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A SUPREMELY VULNERABLE MESSAGE: THE CASE OF VEHICLE ADHESIVES AND THE TRACES OF KAFKAESQUE CRIMINAL JUSTICE IN BRAZIL

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ABSTRACT: This paper has the purpose of discussing the Kafkaesque traces of Criminal Justice in Brazil. It does so based on the comparative analysis of an odd, atypical lawsuit (the case of vehicle adhesives). It also analyzes the short story *An Imperial Message*, by Franz Kafka. The complete study is accomplished under the perspective of the trans-disciplinary field of Law and Art.

KEYWORDS: Law and Art; Criminal Justice; Kafkaesque.

1 INTRODUCTION

This paper has the purpose of analyzing the Kafkaesque trait of some bizarre lawsuits in the Brazilian Criminal Justice. To accomplish that, a comparison is made between a very atypical Brazilian case (the case of vehicle adhesives) and the short story *An Imperial Message*, by Franz Kafka.

The main legal and criminal matters of this investigation have already been extensively discussed in the legal doctrine: the recent

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phenomenon of over-incarceration in Brazil (Carvalho, 2015), the decisive contribution of the War on Drugs to that phenomenon (Carvalho, 2010), the differential impact of drug policy on the numbers of female incarceration (Helpes, 2014), the excessive use of preventive detention in Brazil (Santos, 2015), and the recent awakening to the problem of incarcerated mothers and pregnant women, including collective *Habeas Corpus* (HC) 143,641, judged by the Supreme Federal Court (Brazil, 2018).

Analyzing legal discussions in art, especially in the writings by Franz Kafka, is also nothing new (Rosa, 2013, p.9-14). Hence the use of the adjective “Kafkaesque”, common to refer to absurd situations, even ones described in the work of previous literature writers (Borges, 1999, p. 96), which are usually willful legal decisions that affect citizens in their relation to the Police and the legal system.

Thus, this research is justified by the identification of a concrete case that took place in the state of Bahia, in Brazil, in 2018. It is a notable case due to its atypical characteristics. It is then compared to the narrative of the short story *An Imperial Message*, by the Czech writer, with the purpose of tracing the Kafkaesque aspects of Criminal Justice in Brazil.

2 THE CASE OF VEHICLE ADHESIVES

On December 19, 2018, around 11:40pm, in front of the police station in the city of Camacã, in the south of the state of Bahia, Brazil, Maria (fictitious name) was seen tearing pieces of the identification stickers from the civil police vehicle with police plate PKE 7012. For that, she was arrested in *flagrante delicto* for the crime stated in art. 163, Sole Paragraph, III, of the Penal Code (qualified damage, for harming a public good), subject to a penalty of detention from six months to three years.

According to article 313, I, of the Criminal Procedure Code, as a rule, only intentional crimes with a maximum sentence of more than four years admit preventive detention. However, article 313, II, of the code authorizes pre-trial detention for repeat offenders in willful crimes, and Maria was sentenced, on December 21, 2015, to 5 (five) years of imprisonment, under semi-open regime, for drug trafficking, due to

possession of marijuana at her residence, also in Camacã, on April 3, 2015, and, at the time of the new arrest, in 2018, she was on probation.

On December 21, 2018, based on the guarantee of public order and due to recidivism, the arrest in the act was converted into preventive detention.

On January 9, 2019, the Public Defender's Office requested the revocation of the preventive detention, due to the disproportionality of the measure in the face of the act performed. Alternatively, in case of revocation rejection, it declared the fulfillment of the preventive detention as house arrest, due to the proven presence of two daughters under the age of 12.

Article 318 of the Criminal Procedural Code, in 2016, was amended to provide for the possibility of replacing preventive detention with house arrest for women with children under 12 years of age, and for men who are solely responsible for children under 12 years of age.

To ensure the effectiveness of this provision, the Federal Public Defender's Office filed the collective *Habeas Corpus* 143,641 at the Federal Supreme Court, which was tried on February 20, 2018, with the following provision:

14 – Order granted to determine the substitution of preventive detention for home detention - without prejudice to the concomitant application of alternative measures provided for in article 319 of the Criminal Procedure Code - of all women prisoners, pregnant women, puerperal women or mothers of children and disabled people, under the terms of article 2 of the Child and Adolescent Statute and the Convention on the Rights of Persons with Disabilities (Legislative Decree 186/2008 and Law 13.146 / 2015), listed in this process by National Penitentiary Department and other state authorities, as long as this condition persists, except for cases of crimes committed by them through violence or serious threat, against their descendants or, even in extremely exceptional situations, which must be duly substantiated by the judges who deny the benefit.

15 – Extension of the official order to all other women prisoners, pregnant women, mothers or mothers of children and persons with disabilities, as well as adolescents subject to socio-educational measures in the same situation in the national territory, subject to the above restrictions (Brasil, 2018).

Following this decision, the Criminal Procedure Code was changed, with the inclusion of article 318-A, in December 2018, ordering the substitution of pre-trial detention for house arrest for women who are mothers or guardians of children or disabled people, provided that their

crimes did not involve violence or serious threat and had not been committed against their descendants.

Despite that, on January 21, 2019, the request for revocation of pre-trial detention, and the substitute request for house arrest, were rejected, with the argument that motherhood alone was not enough for house arrest, and that it should be indispensable to demonstrate that the child depended on the mother's care. In addition to that, it was argued that Maria had been persistent in the practice of crimes and posed a risk to public order.

On February 1, 2019, the Public Defender's Office of Bahia filed *habeas corpus* in the Court of Justice of the State of Bahia, arguing once again that the arrest was disproportionate to the act and, alternatively, that, the defendant being the mother of two daughters under the age of 12, it would be appropriate, in the worst-case scenario, to replace preventive detention with house arrest.

On February 4, 2019, the injunction was dismissed and, on April 4, 2019, the *habeas corpus* order was denied, with the argument that, since the defendant is a repeat offender, there would be no possibility of applying alternative precautionary measures to imprisonment, preventive detention being a manifest need, and that, with regard to the request for house arrest, it was not proven that the children indicated in the records needed exclusively maternal care.

However, a week before the order was denied, on March 27, 2019, the same judge decided to revoke the preventive detention, stating that:

It came to the attention of this Court that the accused is in poor health, needing medical treatment, which she has been doing outside the prison unit, with no success. Thus, she needs better care. In fact, the conduct attributed to her is not one of those carried out with violence or serious threat to people. In addition, analysis of the case records shows that she does not have a criminal record (Bahia, 2019).

Finally, on May 4, 2019, after the condemnatory request of the Public Prosecutor's Office of Bahia in final allegations and the absolving request by the defender, the defendant was acquitted by the application of the principle of insignificance to the conduct for which she was denounced.

3 AN IMPERIAL MESSAGE

An imperial message is a short story written by Kafka. It was made public in Germany in 1920, in the volume entitled *A country doctor: short stories*. The Czech author had worked extensively in the preparation and publication of this work, which he regarded as a kind of literary testament (Carone, 2003). The story, an example of what he himself called *kleine prose* (small prose), reflects the genius' style: circular, encrypted, hyperbolic, parabolic (Pucheu and Trocoli, 2013).

Carone (2014) highlights:

Kafka is a realistic author who created a new way to account for a new reality, because the world had become so obscure, so insoluble, that he needed to make a literary construction to account literarily for that. So, he invented a narrator who does not know about the narrated things, and that narrator is us.

In just over a page, and less than 40 lines, Kafka tells the story of a message from a dying emperor, entrusted to a faithful messenger who will never reach his destination, the hands of a distant man who will never know the message that could be known only by him...

In his allegory, which is somewhat Kafkaesque itself, about and in defense of developing hermeneutics of Kafka's work, Agamben (2013, p. 134) mentions something that fits very well with the parable of the short story above: "The most diverse legends are told about the unexplainable. The most ingenious one [...] explains that, being inexplicable, it remains as such in all the explanations that were given of it and will continue to be". Like in the works of Kafka (the inexplicable "it"), the message is not explained: its presence and its existence are uneasy because it is not reduced to a category of being; it is not apprehensible by language, by current communication, from the sender to the receiver, and from this to the recipient; in this sense, the message is affected by the circumstances of the environment, like a shadow, this existence, this elusive presence ...

It would not be exaggerating to say that, in the story, the message itself is the leading role. Through this message (which we know exists, but whose content we do not know), Kafka describes the process of objectifying the subjects of law (the citizens) before the authority (the emperor, the State). As is known, in other works, Kafka deepens this

theme, signaling that the subduing authority is the very authority of the law (Kafka, 1999a; 2016).

Ricardo Taxi (2018, p. 140), in attempt to identify the “mythical element of modern law” from the work of Kafka,

seeks to show how Kafka’s literature can, based on the interpretation defended here, play an important role of critical resistance, as it reveals the elements of violence, arbitrariness and contradiction that permeate the modern and contemporary experience of the law.

In that same story, Kafka exposes the absurd situation of a message that, even being ruled over by maximum authority, does not reach its goal, it never reaches its recipient. This theme too, the theme of alienation, deviation, is used by Kafka in his other works already mentioned (Kafka, 1999a; 2016).

Here, it is important to note that, for the man whom the message is destined for, but whom the message will never reach, for him, in order to know the message, it would be necessary to go see the dying emperor. But the man is not allowed to go to the palaces, let alone have access to the mortuary chamber... It would not even be possible for him, in case he met the faithful messenger halfway, in such a hypothetical meeting, it would never be possible to communicate the message, because the messenger, due to his loyalty to the emperor, would have to surprise the man, not because he should be surprised, but because perhaps the messenger would not recognize him, and would take him for an impostor and shoo him away, in case the man was not where he was supposed to be. This impossibility of communication and access allows to characterize the message as a stillborn order, emanating from an authority in which the authority itself vanishes, entrusted to a messenger who cannot communicate it, destined to a subject who will never know what such an order would reserve.

For Agamben (2013, p. 25), the “apparent death, that is, the return from where we have never been, [is linked] to language, insofar as the word has never been in the non-linguistic place from where it, however, returns”. Similarly, but with different terminology, Pondé (2008) points out that Kafka is able to diagnose the

fracture of meaning in modernity: this fracture means, in addition to the collapse of metaphysical *mechanisms*,

the *new* modern condition of not having the necessary *hermeneutic naivety* onto which the web of meanings is constructed.

Kafka allegorically introduces the paradox of an emanated but incommunicable order, revealing that the authority of the dying emperor is not passed on to his faithful messenger, nor does it reach the distant subject. The “message” of the message is that authority, when centralized and concentrated, tends to be reduced to pure form. As Pondé (2008) sees it, “It is a pure, formal ineffable thing, without ecstasy. [...] This nullity is materialized in the overwhelming sensation of ontological exile, because to be a lonely and miserable shadow is not having a being trace at all”.

In the short story, the verbal form “assist” represents the death of the emperor, as an ongoing event. That is, the authority, centralized, concentrated, is disappearing with the death of the emperor. It is an omen that, when the person of the issuer dies, his order will become a pure form, as a hermetic object.

The apparent visibility of the emperor’s death scene, described in the excerpt “all the walls prevented view had been broken down”, demonstrates that an apparent visibility is not revealing, on the contrary, it reveals nothing, it is obscure (this is the allegory that publicity of state acts does not guarantee its effectiveness). As the message was entrusted to the faithful messenger (in turn, an allegory of the state agents with competence to communicate the state acts), only he knew it, but he could not communicate it except to the distant subject (the citizen entitled to the right he cannot exercise). Both (the messenger and the man) only apparently have authority. Once again: the real authority lies in the message...

And so the message circulates in the palace, an image that indicates its imprisonment, within castle walls, “for millennia”. The hyperbole represented by the word “millennia” indicates the excess of time of the state processes, which do not fit in one lifetime, neither the life of the recipient, nor the life of the messenger (the authority of the law is elusive, neither state agents nor citizens can reach it, and when they seem to achieve it, they realize that they cannot access it, nor understand it). Kafka takes up this argument in the aforementioned short story *Before the Law*, which is also an excerpt from *The Trial*, one of his unfinished novels (Kafka, 1999a; 2000, p. 261-263).

In the final scene of the story, the subject man waits placidly, waits in vain for the message to reach him, as if someone who curiously knew himself to be the recipient of a message, but did not know and will not know its content. Here Kafka shows all his pessimism about the possibility of power. This anticipates what Foucault would say years later: power is not to hold. The difference is that, for Foucault, power, even though it cannot be possessed, can be exercised; as for Kafka, power is indomitable, because it is power that dominates (the subject man, the citizen, the recipient, the holder of the message, the authority of the law, none of them can exercise it; no-one can understand it, no-one knows it, no-one can exercise the power they were told they had) (Dreyfus and Rabinow, 1995, p. 202-227; Kafka, 2016).

As Pondé (2008) points out, Kafka, alongside so many other Jewish intellectuals, clearly manifests a kind of “Jewish conscience” of belonging / forgetting, inclusion / exclusion, power / non-power:

a particularly negative [...] awareness of modernity’s failure to deliver on its promises. [...] the Jews, in the wake of the philo-Semitic “Napoleonic optimism”, radically adhered to modernity, insofar as it represented, finally, the much-desired Western citizenship. But soon – and here dwells the privileged awareness – these Jews realized that the price for existential modernity was the dissipation of their very Jewish identity.

This dialectic of power for Jews is evident in their language: according to Bonder (2011, p. 7), for Jews, “It is not possible to ‘be’ without ‘to have’, or rather, it is not possible to ‘be’ without being constantly subject to the question ‘to have or not to have?’”, and, still according to Bonder, in Yiddish, the word “question” has four translations: *frage* (question), the “physical sphere” of possession, which can be represented by the sentence “what is mine, is mine; what is yours is mine”; *shaila* (ambivalence), or “emotional sphere”, “what is mine, is mine; what is yours is yours”; *kashia* (doubt), or “intellectual sphere”, “what is mine is yours; what is yours is mine”; and *teiku* (paradox), or “spiritual sphere”, “what is mine, is yours; what is yours is yours”. In that aspect, the message in Kafka’s story is something you can have, but not hold; and its recipient, the subject man, by not possessing it, is unable, and by being unable, is not.

4 KAFKAESQUE TRACES OF CRIMINAL JUSTICE IN BRAZIL

Kafka's short story, this parable and its allegories, serve as a hermeneutical key to identify the absurdity and excesses of the Brazilian case of vehicle stickers. Hence the idea that this case is an example of the Kafkaesque features that characterize Criminal Justice in Brazil.

Jorge Luis Borges, in his prologue to the Spanish translation of *Metamorphosis* (2010, p. 139-143) maintains that there are two obsessions in Kafka's work: subordination and infinity. The infinity of hierarchies and the impossibility of access lead Abel Posse (2017, p. 294) to summarize that, in Borges' view, Kafka's work presents "life as an absurd wound".

At first glance, the absurdity may seem confined to the unrepeatable peculiarities of an atypical case, and therefore of little use. However, it is representative, like Kafka's most terrifying stories, precisely because it stands for the hyperbolic manifestation of some recurrent problems in criminal practice.

Indeed, in the case under analysis, parallels could be drawn between the dying emperor, the Supreme Court and the Criminal Procedure Code (and, by extension, the National Congress); the faithful messenger, the great ones of the kingdom and the state agents (Bahia's Police, Public Defender's Office, Public Ministry, Court of Justice, and the First-Degree Court in Camacã); the distant recipient and the citizens (Maria).

As seen, neither the *habeas corpus* order issued by the Supreme Court, nor the Criminal Procedure Code rule after its amendment, when handled by state agents, in the clashes of the judicial system, none of them managed to guarantee the full exercise of Maria's right to freedom. Her situation of vulnerability, both in the judicial system and in the broader social system, has only worsened, either because her condition as a mother had been disregarded, or because her condition as a repeat offender had been overestimated.

The order / norm of the case, like the message sent in Kafka's narrative, is, on the one hand, marked by clarity (since it is known that it exists and was issued by the competent authority: there the emperor, here the Supreme Court and the National Congress), but on the other hand, it is shrouded in obscurity (since the content of the message is not known and will not be known and, similarly, any effectiveness is dodged from the order / norm). This ineffectiveness of the order / norm, like the

inaccessibility and incommunicability of the message, results not from its intrinsic characteristics, but from the infinite possibilities of circular (re) interpretations (there, the curiosity of the “great ones of the kingdom”, which prevents the movement of the faithful messenger; here, the divergent, conflicting performance of state agents).

In this case, the state agents did little to make that order / norm effective. Aside from the Public Defense’s work, in providing legal assistance to the needy person, the actions of the other state agents were aimed at removing Maria from the freedom that the Supreme Court’s order and the Criminal Procedure Code’s norm guaranteed for her.

Not even the “higher” authority (the Court of Justice) allowed the message to flow; on the contrary, when denying *Habeas Corpus*, it endorsed the ban imposed by the “inferior” authority’s decision. The Court of Justice did not realize that, a week earlier, the First-Degree Court had revoked the preventive detention, not because of Maria’s right, but because of hermeneutical institutes and techniques of the legal system (application of the principles of insignificance and proportionality, by weighing the severity of the conduct in view of the damage caused). It should be noted that such a hermeneutic effort, which served to revoke the prison and subsequent acquittal and therefore removed the imposition of any unfavorable legal consequences, was always available to the authorities, but it was only used when Maria’s stay in prison became a burden on the judicial system itself, which brings another Kafkaesque refinement to the case.

Even among state agents (“the great ones in the kingdom”) there were power struggles, which set the order / norm (the message) apart from Maria (the distant subject). In these disputes, the Public Defense resembled the faithful messenger, because, when confronting the other state agents, despite its competence (innate strength, reinforced by the “symbol of the sun”), it felt impotent and found itself intertwined by the disagreement of their peers (whose “resistance” rendered “their efforts” “vain”).

Thus, somehow the actions of some state agents (Bahia’s Police, Public Defender’s Office, Public Ministry, Court of Justice, and the First-Degree Court in Camacã) made it difficult and hindered the authority of the law (the Supreme Court’s order and the Criminal Procedure Code’s norm). Unlike the faithful messenger (the Public Defense), the great ones of the kingdom were not so faithful to the imperial authority (the Supreme

Court and the National Congress). It should be noted that it is not a question of not being able to think differently, of restricting hermeneutic freedom, but of observing the deliberate refusal to comply with an order / norm guaranteeing a right. Finally, the dying emperor had entrusted the faithful messenger with the mission of carrying the message to the distant subject, but the great ones of the kingdom did not allow it, and so they defied the imperial authority.

Maria, in turn, represents yet another of the numerous cases of hypervulnerability or intersectionality, thus understanding the sum of situations in which practical citizenship (the exercise of rights) does not reflect the rightful citizenship (ownership of rights). Facing the judicial system, not even the fact that Maria performed an act formally framed to the penal type of qualified damage, a minor crime, and being the mother of two children, circumstances that strongly recommend the adoption of alternative measures to prison, either during the process, whether after the conviction, none of those facts balanced the relations and effects of power between Maria and the State, whose response was to amplify the negative consequences of the recurrence (which, by the way, was not even a specific recurrence).

The most secure field of the legal doctrine has long pointed out that the valuation of recidivism, to the detriment of the defendant, implies a violation of the penal principle of *ne bis in idem* (prohibition of double punishment for the same fact), and, more than that, in view of the broad consensus on the failure of the prison system (Bittencourt, 2011. p. 165-168), the only possible valuation of recidivism, consistent with this diagnosis, would be its framing as a mitigating circumstance. Whoever had lived the experience of the Brazilian prisons leaves them with greater difficulty in adjusting to social life than they had before entering (Carvalho, 2002, p. 61-70).

The case of Maria is an extreme example of the legal concept of *bis in idem*: less than four months after the fact, the Judiciary Power itself acknowledged the insignificance of removing vehicle adhesives and absolved her, by declaring very clearly that her conduct had not been criminal at all, but a minor civil illicit deed, harmful to public goods. Thus, the only circumstance that made her remain in prison for months was her first and only crime.

Summing up, Maria was a pre-trial detainee for three months, due to recidivism, and, at the end of the process, the same authority who had imprisoned her before the trial declared that she had not committed any crime.

The apparent inconsistency reveals two typical features of the criminal justice system. The first, pointed out by Howard Becker (2008, p. 162-163, translated), is that “people can be labeled as deviant not because they really broke a rule, but because they showed disrespect for the enforcer of the rule”. The second is the use of preventive detention as an anticipation of the sentence, under the pretext of “restoring the credibility of the institutions” (Lopes Jr., 2016, p. 666-667, translated), which was fought against by the guarantor discourse, and which, formally, became prohibited by article 313, § 2, of the Criminal Procedure Code, with the wording of Law 13,964 / 2019 (Brasil, 2019)

By the way, Maria’s recurrence shows her vulnerability not only in the judicial system, but, above all, in the broader social system, in which a past criminal conviction for drug trafficking has clung to her as a discriminatory mark. The subsequent preventive detention for damage to public goods accentuated this discrimination, as it disregarded the abstract gravity of the crime, and her motherhood.

As noted by Zambrano (2015, p. 247), relating the ideas of system, vulnerability and dehumanization:

The normative system fails to classify the human reality that escapes the pre-established order in its categories, as it also borders on criminal violence, although it is ambiguously located on the opposite pole. In this sense, the intersection between law and literature teaches that individual situations are always placed in that social, cultural, historical and economic kaleidoscope that conditions our deeds as much as our will.

Maria’s vulnerability, like that of every citizen facing the State, demonstrates how the relations and the power effects of the legal citizenship in Brazil materially exclude people, even when they seem to be formally included. This is because such relations and effects are subdued to hegemony, by the idea of domination, if not oppression. Maria, here, is the irresponsible insolent who deserves no pity, in fact, who deserves pity without mercy, custody without support, assistance without freedom.

Maria, like every citizen facing the State, especially Criminal Justice, is an object of regulation, but not a subject to be emancipated.

It is interesting how Maria, in a short time, lived the most typical and then the most atypical of experiences regarding female incarceration. Her first conviction was for drug trafficking, a crime attributed to 64.48% of women arrested in Brazil, between pre-trial and sentenced cases (Moura, 2019, p. 46). When leaving prison to serve the sentence in house regime, the stigma of conviction, in the case of vehicle adhesives, took her to the opposite extreme: only 2,752 of the 26,952 women prisoners whose criminal type was declared were answering for property crimes without violence, that is, 10.21%, and only 26 of them, that is, 0.096% of imprisoned women across the country, in the most recent survey, were in custody for “other property crimes” (Moura, 2019, p. 45). This latter group includes qualified damage and other typical figures of little forensic incidence, such as indirect extortion, the suppression or alteration of marks on animals, the simulated duplicate, the inducement to speculation, the fraud in the trade of metals and precious stones and the irregular emission of “warrant”.

It must be made clear that both the collective *habeas corpus* and the subsequent amendment of the Criminal Procedure Code were received with various objections by the doctrine, under the formal aspect, regarding the possibility of attributing binding effect to a decision taken, by majority, by a group of the Supreme Court, not fulfilling the requirement of an absolute majority of the members of the court, as with respect to the court’s competence to decide directly on arrest orders issued by first-degree judges (Lordelo, 2018). Also, it received objections of material order, since its tone of apparent automatic recognition of the right for all women who are in the same situation would supposedly deprive the judge of the assessment of specific case circumstances, freeing people who can risk the public order.

As a result of this, a restrictive interpretation was consolidated in the jurisprudence, which, as in the case of Maria, requires proof that the mother’s care is indispensable for the child, and believes that the availability of other family members would supply the need for the

presence of the mother and therefore would make the grant of house incarceration unnecessary.

It is quite possible that the great ones of the kingdom have the sincere conviction and good reasons to prevent the delivery of the emperor's message, to deny his arrival to the subject man, but it cannot be denied that everyone knows of its existence, recognizes its authority, and was warned of the need for its delivery.

Regardless of their good reasons and sincere convictions, it is clear from the beginning that the conduct of pulling out the adhesive identification signs of an official vehicle would not authorize the treatment of Maria's case as the exception to the house arrest rule provided for in the *Habeas Corpus* and omitted by the Criminal Procedure Code.

Not only does the disproportionate nature of liberty deprivation stand out: the case of vehicle stickers is also a notable warning about the limits of the legal security promises of legal positivism, since it would be difficult to formulate clearer normative texts or court decisions *erga omnes* more evidently applicable to the case.

In this regard, José Rodrigo Rodriguez (2012, p. 136, translated) states that “depending on the regulated object, an open normative text can produce more legal certainty than a closed legal text”. According to the author, very detailed normative texts, loaded with specific predictions, can lead to a “rules game”, which could justify any type of behavior, and thus “the effect of regulation ends up being contrary to the objective set by the legislator and this paradox harms legal security itself” (Rodriguez, 2012, p. 136, translated).

Thus, given the impossibility of denying the incidence of article 318, V, and article 318-A of the Criminal Procedure Code to any specific case, such as that of Maria, in which house arrest does not seem to be the recommended measure, the Judiciary tries to interpret article 318, Sole Paragraph, of the same code, which imposes on the judge the requirement of suitable evidence to replace preventive detention, so that the “suitable evidence” starts to encompass not only the legal hypothesis (children under the age of twelve), but also some circumstances that were not

required by the rule (effective custody of the child or need for maternal care), whose specificity apparently brings security to the defendant.

Releasing Maria, only when she became a burden, and the subsequent recognition of the legal and penal insignificance of the removal of the adhesive of the Civil Police vehicle in Camacã, are the evidence that the message (of the order from the Supreme Court and the norm of the Criminal Procedure Code) never reached their destination, despite their indisputable clarity

5 CONCLUSIONS

What is seen in this case, as in so many others, in addition to the oddity of the prison, of the complaint, of keeping the prison, of denying *habeas corpus* and of the consequent ineffectiveness of the right to freedom, what is also seen is the recurrent overload of the Judiciary, in the criminal sphere, to solve a conflict that the legal system has been gradually managing in an alternative way, in view of the relationship between the severity of the deed, the extent of the damage and the severity of the sentence. It is not a question, therefore, of punishing for insolence, but of not punishing someone for a deed that did not represent social risk whose control would demand such a solution.

The fact (actually, the succession of Maria's misfortunes) reveals that not only is she (Maria), nor also the state agents, but the order / norm itself, the message itself, is supremely vulnerable. Supreme because they emanate from the maximum authorities; vulnerable because, however, they are not effective.

Therefore, the legal system itself is vulnerable. Even if recognizing rights, conferring competences and providing for skillful solutions to solve problems of the broader social system, the environment of the judicial subsystem attracts such a prerogative to itself. Thus, the problem is solved through its characteristic, hermetic, hegemonic language, as is the case with technical instruments and procedures of legal discourse.

Notwithstanding the lack of elements to substantiate a thesis, there seems to be enough signs to suggest the hypothesis that, through the legal discourse, power dominates, and it dominates over whoever embodies

power (the emperor, the state), or what objectifies power (the message, the law). What is more, power is not possible to be held, and it is not exercised only in one sense (even in palaces, powers are not only exercised from top to bottom, nor from bottom to top, but in various ways, in different ways, in various senses, in levels, or networks, or systems; the more influence is exerted on these systems, networks or levels, the broader the power is exercised and the greater the authority of the person who exercises it becomes).

Kafka highlights the paradox that this authority, in its ultimate expression, is but a mist, the last breath of a dying emperor. Such a viewpoint is just a clairvoyant finding. The genius does not point to a hopeful exit. On the contrary, what he says shows the impossibility of communicating the message in the face of the obstacles that the great people of the kingdom offer to the faithful messenger, who will never fulfill his mission. After all, desolate, is the distant subject man, “the tiny shadow taking refuge in the most remote distance from the imperial sun”.

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