

The Law “Of” Literature

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A connection arises between law and literature insofar as laws and case-law regulate situations related with the literary field. This tends to be called “the law ‘of’ literature”. It is not a specific branch of law, but rather a transversal approach that covers questions of private law (authors’ rights and copyright), criminal law (a variety of publishing offences, libel, defamation, racist offences), constitutional law (freedom of expression and censorship) and administrative law (school curriculums,¹ public libraries...²).³

1.-Matters of private law: author’s rights and intellectual property. Copyright

An important part of intellectual property law⁴ relates to author’s rights and copyright,⁵ which impose limits on “creative copying”.⁶ This may affect authors such as Shakespeare, who wrote before these rules existed in their contemporary form.

A special “type” in this regard, a variant, occurs with respect to parodies – in other words, in the case of works which existence depends on copying the parodied work. In these situations, a judgment must be made as to when fair use is made, within certain limits, of the copyright.⁷

It is logical for authors to have intellectual property rights over their creations.⁸ If their works could be freely copied, plagiarists would benefit unjustly from the original creation.⁹

¹ C. R. B. Dunlop, “Literature Studies in Law Schools”, in *Cardozo Studies in Law and Literature*, vol. 3, Issue 1, spring/summer 1991, pp. 63-110. Watt Gary, “Teaching Law and Literature Review Essay”, in *Law & Literature*, vol. 26, Issue 2, 2014, pp. 231-248. Paul J. Heald, *A Guide to Law and Literature for Teachers, Students, and Researchers*, Durham, North Carolina, Carolina Academic Press, 1998.

² Elizabeth M. Moys, *Manual of Law Librarianship: the Use and Organization of Legal Literature*, London, Andre Deutsch, 1976; Aldershot, Gower, 1987.

³ Pedro Talavera, *Derecho y Literatura*, Preface by Adela Cortina, Granada, Editorial Comares, 2006, p. 10, note 8.

⁴ Paul K. Saint Amour, “Your Right to What’s Mine: On Personal Intellectual Property”, in *Law & Literature*, vol. 25, Issue 1, *Special Issue on Futures of Fair Use*, 2013, pp. 103-121.

⁵ David Roth, “Two Copyright Case Studies from a Literary Perspective”, in *Law & Literature*, vol. 22, Issue 1, spring 2010, pp. 110-141.

⁶ Lyman Ray Patterson, *Copyright in Historical Perspective*, Nashville, Vanderbilt University Press, 1968. Mark Rose, *Authors and Owners: The Invention of Copyright*, Cambridge, Harvard University Press, 1993. Laura J. Rosenthal, *Playwrights and Plagiarists in Early Modern England*, Cambridge, Cambridge University Press, 1996.

⁷ Michael Meehan, “Authorship and Imagination in Blackstone’s *Commentaries on the Laws of England*”, in *Eighteenth-Century Life*, 16, 1992, pp. 11-126.

⁸ James Appleton Morgan, *The Law of Literature; reviewing the Laws of Literary Property in Manuscripts: Books, Lectures, Dramatic and Musical Compositions, Works of Art, Newspapers, Periodicals... Copyright Transfers, and Copyright and Piracy; Libel and Contempt of Court by Litterary Matter, etc.*, New York, J. Cockcroft, 1875.

⁹ Peter Haszi, “Toward a Theory of Copyright: The Metamorphoses of ‘Authorship’”, in *Duke Law Journal*, 1991, pp. 455-502. Peter Jaszi – Martha Woodmansee, “The Ethical Reaches of Authorship”, in *South Atlantic Quarterly*, 95, 1996, pp. 947-977. Richard A. Posner, *Law and Literature*, Cambridge, Mass., Harvard University

Copyright is established to protect the property in the author's work and to prevent literary piracy. Authors hold the intellectual property right over their texts and the title for the exclusive use of the benefits from their verbal creation.¹⁰ Copyright is one of the clearest examples of the relationship between legal and literary ideas, of literary concepts entering into the legal domain. It is hence unsurprising that it represents one of the central themes in works studying law and literature. Copyright is an exclusive right granted by law for a certain number of years to an author, composer, designer, or other similar person to print, publish and sell copies of their original creation.

It is a Western creation. In Ancient Egypt, originality in art was neither prized nor extolled. Similarly, traditional Chinese culture gave the greatest value to the most accurate imitations of the works of an older artist, with enormous value placed on tradition. Quotation marks to cite the material of a preceding author only appeared after the 17th Century. Meanwhile, collaboration among various authors was a common approach in order to produce literary works.

John Locke's *Two Treatises of Government* (1690) defined property as a natural right belonging to the individual. This Lockean definition of how property is created can be applied to written work. The publication in 1798 of the *Lyrical Ballads* of Wordsworth and Coleridge represents a significant initial step in the formation of Romantic ideas of author's rights. A further key step was the 1759 publication of *Conjectures on Original Composition* by Edward Young. This work established the foundations for intellectual property, attributing value to originality and genius as opposed to imitation.

Two aspects of moral rights stand out: the right of paternity and the right to integrity of the work. The former includes the right to be identified as the author of the work – unless the author wishes to remain anonymous. The latter is the right for the literary work not to be treated in a derogatory fashion and for the author to be consulted regarding any alteration to the work.

As a legal institution, copyright pursues the following ends: providing for the orderly commercial trade of books; promoting the circulation of ideas and art; stimulating authors to invest time and effort in their creations knowing that their livelihoods and those of their families may be secured through literary success; and protecting authors from the copying of their creations in an unauthorized manner in an “era of mechanical reproduction”.¹¹

Intellectual property, as defined by the World Intellectual Property Organization, refers to any creation by the human mind, among which are literary and artistic works. The English term used to refer to author's rights, copyright, alludes to the fundamental acts that, with regard to literary and artistic creations, may only be carried out by or with the authorization of the author, such as the production of copies. The author is the only party that may authorize changes to their creation, while the publisher will also have the right to make copies, provided that the author has granted permission. The owner of the intellectual property may prevent other parties from making use of such property without first obtaining consent. Moral rights correspond to the Continental tradition, of French origin, while copyright is the fruit of Anglo-Saxon tradition and solely concerns economic, not moral, rights.

Author's rights are recognized in the Universal Declaration of Human Rights as a fundamental human right. Western legislation on author's rights began in the United Kingdom in 1710 with the Statute of Anne, though Antonio de Nebrija, creator of a renowned grammar of the Castilian language (*Gramática castellana*) in a much earlier time, is often recognized as having been the first author to claim intellectual property rights in the Western world, toward the end of the 15th Century.

Press, 1998. 3rd ed. 2009, pp. 382, 389-405. David Saunders, *Authorship and Copyright*, London, Routledge, 1992. Wolfram Schmidgen, *Eighteenth-Century Fiction and the Law of Property*, Cambridge, Cambridge University Press, 2002. Martha Woodmansee, “The Cultural Work of Copyright: Legislating Authorship in Britain 1837-1842”, in *Law in the Domains of Culture*, Ed. Austin Sarat – Thomas R. Kearns, Ann Arbor, University of Michigan Press, 1998, pp. 65-96. Martha Woodmansee – Peter Jaszi (eds.), *The Construction of Authorship: Textual Appropriation in Law and Literature*, 1994.

¹⁰ Robert Spoo, “Ah, You Publishing Scoundrel: A Hauntological Reading of Privacy, Moral Rights, and the Fair Use of Unpublished Works”, in *Law & Literature*, vol. 25, Issue 1, *Special Issue on Futures of Fair Use*, 2013, pp. 85-102.

¹¹ Kieran Dolin, *A Critical Introduction to Law and Literature*, Cambridge, Cambridge University Press, 2007, pp. 62-71.

The German philosopher Immanuel Kant stated: “a work of art cannot be separated from its author”. In England, public domain was only born following *Donaldson v. Beckett* in 1774. In the United States, author’s rights were contemplated in the 1787 Constitution and in 1890 the United State Congress passed the first Copyright Act. As regards France, we have to wait until the end of the French Revolution for the National Assembly to enact the first *Loi du droit d’auteur*, in 1791.

Current legislation on author’s rights in Spain is established in the Intellectual Property Law 1987 (*Ley de propiedad intelectual 22/11, de 11 de noviembre de 1987*), which has undergone various amendments over the years. The latest amendment was the Law amending the restated text of the Intellectual Property Law (*Ley por la que se modifica el texto refundido de la Ley de Propiedad Intelectual*), which came into force on 1 January 2015, with the exception of certain sections and articles that were due to enter into effect between two months and a year after the publication of the text in the Official State Bulletin.

The measures contained in the new law may be grouped into three sections: 1.-The private copy system. 2.-Supervisory mechanisms for the entities managing intellectual property rights. 3.-Penalties.

The new law excludes reproductions for professional or business use from the limitation on private copies. Works that have been made available to the public pursuant to contractual agreements, meaning that anyone may access them at a time and place of their own choosing, are also excluded from this limitation.

With respect to uncredited works, the law permits citizens to access them once digitalized by cultural institutions to guarantee that they are not used for profit.

The status of author cannot be waived or transferred *inter vivos* or *mortis causa*. Nor is it extinguished by the passage of time. The rights comprising intellectual property are divided into two categories: moral and economic. Moral rights ensure the author is recognized as such. They cannot be waived and are inalienable, accompanying authors throughout their lives and their heirs when they die. Economic rights require a differentiation between those relating to the use of the work, which permit their holder to authorize or prohibit such use, and rights to remuneration for the aforementioned use, as well as compensation rights such as the right for private copy. The Spanish legislation protects intellectual property rights through administrative, civil and criminal actions. In this regard, for example, the latest reform of the Intellectual Property Act increases fines for very serious infringements from 300,000 euros to 600,000 euros.

A work becomes public domain when the author’s economic rights have expired, which tends to occur after a period following the author’s death (*post mortem auctoris*), at which time the work may be freely used, though moral rights must still be respected. The minimum term found worldwide, established in the Berne Convention, is 50 years. This period has been extended in many countries to between 70 and 90 years following the author’s death.

The foregoing terms apply for *economic* author’s rights. In terms of *moral* rights, they remain with the author on a permanent basis, being incapable of alienation or prescription. In addition, there are *connected* rights, which protect persons related to the author, such as translators, interpreters, producers, and publishers. Rights of *reproduction* consist of preventing third parties from making copies of the work, as already mentioned. There are also *public communication* rights, which require the author’s authorization to perform the work in a theatre or other public place. Finally, *translation* rights prohibit a translation being made of a work without the author’s permission.

2.-Matters of criminal law

2.1.-The (im)morality of literature. Censorship. Pornography

In the preface to his satirical and shocking, and at the same time highly moralistic, *The Picture of Dorian Gray*,¹² Oscar Wilde made the famous observation that “there is no such thing as a moral or immoral book. Books are well written, or badly written.

¹² Antonio Sanna, “Silent Homosexuality in Oscar Wilde’s *Teleny* and *The Picture of Dorian Gray* and Robert Louis Stevenson’s *Dr. Jekyll and Mr. Hyde*”, in *Law & Literature*, vol. 24, Issue 1, 2012, pp. 21-39.

That is all.”¹³ This view represented a challenge by Wilde to the conventional wisdom of the time, to the established view of that era. Almost the whole world agreed during Wilde’s time that immersion in the masterpieces of Western civilization made us better people. In contrast, many today consider this claim to be evidence of Victorian morality. A population as cultured as the German one proved capable of acts such as the Holocaust. Thomas Mann, one of the greatest German novelists, was a strong supporter of the German Empire during the First World War. The German judges that served Hitler were also men of culture, well versed in Kant, Goethe and Schiller. Culture was, in fact, a tool used by the Nazi regime. National Socialism used aesthetic pleasure to exalt aggressiveness. In fact, art involves and requires exaltation, rapture and extremes, in this respect revealing itself as antagonistic to democratic regimes, which are closer to and more comfortable with collaboration, consensus and compromise.

But this does not mean that literary works do not have moral overtones. What is *King Lear* other than a hymn to the enormous value of simple goodness and to the horror of gratuitous cruelty?

Martha C. Nussbaum combines literature with moral philosophy. She does not deny the importance of aesthetic values, but nor does Nussbaum ignore moral values, which she views as influencing the final appraisal of a work as literature.

One may imagine critics within this moralistic or didactic literary tradition preparing lists of edifying literary works to be read by judges. Should judges not read and learn from the work of poets? Would doing so not be of use to them when considering legal loopholes and grey areas?¹⁴

For example, Richard A. Posner does not appear to consider that the evidence shows that pornography makes men –its principal consumers– something “worse”. And along the same lines, it is unclear that edifying literature makes human beings better people.¹⁵

¹³ J. E. Chamberlin, “Oscar Wilde”, in Martin L. Friedland (ed.), *Rough Justice: Essays on Crime in Literature*, Toronto, University of Toronto Press, 1991, pp. 141-156. Richard Elmann, *Eminent Domain: Yeats among Wilde, Joyce, Pound, Eliot and Auden*, New York, Oxford University Press, 1967. Hal Gladfelder, “Obscenity, Censorship and the Eighteenth-Century Novel: the Case of John Cleland”, in *Wordsworth Circle*, 35, 2004, pp. 123-127. Ian Hunter – David Saunders – Dugald Williamson, *On Pornography Literature, Sexuality and Obscenity Law*, Basingstoke, Macmillan, 1993. Felice Flanery Lewis, *Literature, Obscenity & Law*, Carbondale, Southern Illinois University Press, 1976. Jan-Melissa Schramm, “Is Literature More Ethical than Law? Fitzjames Stephen and Literary Responses to the Advent of Full Legal Representation for Felons”, in Michael Freeman – Andrew Lewis (eds.), *Law and Literature. Current Legal Issues*, volume 2, London-New York, Oxford University Press, 1999, pp. 417-436. *Id.*, *Testimony and Advocacy in Victorian Law, Literature and Theology*, Cambridge, Cambridge University Press, 2000. Theodore Schroeder (1864-1953), “*Obscene*” *Literature and Constitutional Law: a Forensic Defense of Freedom of the Press*, New York, 1911. H. J. Schütz, *Verbotene Bücher. Eine Geschichte der Zensur von Homer bis Henry Miller*, München, Beck, 1990. John Sutherland, *Offensive Literature: Decensorship in Britain 1960-1982*, London, Junction Books, 1982. Peter J. Hutchings, “Violence, Censorship and the Law”, in *Cardozo Studies in Law and Literature*, vol. 6, Issue 2, fall/winter 1994, pp. 204-224. *Id.*, “Freedom of Speech in Hong Kong & (and) the Problem of China”, *Boalt Hall Symposium: Panel One: The State’s Relation to Art, Political Speech and Indigenous Peoples*, in *Cardozo Studies in Law and Literature*, vol. 8, Issue 1, spring/summer 1996, pp. 267-276. Joseph S. Jenkins, “Copyright Law and Political Theology: Censorship and the Forebear’s Desire”, in *Law & Literature*, vol. 25, Issue 1, *Special Issue on Futures of Fair Use*, 2013, pp. 65-84.

¹⁴ James Boyd White, “What Can a Lawyer Learn from Literature?”, in *Harvard Law Review*, 102, 1989. *Id.*, “Law and Literature: ‘No Manifesto’”, in *Mercer Law Review*, 39, 1988. John Denvir, “‘Deep Dialogue’ – James Joyce’s Contribution to American Constitutional Theory”, in *Cardozo Studies in Law and Literature*, 3, 1991.

¹⁵ R. A. Posner, *Law and Literature*, *op. cit.* pp. 305-311, esp. p. 311.

The classic works of literature are plagued with moral atrocities – both from our contemporary perspective and, often, from that of the age in which they were written: rape, murder, human and animal sacrifices, slavery, concubinage, misogyny, in *The Oresteia* and many other works; bloody vengeance, anti-semitism, in innumerable books including works by Shakespeare and Dickens; racism and sexism, homophobia, for example in Mann's *Death in Venice*; colonialism and imperialism, religious obscurantism, militarism, gratuitous violence, torture (as in *Othello*) and criminality, alcoholism and drug addiction, sadism, pornography, machismo, cruelty to animals (when the theme involves bullfighting, for example), snobbery, defence of fascism, disregard of the poor, the weak, the elderly and the disabled. The world of literature is one of moral anarchy; to enter it is to immerse oneself in ethical relativism.

Literature addresses topics such as adultery (for example, in the works of Lawrence, Hemingway, Madox Ford and Joyce). There are novels in which a dominant minority imposes its desires on a dispossessed majority (for example, in Austen, James, Wharton, Proust and Fitzgerald). In this sense, the novel is a more bourgeois medium than Greek, Elizabethan or French tragedy, genres concerned with the activities and sensibilities of Kings and aristocrats. The growth of the novel as a literary genre coincides with the appearance of the bourgeois and of philosophical realism.¹⁶

In our view, devaluing a literary work due to its moral, political or philosophical content is a demonstration of intolerance, puritanism, illiberal spirit and parochialism ill-suited to the telecommunications era and the global village in which we live today.

And the fact is that it is not necessary to concern ourselves greatly with the question of the immorality of literary works. The influence of literature on human change is not so vast. It is inferior to that of scientific works such as those of Darwin, Adam Smith, Marx, Freud, Keynes and Hayek. The question we may ask, then, is if we do not read literary pieces to form better or truer opinions and beliefs with regard to religion, politics, economics and morality, why do we read them?

The answer is clear. We do so because literature allows us to extend our emotional and intellectual horizons. Moreover, fantastical literature can stir feelings and make us live emotions and experiences that we have not encountered in our real lives. Even so, we are disinclined to believe in the idea that literature can teach us how to live. Literature is not meant to offer advice. It is more accurate to say, as did Nietzsche, that literature makes us become what we are, helps to construct our identity, capturing aspects of ourselves that are of interest and that are embodied in the literary work. Reading is like friendship. Cultured people develop friendships with authors and with the characters in their works. One of the greatest pleasures that reading offers, a true satisfaction beyond moral hues, is providing the reader with a kind of echo of their daily lives. It is as though our reality reflected fiction, only normally with less intensity. Literature can also act as therapy, and frequently as consolation.

Those who would not agree with the foregoing argument, and instead consider that edifying literature can make us better people, are also inclined to believe that immoral literature can make us worse. According to this perspective, literature ought to avoid praising violence, discrimination, deviant sexual behaviour, atheism or other supposedly reprehensible attitudes and behaviours. Here, censorship would come into play, with proponents maintaining that immoral books are not literature and therefore that nothing is lost through their disappearance.

But it would be a pity to define literature so narrowly. Such is the case, for example, in pornographic literature. Masterpieces such as *Ulysses*, by the Irish writer James Joyce, might fall under this category.¹⁷

Ulysses is an exhaustive narration of a day in the life of the Jewish Leopold Bloom. The everyday words, acts and thoughts of Bloom are compared, with an ironic parallelism, to Homer's heroic story of the *Odyssey*. The work was censored. It was first published in the American journal *Little Review* in 1918. However, in 1920 and after the publication of the voyeuristic encounter between Leopold Bloom and Gerry MacDowell, the publishers faced claims, fines and orders not to publish more chapters. It being impossible to publish the book in Great Britain, Sylvia Beach, owner of the Shakespeare and Company Bookshop, published *Ulysses* in Paris in 1922.

¹⁶ R. A. Posner, *Law and Literature, op. cit.*, pp. 310-312.

¹⁷ James Joyce, *Ulysses*, London, Penguin, 1992. T. S. Elliot, "Ulysses, Order and Myth" (1923), in Peter Faulkner (ed.), *A Modernist Reader*, London, Batsford, 1986, pp. 100-104. Joseph Valente, *James Joyce and the Problem of Justice*, New York, Cambridge University Press, 1995.

The copies sent to England were confiscated by the customs authorities. For ten years, the work could only be found in Continental Europe. In 1932, Random House in the United States imported a copy with the intention of producing an American edition. The copy was again confiscated by the customs authorities and Random House brought a claim challenging the lawfulness of this action. In the ensuing 1933 judgment, *United States v. One Book Called "Ulysses"*, Judge John M. Woolsey made a series of key observations. First, he requested expert reports concerning the literary value of the work. Second, he offered the opinion that *Ulysses* was a work of art and not a pornographic book, stating that the book ought to be read as a whole and not separating the erotic sequences from their context. As a result of the judgment, Random House was freed to publish *Ulysses*. The published edition paid homage to Judge Woolsey, and included his judgment. Today, this represents a keystone in the "literature of law".¹⁸

Yet, leaving aside an adolescent public, such as schoolchildren, who may be influenced by these works, what evil could in reality be done by a work such as this in comparison with online or electronic pornography, for example? A verbal description of sexual conduct is nothing in comparison with the audiovisual images of a photograph or a film.

Ulysses could not be sold in England and other countries for years following its publication. Nor could works by Henry Miller and *Lady Chatterley's Lover* by D. H. Lawrence be legally acquired in the United States before 1960.¹⁹ Homosexuality was belatedly accepted as a natural theme in many countries, including in the West. In 1959, judge Frederick van Pelt Bryan ruled on the US edition of *Lady Chatterley's Lover*, making an important observation that would influence subsequent cases in the 1960s: that a work of literature published and distributed through normal channels by a prestigious and well-reputed publisher is something very different to pornographic literature, furtively distributed through back channels. Penguin Books faced trial for publishing *Lady Chatterley's Lover*. The trial, before Justice Byrne, lasted six days. The defence called thirty-five experts in support of the literary merit of the work. The jury, after three hours of deliberations, reached a not-guilty verdict. Penguin Books sold more than two million copies of the book.²⁰

Blasphemy²¹ is one of the offences sometimes present in literature. It appeared to be dead during the 20th Century, but was resurrected and became a contemporary question in 1970 and particularly in 1990 with respect to the novelist Salman Rushdie, with his work *The Satanic Verses*. The boundaries between blasphemy and sedition, the common public good and morality, were blurred. Blasphemy consists of attacking religious dogma, principally those of Christianity, also extending to matters of sexuality and politics. Blasphemy became a less serious offence with Western liberalism and secularism, which granted literature a quasi-sacred character. However, other religions have demanded that their dogma be respected. This is the case for the aforementioned *Satanic Verses*, published in 1988, together with the *cartoons of Mohammed*, one of the most recent cases involving controversy over blasphemy in literature. The scenes and language contained in Rushdie's novel included material that was gravely offensive to Muslims, resulting in the book being burned, in riots, and in a death sentence being handed down with respect to its author by the Ayatollah Khomeini of Iran, leaving Rushdie under the protection of the courts in the face of the scale of threatened violence against his person.²²

Censorship in totalitarian regimes, such as the former USSR, and theocracies such as Iran, may dry up literary creativity.

¹⁸ K. Dolin, *A Critical Introduction to Law and Literature*, *op. cit.*, pp. 46-47.

¹⁹ Charles Rembar, *The End of Obscenity: The Trial of Lady Chatterley, Tropic of Cancer and Fanny Hill*, London, Andre Deutsch, 1968. C. H. Rolph (ed.), *The Trial of Lady Chatterley*, Harmondsworth, Penguin Books, 1961.

²⁰ K. Dolin, *A Critical Introduction to Law and Literature*, *op. cit.*, pp. 48-49.

²¹ Joss Marsh, *Word Crimes: Blasphemy, Culture and Literature in Nineteenth-Century England*, Chicago, University of Chicago Press, 1998.

²² K. Dolin, *A Critical Introduction...*, *op. cit.*, pp. 50-53. P. Chakravorty, "The Rushdie Incident as Law and Literature Parable", in *Yale Law Journal*, 104, 8, 1995, pp. 2213-2247. W. J. Weatherby, *Salman Rushdie: Sentenced to Death*, New York, Carroll and Graf, 1990. Richard Webster, *A Brief History of Blasphemy: Liberalism, Censorship and the Satanic Verses*, Southwold, Orwell Press, 1990.

Western democracies are a different matter; at most, they may refuse to accept detailed descriptions of sexual acts in literary works for a generation or two.²³ And today, when the limits are so broad, there is almost nothing that cannot be published. The situation was different in times past, with works such as *Lysistrata* (which subject was a sexual strike by women) or the novels of Henry Miller. The list of authors of literary works that were deemed sexually explicit by the standards of the time – in some cases, for decades – include, in addition to the aforementioned examples, Boccaccio and Rabelais.²⁴

2.2.-Variety of press offences

2.2.1.-Defamation. Libel

The destructive effects of libel have been explored in many literary texts. *Othello* is one of the many stories in which there are traces of libel in the literature of the era. Suspicion regarding libel fell particularly upon satire, which became an increasingly important genre. During the middle of the 20th Century, libel was transformed, moving from being a fundamentally criminal offence to predominantly providing a civil cause of action. In post-modern culture, blurring the lines between history and fiction and past and present, and in which literary texts frequently present radical criticism of centres of power, deliberately targeting famous people may result in defamation.²⁵

In essence, one form of legally regulating the literary process relates to authorship and creativity. With relation to this, as a matter of criminal law, the possibility of defamation arises – and, very closely linked thereto, the invasion of privacy, through fiction, that occurs when the author of an ostensibly fictional work includes real people in such a manner that they are clearly identifiable, and relates falsehoods and libels regarding those people.²⁶

Article 19 of the *International Covenant on Civil and Political Rights* recognizes respect for the reputation of others as a limit on freedom of expression.

Certain literary works add real characters to fictional ones, to provide greater plausibility or for other reasons. We may think of the case of Napoleon in *War and Peace*, Martin Luther in *Michael Kohlhaas*, or Booker T. Washington in *Ragtime*. Similarly, a large number of characters appear under their real names in *Ulysses*.

This is also the case for the former Prime Minister of India, Indira Gandhi, who is a character in Rushdie's *Midnight's Children*, both under her own name and as that of "the widow". The novel in question is an imagination of post-independence India. Indira Gandhi is heavily criticised in the work, and for this reason she defended herself against the allegation that her son had insulted her by claiming she had neglected her last husband, who had died from a heart attack. She won the case, obtained a public apology and the aforementioned passage was omitted from all later editions of the work, as well as Rushdie and the publishers paying the costs of the case.²⁷

²³ Laura Beck Varela, *Literatura jurídica y censura: fortuna de Vinnius en España*, Valencia, Tirant Lo Blanch, 2013.

²⁴ R. A. Posner, *Law and Literature*, op. cit., pp. 313-344. Peter Coleman, *Obscenity, Blasphemy and Sedition: 100 Years of Censorship in Australia*, Sydney, Angus and Robertson, 1974.

²⁵ K. Dolin, *A Critical Introduction to Law and Literature*, op. cit., pp. 56-59.

²⁶ William Holdsworth, "Defamation in the Sixteenth and Seventeenth Centuries", in *Law Quarterly Review*, 40, 1924, pp. 397-401. Robert D. Sack, *Libel, Slander and Related Problems*, New York, Practising Law Institute, 1980. Michele Lowrie, "Slander and Horse law in Horace Sermons 2.1.", in *Law & Literature*, vol. 17, Issue 3, *Symposium: Law, Satire, Incapacity*, fall 2005. Stephanie Lysyk, "Love of the Censor: Legendre, Censorship, and the Theater of the Basoche", in *Cardozo Studies in Law and Literature*, vol. 11, Issue 2, winter 1999, pp. 113-134.

²⁷ K. Dolin, *A Critical Introduction to Law and Literature*, op. cit., p. 59.

A problem with the cases of literary defamation is calculating or measuring damages, since although the value of harm to reputation may be at least approximately measured, this is not so for the other side of the scales: the value of the literary work, which appraisal often requires the perspective afforded by the passage of time.²⁸

The issue of defamation is related to that of *injurias* and *calumnias* (in English, both these terms are collected under the umbrella term of libel). It is useful here to explain the difference between these two Spanish concepts. Though both are attacks on the right of honour of the subjects, we understand *injurias* as the fact of falsely alleging that someone has engaged in acts that affect the dignity of that person, with the person making the statements having a defamatory intention, deliberately and knowingly attacking the honour or reputation of the injured party. This is the case for insults. *Calumnia* goes further, consisting of falsely accusing someone of a crime, such as claiming that they have stolen something, that they have falsified a document or that they have made false testimony during trial; that is, provided that the alleged crime is false, and not if it can be proven that the person in question did commit such offence.

2.2.2.-Sedition

Any word, verbal or written, with the calculated intention of disturbing domestic peace and the government of the country in which it is published or made public, constitutes sedition. With the emergence of civil society, literature became a means of stimulating political change, and sedition developed into a tool for resisting power. A true claim cannot be punished as sedition, regardless of how critical it is of the government. However, sedition continues to act as a limit and a recognized legal restriction on free speech. The concept of sedition was set forth by Judge Oliver Wendell Holmes in 1919 in the *Abrams* case. Holmes held that sedition could only be prosecuted with justification under the Constitution if it constituted “clear and present danger”: only in the case of such “clear and present danger” could freedom of speech be limited. The most celebrated cases in this respect was that of *Mahatma Gandhi*, in 1922, relating to three articles written by Gandhi, which led to a six-year prison sentence.²⁹

2.2.3.-Racism

*Uncle Tom’s Cabin*³⁰ stands out in the context of literature on racism. The celebrated novel by Harriet Beecher Stowe (1811-1896), published in 1952, considers the role of literature as a critical reflection on the law, which did more to end segregationist laws in the United States than dozens of years of challenges and debates in Congress.³¹ The work takes slavery as a central theme, revolving around the tale of an Afro-American slave, Uncle Tom, and arguing that Christian love and faith can overcome something as hateful and aberrant as depriving human beings of their freedom. The central theme of the novel emphasizes the immorality and evil of slavery, as something destructive and horrific, which is for example reflected in its separation of families. The novel was written with the aim of giving greater impetus to the abolitionist cause in the United States at a time before the Civil War. When President Lincoln met the author of the book in 1862, in the middle of the American Civil War, he told her: “So you’re the little women who wrote the book that started this great war”.

Another key novel in the history of the racial struggle is *To Kill a Mockingbird*,³² by the American author Harper Lee, which was published in 1960 and won the Pulitzer Prize.

²⁸ R. A. Posner, *Law and Literature*, *op. cit.*, pp. 381-389 and 405-412. Eric Barendt, “Defamation and Fiction”, in Michael Freeman – Andrew Lewis (eds.), *Law and Literature. Current Legal Issues*, volume 2, London-New York, Oxford University Press, 1999, pp. 481-498. Anthony Bradney, “Reading Blasfemy: The Necessity for Literary Analysis in Legal Scholarship”, in Michael Freeman – Andrew Lewis (eds.), *Law and Literature. Current Legal Issues*, *op. cit.*, pp. 533-554. Patrick Hanafin – Adam Gearey – Joseph Brooker (eds.), *Law and Literature*, Oxford, Blackwell, 2004.

²⁹ K. Dolin, *Critical Introduction...*, *op. cit.*, pp. 53-55.

³⁰ Harriet Beecher Stowe (1811-1896), *La cabaña del Tío Tom*, Madrid, Cátedra, 1998. Translation into Spanish by Elizabeth Power, from the English original, *Uncle Tom’s Cabin*.

³¹ Susan Tiefenbrun, “Semiotics and Martin Luther King’s ‘Letter from Birmingham Jail’”, in *Cardozo Studies on Law and Literature*, 4, 1992, pp. 255-287.

³² Harper Lee, *To Kill a Mockinbird*, Philadelphia, J. B. Lippincott, 1960. There is a translation into Spanish by Baldomero Porta, *Matar a un ruiseñor*, MDS-Mediasat, 2003.

The novel addresses controversial themes, such as rape –by a black man of a white woman– and racial inequality. Its protagonist, the attorney Atticus Finch, is one of the most emblematic fictional characters in terms of racial heroism. In addition to racial injustice, other key themes in the work include the loss of innocence, defence of tolerance and the fight against prejudice, in addition to courage and compassion, live in the Deep South, and gender roles. Though the work is a set text in schools in English-speaking countries, it has been subject to campaigns opposing its use in such contexts due to its frequent use of racial epithets. It was brought to cinemas by Robert Mulligan, whose adaptation won three Oscars. Gregory Peck played the role of Atticus Finch. The theme of the book is related with two episodes in America at that time: the bus boycott in Montgomery, after the seamstress Rosa Parks refused to take a seat at the back of a bus, and the boycott of the University of Alabama following the acceptance and subsequent expulsion of a student.

The African-American literature of the United States has been written in that country by, about, and in some cases for, African Americans.³³ Among the themes this field of literature explores are the role of these minorities in American society, racism, slavery and equality. Outstanding contributions include the works of authors such as Toni Morrison and Maya Angelou, Booker T. Washington, and such popular books as *Roots: The Saga of an American Family*, by Alex Haley, and *The Color Purple*, by Alice Walker, both of which were filmed for the big screen.

In the European context, it is necessary to highlight the Count of Boulainvilliers writing a book in 1727, which sought to prove the supremacy of the French nobility due to its descendance from the dominant races of the French. On the topic of racism in Continental literature, Francisco de Quevedo's poem *Boda de negros* ("Black Wedding") must also be mentioned. This work relates the dark and the demonic, pestilence and misery. Also among the works of Quevedo is *Execración contra los judíos* ("Diatribes against the Jews"), in which he presents Jewish people as rich through usury, advocating their expulsion from the Spanish territory. Similarly, Shakespeare often makes use of such racist stereotypes, such as the Jewish character Shylock in *The Merchant of Venice*. The characters of Othello, a Venetian Moor, and another Moor, Aaron, in *Titus Andronicus*, or Caliban in *The Tempest*, represent other examples. In his online article "Breves: Racismo y Literatura" ("Briefs: Racism and Literature"), Jorge Rubén Fernández also identifies racist elements in certain passages by the German philosopher Immanuel Kant.

In Hispano-American literature, in the book *Martín Fierro* by the Argentinian author José Hernández, an important work in traditional Argentinian literature, the following phrase appears, spoken by the main character, the *gaucho* Martín Fierro: "God made whites; Saint Peter made mulattos; and the devil made blacks". This book was heavily criticised by Jorge Luis Borges, who did not share such ideological prejudices.³⁴

In May 1987, the French government commenced a public criminal trial against the Nazi Klaus Barbie, seeking that new generations would not forget the horrors of Nazism. Less than a year after the *Barbie Trial*, around four million French people voted for the far right, which defended values close to Nazism. The murder of the humourists from the satirical weekly Charlie Hebdo is in the recent memory of all. Though racism and xenophobia are, with reason, despised, as Tzvetan Todorov states in *The Displaced Man*, published by Taurus in 2007 (*L'homme dépaysé*, 1996), no few people tend to diminish the importance of these phenomena, considering them a demonstration of democratic individualism within the panorama of existence of different lifestyles. Along these lines, who has not heard someone in their vicinity talk about the immigration of Morroccans and Africans and argue that the best thing is for them to return to their own countries without further ado? Virtually no intellectual admits to racism, but some critics of anti-racism are not too far from being racist. In this regard, for Julien Freund, anti-racists prioritize a sector of the population – immigrants – to the detriment of another – the indigenous members of the population.

³³ Jon-Christian Suggs, "African American Literature and Legal History", in *Law & Literature*, vol. 22, Issue 2, Section 2: *Conference Address*, summer 2010, pp. 325-337.

³⁴ Miguel Ángel Ciuro Caldani, "La cultura jurídica argentina en sus expresiones literarias capitales. Significados jurídicos de *Facundo* y *Martín Fierro*", in José Calvo González (dir.), *Implicación Derecho Literatura: contribuciones a una Teoría del Derecho*, Granada, Comares, 2008, pp. 71-90.

In turn, André Bejin argues that anti-racism is a mask for African imperialists, who “covet our lands” and seek to repopulate Western Europe. In the face of this, what Todorov wishes to tell us in the aforementioned work is that there is a step between critic to anti-racism and racism that some do not hesitate to take.

For the North American writer Jack McDevitt (Philadelphia, 1935), author of science-fiction novels, some of which have won literary prizes: “Literature about extraterrestrials helps the reader to appreciate the interest and beauty of others, and contributes to defeating racism... It contributes to discovering that any being with intelligence is not foreign to us”. McDevitt refers to the manner in which extraterrestrials are characterized in the contemporary era, not to the malign extraterrestrials that inhabited science fiction in the 1930s.