ANAMORPHOSIS – Revista Internacional de Direito e Literatura
v. 3, n. 2, julho-dezembro 2017
 – doi: 10.21119/anamps.32.411-435

KAFKA AS A CRIMINALIST: FROM LITERARY FICTION TO CRIMINAL REALITY

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ABSTRACT: From the literary works of Franz Kafka, filled with literary fantasy and the creative dimension of the author, themes emerge that include the contemporary ills of the criminal science. Literature, which in this article is mixed with law in order to unveil what the forensic practice insists on masking, illustrates the granting inversion that criminal prosecution has defended as a measure for fairness. From the old criminal legality to the long forgotten minimal intervention, we point out to Kafka, who already described this picture in the early twentieth century, a picture which, unfortunately, is still current. The methodology of this article includes the studies of *Law and Literature*, proposing the critical reflection of the legal science. The paper gains body and form through the fantastic literary universe of Kafka, importing his fiction into the criminal practice of nowadays.

KEYWORDS: law and literature; Franz Kafka; criminal law; criminal prosecution.

1 INTRODUCTORY LINES: FROM LAW INTO THE KAFKAESQUE UNIVERSE

Franz Kafka's work is surrounded by uncertainties, as there are characters in dubious and distorted realities, with paradoxical experiences, and distressing contingencies from which they do not dodge. The Kafkaesque narrative could thus be understood from a central point: in Kafka there is no salvation! For the novelist, reality is distorted by interpersonal relations ruled by existential misery, in which man, reduced to the condition of being errand, is not able to exist in the world unless in conflict with his destiny of afflictions.

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The Kafkaesque characters commonly encounter materialized powers, sometimes in an endless legal process, as in *The Trial*, and at other times in a condemnation to death through torture, as *In the penal colony*. These powers that subjugate the characters of Kafka are annihilating, superior to their wills and invasive, preceding the future and undelayable condemnations there are in the narratives, and this is the typical literary universe of the author. Kafka supposedly said, "There is a target, but there is no path to follow; what we call a path is just hesitation" (Carone, 2009a, p. 56). Also, "There is much hope in the world, but not for us" (Carone, 2009b, p. 56).

Kafka's writings are, therefore, windows wide open to the misfortunes of reality. Kafka is, inevitably, a realist, to whom the fictional and magical narrative is the chosen escape valve. His literary universe is a fantastic allegory, but, despite all that, the convergences with the reality surpass the fictional one that his works contain.

Kafka unmasks reality in a utopian literary universe, deconstructing it in order to reconstruct it, penetrating the core of routine relations and illustrating them through the absurdity that no longer rules over men. It is then in the Kafkaesque absurdity that the delusions of modern man and his time are revealed.

As for readers, the enigmatic character of Kafka's works is interesting, among other reasons, for the contemporaneity and close relation with the facticity of the modern and postmodern world, including the legal universe. In the latter case, the Kafkaesque pungencies are evident when confronted with the unhappiness of a corrupt legal system.

In a certain way, even who has no expertise in the juridical sciences is provoked by the torments of K. and his trial – quality pointed out in the Kafkaesque narratives, which mix fiction to reality. Thus, Kafka's plots, intersecting with Law, are not only understandable to jurists, but also to those who, through the window of Kafkaesque literature, aim at glimpsing the cloudy horizon to which the literary genius points. In other words, Kafka's works are full of legal questions, and this prompts legal readers who, aware of the inadequacies of the social norms to their critical and

sensitive formations, endorse the studies of *Law and Literature* in the light of Kafka's writings.

In the universe of the novelist, permeated by the tragedies of forensic practice, stand out as representative works of this theme: the novels *The castle* and *The trial*; the short story *In the penal colony*; and the enigmatic parable *Before the Law*. These works have in common the fact of including in their plots the juridical wounds that in the literature of Kafka are enlarged in order to impact the reader. The excessive technicality and limiting bureaucracy that plagues legal practice is elevated to other levels of perception, and thus criminal sanction, for example, widely discussed in the criminal sciences, in the Kafkaesque universe, finds no limits. Likewise, if the defendant is not sentenced to death by a judge, to Kafka this is indifferent, as the trial or life itself ends up doing so; Justice will pursue the guilty who exude the "smell of guilt", and his literature, defined as realistic, unveils the savage criminal persecution.

Overcoming centuries of legal tradition, modern jurists now live with an inauthentic Law, torn from humanity, of which they are, at the same time, authors and victims; a Law in which, in the criminal sphere, the criminal functions are emptied before the condemnations that appear banal to the routine of the courts and of the media.

Kafka's literature anticipates to its readers that the plot of a character, accused by someone whom he does not know, of having practiced an unknown crime, is exactly the unveiling of the effective penal order. And in view of these ideas, jurists will not hesitate about the indispensability of *Law and Literature* studies, especially if they are based on a novelist like Kafka, capable of promoting in his readers the transition from an uncritical position to criticism.

Curiously, Kafka's approximation to Law is explained by his studies as a jurist, a circumstance that, together with so many others, makes his narratives texts of authority. Kafka knows the intricacies of what he criticizes, so that the criticism made has as its foundation the legal reality itself – especially the criminal legal reality.

2 THE CRISIS OF LEGALITY IN THE KAFKAESQUE TRIAL

Walter Benjamin, a twentieth-century philosopher, wrote in a literary essay on Franz Kafka that: "It is true that in Kafka's work written law exists in codes, but they are secret" (1987a, p. 140). In another passage, taken from personal files and inserted in a letter sent to Gershom Scholem, W. Benjamin considers that the modern man contained in the Kafkaesque narratives is "[...] given to an impenetrable bureaucratic apparatus whose function is directed by instances which remain inaccurate to the executing agencies themselves, let alone to whom they are manipulated" (1993, p. 100).

Benjamin's criticism of Kafka's work is provoked not only by the valiant analytical judgment of the narratives, but also by his proximity to the criticism of the modern repressive penal system, which attacks fair and rational criminal prosecution. The observations of the German thinker reveal that the reader of Kafka does not need to have the domain of the legal science in order to read the author's writings and recognize the vices of legality which, for example, K.'s case – in what is the most symbolic work of the Czech writer in intersection with Law – contains.

The crisis of legality in Kafka is represented, in short, by a trial in which the accused, among other misfortunes, is unaware of the content of the accusation that prevails over him – a situation experienced by Josef K. – and by a punitive criminal ideal, symbolized by torture and practiced through the conservative tradition – as in the criminal machine that writes over the body of the convicted the content of his sentence, which preexists him and the crime itself, illustrated in drawings unintelligible to anyone other than those who execute the sentences.

In opposition to these vicious figurations, criminal legislation must constitute an accessible and intelligible whole to the men upon whom it stands, promptly indicating the limits of criminal prosecution, in order to dissipate it from torture and arbitrariness.

Criminal ordering is not allowed, as it happens in Kafkaesque literature, to be unintelligible or secret, since such paradoxical circumstances do not fit into the rule of law; after all, the law, unknown to men, would be precisely what would punish them, writing in the bodies of

the condemned the commandment that they failed to obey, without at least they having the knowledge that a given commandment was valid.

Stories such as the murder of Josef K., practiced by the assistants of his trial who stab a knife in his chest, turning it twice, or even the torture of the condemned who would only know himself was "condemned" at the moment of the sentence execution, occasion in which he has to discover, by the movements that the machine creep does in his body, the content of his conviction, as in *In the penal colony*, put in question the criminal practice.

Criminal law is structured and materialized by a social and political body, which symbolizes in repressive apparatuses the behaviors impracticable in that environment, as punishable. In view of this, the penal rule is a human construction, and for this reason it must serve the knowledge of all, and not only of some privileged persons who, coincidentally, are the same ones who will judge the condemned, ignorant of the law: "Criminal law comes to life (i.e., it is legislated) to fulfill concrete functions *within* and *for a* society that concretely organized itself in a certain way" (Batista, 2011a, p. 19).

Criminal prosecution compatible with the rule of law, because it is just and rational, understandable and official, presupposes that it legitimates and enforces the diffusion of the repressive rule to all of the people. Understanding by the people about what is the repressive text is a guarantee of the limits of criminal prosecution, preventing it from sniffing, as in the Kafkaesque writings, arbitrarily chosen ones who exude a certain "scent of guilt."

From the practice of an unjust criminal act incurs a corresponding penalty. Indeed, it is precisely the penalty, "a particularly serious kind of sanction" (Batista, 2011b, p. 41), which transmutes an offense into a crime. This is a political decision, stemming from a legislative process, in which legislators, representatives of the people, choose to penalize certain conducts to the detriment of others, which henceforth appear as crimes.

From the perspective of modern penal doctrine, punishment is not a consequence of criminal practice, but its basis of possibility, since the offense is only a crime because there was a previous decision that erected it to this condition. So how can we admit to making political decisions – those

that transmute illicit crimes – mysterious contents to those who make up the social body?

It is therefore essential, under the rule of law, that the primary and secondary precepts of the criminal law be clear, logical and precise. It is also indispensable that criminal laws contain all the necessary attributes of their limitations, in a logical counteracting to the excessive criminal persecution that is practiced in the light of vagaries, unknown and inaccessible, as in Kafka works.

The ideas set forth induce legality and shape it; and, from a principle-based point of view, they impose limits on the State's right to punish, guaranteeing that the citizen is not surprised by torturing or secret repressive apparatuses.

In a historical survey, the principle of legality is based on the French Revolution and is born of the ideal of non-subjection of men to the arbitrariness of totalitarian power projected in punishment, especially in tortures, symbols of perpetuity. It is noted that from the eighteenth century the classes of the people who did not pass through the powers understood the essentiality of the confrontation of ideals of dominion that expressed the wills of some in opposition to the freedoms of others:

> The new ideals preached the necessity of replacing the will of the sovereign and the judges, by a general will, which should be contained in a normative provision emanating from the Legislative Power, with recognized popular legitimacy, linked to the legal powers. Such ideals prevailed that the citizen could no longer be a mere instrument of power, or passive subject of monarchical absolutism, but a participant and controller of this power, with the right to certain guarantees, as to be submitted to the empire of the popular will and not the mere will of power holders (Giacomolli, 2007a, p. 152).

After two hundred and twenty-eight years of the French Revolution, modern penal laws, on average in the countries of the world, come from a legitimate legislative process, and no longer subjugate those on which they stand. However, despite the historical development, the doctrinal understanding is that this approach to the principle of legality is strictly formal, and that, for this reason, it must be examined in other perspectives.

That is to say, in spite of criminal laws enshrined in the light of due legislative process and therefore representative of the people's wishes, it is not allowed in Criminal Law to invade the spheres of individual guarantees of citizens under the pretext that the State thus does it by prestige to the laws – what occurs to Josef K. in his trial and to the convict of *In the penal colony*.

The contemporary penal doctrine extends the principle of legality to the condition of ensuring the guarantees of men against a state that is, in its outlines, greater than they. Legality: "It also carries with it the need to protect and guarantee the citizen against punitive power, a possible goal to be achieved with a limitation of the power to apply and enforce criminal law" (Giacomolli, 2007b, p. 155). Thus, in a State governed by the rule of law, the only formal understanding of legality – which makes it, but does not limit it – is not enough.

Only in the light of the formal understanding of legality would the State incur the false maxim that the law, the expression of the collective will, surpasses men in their individualities. The state would start from the premise that laws are given to invade the spheres of guarantees of men as they wish, after all there are no limitations to something that is, properly, above them. That is why in union with the formal aspect of legality there must be another facet of this principle, contained in its material aspect.

Understood materially, legality points to the insufficiency of the mere legislative process in the production of criminal laws, and thus:

> [...] not only the forms and procedures imposed by the Constitution, but also, and especially, their content, respecting their prohibitions and impositions for the guarantee of our fundamental rights that it foresees (Greco, 2007, 98).

The material aspect of criminal law presupposes and legitimates, for example, the existence of a criminal process in which the defendant is charged with the commission of an offense that is previously typified and intelligible from the outset. In the same sense, the process, which is a public and accessible rule, will be dealt with before a court that is not an exception, since it has previously been legitimated: "[...] the essence of criminal law lies in the legitimacy and legitimacy of exercising the power to create the law and to apply it with a sense of guarantee to citizenship" (Giacomolli, 2011c, p. 157).

For Nereu José Giacomolli, when writing about the material sense of legality:

> The essence, or its material meaning, is in the very historical evolution of the principle, that is, it is linked to the limitation of the exercise of power (including the power to punish), the division of public functions between the powers of the State, which politically supports human coexistence, and popular sovereignty which is legitimating of criminal norms (Giacomolli, 2007d, p. 157).

Consequently, it is in a criminal law concerned with legal certainty, that is to say, not isolating defendants with secret norms or inaccessible codes, that the principle of legality as a cornerstone is contained; "In addition to ensuring the possibility of prior knowledge of crimes and punishments, the principle guarantees that the citizen will not be subjected to criminal coercion other than that established by law" (Batista, 2011c, p. 65).

Legality as a principle-based command includes, at most, four guarantor dimensions, according to the doctrine of Nilo Batista.

In the first, the principle of legality is a prohibition on the retroactivity of the criminal law (*nullum crimen nulla poena sine lege praevia*). That is, the criminal law will only retroact to benefit the defendant; and, in other cases, the penal law will not cover past events in order to punish them.

The second dimension is prohibitive to the creation of crimes and penalties by customs (*nullum crimen nulla poena sine lege scripta*). Thus, only written criminal laws are adept at the formulation of crimes and penalties.

In the third dimension, the principle of legality prohibits the use of analogy to create crimes, to substantiate or aggravate penalties (*nullum crimen nulla poena sine lege scricta*).

And finally, the last of the dimensions enshrines the precept that legality forbids vague and indeterminate incriminations (*nullum crimen nulla poena sine lege certa*). In obedience to the individual guarantees of the citizens, criminal laws must be accessible and intelligible, capable of indicating, in all the contours, the conduct that if practiced they correspond to a criminal offence.

It is precisely in this last dimension of legality that the misfortunes of the Kafkaesque characters are transcribed, because to them this principle

does not exist and to punitive power there are no limits. This allows Josef K. to be arrested, in *The trial*, without even knowing the accusation that hangs over him – and he never gets to know it. Also, the absence of legality, as a principle, is what makes the convict *In the penal colony* an object of torture subdued to the repressive penal machine that annihilates him.

Therefore, to oppose the State's unlimited power to punish implies adhering to the principle of legality as a guiding principle of the repressive legal system, since it has basic functions to the phases of criminal prosecution. That is, legality encompasses criminal classification, condemnation and, also, execution of the penalty, preventing any such horizons from being reduced to the wills of an arbitrary and excessive power:

> The limitation of the punitive power, as a requirement of the rule of law, justifies, from a legal point of view, the legal reserve. And it is limited when the definition of punishable conduct is avoided, when it is forbidden that the determination of the quantity and quality of the sentence should be limited to the sphere of volitional casuistic manifestation of some state authority without constitutional legitimacy (Giacomolli, 2007e, p. 158).

As the effects of criminal prosecution are affected, legality will also have an effect on the criminal process, which may or may not culminate in the conviction of the accused, but, unlike in the Kafkaesque trial, guarantees the right of defense and judgment by a local judge that composes the punitive organ constitutionally legitimized.

Likewise, because of the public interest of the State in criminal proceedings, the prosecution organs guarantee the efficiency of principles such as that of the officer, which provides that the State, in the exercise of criminal prosecution distributed among the various organs that comprise a penal system, shall not be subject to provocation. There is also an accusatory principle in the criminal procedural court that inhibits judgment without prior prosecution.

As a consequence of the principle of legality, in a counterpoint to the Kafkaesque trial, criminal proceedings are not initiated or terminated because of the designs of a class of authorities, since the principle in vogue presupposes the sequential practice of procedural acts and: "[...] informs that criminal prosecution, the deduction of an accusatory claim and the support of the accusation cannot depend on the subjective will of the bodies

that have the legal duty to act according to the current legal system" (Giacomolli, 2007f, p. 168).

There is thus a norm, which is embodied in the principle of legality, which does not rule in Kafkaesque cases, indicating that the process is not an act of will. When it is a power capable of encumbering the individual guarantees of citizens, as is the *jus puniendi* state, all caution is necessary for criminal prosecution. And this duty of caution shall correspond to the strict observance of the principle of legality as the maintainer of fair and rational criminal prosecution, as understood in its formal and material aspects.

4 THE CRIMINAL (MAL)FUNCTION: POPULAR CLAIM AND STATE RESPONSE

With the advance of modernity and the new demands of the welfare state, to the Criminal Law were delivered some burdens that until then were borne by other sectors of the State. Social values that are implemented through primary investments in education and security have been assigned as burdens to the criminal texts, and all this converges for criminal expansion.

If in developed countries and with low crime rates, the management of the criminal system does not seem to require great efforts from the state structure, in developing countries, as is the case in Brazil, this scenario is diverse, and in them the *administratization* of repressive laws has given rise to states of containment that materialize criminal law in the name of popular desires, so that "[...] security becomes a social claim to which the State and, in particular, Criminal Law, must offer a response" (Sánchez, 2002a, p. 40).

There is a vicious cycle that has been incorporated into modern societies and consists of the clamor for new criminal laws, or the "hardening" of existing ones, and the repressive status is continually renewed to contain the advance of crime, which can represent, when reaching the borderline, only a short-term palliative.

These societies await an immediate and severe criminal response to the crimes, regardless of the fact that there are slowdowns in constitutional guarantees. Its fuel is fear, and in the light of Jesús-María Silva Sánchez's doctrine, contemporary societies are "societies of fear" or of the "perceived

insecurity". In them, their members see themselves as victims, and in their hearts, the maxim that, inevitably, they will be, in an instant or another, approached by a criminal who will take away their patrimony or life – or both.

For these reasons, urban conviviality, in modernity, presupposes risks and imminent danger. In the wake of fear, the houses have locks in all the doors, also walls and grids that give the feeling of veiled security.

The popular yearning is for security that allied, "an especially acute way of living the risks" (Sánchez, 2002b, p. 33), results in the exchange of individual liberties by private jail.

Faced with the fears of these societies, the fact is that their members react to safeguard their juridical assets, and the natural reaction of this social body is to protest by an active State that acts with strong hands in the fight against crime – at that point lies the permissive gap of the criminal expansion and the consequent entrance of the symbolism that permeates it.

More than that, even if this fight is carried out at any cost, it is not discouraging, because if there are costs to combat crime, the social body accepts them. Finally, from the societies of "perceived insecurity", effects occur to the criminal sphere, focusing on the inversions of constitutional guarantees.

Added to the presumed risk of urban and social conviviality, the dizzying crescent of crime is propagated by a popular and sensationalist media, which gives citizens the ideal of begging for intense control through the repressive machine, since:

> [...] from the privileged position they hold within the "information society" and within a conception of the world as a *global village* convey an image of reality in which what is distant and what is near has an almost identical presence in the way the receiver receives the message. This gives rise, sometimes, directly to inaccurate perceptions; and, in others, at least a sense of impotence (Sánchez, 2002c, p. 38).

Given this, there are essential characteristics that Criminal Law assumes in these societies and that deserve to be highlighted.

The first of these characteristics is that society is mobilized around the victim, in solidarity with them, because citizens believe that at any moment they may also be victims and therefore expect solidarity to be repeated, so that no socially acceptable risk can persist:

> [...]it is no longer seen in the criminal law an instrument for the defense of citizens in the face of punitive state arbitration – that is, as Magna Carta of the delinquent – and is perceived as Magna Carta of the victim, which results in a consensus restrictive as to the risks allowed, since the person considered as a potential victim of an offense does not accept the consideration of certain risks as permitted (Callegari, 2010a, p. 20).

From this first characteristic, faced with the popular demand for security and also because of the mobilization of the social body in relation to the victims, the Criminal Law is consecrated as a speech of appeal, transmuting the criminal ideals to a political discourse, from which happens:

> [...] the politicization of criminal law through the political use of the notion of security, resulting from an impoverishment or simplification of the political-criminal discourse, which is now oriented only by electoral campaigns that oscillate with the taste of the mediatic and populist conjunctural demands, to the detriment of effectively emancipatory programs (Callegari, 2010b, p. 20).

Finally, in view of the politicization of the penal discourse, conduct that in any way represents a risk to the social body – even if it is small – constitute the protection of criminal law, implying a preventive action that deprives the norms of repression; after all, its effects are, as a rule, aimed at the future – because it punishes an already harmful conduct –giving rise to "[...] punitive management of risks in general, making it possible to speak in a process of *administratization* of Criminal Law" (Callegari, 2010c, p. 21).

This creates a popular imaginary that prescribes that criminal laws are the instrument capable of overcoming the misfortunes that plague the urban dwellers in the "societies of fear", of "perceived insecurity".

The legislative production of criminal bias, in turn, correspond to the popular appeal of all would-be victims and therefore never ceases. On the contrary, it is vital that in the "society of fear" the repressive system be kept

in constant renewal, formulating, with a frequency never experienced, new penal types, or enhancing existing penalties.

It is essential for the members of these societies that the norms of repression include a ruthless and "soulless" Criminal Law, made in the light of criminal sanctions increasingly afflicting criminals. In the social imaginary, the penalty should strike the criminal, since only through the suffering of this subject by the pain is that they will abandon the criminal marginality. Consequently, criminal law abandons its founding characteristic, which prescribed that it is the state's *ultima ratio*, so that, because of the popular appeal for security, it is elevated to the allegedly more effective quality of social pacification tools, assuming functions that do not fit in a Rule of Law.

These unfounded inferences, which seek answers even before the questions, are nothing more than simple and superficial reveries. In fact, it is convenient to walk in the opposite direction of this imaginary. What will remain for men if penal repression becomes a rule and not *ultima ratio*? To what direction do these societies go, reflecting the imaginary that the more rigid the penalty, the greater the prevention or repression of crime?

Under criminal doctrine, criminal laws do not substitute for other state apparatus of greater value, such as massive investments in education and security. What is revealed at the moment in which the criminal punishment is raised to the rule is the opposite of the social pacification, inhabiting a universe of phobias, of panic and of permanent unrest.

For these reasons criminal law is traced by some contours that are proper to it and which, in a historical recovery, were conquered with the hard labor of men facing the empires of power. Failure to stick to these traits has been fundamentally turning off the engines of history.

The Rule of Law, guarantor of the individualities of the citizens, is therefore a State able to handle criminal science with prudence, recognizing that there are certain guiding principles of criminal practice that should guide it in the repression of crime and that there are criminal functions which must rule at the expense of others.

It happens that discussing criminal functions requires revisiting some introductory lessons in criminal science. In other words, there are several

doctrinal fronts that highlight probable functions, objectives and reasons for repression.

In a general overview, the following functions of Criminal Law are indicated: a) as protection of juridical goods, that is to say, Criminal Law protects the most relevant interests to the society, in the light of the fragmentarity and the criminal subsidiarity; b) as an instrument of social control, that is, it would be up to the criminal norms to promote public peace; c) as guarantee, thus, of the penal rule, while punishing, is also the one that guards the citizen from the arbitrariness of a punitive power; (d) as creator or designer of customs, in view of the "[...] close link between criminal matters and the fundamental ethical values of a society" (Masson, 2014a, p. 10); e) as symbolic; f) as motivating, that is to say, the penal rule motivates to non-breach of the norms, what prevents the violation to the protected legal assets; g) as to reach reduction of state violence; and, finally, (h) as promotional, that is, criminal law would exercise transformative functions in society.

In the "fear societies", among the highlighted criminal functions, the most exercised is the symbolic function of Criminal Law – a function also constant in Kafkaesque writings. This means assuming that the repressive norms constitute a symbolic whole, corresponds to a punitive ideal that constructs nothing but fear in the intimate of the citizens, fomenting the risk of urban conviviality.

In a state in which the penal rule is essentially symbolic, the rules of repression reflect only a voluminous number of conduct that in that society are understood as discredited. There is, therefore, a constant criminal legislative renewal, coming to light the scenario narrated, in which are elevated, to the maximum degree, the criminal classification and the enhancement of existing penalties.

Where criminal law is predominantly symbolic, there will be an apparent state of tranquility that, in fact, masks the stormy experiences of citizens; that is to say: "The symbolic function is inherent in all laws, not just those of a criminal nature. It does not produce external effects, but only in the minds of rulers and citizens" (Masson, 2014b, p. 11); because:

> In relation to the former brings the sensation of having done something for the protection of the public peace. With regard to the latter, it provides the false impression

> that the problem of crime is under the control of the authorities, seeking to convey to public opinion the reassuring impression of an attentive and determined legislator (Masson, 2014c, p. 11).

If the basis for the possibility of criminal symbolism is the perceivable phenomenon known as "expansion", coined in the glimmer that the repressive rule is useful for social pacification, since it culminates in a diminutive crime rate, we notice, a *contrario sensu*, "the emergence of multiple new figures, sometimes even the emergence of entire sectors of regulation, accompanied by a reform activity of existing criminal types, performed at a much higher rate than in previous times" (Jakobs and Meliá, 2012, p. 76).

Together with the symbolic criminal ideal, an exacerbated punishing fetish raised to the rule. Thus, the symbolic repressive norms that the ordinations have in the societies of "felt insecurity" are not enough, they are also the current penal types reviewed and enriched by more harmful penalties – punishment is then brought to rule, as in the Kafkaesque literary universe.

Clearly one can perceive with this the incessant invasion of Criminal Law in social sectors that, prior to the symbolism, were not affected by it. Thus, there is an expansion, of a negative and obscure bias, which undermines the legitimacy of the Criminal Law itself.

Certainly, objections are raised to the current criminal expansion also in light of some principles that guide criminal doctrine, namely the principles of minimum intervention and lesivity, not forgetting criminal law.

The principle of minimum intervention, or *ultima ratio*, is understood as the prevalence of the penal rule protecting the legal assets that are actually estimated and necessary for life in society. Faced with this ideal, also in limitation to the punitive power of the State, it is forbidden that criminal law should intervene in the protection of the offense of legal goods of small value, which is in charge of other branches of law, such as Civil Law, through indemnities for moral damages.

The origin of the principle is rooted in the rise of the bourgeoisie, a class which, confronted with an absolutist power which punished comprehensively and unlimitedly, was subjugated to a repressive symbolic rule.

Minimal intervention comes from two other extremely important principles of criminal law: fragmentarity and subsidiarity. The first one (fragmentarity) implies that repressive norms should be used to protect fundamental goods, which, once recognized, would be protected by law.

In turn, the subsidiarity of criminal law: "[...] derives from its consideration as an extreme sanctioning remedy, which must therefore be given only when any other is ineffective" (Batista, 2011d, p. 84).

The principle of lesivity, in turn, ensures punishment only to those individuals who, by their actions, effectively face a criminal legal obligation. From this penal principle, four functions are extracted, according to the lessons of Nilo Batista: a) it is prohibitive to the incrimination of internal attitudes; b) it is prohibitive to the incrimination of conducts that do not exceed the scope of the author himself; c) is prohibitive to the incrimination of simple states or existential conditions; and (d) it is prohibitive to criminalize deviant conducts that do not affect any legal good.

Once these notes have been made, one can compare the ideas exposed to the Kafkaesque literary universe, in which the process is torturing, sacrificial and humiliating to the condemned – subjugated, *In the penal colony*, for example, to the figurative torture machine of the empire of power that diminishes him.

It is emphasized that in Kafkaesque literature criminal law is expressed in a symbolic way, in all its nuances, and enhanced by fictional narratives. The example of Josef K., who after being detained one morning in his home, returns to work, and with the trial faces misfortunes in his personal and professional life, since his process is known by all and the accused is soon recognized, bringing with him the symbolic marks of the criminal expansion.

In the light of symbolic penal law, the repressive statute is merely a representation of ideals not practiced in essence, like Josef K., who enters the empty room, in which he had previously been questioned by an investigating judge. Unlike what happened then, K. is able to handle one of the books of accusation that was under a pile on the magistrate's table. This same magistrate, on another occasion, asked K. for the reason for his delay,

reprimanding him for such neglect of the proceedings. To the examining magistrate, formal rigor is essential, however:

> K. opened the book from the pile and an obscene picture appeared. A man and a woman sat naked on a couch; the vulgar intention of the designer was clearly discernible, but his inability had been so great that at last one could see only a man and a woman who stood out from the engraving with an excessive corporality, sitting both in a position that was too erect and, as a result of the false perceptive, they only turned to each other with difficulty. K. did not continue to leaf through, only opened the cover page of the second book; it was a novel with the label: The Torments that Grete had to suffer with her husband Hans (Kafka, 2005, p. 55).

The setbacks are notorious: in a symbolic criminal ideal there is a veiled peace that, in truth, does not exist, because the repressive system is full of uncertainties and doubts that are practiced daily. Although there are large numbers of criminal laws that criminalize criminal conduct, violations of them are routinized, and the state is not agile enough to repress them, thus breaking with the political penal discourse it prescribes:

> In fact, if every citizen did a quick examination of conscience, they would prove that they repeatedly violated criminal law throughout life: they did not return the borrowed book, took the towel of a hotel, appropriated a lost object, etc. In all conscience, each of us has a bulky medical record. Judges increase it daily by falsely subscribing to statements made in their presence and in which they are never present. The servants of Justice daily certify several of these ideological falsehoods (Zaffaroni and Pierangeli, 2002, page 58).

From that on, the presumed risks of social coexistence are not overcome while Kafka's penal malfunction, illustrated in a symbolic and punitive repressive ideal, finds similarities with the modern reality, promoting the logical inversion of the guarantees and the misrepresentation and vice of criminal prosecution.

Transposing these lessons to Brazil, through a contextual cut, there is the guarantee expansion and inversion, which are faithfully represented in preventive prisons decreed for a derisory period, insufficient to guarantee any of its legal permissive; the medialization of the crime process that investigates possible crimes of corruption and the "canonization" of magistrates; the reversal of the burden of proof in these

cases, with presumed guilt and procedural advantages to the prosecution organs; the permit of arrest before the final sentence; the attempts of the National Congress to approve the reduction of the criminal majority; and so many others.

Regarding the legislative expansion of criminal law in Brazil, there are equally controversial examples, such as Law 13,142 of 2015, which included in article 121 of the Penal Code (murder) the increase in sentence when practiced against members of the prison system and the National Public Security Force, acting in the fight against crime; and also, Law 13,260 of 2016, which typifies the crime of terrorism, after the protests of 2013.

To the first, the criticism falls on the legislative process, from the protocol of the bill to its approval by the houses of the Legislative Congress, which lasted four months, although the matter involved the inclusion of increased sentence in crime and, more, included the crimes defined in a new law in the role of heinous crimes. Add the polarization in the debates, respectively between the deputies and senators, each endorsing the ideas of their counterparts in a conservative and mediatic discourse, that exalted the corporative force of the police, nevertheless:

> The challenge to improve police protection and change the ongoing genocidal trend is to stop exposing police officers to confrontation by formulating a policy of preventive public safety with the preservation of human rights. [...] The challenge is to agree on a minimum agenda in criminal matters that escapes from punitive failures and contributes to (re) positioning the debate based on the values of an effectively democratic society (Freitas, 2015, p. 41).

To the second example, clearly an expansionist one, the thematic relevance of the matter is criticized, which is aggravated by the imprecision in the definition of the concept of terrorism, and the lack of reasonableness in the establishment of penalties, with the technical confusion between preparatory and enforcement acts punishable by identical forms.

Contrary to legality, voices calling for criminal prosecution at any cost seem to indicate the future direction. Democracy, surrendered, shrinks in embarrassment, as if Kafka could see the days to come.

5 FROM PRESUMED GUILT TO INHUMANE JURISDICTION: KAFKA AND THE PRESUMPTION OF INNOCENCE

In the Kafkaesque literary universe, the presumption is not that of innocence, but that of guilt – this point is necessary for the understanding of the writings of the novelist. Thus, for example, Josef K.'s detention is only carried out in the Kafkaesque process, since the principle of the presumption of innocence (which, from the point of view of the present criminal procedure, is of extreme value to the procedural guarantee) does not prevail.

Founded on the symbolic ideal of Criminal Law, Kafkaesque law persecutes all those who exude the scent of "guilt". Sadly, it is up to the Kafkaesque defendants to prove their innocence through an unsecured process, which, in fact, is ultimately impossible in Kafka's universe, and accusations are inaccessible and unintelligible. Therefore, if the accusation itself is a distant and unattainable point, then what can the Kafkaesque accused defend himself from?

In the Kafkaesque narrative, it is not possible for the accused to know the content of the accusations that prevail over them, precisely because in Kafka's case the presumption is that of guilt, there being no plausible reasons for the defense formulation, which is not admitted, but only tolerated.

The Kafkaesque defendants are condemned from the beginning of their proceedings, which is possible, and brought to the rule in the Kafkaesque universe, since the analysis of the guilt of the accused is always dispensable, after all the assumption is that, given the ignorance of the subjects before the laws – a point of prominence in Kafka's literature: "[...] Man can transgress them without knowing it" (Benjamin 1987, p. 140).

In a State of Law, reality must correspond to the exact opposite of the Kafkaesque narrative, not admitted verbal processes nor condemned *a priori*. For these reasons, due legal process must not be inaccessible or contradictory, after all, in the light of legality, it is only lawful to condemn a defendant after all stages of a legitimate process, due to principles that make imperative the legal order, therefore, especially, conducted by a constitutionally established authority.

Thus, the guarantee of presumption of innocence, in a State of Law, is not a procedural adornment, nor will it be suppressed under the pretext of

the expansion of Criminal Law, which presupposes as guilty all those on which a superficial value criminal judgment falls.

Recognition of the presumption of innocence is not mere dilettantism. Nor does it represent a guarantee only for those charged with a case. On all angles, the presumption of innocence is limiting to the power to punish the State and, consequently, it interests all without distinction.

Cesare Beccaria, recognized in the year 1764, and therefore in the eighteenth century, the indispensability of the principle of presumption of innocence: "No one can be condemned as a criminal until proven guilty, nor can society withdraw public protection until it has been proved that one violated the rules agreed upon" (Beccaria, 2012, p. 47).

Given this, how can we admit that, in the 21st century, discussions about the value of this principle? Yet, how can we think of mitigating it, intending to take to the final consequences a criminal persecution symbolic of a repressive and vengeful ideal in societies? Of course, keeping such questions open is an absurdity for the Rule of Law. The principle of the presumption of innocence is based precisely on some ideals of these states – such as the dignity of the human person and the effective protection of their freedom – and, therefore, recognizing it is, in practice, legitimizing a state "of law".

In a historical resumption, the presumption of innocence was already enshrined in the Antient Roman law; nevertheless, it was at the cradle of the French Revolution that this principle was more widely disseminated, with the premise that it would be better to acquit a guilty party to convict an innocent man: "This fundamental principle of civility represents the fruit of a guarantor option in favor of guardianship of the immunity of the innocent, albeit at the cost of the impunity of some culprit" (Ferrajoli, 2002a, p. 441).

It was then referenced in normative prescriptions. Thus, the principle of the presumption of innocence is as follows: a) Article 9 of the Declaration of Human Rights, dated 1789, providing that "every accused person shall be held innocent until he is found guilty and if he deems it necessary to arrest him, unnecessary rigor in the custody of his person shall be severely repressed by law"; (b) in the Universal Declaration of Human Rights of 1948, stating that "every person charged with a criminal

offense has the right to be presumed innocent until proven guilty according to law in a public trial in which all the guarantees necessary for its defense have been secured"; and, c) in the Brazilian Constitution, that dictates it as a fundamental right, in clause LVII of article 5, imposing that "no one shall be guilty until a final sentence of condemnatory criminal sentence".

In the wake of these ideas, the presumption of innocence is therefore a guarantee of the citizen against the possible arbiters of a State. Indeed, it would have given K. the right to presume himself innocent, so that he could practice, in all his faculties, the exercise of defense. Maybe he would not have ended up with a knife in his chest!

Thus, to oppose the procedure in Kafka is to admit that, ideally, due process of law must be permeated by the presumption of innocence, removed only at the moment when a legitimate decision can no longer be appealed, by an authority legitimized by either:

> The deprivation of liberty of the individual can only result from a sentence handed down in a fair process, that is, due process of law. The defendant can only be convicted if his or her responsibility is properly proven and respects the possibility of defending him or herself broadly, that is, when given the opportunity to challenge all the accusations that have been imputed and to produce all proofs of innocence (Ferrari, 2011, p. 688).

According to the precious lessons of Luigi Ferrajoli, a State which does not respect the presumption of innocence of its citizens is capable, at one time or another, of violating their individual freedoms, so that there is an intimate relation between the guarantee of innocence and public safety.

In the previous topic of this article, some comments have been made about how "fear societies" have allowed the unlimited expansion of criminal law, and therefore have admitted, on account of the call for security, that individual guarantees are mitigated under foundation of the punishing fetish.

There are, in the wake of these notes, a dubious state of affairs in the "societies of fear", which make them fail in their own appeals – a paradox that approaches the Kafkaesque universe. That is to say, these collectivities

are not taken into account by the fact that abandoning individual guarantees – for example, the accused in criminal proceedings – under the pretext of a veiled social pacification that one wants to achieve, is it to allow the state of panic – that which they crave to fight – to spread without great difficulty?

The presumption of innocence is not only a guarantor of the freedoms of citizens, but also indicates to them a protective horizon directed to the maintenance of their own security or social defenses – the primary perspectives of a society that yearns for social pacification:

> [...] the presumption of innocence is not only a guarantee of freedom and truth, but also a guarantee of security or, if you will, of social defense: of the specific "security" provided by the rule of law and expressed by the citizens in justice, and their specific "defense" against punitive arbitration (Ferrajoli, 2002b, p. 441).

In view of these ideas, the presumption of innocence is a primacy to the legitimacy of state criminal prosecution. The guarantee of being treated as innocent until a legitimate sentence disregards this primacy is fundamentally a limit to the punitive power of the state.

Contrary to this, while admitting as legitimate and legitimate the criminal expansion, which will scourge through symbolism and punishing fetish, a state of fear is allowed to take hold over some societies – a fact that discredits Criminal Law in its nuances.

In the rule of law, citizens, especially the innocent, before criminal jurisdiction will not fear, as the Kafkaesque characters fear it. It is not appropriate to admit that the criminal prosecution causes torments to the defendants who are known innocent, inflicting pain and misery to their existences:

> [...] since an innocent accused has reason to fear a judge, that is to say that this is outside the logic of the rule of law: fear and even only the suspicion or the innocent security of the innocent signal the bankruptcy of the same function of criminal jurisdiction and the breakdown of the political values that legitimize it (Ferrajoli, 2002c, p. 441).

Criminal law does not lend itself to these misfortunes and to try to handle it in such a way is to glimpse, hanging over men, a dark future erected in the light of fear before an inhuman criminal jurisdiction.

6 FINAL CONSIDERATIONS

Transiting through the Kafkaesque literary universe, numerous possibilities of theoretical reflections *in* and *of* Law have been revealed.

Among selected works from the range of Franz Kafka's production, those that are representative of an undesired legal horizon, it is possible to see that the Kafkaesque defendant, the Kafkaesque sentence, the Kafkaesque trial, and, finally, all the contours of the novelist's fantastic literature, surely are ideals of a law which would be impractical in the light of the modern penal doctrine.

In the Kafkaesque literary universe, man will never cross the "gates" of the law. He will die trying, but his attempts, such as that of the simple man in the Kafkaesh parable *Before the Law*, will be in vain – in Kafka there is no salvation!

In the author's writings, condemnation is the rule, and there is no way to escape it. In the Kafkaesque trial, for example, one realizes that, in fact, it is in essence simple condemnation itself.

Moreover, condemnation, coming to light by means of a punitive power of unlimited character, is, above all, torturous, reducing men to the condition of objects.

The fact is that in Kafkaesque literature, criminal prosecution has merely symbolic aspects and an exacerbated punishing fetish, and it is immediate to overcome these obstacles through a just and rational rule.

In Kafka's literature, criminal jurisdiction legitimizes itself through the fear that it encloses in those over which it rules; in short, in the Kafkaesque universe, even the innocent man fears to be prosecuted. Faced with this, some differences were opened. These must be removed from legal practice and, above all, from criminal practice.

In Kafka, law exists, but the law that represents it is an inaccessible and secret point; the criminal proceedings do not cover guarantees, and the absence of legality is a logical consequence; there is an empire of power, illustrated in the Kafkaesque narratives, which will conceive in the penalty a symbolic instrument of repression; and, finally, the Kafkaesque defendants are not presumed innocent, but guilty, which makes them fear criminal jurisdiction.

These misfortunes continue to ravage today's criminal jurisdiction, whereas distancing oneself from these tragedies must be the task of the critic, whether jurist or citizen.

For these reasons, criminal law should not be sympathetic to the symbolic function evident in the Kafka writings; on the contrary, it is imperative that the repressive norms, although punishing, also represent guarantees to societies.

In the lines that have passed, the phenomenon of criminal expansion, which is contained in the Kafkaesque literary universe, has been broken up, and by its practice the symbolism in Kafka is raised to its highest degrees.

In short, criminal expansion is only carried out in "fear societies" or "perceived insecurity", which aspire at any cost for security and criminal repression – even if this cost is very high and represents a setback in criminal matters.

As opposed to Kafkaesque fiction, which illustrates a state of exception and uncertainty, in a State governed by the Rule of Law, the punitive power of the state must find definite limits, for example those expressed in the individual guarantees of citizens before criminal prosecution.

Finally, this study of *Law and Literature* has shown that the Kafkaesque universe is uninhabitable to those who seek a state of social peace erected on the pillars of a legitimate legal order. If the Kafkaesque man takes long steps towards his condemnation, critical literature will divert him.

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Original language: Portuguese
Received: 19 May 17
Accepted: 10 Nov. 17