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**KAFKA AND THE MYTHICAL ELEMENT OF MODERN LAW:  
A STUDY BASED ON THE READING  
BY PETER FITZPATRICK**

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**ABSTRACT:** The paper aims at presenting the reading of Kafka developed by the Australian Philosopher Peter Fitzpatrick, bringing it to the context of his critical reflection concerning the mythical foundations of modern Law. Presenting briefly the main issues of Fitzpatrick's thought, the paper seeks to show the potentiality of novels and short stories written by Kafka to the deconstruction of some of the paradigms which move the modern conception of Law. Moreover, the article analyzes to what extent the deconstruction of the mythical contents of Law has an emancipatory role, thus bringing to the surface elements of racism, imperialism, colonialism and violence which are hidden below the traditional discourse of a rational law.

**KEYWORDS:** Kafka; Fitzpatrick; Mythology; critical theory; modern Law.

“It is in this razor's edge that we live. A writer once summed it up as follows: the only law visible and undoubtedly imposed on us is the nobility – and do we want to spontaneously deprive ourselves of it?”  
(Kafka, 2002, p. 125).

## **1 INTRODUCTION**

This article aims at discussing the reading of the work by Franz Kafka presented by the Australian philosopher Peter Fitzpatrick (2015) as part of

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a critical reading about the foundations of modern Law. Unlike hermeneutical interpretations, which privilege the notions of bureaucracy and the rationalist exaggerations of modernity, the reading offered here seeks to rescue the mythical elements present in modern Law.

To introduce the reading developed by Fitzpatrick, it is necessary first to contextualize the state-of-the-art of the Kafkaesque work. Being a very dense writer, who brought forth elements ranging from Jewish theology to juridical and sociological components and being his work object of different interpretations throughout the twentieth century, it is relevant to specify at least some of them, in order to contextualize the tradition from which the criticism of the Australian philosopher is inserted.

In addition, the article also addresses Fitzpatrick's production on the contemporary critical legal thinking, pointing out some of his major influences such as poststructuralism and deconstruction, seeking to construct a theoretical argument in which literature is not just an example or an aid to philosophical reflection, but has the fundamental role of questioning the kind of certainty and rationality on which modern notions of truth and science are based.

Finally, from the theoretical elements stated, the present research aims at showing how Kafkaesque literature can, based on the interpretation defended here, play an important role of critical resistance, insofar as it allows the unveiling of elements such as violence, arbitrariness and contradiction which permeate the modern and contemporary experience of Law.

The methodology of the research is basically based on the confrontation between texts of the Czech writer and critical comments of thinkers whose works somehow confronted Kafka. In this sense, do not seek to defend this reading as the most faithful or as the one that represents the intention of the author, but to make explicit at all times the fundamental elements which were inserted and constructed through the tradition of reading the author, due to questions developed throughout decades and whose confrontation demanded the return to the original production by Kafka. It is, therefore, a confrontation of the horizon of issues proposed from the Kafkaesque work with fundamental elements that, if not originally thought by the writer, seem to inexorably lead to their encounter.

## 2 THE POSITION OF FITZPATRICK'S READING IN THE TRADITION OF KAFKAESQUE RECEPTION

The nightmare of streets that lead nowhere, of the law whose gates are closed, of the unattainable castles, and of impossible dialogue is so drastic and seemingly absolute that its influence gave rise to the adjective “kafkaesque”, which usually denotes a confusing and terrifying situation, usually involving systems or rules that do not seem to make any sense.

The place where the surrealist terror of this labyrinth seems to be the strongest is precisely the court of law, the so-called palace of justice, perhaps because it is the place where traditionally the broken balance in a given relationship is restored. In a closer reading of modernity, the court is the place for the rational application of a cold and impersonal law. None of this can be further from the Kafkaesque universe, where access to law lies behind insurmountable doors, guarded, operated, and judged by people whose mediocrity only makes the inevitability and brutality of law-abiding violence (*Gewalt*) even more resplendent.

In reading Max Brod (Brod, 1987), a biographer and one of the first to carry out a comprehensive exegesis of the Czech writer, all the obscurity and meaninglessness in the world of Kafka's novels is read as a path to a kind of “religious evolution”, a search for the recognition of the grace of God, but a God who sent messages that were lost and now need to be rediscovered, just like the imperial message. The hope then, if there is hope for a character like K., lies on a path that leads to Zionism and the search for a transcendence that has been lost and needs to be rediscovered (Santos, 2017).

Curiously, when it is thought about the law, such a reading dialogues both with the search for a religious transcendence of a Natural-Law style, with the rehabilitation of the ontological conditions so that an ethical reasoning can re-emerge<sup>2</sup>, as with the promise of a certain Marxism that sees redemption at the end of history, in the dialectical outcome. Indeed, being Max Brod a Zionist Jew and Kafka's best friend, also a Jew, friendship often led Brod to see in the despair of his friend an evil whose

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<sup>2</sup> The great philosophical challenge of contemporary juridical hermeneutics has been precisely to rehabilitate a prudential and moral reasoning without reviving an essentialist ontology.

remedy was in closer approximation to the Jewish religion, with which the novelist did not have a very close relationship throughout his life.

Contrary to this reading, the Australian philosopher Peter Fitzpatrick takes up with Walter Benjamin's reading the theological elements of Kafka in order to take a path contrary to that outlined by Max Brod (Benjamin, 1987). In a 1934 essay, commemorating the 10 years of Kafka's death, Benjamin had already criticized the logic of Brod's thought, while recalling the theological approach. As stated by Bruno Santos,

the set of theological categories present in reading by Brod is strategically reversed by Benjamin in establishing two central axes for the interpretation of the Kafkaesque work: the mystical experience and the life of man in the big city (Santos, 2017, p. 2).

It is precisely the search for a kind of mystical or theological element in this experience of modern rational bureaucracy which in a way meets with Fitzpatrick's thesis as it allows to reveal modern law not by the narratives seen as paradigmatic, but from of excluded points<sup>3</sup>, of what is denied there. This theological element, however, is not regarded as the attempt or hope for a rescue of the broken strands of a connection with a transcendent or traditionally forged sense, but just as the realization that determinability and non-determinability maintain a strange structural relationship within which moves, as if on a razor's edge, the language of the author's critical thinking.

In Benjamin's study, the mystical experience lost its truth and the parables became untransferable, now being in ruins, also reflected in the bureaucratic apparatus of modernity. In this world, as already said, law is inaccessible, invasive, totalizing, but absent. In short, it proves incapable of fulfilling or even making its designs knowable.

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<sup>3</sup> This perspective is what allows Fitzpatrick's reading to be inserted in a post-structuralist discussion, as it aims at discussing the object not from the elements that are central to it, but from those that are peripheral, which are excluded or relegated to edges. If it is possible to think of modern law as having a rational core and based on the rule of law and surrounded by borderlines of irrational thought or relegated to the decision of authority, in Fitzpatrick the notions of nucleus and extremities are overlapping, since the element which is a transcendent justification for the juridical phenomenon is brought back as what animates the narrative movement of the great theories of law such as those of Hart and Dworkin, among others.

Fitzpatrick emphasizes this view by emphasizing that

With the Trial this aporetic structure is evoked in its absence and in the impelling search for an ever elusive law. Yet the trial, the process, remains interminable. The law remains indistinguishably everywhere. And that everywhere is variable and fleeting. Then, towards the end of the novel, the parable Before The Law provides the corrective by instating the enduring opposition between the determinate, limited law and the illimitable (Fitzpatrick, 2015, p. 113).

The fact that the theological element is present in both Brod and Benjamin's works does not lead to the conclusion that both point to the search for lost transcendence. At this point, it is due to Jeane Marie Gagnebin the precise distinction between theology and religion, which it is important to point out at once to the extent that Benjamin's reading – which is also true for Fitzpatrick's – is theological but never religious.

For the first clarification of what the theological element here means, one may remember with Gagnebin that it is a matter of pointing to an incompleteness or quest which always comes late and which is theological, precisely insofar as it is dealing with the unfathomable, that which must necessarily be thought, but which at the same time escapes our capacity and even seems to transcend the limits of what language can name (Gagnebin, 2014, p. 194).

If, in any case, the Law is in this “no place”, in this non-transferability of meaning, its position to the authors analyzed here is not the same.

Fitzpatrick points out once again elements in Kafka's work that lead to this aporetic structure when he recalls that in the *Trial*

the work of negative formation begins with the title. There is no trial. Or the title could be translated as the process. There is no process. And in a sense the novel is not there in being reputed unfinished. Yet incompleteness is apt since the novel insistently pursues irresolution. And the focal figure of this irresolution and of the law – where all reality becomes the law, is the court (Fitzpatrick, 2015, p. 102).

In any case, the Kafkaesque interpretation developed by Peter Fitzpatrick in a series of articles presents another possibility of reading, in which the work of Kafka allows a critical reading that, instead of emphasizing the inaccessible passages and the interminable labyrinths,

evidences the critical potentiality in the positive sense, as an act that breaks with the attempts of access, which would otherwise appear as inaccessible.

The rescue of this critical possibility in a not only negative sense but pointing to a kind of possibility of redemption for Law, to be explored in this paper through Fitzpatrick, is part of a route of exploration of the Kafkaesque universe that had already been opened by Benjamin, although in his reading the Law is almost always exposed only as something negative and without any emancipatory possibility regarding the Kafkaesque labyrinth.

The opening of this path needs, in any case, to perceive the mythical element that the law has, not only in the Kafkaesque narrative, but in its most basic modern formulations.

### 3 MYTHS IN THE MODERN LAW

*The Mythology of modern law*, by Peter Fitzpatrick, is a work of clear Foucauldian and Derridean influence, verifiable insofar as its author, in the writers' words of his preface,

Deconstructs the Western myth that founds and pervades the law. Myth is a form that unifies (apparently) without totalizing, a form that maintains unity in apparent inconsistency and presence in apparent absence. This book, therefore, reveals that mythology does not exist only in "other" societies, but permeates our own, and perhaps it is even stronger in those places where its absence is proclaimed most noisily, that is, in those places where reason and sternness are most prominent, namely: in the law and in the sciences (Cain; Smart, 2005, p. 20).

Identifying modern law and modern science as mythical kingdoms is a quite radical step, inasmuch as it contradicts the very fundamental element of the myth of modernity, which is the overcoming of any transcendence, of any mythical or religious explanation. All this would be part of an almost prehistoric past. The act of identifying the persistence of the myth in modernity needs, in this sense, to deconstruct the narratives of self-identification of modernity.

The work does not seek, on the other hand, to substitute a modern vision for another vision that, when incorporating the myth, presents the Law with the same pretension of clarity with which modernity does it, replacing only one image for the other. On the contrary, the image of law

that exists from Fitzpatrick's work is blurred, difficult to see, a difficulty that becomes even linguistic and makes the reading of the novel quite difficult.

From a poststructuralist approach, it seeks to illuminate not what the Law "truly is", but to show that this supposed identity escapes our hands when we try to apprehend it. The understanding of this permeates the notion that modern law is fundamentally constituted of a series of aporetic narratives that only acquire unitary and rational sense from a more comprehensive narrative of mythical order.

If in structuralism, which was one of the dominant currents in French philosophy of the second half of the twentieth century, knowledge was conceived from defined structures, within which singularities and individual actions were reduced for a vision that only comprised the particularities and creations as an internal game and subsumed in the general archetype, poststructuralism respects the singularity precisely in that it privileges what is denied by the structure, what is at its limit.

To bring a central argument to post-structuralism, one can say that what defines something is not its core, but its edges, its limits (Williams, 2005). Thus, if modern law is defined by bureaucratization, rationality, so irrational, mythical and arbitrary elements can only appear either as denied elements or as exceptions that lie on the margins of the general characterization of legal modernity. Post-structuralism, in Fitzpatrick's thesis, is seen precisely in an attempt to show that these marginal elements are actually at the core of modernity, as its hidden face, as the hidden element that would undermine the coherence of construction.

In other words, instead of taking a more obvious course and showing that modern law claims to be "A" when in fact it is "B", Fitzpatrick says that the modern notion of law, like any Western mythical narrative, escapes apprehension either in factual terms or in terms of a set of conventions that can simply be pointed out and embodied.

In order to anticipate something of the hypothesis, the reading of modern law as a mythical narrative does not imply that the social practice of law is an illusion<sup>4</sup>, that its foundations are pure inventions that dissolve when a more critical eye approaches. The point is to show that there is a tension between determination and indetermination and that it is precisely this tension, that absence, that allows arbitrariness, racism, sexism, xenophobia, privileges, etc. coexist perfectly with the aspects of universality, equality, security that are held as bastions of modern law.

Of course, in its arrogance, modern law could never admit mythological elements in its construction. Its narrative was created precisely due to the fact that it expelled mythical, religious and transcendent elements from its explanation of the law (Fitzpatrick, 2005). The kingdom of the sacred became part of that retrograde Law we moderns left behind. Fitzpatrick's theory is critical, therefore, insofar as it brings to light this uncomfortable persistence of myth in the narrative of modern law and opens the way to the perception of the violence that such veiled conception makes possible.

There is a decolonial perspective here that is only clear when one looks closely at Fitzpatrick's reconstruction of the narrative of modern law. By identifying mythical narratives with what is static and invariable, modernity would be synonymous with change, of progress. In its universalizing endeavor, the modern element must expand. It is in this expansion that modernity creates the monsters it needs to confront: savages, people who live in primitive conditions and need to be brought to the light of progress. It is in denial to these people that modernity is finally identified with palpable content. Modern is the opposite of these monsters and savages who need to be domesticated, catechized etc.

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<sup>4</sup> The assertion that the law, in the sense of its codes of norms, codes of conduct of the authorities, guiding principles, legitimacy, etc. is a social construction forged by a series of practices constituted by conventions, a reading supported by the main theorists of the law of so-called analytical jurisprudence, makes the mistake of questioning whether the Law is an "illusion" or it has a factual existence. Above, by stating that for Fitzpatrick the mythical element of law does not imply that the legal practice is merely an illusion, I meant precisely to refer to the conventions and predictability allegedly arising from knowledge of practices and their meaning.

In an article titled “Political Agonism and the (Im) Possibility of Law: Kafka’s Solution”, the relation between this reading of the modern constitution of the law as a negative denomination and Kafkaesque literature is evident: “It would seem to be impossible for law to have any positive, any self-existent content. Rather than the search for content in terms of the positive, perhaps a resort to the negative could prove to be more promising, and this is where Kafka comes in” (Fitzpatrick, 2015, p.101).

The mention of Kafka refers precisely to the aporetic structure of the inaccessibility of the law, a presence that occurs through totality and void. Contrary to a negative reading, in which the character fails to seek the inaccessible, Fitzpatrick reads K.’s failure as a positive failure, which could be summed up as the perception of the element of indetermination that is constitutive of the experiencing of the law.

There are two excerpts from Kafka that Fitzpatrick has, more than once, used to illustrate this point. The first and best known is that of the *Gesetz*, which has its doors open, but whose entrance is forbidden to the peasant, illustrated in the famous “Before the Law”, from ninth chapter of *The Trial* and also separated in the collections of small Kafka stories. The second metaphor, contained in the short text “The Problem of Our Laws”, published in *The Great Wall of China: Other Stories* (Kafka, 2002, 123) tells the story of a law people believe to exist, but only the nobles know it. The rest of the population needs to observe the behavior of the nobles to know the content of the law, to know what is forbidden and allowed. It is curious that, although the existence of the law may be an invention (the people have no way of knowing whether the law exists in fact or not) and that there is nothing but arbitrariness and domination, the people prefer such a law than none, since the nobility as a law in itself still seems to them better than the lack of laws (Kafka, 2012, 125).

As can be seen, both accounts deal with an absent or inaccessible law and yet somehow present. It is not with the void that the reports dialogue, however.

In both, although they approach distinct points, there is a fence, a blocked path, but at the same time an opening, a hope of entrance or understanding.

Both collaborate in the construction and development of what Fitzpatrick calls the *mythology of modern law*.

#### **4 THE PLACE OF KAFKA IN THE RELATIONSHIP BETWEEN PHILOSOPHY AND LITERATURE**

When one reads the strategic moments in which Kafka arises in Fitzpatrick's theoretical argument, one may think that his interest in the Czech prose writer is much more central than what is usually given to a literary work within a philosophical argument.

If Jeanne Marie is right in her argument in the article "Philosophy and Literature", in fact an influential tradition that refers to Plato became almost hegemonic in this regard, so that at best the literary work (as an artistic creation) occupies a secondary position in relation to philosophical argumentation (Gagnebin, 2016). It is important to show here to what extent this does not happen in Fitzpatrick's work and how instructive this can be in relation to law and literature.

It is usual that approximations between philosophical thought (including legal-philosophical thought) and literature use the latter as a privileged example of something unveiled by the former. This path was traced in a very fruitful way by the Brazilian philosopher Benedito Nunes, who interpreted dense and often difficult works, as the production by Clarice Lispector and Guimarães Rosa, yielding to such works a forged comprehensibility from philosophical hypotheses, which reveal the ontological potential behind those works of art. In other words, it is as if the novelist writes nebulously, dreamily, then the philosopher is needed to realize the subsequent conceptual clarification.

Jeanne Marie Gagnebin criticizes this approach. While acknowledging the philosophical merits of a Heideggerian or Sartrean reading of Lispector and Guimarães Rosa, Gagnebin questions the privileged position of the philosopher and his conceptual artifice, which refers to Plato's model of idealist reading (Gagnebin, 2012).

In opposition to this way of seeing the relation, in Gagnebin it is not the Philosophy that gives form and concepts to the geniuses of Literature, but Literature that invites to a reflection on the literary forms of the Philosophy. It is not Philosophy that erases the fog of artistic genius and

allows the unveiling of truth, but Literature that allows one to question the enlightened logic of philosophical truth.

It is precisely through this third view that this article intends to see the relationship between Kafka and Fitzpatrick. Kafka is not a good example or an artistic metaphor that is only clear in the light of Fitzpatrick's deconstruction and post-structuralism, but the aporetic movement of his writing is a fundamental element in the very theoretical construction of the Australian philosopher, inasmuch as the reading of a mythological element inscribed in modern law can only be adequately understood from a narrative writing that incorporates concepts into itself as constitutive elements.

It would never be possible to understand Kafka or Fitzpatrick in an assertive, analytical way, withdrawing a couple of central theses and exposing them in a logical way. On the contrary, they are reasonings that only make sense as their logics are inserted into a narrative structure.

The central point, however, appears when one observes that this aporetic narrative is not a question of style, but imposed by the very structure of what is spoken. Fitzpatrick is not an author who writes all his work in an intentionally difficult and so to speak parabolic manner, but the fact of approaching mythology in modern law under a deconstructive structure is fundamental insofar as it concerns the negation of the current narrative of modern law, as it is seen, of course, scientifically knowable<sup>5</sup> etc.

Alberto Pucheu recalls in *Kafka the poet* how every work of the Jewish writer was pierced by tension, by the struggle between having to write about the unspeakable, between bringing up paths that are forbidden. Pucheu quotes a text by Danielle Cohen entitled "Scripture is a fight against the gods", which reads that "his [Kafka's] combat against the gods of Ulysses and the God of Abraham had somehow migrated to the other side of writing, once and for all, without hope of finding a consoling

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<sup>5</sup> Nothing shows the importance of this writing more than a quick reading in contemporary articles of analytical jurisprudence, which start from certain theses seen as conceptually necessary and are written by means of a series of assertions that freeze and artificialize the concepts.

*phoné*, the sign precisely of our adhesion to the world where he had never felt completely at home” (Cohen *apud* Pucheu, 2015, p. 155).

Also, in the *Letter to his father* this tension reaches the pinnacle, as illustrated by the following passage:

The impossibility of quiet intercourse had another consequence, very natural in the background: I unlearned to speak. Certainly, I would not have been, as the context, a great orator, but I would no doubt have mastered ordinary and common human language. However, very early you interdicted my words (Kafka, 1997a, p. 21).

Much is lost when one reduces these autobiographical accounts to an attempt of psychological hermeneutics, in the sense that such accounts are important to understand the author’s spirit as an inventive individuality. Deleuze and Guatarri (2014) recall that Kafka, being Czech and writing in German, was always a foreigner in his own “official language”, just as his Jewish upbringing made him a stranger in his city. However, the hermeneutic misconception would be to reduce the experience of this estrangement (*Fremdheit*) to an idiosyncrasy of that person, not to understand how the experience of an epoch, or the extreme experience of the bankruptcy of promises of modern law and modern thought in a general way.

Turning to the question of Fitzpatrick’s critical theory of law, the experience of Kafkaesque literature has a fundamental potential precisely to the extent that it unveils the character of strangers, of foreigners (*Fremd*) in which we stand before the law. For this, a small philosophical reflection on the terms present in the title of the Kafkaesque parable is important.

The original title of the parable is “*Vor dem Gesetz*” (Kafka, 2008). The term *Vor*, translated as “forth”, has two senses in German, referring both to what is in front of something and to what comes before something. The English translation “Before the Law” is more faithful to this double sense of the German, because it evokes both the act of prostrating under the yoke of the law and the question that the parable refers to something previous, as a preface to the law.

Still more instructive is Kafka’s choice of the term *Gesetz* rather than *Recht*. It is not about the Law as a whole, but about the law, the norm, that which frames, that builds and allows something to be seen as something.

Hans Kelsen presented this question in a fundamental way in the first chapter of his *Pure Theory of Law*, when he pointed out that the norm works as a scheme of interpretation, that is, that the norm attributes to certain situations, acts, facts, etc. a *sense according to Law* (Kelsen, 1998).

Before prohibiting, permitting, obligating, the law constitutes a relation according to the Law. If, therefore, the peasant cannot enter the law (*Gesetz*), this does not simply mean that he does not have his right respected, but that he does not have the possibility to know what his relations mean according to Law, that is, he is in the dark about the meaning of his actions.

Now if we think that in modernity state rationality is fundamentally based on law as codes of rules and legally constituted bureaucratic relations, being a foreigner in the law means being a foreigner in the world, which is precisely the tonic of the protagonists of the Kafkaesque novels and short stories.

François Ost realized that this experience of non-belonging was sharpened throughout Kafka's work, as if the path of the author's writing was that of a perception of a growing distance between the protagonist and the common-sense ground to which he tries to belong. If in the first novels the name of the protagonist was still Gregor Samsa (*Metamorphosis*), Karl Rossman (*Amerika*), in *The Trial* the surname is already lost, and the main character becomes only Joseph K., culminating in *The Castle*, with the loss of the name whatsoever, the main character being only K (Ost, 2004).

This sense of loneliness and loss of one's own identity in Kafka needs to be enriched here with Judith Butler's (2015) Hegelian perception in *Giving an account of oneself*, regarding the social construction of the self and the dialectic of recognition, in which we recognize ourselves as subjects in contrast to each other and with a previous picture of meaning. Thus, the progressive loss of the identity of K. is also a result of the erasure and continuous torsion of this frame of reference. Also, the other as such cannot be well perceived by K.

In his already mentioned text of 1934, Walter Benjamin (1987) realized that Kafka's world, although its laws are not known and its authorities are inaccessible, is a world of law in the sense that it is a kind of world where the protagonist walks with fear, being at all times recriminated and punished for violating a law whose content is inaccessible to him. The image here resembles that of a son who in everything displeases his father, who does not know what he can or cannot do, but who is always guilty and lives with remorse. Benjamin says that in Kafka the world of the authorities and the world of the parents seem the same.

Moreover, Benjamin realized that this world taken by an invisible and violent law does not only affect the protagonist. The authorities also suffer the effects. They become hunchbacks, their heads almost touching their chest, their deteriorated appearance, as if their bodies were apprehending the dark, musty surroundings of everything that in Kafka embodies a court or public body.

## **5 THE THEOLOGICAL ELEMENT AND THE SPACE FOR RESISTANCE**

Finally, it remains to consider the political role that this theological element has in Law.

In her work *Limiar, aura e rememoração*, Jeanne Marie Gagnebin (2014) dates back how Theodor Adorno was very enthusiastic about Bertold Brecht's work and that this was not his feeling about Kafka's writings. Adorno saw, in Kafka's theological universe, dead-ends and a lost sense that induced the reader to conform, insofar as one of the most obvious elements in Kafka's prose is the complete failure of any successful attempts by his heroes.

This unenthusiastic interpretation, as in this case is notorious, comes from someone who seeks in a critical article the point of a path to action, a criticism that tracks or at least allows others to walk an emancipatory path.

Also, with Fitzpatrick's writings something similar happened. Not by chance, the introduction to the Brazilian edition, written by the author in 2007, aims precisely at answering accusations that impute a tone of conformity. After all, if modern law still has mythical supporters, what are

the consequences of this for daily praxis and the violence it reproduces? Whether it is called the ultimate foundation of a shared-law legal system or a “mythical narrative background”, do the factual elements remain the same? If, on the other hand, the book proposes to denounce the persistence of the myth, thus returning to the need to remove it and finally to reach a community that has transparency on all the threads conducting its social practices, would not the book repeat the same mistake that it criticizes in modernity? Would not Fitzpatrick also seek a reading that moves away the myth as wild and backward and finally reaches the age of reason (Fitzpatrick, 2007, 19)?

Different from the answer given in the preface to the 2nd edition of his work, several articles by Fitzpatrick such as “Agonism and the Limits of Law” give way to this reading, insofar as they do not reach a conclusion, but usually end in impasses and in aesthetical narratives that cannot come together to anything productive. And it must be emphasized that Fitzpatrick admires much in Kafka precisely the way his protagonists inevitably fail, the way that sense that is sought at the beginning of the work is more and more invasive, but absent, that is, radiating a proximity and at the same time increasingly, definitely unattainable. The only success the protagonist can achieve is an understanding of the inevitability of his failure. It is here, however, that something interesting hides.

Agamben saw Kafka’s critical potential in a rather particular interpretation of *The Trial*, when he asserted that it is a process of insult driven by Joseph K. against himself (Agamben, 2009). Having studied the history of Roman legal institutions, the Italian philosopher recalled that the false testimony was a very serious crime in Roman law, punished with the mark K. on the forehead, which meant *Kalumniator*. Reading a series of clues throughout the text, Agamben seeks to show that the trial exists only within the imagination of K. and that it only gains body from acts performed by K.

This reading, as Daniel Arruda Nascimento accurately stated, seems at first considerably weak and easily disputable by several pages in which the inescapable reality of the trial is noticeable (Nascimento, 2014, 145). The critical potential of Agamben’s interpretation, which in essence is

what matters here, is only clear when this reading is joined by another fundamental element. According to Agamben, says Nascimento:

self-calumny is part of Kafka's strategy in his incessant melee combat with the law. [...] If the accusation is false and if, on the other hand, accuser and accused coincide, then it is the very fundamental implication of man in the law that is called into question. The only way to assert one's own innocence before the law is, in this sense, to accuse oneself falsely (Nascimento, 2014, p. 145)

As it turns out, a false accusation would thus be the way out of short-circuiting the law, that is, to make it accessible at a false moment, to call it its ineffable violence at a time when it would not fit.

It would now be necessary to combine this thought with Fitzpatrick's reading in which Kafka demonstrates the potential for failure. The fact that the hero is always struggling with something beyond his forces, with randomities whose common point of explanation has been broken, is only conformist and purely surreal if the reading is concluded as the story of a defeat. But this is not the story of a defeat.

Using again the resource of biography, writing was the way that the frightened Kafka found to overcome the silence imposed on him by the Father, the life of a stranger, the general loss of a destination point in the context of the war of the beginning twentieth century.

As Fitzpatrick replied to the critics, writing about modern law amidst aporetic narratives is also not a way of renaming the foundations of praxis. On the contrary, in the case of Fitzpatrick, it is a question of attacking colonialism, symbolic violence, sexism, and a series of other elements that are present and denied by the presuppositions of modern law. In this case, it is a question of showing how perfectly it is possible for this structure to sustain universality and sexism at the same time, just as it is fully compatible and even complementary to think of universal human rights and the characterization of the natives as savages and primitive.

In his book *The Power of Thought*, Agamben (2015) points out that something hides behind the apparent total defeat in the parable "Before the Law". At the end of the parable, realizing the impending death of the peasant, the porter approaches, and being asked why no one had attempted to enter through that door until now, he answers triumphantly

that the door was intended only for the peasant, which is why now he, the porter, would close it and leave.

As said above and even emphasized in Fitzpatrick's reading, there is an important riddle here, in that the entry into law is inaccessible, but its doors are open. From its opening comes a light that blinds the doorman. The peasant spends his life believing in the reality and tangibility of this light, never being able to reach it.

Does the opening of doors help in any way to sustain the illusion of its full inaccessibility? If this is true, the closure subsequent to the peasant's death says something about the splendor of that law, and even about the need for a porter.

Is Agamben here trying to do magic with crumbs? Does his interpretation seek fruitlessly minimum points of refuge where there is only absence and impotence?

What can be answered here is that it was in this razor line that Kafka lived, the same one in which those characters of "The problem of our laws" lived, and the same one, in which is sustained and can support any theory that looks for a space of emancipatory criticism amid the labyrinth of modern juridical rationality. The fact is that, without Kafka, this mythical element would hardly be wrenched from its comfortable veiling.

## 6 CONCLUSIONS

The central purpose of this article was to present, from the reading of Kafka by Peter Fitzpatrick, the aporias in which the modern understanding of the juridical phenomenon is entangled. Rather than revealing exactly what is right behind some mask or speech, Fitzpatrick rightly pointed out that what is meant by modern law results from a series of contradictory elements, which can only be united and presented coherently from a mythical narrative.

Like the law that is believed to exist, but only the nobles know, or as the open, but impassable, doors of the law, Fitzpatrick relied on Kafka's literary narrative to criticize the logic of a Law that surpassed transcendence and whose content is now fully constructed and known by clearly defined authorities.

The criticism of the mythical elements of modern law, while taking on the appearance of philosophical dialogue, plays a relevant role as critical resistance, precisely since it allows one to perceive how modern law can accommodate contradictory elements such as universality and racism, equality and sexism, liberalism and censorship. All this is possible since, as it is not palpable, Law can become pervasive and conciliate contradictory elements.

It was precisely this element that the article sought to bring when, in the light of theological reading, it dealt with how the Kafkaesque trial never really happens and at the same time is found everywhere, as is also the case with theological discourse, whose tone is that of something that escapes the complete understanding, at the same time fills everything.

As stated above, the way in which Kafka's work provides critical reflection is not from the narrative of a hero's triumph but from the account of a defeat, a loss, something that has long since become understandable and does not seem to offer a way out. The protagonist, usually called K., always fails and suffers all kinds of arbitrariness and impossibilities. The point is that through this non-attainment and these dead ends, Kafka shows the aporias in which modernity has become entangled and finds, in the small and almost imperceptible span of a flash of light, a space for resistance.

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