pensiero Clinico: Investigando I Contorni, L'importanza e le Traiettorie. Individuando le Posizioni Cliniche, Filosofia e Teoria del Diritto Interpretazione e Argomentazione Giuridica* (Di Donato, Flora & Scamardella, Francesca, eds.). Napoli: Editoriale Scientifica. English version, *Toward a Jurisprudence of Clinical Thought: Investigating the Contours, Urges and Trajectories*, manuscript on file with author.
- Shalleck, Ann. 2018. "Narrative Understanding: Revisiting the Stories of *Law Lawyering*." *Clinical Law Review*. 24: 467-286.
- White, Lucie E. 1990. "Subordination, Rhetorical Survival Skills, and Sunday Shoes: Notes on the Hearing of Mrs. G." *Buffalo Law Review*. 38: 1-58.

