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Kafka's Unspoken Philosophy of Law

Abstract

In the first part of the paper, the author pays close attention to the fact that in Kafka's diaries and correspondence, we find a notable absence of his professional life. If we never knew the famous writer was a law expert, we would hardly be able to determine that from his personal writings. There is no mention of his studies of law, professional aspirations, problems or procedural interests related to judicial practice, or difficulties or achievements in the workplace. Surprisingly, within the complex hierarchy of business interactions, the writer occupied a very high position. The performed analysis uncovers an essential, but a barely recognisable feature of Kafka's works. Above all, they try to alert us that the feudal world is still alive and well, that in the modern times we only see the multiplication of the former sovereigns whose role was to impose the laws onto others but can personally be excused. The works of Rudolf von Jhering, one of the best-known philosophers of the law of the time, and Hans Gross, the famous founder of criminology and Kafka's professor at Charles University, Prague, were thematised in order to determine the dimensions of the writer's crucial preoccupation – to deconstruct the social Darwinist theories of the criminal law.

Keywords

Franz Kafka, fictionalisation, law, Hans Gross, Rudolph von Jhering, criminal law

Being-in-the-World Is Being-on-Trial

In this paper, I examine the philosophy of law in Kafka's most read and famous novel, *The Trial*. The initial premise is that Kafka was inspired by the work on the philosophy of law. More precisely, on the one hand, by Rudolph von Jhering's theory of duty in the maintenance of one's rights, exemplified in his, at the time, a rather popular book *Struggle for Law*, and on the other hand, by the thoughts of Kafka's law professor at the Charles University, Hans Gross.

Assaying and evaluating law in fiction is one of the obsessive themes of Kafka's works. In these works, the law is not perceived as definitive and positive but indeterminate and unknown. It is as if in the matters of the law, the paradox takes precedence, for only those who study the "unknown legal system" (Kafka: 2009, 44) can qualify for the highest positions in the judiciary. Conventional discussions about law are not permitted, and for Kafka, the law was never rationally or intelligibly structured. Based on that premise, he concluded that, at all times, a man had been able to feel the lash of the law on their skin (David: 1980, 72). Similarly to the guest in Kafka's short story "In the Penal Colony", Kafka was unconcerned with the law's institutionalised apparatus, he bothered with how the law affects common folk.

Kafka's choice of literature becomes more evident when we acknowledge that the law outlines can only be observed through human suffering. This does not relate to suffering due to injustice or a contingent procedural omission, but due to existential exposure to anonymous violence, the nameless sufferings.

The medium of rational thought is not adequate for discussions related to the law since, for Kafka, Descartes's equality between being and thinking is not valid (North: 2015, 66–67). It would be more appropriate to address this as an accord between shame and being.

Pudeo, ergo sum (*I feel shame, therefore I am*), would be the unsaid dictum for Kafka, conceived as a consequence of loneliness, exile of sorts, inevitable "indictment" felt in the absence of social justice. The ideal of the lonely existing individual, which for Kierkegaard is the pinnacle of humanity and the promise of the desired authenticity, becomes a curse for Kafka. For him, to be lonely is to be convicted. It appears as if his character of *the invisible judge* metaphorically explains why the indictment is neither known nor available. It seems appropriate to interpret this from the perspective of the absence of the imaginary community which we have failed to establish for ourselves:

"Loneliness is the consequence of indictment, but it is also its possible cause, in terms of the loss of the sense of community." (Abraham: 2008, 214)

With Kafka's protagonist in *The Trial*, we see no deeper self which could be revealed to readers, no inner life, only simplicity, confidence in one's righteousness and innocence. From this naivete of the average existence comes the feeling of "detention", fatal entrapment in the webs of power. Perhaps the only *a priori* with which Kafka's literature goes on is tied to the existential equality of *being-in-the-world* and *being-on-trial*. To be human is to be on trial. Joseph K. exists only as long as the trial exists. Therefore, we can claim that the Trial is the determining medium of his subjectivation. The prior experiences of K. are entirely irrelevant, and the end of the trial is at the same time, his personal ending. If the inclusion in the trial precedes every prior experience, then it does not take much to confirm one's guilt. The legal comfort of Kafka's works suggests that no one is innocent in the webs of power.

Literature of the Community under Threat

However, in Kafka's diaries, we find a notable absence of his professional life. If we never knew the writer was a law expert, we would not deduce that from his private writings. In these, there is no mention of his studies of law, professional aspirations, problems, or procedural interests related to judicial practice, nor of difficulties or achievements in the workplace, where, in the complex hierarchy, the writer occupied a very high position. Multiple promotions show that Kafka was not indifferent to his career in law; he was devoted to addressing professional challenges and demands. If we survey his career, we may notice how difficult it is to identify him with the person who describes his work with clichéd phrases, such as the inevitable "it pays the rent". However, Kafka was doing just that, convincing himself of his career's insignificance in his life. One thing is certain: the omnipresence of invisible and inaccessible structures of governance and administration in his literary works does not in any way reflect his personal experiences in practising law. What was considered unattainable and absent in his literature, was accessible and present in his everyday work.

If the hierarchy in his literature establishes a pillar at the bottom of which is the living presence of the lesser clerks, while at the top we see shades of those about whose existence one can only speculate, for they are, like Klamm from *The Castle*, known only "in general features", then Kafka's personal

experiences testify to the opposite. In his description of the trial, the writer's everyday routines become unrecognisable, bearing in mind everyday communication of our law-expert with the juridical order's highest instances and most prominent judicial authorities. Our writer was, for most of his career, employed in the *Workmen's Accidence Insurance Institute for the Kingdom of Bohemia*, which had over 250 employees, and where he held a very high position:

"He was by no means a small cog in the engine of the bureaucratic apparatus, moved by unfathomable forces, but one of the leading heads of the administration which also moved and maintained the cog mechanism of the organisation." (Binder: 1993, 90–91)

Even though he always tried to emphasise his literary works above his profession, Kafka did not choose writing to leave the judiciary behind. On the contrary, as a writer and not a law expert, Kafka became "an essential element of a community under threat" (Friedländer: 2013, 160–161).

Kafka would probably have confirmed a Husserlian point of view that the transcendental *We* precede the transcendental *I*. Kafka's protagonists' view is phenomenological insofar the narrative plain is concerned because there is nothing outside of the horizon available to aid their description. It makes no difference whether or not it includes countless inaccessible rooms, endless corridors, hidden secret chambers, massive wardrobes, multiple doors, places beyond the reach of Joseph K. Even though his situation as an accused, but, at first glance, a free detainee cannot be compared with Husserl's imperative of the indifferent observer. We ask whether this game of absence versus presence, the corporal and the reachable of the lowest link in the hierarchy versus the incorporeal and the unreachable of its peaks, is or isn't yet another example of the immediate givenness of the appearance and the indirect absence of the phenomenon.

If we take into account the above-mentioned relationship from the perspective of the question of guilt and the implementation of the law, we can notice the workings of the hierarchy by which the lowest and the most vulnerable castes are affected by the law, while the highest ones are conveniently bypassed. If we remember that Kafka's *goddess of justice bears a resemblance to the goddess of the hunt* (Kafka: 2009, 105), then the division into the hunter and the hunted is clearly marked on the vertical of the social hierarchy. Above all, Kafka's works attempt to alert us that the feudal world is still alive and well, that in the modern times we only see the multiplication of the former sovereigns whose role was to impose the laws onto others but were excused themselves. In his indirect remarks to the courts, a prominent remark is that there is no direct communication between high ranking officials because moving towards the higher hierarchical positions implies absolute isolation.

Kafka's explanation is quite simple: interests differ. Far from serving the interest of justice, the court's higher hierarchical instances are mainly concerned with personal interests. We should note the extreme hierarchical complexity, the court's explicit personalised mediation, and the incomprehensible directness of its functioning. On one side, the court is institutionally presented in public through a thick web of clerks, their assistants who are mainly concerned with continuously reaffirming and preserving their way of life and work. What remains unclear relates to the necessity of the "dense network of representatives and affiliates" (Denksy: 2010, 128), the people who make connections, when the operative application of the law does not know the warrant or the victim, but only the accused, whose guilt occupies the attention

of the court and brings the inevitable verdict with a magnetic force. The government does not investigate guilt:

“Our department (...) does not seek out the guilt in the population but, as it says in the law, is attracted by guilt and has to send us guards out. That is the law.” (Kafka: 2009, 8–9)

This fatal connection provides clue to why the defence is not provided by the law but is merely tolerated, and *why the chances of Joseph K making a defense in front of pictures of judges are greater than making his case in front of actual judges*. Kafka's intent was not to expose or ridicule the institution of the court, nor to offer a metaphorical criticism of the social injustices which are brought about due to the inefficient work of the judiciary, or the unbearable political bias of the court. Seldom can we see the actual arguments, like the one related to the conflicts between the letter of the law and law practice.

“Of course, the law says – though I haven't read it myself – that an innocent man is to be acquitted; on the other hand, it doesn't say that judges can be influenced. My experience, however, is the exact opposite. I have never heard of any genuine acquittal, but I have heard of many cases of influence being exerted.” (Kafka: 2009, 110)

Even in this instance, the protagonist does not speak about the current judicial practice, rather, about a law he “never read”. With that comment, at first glance unnecessary, Kafka notes that it is not his intent to understand the judiciary from the perspective of a realistic paradigm.

Unlike Dostoevsky, who focused the *Crime and Punishment* narrative around the perpetrator, Raskolnikov, and the top-notch inspector, Porfiry Petrovitch, the inspector appears in *The Trial* so that he can vanish – he is nowhere to be found after chapter two. Dostoevsky describes in detail the motives and the dilemmas of the perpetrator, showing the crime, but even more importantly, the magnificent skills of the inspector who, after only three conversations, forces the suspect to confess, even though he has no tangible evidence. In Kafka's *The Trial* there is no rank, he “reverses Dostoyevsky's procedure by having his protagonist immediately placed under arrest, while dispensing explicitly with any kind of crime” (Kirchberger: 1986, 72–73). In contrast to the expected timeframe, which consists of phases that follow a logical sequence *perpetrator – crime – investigation – confession – trial – conviction – punishment*, Kafka only addresses *trial* and *punishment*.

That way Kafka shows he cares far more about presenting the judiciary through an inversion of our common expectations. Instead of protecting all citizens by implementing laws, the court is shown as a frightening, unfathomable institution. What Joseph K. does not expect and cannot know is revealed through an array of shocking findings that point to the court being an institution without any control or boundary. Discomfort, as a root theme of the *The Trial*, is conceived alongside a notion that where there are no clear boundaries, control is absent. If the court is everywhere, if everyone is employed by it, then the sheer existence of the untouchable hierarchy is questionable, especially if we are referring to the highest instances.

Kafka's insinuations lead to the conclusion that the court does not have a predetermined place or a fixed hierarchy. By placing the courtroom right next to the washers, Kafka created a sublime game with the civilisations archetype of purification. Unlike dirty laundry, which will, after being cleansed become clean and bright once more, those whose guilt “is worthy of attention” will not be allowed to rehabilitate themselves because they will be brutally executed. The absence of the highest instances and the uncertain existence of the ex-

traordinary, reliable lawyers turn the court into a machine of spurious infinity which disables any logical thought. The extremely complicated and mediated network of clerks and affiliates uncovers its pointlessness employing the directness of verdict. Where it is no longer known who the victim is, and what the indictment is, every type of defence is *a priori* impossible.

How to comprehend a notable division between Kafka's literary thematisations of the phenomena related to law and the silence about personal experiences with the law? Things become even more interesting if we question the juristic or philosophical authorities Kafka met during his studies and after them, whose basic ideas can be traced. We can try to tie the first conceptual stimulus for Kafka's literature to the first book written by Rudolph von Jhering, *The Struggle for Law* (1872), an extremely popular and rare bestseller from the domain of the philosophy of law in the second half of the 19th century. In a dramatic style, which can only be compared to the introductory passages of Kant's *Critique of Pure Reason*, that proclaimed that we are living in the genuine age of criticism to which everything must be subjected, von Jhering insisted on the thesis that law in its entirety became disputable.

Jhering's idea of the process, popularly known today as *commons*, is, at least in spirit, moved out of the framework of the realisation of personal interests, transforming itself into a struggle for the common cause from which no one is excluded nor spared. Joseph K. is aware of the danger he is putting himself into, as he gives up on his defence in front of the court clerks, taking up the common interests in protection instead:

“What I do want to do is to see that an abuse of public office is brought out into the open.” (Kafka: 2009, 35)

For Jhering, the violation of the law becomes a violation of the person, an unacceptable humiliation that deprives us of our sense of dignity and personal honour. In a word, a man fighting for himself, exercising his rights, is fighting for his community:

“My legal right is the law; when my legal right is violated, the law is violated; when it is asserted, the law is asserted. It sounds paradoxical, and yet it is true, that precisely among jurists this view is far from being usual. According to their view, in the struggle for concrete legal rights, the law itself is in no way involved; the struggle does not turn on the abstract law, but on its incorporation in the form of this concrete legal right, a photograph, so to speak, of that law, in which it has become fixed, but in which it is not itself directly affected.” (Jhering: 1915, 69)

The scene from *The Trial* in which Joseph K. takes the initiative in the courtroom and boldly attacks the unknown institution that accused him – disputing the notes from the inspector as a “book of guilt” (*Schuldbuch*), with the remark that he accepted to participate in the trial “out of pity”, roaring against the meaningless system and the worst kind of corruption among its employees – is in its core based on Jhering's idea that *the assertion of one's legal right is a duty which he owes to society* (Jhering: 1915, 69). Joseph K. unambiguously pointed that out:

“... what has happened to me is merely an individual case, and as such not very important, since I do not take it too much to heart, but it is a sign of the way many people are treated and it is for them that I take my stand here, not for myself.” (Kafka: 2009, 44)

In the end, Joseph K. confidently asserts that he could have gone on with his life, in which he would have been far more powerful than his prosecutors, but

he chose not to, because he stood up in the name of others, risking his defeat in the process.

If we liken the unnamed structure from the short story (*Der Bau*) to the juridical order, the epilogue will make far more sense, where the builder feels remorse because he became a victim of a fatal misunderstanding. Jhering claimed that in

“... the law, man possesses and defends the moral condition of his existence – without law he sinks to the level of the beast.” (Jhering: 1915, 32)

Dedicating its entire life to itself, and to the idea of obtaining utmost security, Kafka's beast constantly reinforced the structure from the perspective of personal safety, while it completely disregarded the need of others for protection. Truth be told, it would be a mistake to interpret Kafka as a consistent follower and supporter of all of Jhering's ideas. He was infinitely far from accepting one of the crucial definitions of the *Struggle for Law* which implied that the law necessitates the idealism of character. The presence of liberal sparks in Kafka's works is beyond question, but its appearance is most of the time curled into a gloomy realism that does not trust the promises of emancipation and no longer wishes to participate in the ideology of progress. Modern tendencies for equality before the law and the establishment of the rule of law in Kafka's works represent only one side of the story.

The conflict arising between the tendency towards pursuing our personal interests and the lack of information about our own rights takes a prominent position in Kafka's works. Its theoretical origin is most probably tied to Kafka's professor of philosophy of law at the University of Prague, Hans Gross. Gross' principal work, *Criminal Psychology: A Manual for Judges, Practitioners and Students* (1893), “has for decades held the status of the police bible”, where the crucial theoretical innovation was tied to the shift in the investigatory focus from the crime itself to the psychological profile of the criminal. Kafka's biographer, Ernst Pawel, pointed out the overtly assenting memories Kafka associated with the professor, and in his most prominent novels he noted the presence of Gross' ideas, but also of Gross himself:

“A couple of assenting critics can be found in *The Trial*, and in *The Castle*, and they do not only carry the marks of Gross' courses, but also Gross himself.” (Pawel: 1988, 166–167)

For Kafka's literature, the analogy between the psychological and the physical is crucial, and it undoubtedly represents the key postulate of his works. The corporeal manifestations and metamorphoses of his characters always display certain psychological processes, usually tied to traumas, alienation, loneliness, and helplessness:

“Kafka frequently plays out some of the signal shocks of modernity by forcing his readers to grasp the world through the constricted, humiliated viewpoints of his protagonists. That is, Kafka's protagonists are often disoriented, mistaken about realities, and uncertain about what even the near-term future holds.” (Fleming & O'Carroll: 2011, 30)

Portraying bodily deformities and transformations, Kafka understood that they express a mere reflection of psychological processes. The theoretical incentive for his literary procedure was found with Gross. Hans Gross adopted and adjusted Helmholtz's principle about the complementarity of the psychological and the physical, formulating it thusly:

“Every mental event must have its corresponding physical event in some form.” (Gross: 1998, 43)

Naturally, the possibilities of applying this principle were observed by Gross strictly from the criminological, and not the psychological position, tying them to the investigative procedure. The key ideas of Hans Gross rest on the diagnosis of certain inclinations of the modern man which present aggravating circumstances to both the investigative procedure and the judicial process itself. With Kafka, they are depicted through the air's stuffiness, foggy, and blurry lights, which prevent the actors in the courtroom from seeing and thinking clearly. Relying on his own personal experiences, Gross pointed out that the witnesses are prone to jumping to conclusions for they tend to judge and adjudicate more than they tend to describe in detail what they saw or heard. The effects of unreliable witnesses are further aggravated due to the lawyers' inclination not to explain the phenomena they see, ignoring the study of reality, and instead, make haste, unfounded and abstract conclusions. However, even when dealing with mere abstractions, Gross is convinced that "the most complex and abstract concepts are derived from sensation. Their relation must be studied" (Gross: 1998, 107). In the end, the necessity of dealing with a myriad of unexamined assumptions forced Gross to the method of *variation*, whose point is not to have any reference to all details of evidence which may be incorrect (Gross: 1998, 14).

As the semiotics of an average psychological profile, the project of Gross' phenomenology appears, from Kafka's perspective, to remain in the shadows of the awareness of the fissure, a kind of a crisis of contemporary subjectivity. On the one hand, Gross finds it indisputable that the main characteristic of contemporary human is to manifest "*exaggerated interest in himself*" (Gross: 1998, 26), which in turn means they only understand what they already know, and furthermore, that they will be ready to do something only when they are certain they will gain a concrete advantage or benefit for themselves. On the other hand, this egotistical inclination of the contemporary subject cannot coincide with his gargantuan ignorance "how little attention men really pay to their own affairs" (Gross: 1998, 24).

In many places, Kafka's literature expresses the idea that, no matter how bad things are in the realm of human, human's tendency to protect themselves by creating illusory premises about it is even worse. If the origin of the principal fatal illusion is tied to the need for security, sanctuary, and protection, to the same need that established the necessity of creating laws and developing the judicial system, then the important pages of Kafka's works can be read in the horizon of negative anthropology. It is as if its premises testify to the failed human tendency to protect every individual using the courts and law. Instead, the institutions that were founded to provide safety and security become the harbingers of threat, which brings doom to those who were convinced that, thanks to those institutions, they were safe and protected. The negative anthropology brings with itself the negative idea of imprisonment. The efforts of Kafka's protagonists are not tied to breaking free because their doors are not locked from the outside, but from within. The parabola of the centennial wait before the law becomes clearer if we understand that the surveyor does not tire themselves with reflections on whether the castle is free or if it is the ultimate dungeon (Anders: 1951, 33). Instead, they consistently contemplate finding a way to enter the castle, and their lack of freedom is likened to the denied access and barred entrance.

Being beyond the Law

Long before Foucault, Kafka described a paradox according to which our beliefs about the impartiality, objectivity, and neutrality of the judicial system morph into a realisation that human existence “is the product of the ideas and technologies of disciplinary power” (Dungey: 2014, 49). In the same fashion, the leading idea of *The Trial* makes an attempt to demonstrate the complementarity of the court and the law, whose power does not come from the outside, but is always present, within us:

“The term law court (Gericht) is at times in *The Trial* apparently interchangeable with the law (Gesetz) (...). In the cathedral chapter, for example, the chaplain tells Josef K. he is deluding himself about the court, but then goes on to speak about the law rather than about the court.” (Kirchberger: 1986, 45)

Being unaware of our rights is the negative core of Kafka's anthropology. We can consider that the lessons learned from Hans Gross left a stronger mark in Kafka's works than the spirited liberal philosophy-of-law type messages from Rudolph von Jhering. *The Trial* is thus presented as a deconstruction of contemporary existence supported by inauthentic notions and habits. In its core lies the gap between egoistical interests and the inability to achieve them due to a complete and utter disregard of everything beyond the narrow horizon of the already learned. The egoist cannot allow themselves to be a limited nescient, as the contemporary form of egoism is reduced to ignorance and narrow-mindedness. Furthermore, Kafka deconstructed the myths which feed the modern community, refusing to accept the world in the form in which it appears. Unlike the romantics and the avant-garde, who seek the exotic in the common, the unusual in the usual, Kafka attempted to demonstrate the final strangeness of what is usually taken for granted:

“Far from being an efficient institution, the court is a type of religion, whose rituals are observed without questioning their absurdity (...) cut from its foundations, the court is nothing but an empty form. And that form bears the signs of inevitable corruption.” (Gliksohn: 1971, 37)

The Paradox of the Free Arrestee

Traces of the emancipation from Jhering are mostly there where Kafka's literature reveals to us the invisible chains which tie us to the modern order. Aligning with the contemporary episteme unreservedly, Kafka does not work in the interest of emancipation by projecting a better world, but by tearing down with all his might the illusions and the lies of the existing world.

“... the regime of the work of art is freedom. All modern literature is black, and is, if you will, poisonous, but, as progress of consciences, as an invitation to initiative, it carries its cure with it.” (Merleau-Ponty: 1997, 70)

This becomes especially apparent when considering that, in Kafka's eyes, the belief that the judicial institutions exist for all citizens' protection and well-being presents an extremely powerful delusion.

Thanks to it, however, we are able to come to the source of the constitution of power. The power of one side represents the impotence of the other. The power of those who know the law is never demonstrated in a positive fashion, and it is clear that those who know the law misuse their knowledge; they use it strictly to manipulate those who are ignorant of the law. Expertise in law is thereby further indicated as the precondition for creating a demarcation line

that separates the perpetrators of violence from violence victims. It is worth noting that the ignorant person has no means of becoming knowledgeable, because the world of law and order does not allow itself to be scrutinised, studied or known. It does not allow itself to be inspected from “the outside”. Furthermore, even the slightest glance of the other disrupts it and questions it, and it is then by default unacceptable and intolerable (Robert: 1960, 91). A number of examples from *The Castle* are quite exemplary: the gentlemen are described as extremely sensitive, as they are incapable of withstanding the looks coming from a stranger if they have not been prepared in advance for such a meeting; also, the gentlemen must sleep a lot, otherwise, they would not be able to stand the common folk (Kafka: 1946, 49). Finally, the view of the castle is carefree and liberating, while the view of the land surveyor K. constantly wanders and shifts, to be rejected over and over, and denied acceptance.

Furthermore, suffering from violence does not take place in predictable proportions, because the individual, lacking the knowledge of the law is incapable of precisely determining the border between safety and danger. Those who are unaware of their rights cannot know they have been moved out of their desired safety and comfort zone, which causes them to constantly live in the naïve and yet fatal illusion of safety and protection:

“What discord is there between the visibly human and everything else (...). The man who counts loses his breath in the first instant. We should be afraid of even leaving the house.” (Kafka: 1997, 382)

The metaphor of the house is common in Kafka's works. Its function is to emphasise the focus on the human's need to “feel at home”, to enjoy the close, reliable, and familiar. However, it is in that most intimate circle where the unexpected, unannounced breaches of the unknown, foreign, and unreliable occur. The uncomfortable confrontation with the delusions of safety in the case of Joseph K.'s arrest is only temporarily alleviated by the comments of “the guard” that, in spite of being arrested, he can continue with his business and other everyday activities. The secrets of inter-human communication with Kafka are revealed as conscious delusions, dishonest but routine mechanisms of mutual comforting, the provision of relief in inconsolable situations, the belief in a positive outcome when the worst is imminent. In the case of Joseph K., the possibility of being able to keep on doing his work seemed like salvation; it took him to the utterly wrong conclusion that “being arrested is not so bad” (Kafka: 2009, 16).

The free arrestee paradox can easily be generalised, especially if we pay attention to the suggestion of the compatibility between capital and justice. Satisfying the latter cannot be done at the cost of the former, as the law does not question the functioning of capital. The *a priori* systematic harmony of the bank and the court is not present with the individual. The discomfort created by his arrest does not allow Joseph K. to continue with his business life as if nothing ever happened. On the contrary, starting with the first encounter with his “guards”, K. gets more and more pulled into the temporal vortex. The simultaneous status of prisoner and procurator becomes unbearable as the proverbial commitment and responsibility push him further into the conflict. The time dedicated to his duties at the bank appears wasted in vain and lost to the trial, while the time dedicated to the trial issues adversely affects the duties of a high-ranking banking official. The equivalency of capital and the

law can be seen on the system's plain, while on the individual's plain, it turns into a conflict:

"... in neither of these two systems can K. find a value scale which would allow him to imagine and justify his existence." (Gliksohn: 1971, 41)

The liberal spirit of modern economy is based upon the ideas of harmony, which is continuously being disregarded. Smith's *invisible hand of the market* and Turgot's *superior power* testify to the invisible mechanisms of government. They are not in the hands of individual actors, but in the faceless mechanisms of economic activities, even when they end in failure and doom. The idea of harmony achieved despite doom, or even thanks to the failure of certain groups, leads the functioning of the market economy to the unexpected vicinity of the ideology of social Darwinism:

"... the idea of the invisible hand of the market is tied to the concept that the market chooses the best (most adaptable) participants and that it rejects the bad ones. Or, put in other words, with the idea of social Darwinism." (Sedláček: 2013, 326)

The rejected and bankrupted participant is not someone who necessarily made the wrong business choices or degraded the quality of his products or services. On the contrary, to avoid adaptation, not to take those actions which would successfully integrate him into new conditions is sufficient reason for one to be rejected. Put into the framework of law, social Darwinism implies turning the tables between innocence and guilt. The guilty party can be "fixed", rehabilitated, adjusted, while the innocent as such remains "incorrigible", and thus remains outside of the regime of adaptation and correction. *In the perverted world, the lack of guilt is the worst possible kind of guilt.*

In the words of Joseph K, who, replying to the comment from the prison chaplain, that we should not consider everything true, but we must consider it necessary, says that it is a dreary postulate, thanks to which "the lie has been made the world order" (Kafka: 2009, 303). Kafka leads the social Darwinist theories of the criminal law *ad absurdum* (Heller: 1989, 59–60), with the intent of unveiling the capabilities of the explosive mixture of the contemporary psychopathological insights and the inherited religious archetypes about punishment as the appropriate retribution. The paradoxes of the free arrestee and the innocent culprit remain powerful witnesses to the crisis of contemporary subjectivity. The choice of literature is the consequence of a conscious decision made by this law expert to make the fictitious thought experiment a medium for display of the false order, for Kafka did not assume to see the truth clearly, but he instead felt that emancipation is only possible through the denouncement of the lie. For this reason, he did not refute social Darwinism in Jhering's style, by neither calling upon its antithesis, its liberal appeals nor upon the religiously ethical emphasis on the dignity of human. Likewise, Kafka did not rely on the detailed and experience-based insights of Hans Gross. Their ideas were merely theoretical motivation, and the response to it was a literary, personal one, the one of Franz Kafka, the unique witness to our inverted world.

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Dragan Prole

Kafkina neizgovorena filozofija prava

Sažetak

U prvom dijelu članka autor poklanja naročitu pažnju činjenici da je u Kafkinim dnevnicima upadljivo odsustvo njegova profesionalnog života. Da ne znamo da je slavni pisac bio pravni ekspert, na osnovi njegovih osobnih bilježaka to ne bismo mogli zaključiti. U njima nema niti spomena o njegovom studiju prava, profesionalnim ambicijama i problemima proceduralnog interesa vezanog za pravnu praksu, niti o teškoćama ili postignućima na radnom mjestu, u čijoj je složenoj hijerarhiji pisac zauzimao veoma visoku poziciju. Rezultati provedenih analiza pokazuju bitnu, ali teško prepoznatljivu karakteristiku Kafkina književnog djela. Iznad nas svega nastoji upozoriti na to da je feudalni svijet još uvijek živ i zdrav, te da u modernom svijetu prepoznajemo jedino umnožavanje bivših suverena, čija je uloga da drugima nametnu zakone, a da od njih sami budu izuzeti. Djela Rudolpha von Jheringa, jednog od najpoznatijih filozofa prava toga vremena, i Hansa Grossa, slavnog utemeljitelja kriminologije i Kafkina profesora na praškom Karlovom univerzitetu, tematizirana su da bi se odredile dimenzije piščeve dekonstrukcije socijaldarvinističkih teorija krivičnog prava.

Ključne riječi

Franz Kafka, fikcionalizacija, pravo, Hans Gross, Rudolph von Jhering, kazneno pravo

Dragan Prole

Kafkas unausgesprochene Rechtsphilosophie

Zusammenfassung

Im ersten Teil des Artikels legt der Autor sein Augenmerk vornehmlich auf die Tatsache, dass in Kafkas Tagebüchern die Abwesenheit seines Berufslebens augenfällig ist. Wenn wir nicht wüssten, dass der berühmte Schriftsteller ein Rechtsexperte war, könnten wir dies nicht aufgrund seiner persönlichen Notizen schließen. In ihnen ist kein Wort gefallen über sein Jura-studium, seine beruflichen Ambitionen und Probleme des prozeduralen Interesses hinsichtlich der Rechtspraxis, wie auch über Schwierigkeiten oder Leistungen am Arbeitsplatz, in dessen komplexer Hierarchie der Schriftsteller eine sehr hohe Position einnahm. Die Ergebnisse der durchgeführten Analysen zeigen ein belangvolles, aber schwer zu erkennendes Merkmal von Kafkas literarischem Werk. Allem voran ist er bestrebt, uns zu warnen, dass die feudale Welt immer noch lebendig und gesund ist, und dass wir in der modernen Welt lediglich die Vermehrung ehemaliger Souveräne gewahren, deren Rolle es ist, anderen Gesetze aufzuerlegen und dabei selbst von denselben ausgenommen zu sein. Die Werke Rudolf von Jherings, eines der bekanntesten Rechtsphilosophen jener Zeit, und Hans Gross', des berühmten Begründers der Kriminologie und Professors Kafkas an der Prager Karls-Universität, wurden thematisiert, um die Dimensionen der vom Schriftsteller ausgeführten Dekonstruktion der sozioldarwinistischen Theorien des Strafrechts festzulegen.

Schlüsselwörter

Franz Kafka, Fiktionalisierung, Recht, Hans Gross, Rudolph von Jhering, Strafrecht

Dragan Prole

La philosophie du droit tacite de Kafka

Résumé

Dans la première partie de l'article l'auteur accorde une attention particulière au fait que dans les journaux de Kafka sa vie professionnelle soit absente de manière évidente. Si nous ne savions pas que le célèbre écrivain était un expert en droit, nous ne pourrions le déduire sur la base de ses notes personnelles. Il n'y fait aucune mention de ses études de droit, de ses ambitions professionnelles et des problèmes d'intérêt procédural liés à sa pratique du droit, ni des difficultés et des acquis sur son lieu de travail, au sein d'une hiérarchie complexe où l'écrivain occupait une position très élevée. Les résultats des analyses menées montrent une caractéristique essentielle, mais difficilement reconnaissables, des œuvres littéraires de Kafka. L'écrivain s'applique à nous mettre en garde sur le fait que le monde féodal est encore vivant et sain, et que nous reconnaissons uniquement la reproduction des anciens souverains dans le monde moderne, dont le rôle est d'imposer des lois aux autres et en être eux-mêmes exemptés. Les œuvres de Rudolf von Jhering, l'un des philosophes les plus connus de ce temps-là, et de Hans Gross, fondateur célèbre de la criminologie et professeur de Kafka à l'université Charles de Prague, ont été thématisées afin de déterminer les dimensions de la déconstruction kafkaïenne des théories du darwinisme social liées au droit pénal.

Mots-clés

Franz Kafka, fictionnalisation, droit, Hans Gross, Rudolf von Jhering, droit pénal