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**LAW, JUSTICE AND MYTH:  
A READING OF *THE TRIAL*, BY F. KAFKA**

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**ABSTRACT:** This study aims at discussing the importance of literature to the study of law, from the perspective of Franz Kafka's novel *The trial*. This article seeks to investigate the way in which poetry and myth can be used to reflect on the problems experienced by legislators and lawyers, as well as by those who, out of their will, are subject to the anguish caused by morose and bureaucratic legal proceedings – this at best, when not inflicting indelible social marks that come to accompany the individual for the rest of their lives. Still in this scope, the study intends to investigate the relativity of the concept of justice as one of the causes related to the stagnation of law as a legal science.

**KEYWORDS:** law; forgetfulness; justice; myth; Franz Kafka.

**1 INTRODUCTION**

According to Paulo Ferreira da Cunha (2005, p. 33), law must be seen under a threefold perspective: technique, science and art. Technique and science serve art, and it is in literature in which it manifests itself: through the interpretation of the *human* trait, manifested both in fiction and poetry – either through the utopia in which law is inserted, or by the mythical imprint equally present in the magic of literature. As well as literature, law has characters, with predetermined roles and personal behaviors, within a

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specific plot. In both fields of knowledge, the protagonists are predestined by stories conceived by writers; hence the lawyers have their performance delimited by the interpretation of courts and tribunals. Law, thus being an art form, has its own personality: its real understanding takes on the dimension of the eyes of others, in a complex dynamic of normative interpretations. Each judicial sentence is the expression of an individual's trajectory, each imposed decision embodies an image – sometimes transitory, but usually inextinguishable – in a man's life. Each and every case is a unique experience, insofar as the subjects are living texts interpreted from themselves – and, like poems, they are understood from a reader's perception. If the starting point for the interpretation of law comes from the one who operates it (an individual who, like everyone else, perceives life according to his / her own experiences and values), the subtle link between law and art becomes evident.

Thus, from this understanding, one can perceive the importance of literature for the purpose of understanding reality. For the terms of this article, we propose a dialogue between Franz Kafka's famous work *The trial* and the legal practice produced by positive law – a reality often driven either by emptying or by overvaluing the ideal of justice as the fundamental value of the social system. As a consequence of this analysis and considering the constitutional principles of publicity and free manifestation of thought in a modern society fed by the internet and its social networks, some comments must be made about the need to guarantee the *right to forgetfulness*, something of which too little is said in academic circles (not in the dimensions that the appropriate approach to the question would require, at least), although it is a matter that transcends the realm of rights and has profound socioeconomic consequences in the lives of the accused and / or condemned by the system (regardless of judgments of justice or merit), people whose life trajectories become irremediably marked by the publicity of the legal procedural acts.

It should also be stated that, in the writing of this article, the authors used bibliographical research (quantitative criteria) applying the deductive methodology. The research comprised several phases: the choice of theme, work plan elaboration, identification, localization, compilation, analysis, interpretation and writing (Lakatos and Marconi 2003, p. 44). In the

development of the study, we sought to answer the most disturbing questions of law: the subjectivity of the concept of justice and the ideal functioning of the Judiciary system. Transit and dialogue with other branches of knowledge were essential, given the profusion of the most diverse legal crises surrounding the issue. The analysis takes as an initial reference the literature of Franz Kafka, from which human traits are sought to be understood, along with its miseries and fears, reason for which this article was written based on an analytical treatment that is eminently aesthetic.

## **2 LAW AND LITERATURE: A NECESSARY STARTING POINT**

Despite contrary opinions, law having a deep subjectivity influence is a fact. The proposed dialogue between the legal sciences and literature is an indispensable tool for understanding juridical values that, although objectively established according to positivist systematics, have an eminently hermeneutic dynamic. Among the various research fields that have emerged over the last two centuries on the subject, the dramatic Kafka narratives are admittedly some of those which, almost in a prophetic tone, anticipated the hypocrisy of the twentieth-century totalitarian states and their legal systems: claiming impersonality, individuality was destroyed; invoking order, arbitrariness was promoted; affirming efficiency, negligence was practiced. Not that this had not happened before, under the aegis of the great European monarchies, but the ideology adopted at that time was manifestly an absolutist one (such as that advocated by Machiavelli and Hobbes), so the rules were frankly clearer. With the French Revolution and the consecration of values that from then on began to shape Western political structures, the waters of law became “muddled”. Various legal systems have been organized on the sovereign pillars of life, liberty, equality, justice and private property – at least in appearance. In practice, however, what we call “legally qualified contempt” was promoted: the astonishing systematization of disregard for the human condition through trials – supposedly the legal instrument that would promote the observance of individual rights on the material plane –

according to the perverse irony that justifies the depersonalization of the subject under the aegis of the principle of equality (in fact, a treatment equally terrifying for all those who had the misfortune to become targets of the system, for whatever reason). Having said that, we proceeded to analyze the astonishingly credible picture of this legal reality stamped on Kafka's work.

### **2.1 Kafka and literature: a reading of man and subjectivity**

Consecrated as one of the modern precursors of existentialism, Franz Kafka was born in 1883 in Prague, now in Czech Republic, and died in 1924, a month before turning 41, near the city of Vienna, Austria. Born in a family of Jewish backgrounds, he dropped out of chemistry to study law, graduating in 1906 and earning the title of Doctor of Laws. However, nourishing a taste for art and under the influence of authors like Dostoevsky, he devoted himself to literature. His main work, *The trial*, was begun in 1914 and had its production interrupted sometimes. In truth, Kafka would never finish the novel; the original writings were delivered to his friend Max Brod, to whom he had asked to burn the unfinished drafts after his death (and Brod replied that he would not). The first publication of *The trial* occurred in 1925, a year after tuberculosis finally defeated Kafka's forces. Considered one of the greatest novels of the twentieth century, *The trial* formidably portrays the vicissitudes of legal structures: from the top of the Judiciary to the lower hierarchy, Kafka traces a masterful caricature of the system, its institutions and its protagonists, demonstrating its own hypocrisy legal discourse from which decadent and insane justice is appropriated.

In the novel, Josef K., a successful bank employee, has his routine suddenly interrupted by the visit of State agents, who declare him arrested. However, no one is able to provide him with any justification that authorizes the sentence. K. does not receive any answer as to the charge – the content of which will not be known at any time throughout the plot. At that moment, Josef begins to question his reality: “To what authority did they belong? K. still lived in a State of Law, peace reigned everywhere, and

all laws were in force, so who robbed him of his liberty in his house?” (Kafka, 2007, p. 13). The stability and security on which K.’s life was founded was abruptly restrained in the name of law enforcement (from then on K. would never regain his peace of mind). It is thus perceived, *ab initio*, a clear contradiction between the original sense of the norm and the arbitrary action of the State.

The Kafkaesque work reveals the vulnerability of man to institutions created by himself. K. was notoriously a good citizen with no apparent crime or guilt but was detained under a complicated judicial proceeding whose judges were unknown and unreachable figures within a world of endless bureaucracies and a charge never revealed to him – everything formally legitimized, according to the current legal system.

The precepts and values that, transcending beyond the juridical universe, make up the most basic feeling of justice of the human being (justice, as a juridically consecrated value, is, as mentioned, something much more subjective than it looks like)<sup>3</sup>. Literature has a language of its own: the individual is explained by an external analysis, capable of denouncing human misery through narrative (whether real or fictitious, in a descriptive or psychological tone), an efficient way of establishing dialogue with the readers, leading them to ponder the limits of subjectivity and human existence. According to the definition found in the *Dictionary of Philosophy*, subjectivity is defined as the “character of all psychic phenomena as consciousness phenomena, which the subject relates to oneself and calls them *mine*” (Abbagnano, 2007, p. 922). Subjectivity is, in a way, the manifestation of the freedom that operates within man, consubstantiated in the possibility of making choices<sup>4</sup>. It is a concept directly linked to the formation of identity, which is translated from the intimate space of the individual and their experiences (intersubjectivity). For Søren Kierkegaard, a nineteenth-century Danish theologian and

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<sup>3</sup> It is no coincidence that Hans Kelsen devoted a number of works on the subject (What is justice?, The illusion of justice, The problem of justice, just to name a few).

<sup>4</sup> It is worth remembering that subjectivity also embraces the conception of the unconscious formulated by Sigmund Freud.

philosopher, subjectivity consists of an experience of reappropriation of the *Self* – in other words, it is not an arbitrary or irrational mental process. There are mentions in the Post-scriptum attesting, even, that “subjectivity is truth”. That is, only an existing individual who assumes himself as such can maintain his subjectivity. Thus, literature is capable of concretizing the intersection of these worlds (interior / exterior) by promoting the encounter of the subject with his / her *self*. For Professor Roberto Bueno, “literature is a promising instrument, probably more than philosophy, when we have in perspective a process of self-referencing” (2011, p. 10), understood as a process of self-definition and reconstruction of ourselves, given human historicity.

Kafka’s narrative reveals Josef K.’s tormenting search for the accusation that had been imputed to him. The novel captivates the reader by the reports of the agonizing procedural march initiated under the pretext of an apparently unfounded accusation, of which the content is never known (presumably criminal, but never clear), and the work focuses on the torturous quest of K. for answers. The indignation of Josef (sometimes transmuted into arrogance, in certain passages) is contrasted with the resigned posture of the other accused people in other processes (other characters with whom K. comes to have contact throughout the narrative). There is a discussion here about the different postures adopted by the individual in front of the world, be it the real<sup>5</sup> or the phenomenal. The objectification of the *self* by the bureaucratic institutions is also a subject of deepening in the novel, that is, something perceptible in all the presented characters. It is noted that the entire system contributes to the complete emptying of personality. Kafka, who despised psychology, traces throughout his work psychological intuitions that tie the protagonists to one another. *The trial* is not only a social critique: it relates the misery inherent in man and the coldness arising from the detachment of his own interiority. The work sends the reader to reflect on what we really are and what values we effectively advocate. Finally, Kafka conveys the idea of the need to (re)

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<sup>5</sup> Or *numenian*, according to the nomenclature adopted by Immanuel Kant.

think human relations and how we are absorbed by the indifference of judicially mechanized procedures that, under the traditional pretext of pacification and harmonization of social relations, destroy individuality.

## **2.2 The jump from law to poetry and the abandonment of legal propheticism**

The expression *poetic knowledge* – although it refers initially to a different idea – translates, so to speak, to the *bare* reality. Literature cannot be used to the unrestrained and unrestricted prescribing of a supposed *must-be* world disconnected from the real world – quite the contrary; myths perpetuate themselves throughout the history of peoples precisely because they deal with permanently contemporary themes related to the human condition. Law, in turn, has as its theoretical tradition the direction of social behavior through the imposition of general norms, a branch that, frequently, dissociates itself from the reality in which it is inserted. Poetry does not contradict the legal science – instead, the former gives the latter a closer understanding of reality through aesthetics<sup>6</sup>. It should be emphasized that we do not defend the abandonment of the analysis of society and the need for changes through law. However, law, as a social phenomenon, is also a fruit of history and customs of a people, so that its point of reference is always in the past. On the other hand, in order to induce socially desired behaviors, it is imperative that the law be based as much as possible on current values, consecrated in the present, by society. Thus, the legal system promotes a leap when it uses poetry to find its place in time.

The Law and Literature movement was born in the United States at the beginning of the 20th century, and later settled in Europe, reaching, in its latest phase, Latin American countries (Ost, 2006, p. 334). It is important to distinguish the three perspectives of the relation between law and literature: (a) the law *of* literature, with a focus on guaranteeing freedom of expression and study of the legal history of censorship; (b) law *as* literature, aimed at the study of rhetoric and legal texts; and (c) law *in* literature, which searches for law, justice and power in literary texts (and

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<sup>6</sup> Here the word *aesthetics* is used in its philosophical sense (Αισθητική, or Aisthētiké, whose original meaning is linked to the act of perceiving or noting something), in the condition of critical reflection on human culture and nature.

not in legal texts, manuals or courses) (Ost, 2006, p. 334). The study of Kafka's texts is located within the scope of law in literature. From the novel, now object of investigation, we seek to debate the contradictions of law as a science.

Nineteenth-century positivism, based on the rationalism of the time, attempted to attribute to all that was submitted to it for analysis a meaning that was fulfilled in reason – thus denying aesthetic conceptions that indicated any “feeling”. There was a kind of oblivion and “demonization” of poetry, something then judged necessary to deepen human reflection, thus causing abandonment of the search for a refined look over the world through the eyes of language. However, the juridical theory developed during the 18<sup>th</sup>, 19<sup>th</sup> and 20<sup>th</sup> centuries does not respond to the demands of the present time; the models and schemes devised during the rationalist movement are no longer capable of meeting the complexities of contemporary society. Power relations have fragmented, and the conception of what is political does not orbit more exclusively around the state, like the creation of third sector institutions. Another relevant example is the creation of the arbitration institute, an instrument that has been emerging with good adherence by companies, thus demonstrating a clear rupture of the concept of exclusivity of the Judiciary for the resolution of conflicts.

Faced with growing social complexity, the legal sciences have undergone a process of restructuring in their secular institutions<sup>7</sup>. Faced with this new reality, the reformulation of the concept of politics has led to the overcoming of legal structures hitherto in force<sup>8</sup>. In order to adapt to social expectations, Legal Theory cannot be conducted in isolation: first of all, one must understand the need for dialogue between branches of knowledge. Literature has the capacity of inaugurating a new perspective on law: the question of the *existential* aspect as an element of humanization for legal science, through the poetic perspective. Legal language is, first of all, *language*, an environment in which the human

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<sup>7</sup> Mainly from the second half of the twentieth century onwards, the traditional dogmatic approach has gradually given way to juridical research, in most of the Western world.

<sup>8</sup> Comments by Professor José Eduardo Faria, in an interview with the Brazilian Lawyer Order / SP, in May 2017.

being is immersed. However, the independent structure of jurisdiction as a manifestation of sovereign state powers leads, albeit unintentionally, to the detachment of everyday social reality. It is noticed that there is the patent attempt to separate law from the real world. In these terms, the legal universe is seen as the “world of what should be” and expresses a paradigm of “perfection” to be achieved by the world in which we live. As for art, on the other hand, it does not boast itself; it is “humble”. It does not impose dogmatic limits: its fluid model translates into pure freedom to question whatever it is; its language is able to dialogue with all branches of knowledge. In this sense, Pietrofonte (2002, p. 32) reverses the role of art in language:

Art has the property of, by means of the discursive strategies it possesses, to make complexifications that other discourses cannot do. Poetic discourse operates with figures of speech [...]. Thus, objectively, poetic discourse reveals the complexity that exists between those who make the law and those who suffer it.

Law should not shy away from the debate of what is inherent to it: the personal perspective of the individual. Man’s reflection about his own existence and his interpersonal relations must be understood as an impulse of creation (whether in the arts, in science or in the norms) and therefore as an integral element in the genesis of everything that regulates and pervades human life. The return to justice naturalism is not intended here – indeed, it would not be reasonable to aspire for such a level of discussion, since it falls outside the scope of this study. Nor is it intended to seek an essentialist revelation of the law. We only propose the adoption of another perspective, under a more independent bias of the strictly formalist rationalism of the norm. Seeing law through poetry is thus a desired (even necessary) leap for a closer reading of reality.

Legal discourse is an operatively closed system, attached only to those who dedicate themselves to its study. The entrance into this universe is not free and unimpeded; there are a series of difficulties imposed onto those who intend to “venture” in these waters. The consequent distance between law and social reality implies the undesirable protectionism of legal knowledge by the elite, through the “empowerment” of its operators, in the face of those who are on the margins of a language that seems almost inaccessible to the “uninitiated”.

To analyze the law from the perspective of poetry is to deal with its naked reality and to abdicate from self-limited legal propheticism in its own conception. The very separation between the conceptions of really being and of what *should be* reflects the difficulty of the law to face the everyday ills.

Historically, the Theory of Law was developed from legal *propheticism*. Explaining: the prophet is the “individual who predicts the future” (Aurelio, 2005, p. 667) – that is, the one who is not responsible for the analysis of reality, but who points out the future. Oppositely, poetry has a symbolizing capacity: it focuses on the perception of the *human* in a freed way, not stagnant in the past and without the pretension of futuristic predictions. According to Willis and Cantarini (2014, p. 41), “fiction is the truth of law”, and it is from this point of view that “there is also a perspective for the development, in the theory of juridical science, in a proper and current sense, filled with fallibility, since it is essentially human and therefore ‘possibilist’, imaginary”. What is meant by this is that there is no perfection in any of the lexicons, because where there is the human aspect there is also the diversity of viewpoints (and the law is ultimately determined by narrative coherence). Based on Kafka, this approximation can be traced to the present and to the human. Reading the novel reveals a clear identification of lawyers with the characters and situations listed in the narrative. This ability to approximate is an inherent characteristic of literature, and therefore its use becomes essential to the understanding of law.

### 3 MYTH, JUSTICE, IMAGINATION AND UTOPIA

Law did not develop exclusively from itself; the organization we can currently see did not exist in these molds, in the principle of norms. As in other fields of knowledge, law has traditionally been linked to mythological conceptions (a fact which is well known, especially in regard to the cultures of Greece and Rome, but has been perpetuated throughout the Christian tradition). Law was for a long time conceived as the fruit of the divine will, which was imposed on its servants by *revelation*.

In this chapter, we turn to the relation between myth, imagination and law, as well as the importance of this discussion for purposes of understanding the current legal systems.

### **3.1 THE MYTH OF JUSTICE: NECESSITY OR HINDRANCE FOR THE DEVELOPMENT OF LAW?**

If we recognize the importance of breaking with the prophetism played throughout legal history, it is not possible to deny the importance of myth and religiosity to the understanding of law. Myth is the expression, through symbols, of the world and reality from narratives and collective representations. This expression is manifested through stories (tales, fables) in which gods imbued with human characteristics carried out situations that are typical of the human existence, such as fecundation, birth, death, union, separation, war, peace, nature. According to Kierkegaard (2012, p. 50), “myth causes that which is inside to pass on the outside”. Myth unveils human desire in its most intimate aspirations; it is a fictional look at the world that strips the substance of human existence. Paradoxically, we can say that it is within fiction where we can find reality – quality of what is real, of what exists in the physical universe – conceived as “the consecration of the attunement between the sensible representation of the object (image) and the mental interpretation of it (the idea of the object)” (Ganda *et al.*, 2016, p. 05).

The birth of law is mythical. Let us look at the conception of legal hermeneutics, whose etymology refers us to the Olympic god Hermes (Ερμής), son of Zeus and Maia, messenger responsible for interpreting the will of the gods.

Under the name of Témis or Diké, whether in Rome or Athens, justice is paradoxical; sometimes it moves away, sometimes it approaches. There is no fixed concreteness or objectivity; there is a variation in its content throughout history. Law is fiction – the work of human desire – and the mythical element is embedded in its ideal of justice and the rites on which it is founded<sup>9</sup>. Mention should be made of Ulpiano’s concept of justice, for whom it is fair to “give to one’s possession whatever belongs to them”

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<sup>9</sup> Thus, it can be said, in general terms, that *justice* is, for law, what *truth* is for philosophy: it is a value that is difficult to conceptualize, but occupies the central position of the system.

(*sum cuique tribuere*) (Krueger *et al.*, 1889, p. 29). By virtue of such a conception, the question that arises is: who will say what belongs to one's possession? It is perceived that there is no closed and unalterable concept.

It occurs that, despite the relative conceptual indetermination of justice, its presence in the human, to a greater or lesser degree, is undeniable. Consider what happened in Kafka's work, in which Josef K., whose conduct is irreproachable, is captured by the sword of justice without even knowing the reason. There is no due process, publicity or any other guarantee inherent in the Democratic State of Law. Regardless of the current or adopted concept of *justice*, it is certain that anyone will know that K. has suffered *injustice* (strong evidence that this idea tends more to subjectivism than to objectivity, which will be further elaborated in subheading 3.1 of this study).

Eduardo Galeano affirms that utopia is responsible for making humanity keep walking, because, as we walk toward the horizon, it goes farther away (Portal Brasil, 2015). Now, if justice is the utopia of law, then its march and its evolution must be understood as necessary. However, if it is true that "the difference between the remedy and the poison lies in the dose"<sup>10</sup>, then the ideal of justice should not take the form of belief to the point of blindness and impede the advancement of law as a science. Perhaps it is in this paradoxical approach and distance from horizons that the author of the law meets with the pleasure of legal activity. Like the imagination conceived by Kierkegaard, justice must be balanced between fantasy and reality, walking on the tightrope of existence, even in the face of an attempt to make it scientific.

Nor, on the other hand, should the sense of justice hinder the development of scientific law – as a branch of ontology – at the risk of promoting excessive subjectivism, which would inevitably lead to arbitrariness and bankruptcy of the legal system. In order to do so, legal science should not dispense with the technical discussion about the method of its execution, a necessary point to validate its scientificity before the social body, as well as essential to extend the outdated conception that the law is a mere technique of social control (Guerra and

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<sup>10</sup> Aphorism of Paracelsus, physician and physicist of the sixteenth century.

Carnio, 2000, p. 105). This is, in fact, one of the great contemporary challenges of the study of philosophy and the general theory of law: to be guided by justice, without, however, mitigating the independence of law as an autonomous science.

### 3.2 The judiciary, the myth of justice, and passion

The dynamics of the objectification of humanity demonstrated in *The trial* reveals a dispassionate bias of law, insofar as it is promoted as a mere automated instrument of social control, self-referenced and totally stripped of any concern with the individual who has had the unhappiness of be processed. Kierkegaard speaks of a time of appearances, devoid of depth and coherence: “en La Época Presente la acción y la decisión son tan escasas como lo es el deleite del riesgo al nadar en aguas poco profundas<sup>11</sup>” (Kierkegaard, 2012, p. 45). The exercise of law as a mere technical application of the norm is the fruit of the modern conception of society. It became a mechanized and cold legal activity, stripped of beauty and art. Currently, the professional of the area, not by chance called in Brazil as the *operator of the law*, sometimes carries out his work as if he were in an industrial production line. We know that the practical reality of this particular micro universe that has become the legal activity demands, from professionals in the field, the adoption of a “mass” production. However, the excess of trials and cases or the short time can not preclude discussion for possible solutions. It is essential that the lawyer take up the subtle unrest that the theme causes in order to promote the confrontation of these questions, from the scope of the academy to the offices and courts afar. For Kierkegaard, the process of excessive rationalization culminated in the rupture of man with his religiosity, that is, with the mythical element of his own existence, costing him the loss of subjectivity. This, in the Kierkegaardian sense, is directly related to passion, as something that burns, in the sense of the Danish word *inderlighed* (interiority) and which refers to passion and ardor – as “something that is done with deep spirit”. To the extent that passion is withdrawn from man, law also loses its original meaning – which explains, at least in part, the legal chaos in which we are

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<sup>11</sup> Translated: “in the Present Age action and decision are as scarce as the delight of risk in swimming in shallow waters”.

now. The law was seduced by purely mercenary utilitarianism and abandoned its ideals of the past. If, on the one hand, reflectionism brought the technological advance, on the other hand, it also massified the individual and crushed his capacity to be distressed. It is therefore necessary to (re) think of a viable alternative to the professional of the law, so that in legal practice there is a (re) encounter with the passion long lost, in order to safeguard the true object of protection of law: the individual.

Kafka's work denounces the vanities of justice since the Academy: "[...] K. looked at him with curiosity, he was the first student of the unknown science of law that he somehow met personally, a man who one day, for sure, would reach high bureaucratic positions" (2017, p. 73). The force that impels the said student is the desire of power that the knowledge promotes before the common man. In the narrative, he commits innumerable abuses by virtue of his status as an expert of the laws and begins to assume a position of superiority in front of the other people, simply by the position that he one day should occupy. The Judge of Instruction is like a deity in a position of sacredness: Kafka alludes to "the examining magistrate watching him from the window, and knowing therefore that he had come to the audience" (2009, p. 24), to whom unquestionable power is given. It is interesting to note the loss of the sensitivity – and subjectivity – of the officials of the registry, who "do not take the public into much consideration" (2017, p. 81), which causes them to suffer unnoticed by others: "we are hard-hearted, we might like to help everyone, but as court officials we easily give the impression that we are hardened and do not want to help anyone. I suffer greatly from this" (2017, p. 91). It is worth mentioning the innumerable cases of illness that come to the servants of the Judiciary, who, in some cases, end in suicide, as in fact has been occurring over the years in the Regional Labor Court of São Paulo<sup>12</sup>. The natural course to which the system refers is the gradual institutionalization of the individual, but to lose self-referencing as an individual will inevitably lead to illness, as Kafka (2017, p. 94) points out:

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<sup>12</sup> See magazine reported in April 2016 that a suicide occurs every six months in the TRT-SP building, mostly by court officials. Available at: <<http://veja.abril.com.br/brasil/o-predio-do-trt-sp-um-suicidio-a-cada-seis-meses/>>. Access in: 4 jun. 2017.

“[...] he felt that they, accustomed to the air from the registry office, barely supported the relatively cool air coming from the stairs”. Josef K. is indignant at the conditions of the notaries who keep the cases (2017, p. 77):

The wooden stairs explained nothing, no matter how much he looked at it, K. noticed a small piece of paper beside the first flight of the stairs, went there and read, in a childish and clumsy handwriting: ‘Access to the registry offices’. Here in the attic of this rental building were the offices?

When we point out the disregard to which the servants are subjected, the reference is not restricted only to the facilities, buildings and instruments of work: there is an institutional violence that reproduces and reverberates in all those involved in the process, from the parties to the lawyers, servants, prosecutors and magistrates. Jurisdictional activity, frequently, is unhealthy and solitary. This scenario destroys the passion to which the legal professional must give himself, precisely because the system directly decides the life of the people. It is important to promote addressing these issues even in the sphere of public health.

We emphasize that, in the midst of this context, there are legal professionals who still resist in the exercise of their activity with due passion for justice, such as the SP Court judge Pauma Bisson, who offers a true class of humanity through judgment registered under N<sup>o</sup>. 1001412-0/0:

[...] It is a manual planer made by him in brazilwood, and which, apparently embellishing my work office, rigorously warns me who I am, where I came from, and with what extreme care, the care of a carpenter I should treat people who come to me in judgment, disguised as procedural numbers, *so many are my peers who see only repeated paper* [...] (emphasis added).

Thus the discussion of these problems is indispensable from the Academy to the public organs, insofar as passion ultimately defines the very human being.

## 4 LAW AND JUSTICE: A SOCIAL PHENOMENON

### 4.1 The legal concept of justice – less stability than it appears

The analysis of the concept of justice and of the legal institutions erected for this purpose speaks volumes about a society. In the vast majority of nations (to the extent that most national systems have written constitutions), the wishes and aspirations of the collectivity are set out in the Constitution, according to their culture and ideology adopted at a particular time in their political existence. Even when it comes to a society whose constitution is historical (not codified), the analysis of its legal structure often reveals its primordial values, and sometimes it is possible to extract the interpretation adopted about them. It is something like a “fingerprint”: legal-political institutions clearly demonstrate the “should-be” aspect adopted by the system, and by analyzing what the collectivity “wishes to be” we paradoxically achieve the understanding of “What society *is not*”.

Preliminarily, as already mentioned in the third paragraph of subtitle 2.1, any attempt to conceptualize *justice* will inevitably be loaded with immense subjectivity. One should bear in mind that the understanding of this idea differs in all cultures (which is not surprising considering that the concept adopts different interpretations in the individual field itself, varying from person to person). To the extent that the social construction of collectivities is subject to other basic elements (such as customs, history, mythology, and religion, from which they derive their values), it becomes impossible to separate the notion of justice without, first, analyzing the context in which it is inserted.

For a long time, the idea of justice was linked to the idea of virtue, socially related to the need for social harmony achieved through respect for established laws. Aristotle, in *Nicomachean Ethics*, speaks on the subject in several passages:

As we have seen that the lawless man is unjust and the law-abiding man is just, of course all legitimate acts are, in a sense, just acts; because the acts prescribed by the art of the legislator are legitimate, and each of them, we say, is just (2003, p. 79)

The same philosopher continues: “For this very reason it is said that only justice, among all virtues, is the ‘good of another’, since it relates to our neighbor” (2003, p. 80), and “Therefore, justice in this sense is not a part of virtue, but a whole virtue; nor is it its opposite, injustice, a part of vice, but the entire vice itself” (2003, p. 80). Thus the conception of justice as the “means” to be attained, residing in *prudence* the greatest virtue of man and qualified by the habituality of good deeds, which denotes the idea of what is just as the *habitual practice of virtue and of respect to the laws*.

However, the idea of justice as a “divine command” imposed on society, determining the need for obedience to precepts contained in a religious system, has been, for the most part, throughout human history, the prevailing idea. The concept that “righteousness is that which comes from God” – according to a theory which has come to be known as the *Divine Command Theory* – has been the main juridical and moral compass since the earliest days, and even today it is widely applied in most of the existing cultures. In the Western world, much of this idea has fallen into disuse since the separation of religion and state, a division positively promoted by the Enlightenment movement initiated in the seventeenth century. However, supranational coexistence with peoples who, on the other hand, adopt *Sharia* (Islamic Law) as a legal basis for their respective socio-political organizations has become one of the greatest challenges to cultural integration.

It is a fact that a legal system linked to any sort of sacred scriptures from which cogent precepts are extracted causes enormous legal uncertainty, even among the peoples who adopt this kind of organization. The Qur’an, like the Christian Bible or the Jewish Torah, are religious texts whose origins go back to the beginning of civilizations (that is, they are products of a particular historical moment), and often their determinations are understandable only if we consider the context in which were designed. As the great majority of its precepts are conveyed by parables, the interpretation of what is considered (or not) just and legitimate lies at the sole discretion of the interpreter. In other words, the system ends up being ultimately based on pure subjectivism.

This might not be such a problem if cultures as diverse as Islam and Christianity did not have such distinct scales in their hierarchy of values. At the point, it is possible to explain: it can be affirmed, with a high degree of certainty, that all cultures bear the same values, simply because they are *human* organizations. Human beings, in turn, value what is beneficial to them and, in one way or another, aid them in their survival. That is why murder (taking the life of another human being without plausible justification) is, in all cultures, a socially criminalized and punished event. The same is true of the protection of property (theft, robbery), as well as the protection afforded to millennial institutions such as marriage. What differs in all these cases is not only the way in which each culture deals with such issues – usually in nuances related to the breadth of the institute or the application of the penalty, when in violation of the norm – but, yes, the scale of values involved. This only becomes evident when we contrast and compare, analytically, the *scale of values* of two different cultures. Let us take as basis the right to life, for example: a value which, for Western culture with a European tradition, stands as the most sacred sociocultural institute against which no other under normal circumstances can prevail<sup>13</sup>. In contrast to Japanese culture, on the other hand, it can be seen that, despite its long history, only very recently (more precisely after World War II), the right to life came to overlap with the notion of *duty* (another concept extremely subjective, whose understanding can only be extracted casuistically). In these terms, and considering the fact that much we have already discussed in this study on the intimate link between law and literature, it is interesting to invoke a passage from the book *Hagakure* (one of the last genuine written accounts of the samurai warrior code written by Tsunetomo Yamamoto, during the transition from feudal Japan to modernity). According to the account, the personal

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<sup>13</sup> The question of abortion, as might be raised here, is not directly related to the value of life itself, but to what is meant by “being alive” and the determination of the moment in which it comes to exist. The question of euthanasia, on the other hand, is precisely on the few occasions when the quality of survival prevails over life itself – that is, an abnormal circumstance.

servant of Fukahori Magokoru, the second son of Lord Kanzaemon, confusing his master with a boar during a forest hunt, fires his rifle against the knee of his master, who immediately falls wounded, of considerable height. The first reaction of the servant, when he realized what had happened, was the intention to commit *seppuku* (traditional Japanese suicide), to which Magokoru intervened: “you can open your stomach later, but now I’m not feeling well, bring me some of water” (Yamamoto apud Lapo, 2005, p. 132). Sated, the servant would resume his duty – commit *seppuku* – but his master intervened again. Returning home, Magokoru asked his father to forgive his servant, which actually occurred: “It was a mistake, do not worry. Back to work”<sup>14</sup>. This same spirit of *duty*, which overpowered human life with astonishing frequency, was the motivation for the *Kamikaze* attacks conducted throughout World War II, even though the samurai gold era had long since ceased to exist. For them, millennial values overrode the notion of duty to other rights, just as Islamic *Jihad* (within its concept of “holy war”) traditionally praises the suicide attack to the detriment of the life of the individual who practices it.

Then, to the elucidation of the above, how can we suppose that the value of “justice” is apt to be used as a behavioral paradigm that bases life in society, especially when its conceptualization is so subjective as to create such abysmal divisions between cultures that should, at least presumably, coexist?

Well, this is precisely the problem: for many religions, depending on the interpretation adopted, there simply should not be coexistence. Hence the reason that the adoption of a legal system that extracts its values from religion, whatever it may be, will only find its way through the imposition (read “war”) of the will of others. If, within the framework of democratic systems, we conceive justice as the foundation of our social order, through the subjection of personal wills under the sovereign domain of collective well-being – a necessary and unavoidable presupposition of coexistence among the most diverse individuals – for other systems, justice is a

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<sup>14</sup> The original manuscript has long since been lost. Also known as the Book of Kamikases, very few survived after World War II, as the occupation forces ordered its destruction. There are currently four transcripts of the original Japanese text that differ little from one another.

divinely emanated *duty* that does not tolerate divergent positions, both internally (within the social body itself) and externally (in relation to other cultures and their respective legal systems).

Thus, it is not surprising that such a conception of justice becomes predatory according to its own one-sidedness. Not that the previously evoked example of Japanese culture (whose notion of justice is not so closely tied to religion) was very different from Islam in terms of domination: its scale of values changed only (and yet only in more recent times) because *they lost the war*, in a clash that would inevitably come, sooner or later, between two equally powerful and sovereign cultures.

It follows, therefore, that the adoption of the term justice, whose valuation depends on an extremely subjective judgment that submits itself to the most diverse concepts – depending on the culture, the religion and the historical moment of a given society –, cannot serve as a paradigm to erect social institutions whose functioning depends on other values extracted from non-legal systems.

#### **4.2 On the *popular* concept of justice: the role of the legal system in totalitarian regimes**

Literature and law are idealized human abstractions designed to guide human behavior – the former by conscience; the latter, by coercion. Either way, both have the power to induce behavior. That said, this article proposes to analyze, from an eminently literary perspective (and, especially, from Kafka's point of view), the mutability of the conceptions of justice and of law that operate from human yearnings.

Law has often been used over time as an instrument of social control, making it possible for people to justify through it the most terrible barbarism. As discussed earlier in this paper, Josef K. questions the rule of law; that is, the normality of compliance with the law. When the legal tradition of a democratic country breaks with the principle of reasonableness, the rule of law is threatened by tyranny. According to Abbagnano (2007, p. 963), totalitarianism is the “practice of the totalitarian state, that is to say, of the state that intends to identify itself with the lives of its citizens. This term was coined to designate Italian fascism and German

Nazism”. The development of totalitarian regimes took place mainly after the First World War, when an unprecedented worldwide political and economic crisis was established, the perfect setting for the emergence of a political “messiah”, centered on the figure of a person capable of “saving” the nation. It was thus with Nazism and Stalinism, in addition to other similar regimes that have emerged throughout European territory. Equal phenomena also occurred in the East, like Japan militarized after the *Meiji* era (1888-1912), Maoist China and the Pol Pot Khmer Rouge in Cambodia, just to name a few.

Excessive use of military force is a characteristic of the totalitarian state as a means of suppressing any kind of opposition to the government; absence or manipulation of elections; censorship and control of the single party media and government propaganda to promote the figure of the leader. Another peculiar feature of these regimes is the abuse of the Executive Branch’s issuing of decrees, in the face of the fragility of the Legislative. One can also affirm that there is totalitarianism regardless of ideological orientation, be it eminently progressive (“left”) or conservative (“right”): one focused on communist ideology and in defense of the extinction of private property, the other marked by a philosophy based, at least supposedly, on liberal ideals. Either way, both carry a strong ethical discourse: the first, ruled by equality; the second, oriented by property protection. The fact is that in both there is the exacerbated dilation of the state, accompanied by the consequent reduction of the citizen as an individual. One observes the systematic suppression of subjectivity, to the detriment of the growth of the mass manipulated through force.

Totalitarian discourse is generally a discourse that blends nationalism with religious discourse, such as those uttered during Adolf Hitler’s celebrated public rallies, and is always accompanied by the suppression of rights and the growth of state power. It is worth remembering the thinking of Carl Schmitt, whose statist conception “denied the guarantees of the individual rights of the liberal paradigm, understanding that the State, in establishing the law through its sovereign, cannot admit the individual autonomy of citizens” (Alves and Oliveira, 2012, p. 232). Schmitt not only defended the Nazi regime, but as

a jurist he formulated a vast theory in defense of the use of force and the adoption of a policy of “unilateral convenience” for the purpose of promoting the supreme authority of the state. For the author, warfare aimed at combating the enemy would not be a state of exception, and if necessary, it would be possible (and even desirable) to suspend the law, in order to safeguard sovereignty.

In Italy Mussolini stood out, a socialist leader who founded, in 1919 *fasci di combattimento* (combat squads), composed of ex-combatants and unemployed. The country also experienced a deep economic and political crisis, with spikes of uncontrollable inflation and the government weakened by social movements – a soil that seems conducive to the development of fascism, which eventually persecuted and killed thousands of people in the name of state security. As can be seen, law often serves as an instrument for achieving the political objectives of regimes, be they democratic or totalitarian. The occurrence of such a phenomenon is not astonishing; after all, law is the fruit of human desire, and this, frequently, is guided by the thirst for power, regardless of finding a place in some kind of foundation, in which the regime can be seen with legitimacy.

Of all sorts, in analyzing the history of peoples, one can see how Franz Kafka’s work, more than a hundred years later, is still astonishingly contemporary, insofar as the juridical model described in *The trial* reproduces, with astonishing precision, the problems still present in the most diverse Brazilian courts. Moreover, the warning drawn from literature, which points out the dangers arising from a self-referential and indifferent legal system to social reality, is an equally current issue, since the judiciary, from time to time – often much more frequently than we would like to admit – loses its independence to become a mere political instrument, merely a prolongation of the executive power assumed by transitory governments, in pursuit of equally occasional objectives<sup>15</sup> – if one can say that there is *any* objective whatsoever in a system similar to that

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<sup>15</sup> This phenomenon is translated, roughly speaking, into the Brazilian legal world, as “judicial activism”.

described by Kafka. Anyway, in all the cases mentioned, the system ultimately ends up relegating the individual to the ultimate plane, precisely when it should in *all* cases be the main object of protection of the system (which, in fact, is the only reason justification for the very existence of legal institutions).

## **5 THE RIGHT TO FORGET: CAN WE START OVER?**

### **5.1 The publicity of procedural acts and the right to oblivion**

The literature of Franz Kafka, in addition to showing us the horrors of the judicial process badly conducted under the auspices of a highly bureaucratic and inefficient state system, leads us to a final question: considering that the judicial process is, as a rule, public (at least in democratic regimes) and accessible to all and considering that the right to information has constitutional stature raised to the condition of *fundamental guarantee*, a particular point is questioned here: a defendant, regardless of whether he / she is actually guilty or convicted for any reason, would have been entitled to the “social forgetfulness” of the case? The guarantee of information and publicity of public acts can unrestrictedly overlap with the fundamental rights of privacy, private life and honor, justifying the perpetual blemish that causes a judicial process in the life of an individual (although there are legal institutes such as the moral damage)?

The right to forgetfulness, also known as the ‘right to be left alone’, is the prerogative of a person to not allow a fact – criminal or not, regardless of being true – to occur at some point in his / her life, is exposed to the public, causing suffering. One of the most emblematic events on the subject was the “Lebach case” (*Soldatenmord von Lebach*) led by the German Constitutional Court, in which three men were convicted of the death of four German soldiers in 1969 in the town of Lebach. After serving his sentence and about to leave the prison, one of the men learned that the press would send pictures of the convicts on a television program and file an injunction. The German Constitutional Court ruled that the press could not exploit the fact indefinitely given the constitutional protection of the criminal’s person and his private life. It is

interesting to note that this case, whose core is precisely the right to forgetfulness, will never be forgotten.

The question that is raised here is whether the right to oblivion in a society with hyperthymic<sup>16</sup> syndrome can really be possible. Perhaps the system does not really want to “forget”, and the condemned person will be forever indebted to society. Notable example is the case of former football player Bruno, then Flamengo goalkeeper, convicted of killing the model Eliza Samudio from Paraná. Hired by the Boa Sorte football team in March 2017, the sponsors promptly demanded that the goalkeeper be dismissed, and the team’s website was hacked in protest of the hiring. Here is the clear model of a society that never forgets, however democratic it may be.

This phenomenon, moreover, has been well known for millennia by Eastern peoples: its historical existence, recorded in several passages of Japanese literature, is evidenced by the fact that the punishment of the offense reaches not only the condemned person, but the whole family, throughout generations. Although Japan abandoned this practice only a few decades ago (more precisely after the end of World War II), North Korea, in turn, still promotes the collective condemnation of entire families for crimes as simple as “sleeping in the presence of the great leader” – this, incidentally, is a capital crime executed by firing squad<sup>17</sup>. It is enough that a single member of the family commits a crime for the brutal “rule of the three generations” to be applied: if an individual is found guilty of the system and is sent to a concentration camp (yes, they still exist), the same fate will reach the whole family, in addition to the two subsequent generations that are born there, thus remaining for life (The Telegraph, 2017).

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<sup>16</sup> According to the description, it is a “condition in which the individual presents a very high capacity of autobiographical memory”, being characterized by an episodic overly detailed memory. In other words, the individual is unable to forget any events occurring in his life. Available at: <<https://prezi.com/jhogz7yepfiw/sindrome-hipertimesica/>>. Access in: 4 jun. 2017.

<sup>17</sup> On April 30, 2015, the North Korean Defense Minister was executed with an antiaircraft battery shot in front of hundreds of people for having demonstrated “disloyalty to the president”. Available at: <[http://www.bbc.com/portuguese/noticias/2015/05/150513\\_coreiador norte\\_execucao\\_hb](http://www.bbc.com/portuguese/noticias/2015/05/150513_coreiador norte_execucao_hb)>. Accessed on: Oct 13, 2017.

## 5.2 Privacy in the present day: is it possible to forget?

Forgetting is as important as remembering. But how can we erase the traces of the plots experienced in an era that imprisoned the human in social networks? How can we embark on a new path to privacy mitigation? We live in liquid times, where values easily dissipate. Life has become public, and there are no more reserves. Given this, is it possible for the one who committed a crime not to be remembered? In an era in which the media becomes the largest of the courts, is it really possible to believe in the resocialization that the Brazilian penal system proposes, at least in appearance?

A recent example of non-forgetting was broadcast by the Brazilian media. Andreas von Richtofen was known for the crime committed by his sister, Suzane Von Richtofen, who, along with her boyfriend, in 2002, murdered her parents (G1, 2017). Even after completing a bachelor's degree in Pharmacy and Biochemistry and a Ph.D. in Chemistry at the University of São Paulo, Andreas is referred to only as the 'brother of Suzane'. In fact, he was recently found in a neighborhood in the south of São Paulo, in a supposed psychotic outbreak, and was hospitalized in the psychiatric ward of a public hospital. The entire Richtofen family will probably always be remembered for the crime of a single member (Suzane). It is worth remembering that, when progressing to the semi-open regime in 2014, fearing retaliation by the population and extensive media coverage, Suzane refused to leave the prison. There is even the expectation of a movie about her life. Regarding the right to forgetfulness, François Ost (2005, p. 160) writes:

Since, being a public character or not, we were thrown before the scene and placed under the projectors of today – often, we must say, a criminal actuality – we have the right, after a certain time, to be left alone and fall into oblivion and anonymity, which we never wanted to leave.

So it can be said that cases with greater media exposure tend not to be forgotten. On the other hand, the Brazilian Constitution guarantees the right to private life (privacy), intimacy and honor (article 5, X). It is also stated that the right to oblivion is a consequence of the dignity of the human person (article 1, III, of CF / 88). In fact, there is a clear contradiction between the “*real*” world and the “*should-be*” world, a fact

that needs to be discussed and rethought, because, ultimately, the freedom of one individual should not violate the freedom of others.

## 6 FINAL CONSIDERATIONS

In methodological terms, it is understood that every area of science, in order to be elevated to the category of autonomous branch, must be able to evidence its foundation through its own tools – that is, without having to resort to external instruments. The legal sciences do not escape the rule. However, law cannot fail to dialog with other branches of knowledge; it is necessary that the operator bears the inherent passion of the human spirit in order to fulfill the social purpose that the craft demands. For this, it is important to have an open mind: Kafka's view of the law must be allowed, a literature that points to the danger of incurring inefficient and bureaucratic justice (a perverse side effect of the principles of impersonality and equality). Far more than just criticizing the legal system *for* its defects, it is a question of (re) thinking the structure *from* its deficiencies, insofar as law, as a social construction that is, and ultimately reflects imperfection of the human condition itself. Every man is a universe in himself, and so he must be considered by the system before any decision-making is taken. Considering the perpetuity of information in times of the internet and the astonishing capillarity of social networks<sup>18</sup>, it should be borne in mind that the process implies a series of consequences that transcend the mere juridical sphere of the accused, ordinary people whose lives will be irremediably marked by a permanent record that will surely condemn them to perpetual suffering.

Thus, it is essential to promote reflection on the values that have traditionally guided the most diverse legal systems, in order to (re) humanize the common sense of justice.

Only a passionate look at legal activity is capable of reinterpreting concepts and reorienting institutions, but for this to occur, the debate must be faced with the courage to centralize the system in the subject rather than in the lawsuit.

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<sup>18</sup> Not forgetting, too, the role (still) played by traditional media channels.

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