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KAFKA, CRIMINAL LEGAL PROCEDURE AND INFORMATION ASYMMETRY

There are multiple paths one can consider when further developing modern criminal legal jurisprudence. In this contribution, we show that one of the ways to evaluate positive law is by carefully analysing literature which can be labelled *belles lettres*. As Posner argues, literature inevitably attracts academic lawyers as a possible source of their academic achievements [1. P. 14]. One of the most iconic works of literary fiction which can be read over and over again and still proves to be an enlightening writing from which lawyers draw their inspiration is Kafka's novel *The Trial*, written in 1914-15 [2. P. 214] and published in 1925. We shall therefore firstly inquire about the nature of the force which eventually crushes Josef K., who is the main protagonist. One cannot fail to notice the gradual demise of Josef K.'s self-esteem, sharp wit and his ability of logical reasoning, towards the end of the novel even his physical health. The catalyst for the gradual deterioration of body and mind is not fear of the punishment or even fear of the process itself. What slowly destroyed Josef K. was not fear, but rather him not knowing anything about his particular trial or pre-trial proceedings in which he was (supposedly) accused of committing a (supposedly) criminal act.

Although the reader can never be sure that he or she receives relevant information on the criminal procedure in Kafka's dystopian world because the meaning of law is always conveyed to Josef K. via an intermediary, there are multiple occasions where information asymmetry of the criminal procedure can be observed. This theme which is common to the whole novel starts at the beginning of the first chapter, when K. is arrested:

"You can't go away when you're under arrest." "That's how it seems," said K. "And why am I under arrest?" he then asked. "That's something we're not allowed to tell you. Proceedings are underway and you'll learn about everything all in good time." [3. P. 4.]

This claim by one of the policeman who arrest Josef K. is later confirmed by the supervisor:

"These gentlemen and I have got nothing to do with your business, in fact we know almost nothing about you. [...] As to whether you're on a charge, I can't give you any sort of clear answer to that, I don't even know whether you are or not. You're under arrest, you're quite right about that, but I don't know any more than that." [3. P. 15].

Later, Josef K. is not told where his first hearing is going to take place [Kafka. P. 40], and when it does take place, the hearing is not of a public nature [Kafka. P. 45]. Some further information on the procedure is revealed to Josef K. by his lawyer, Herr Huld:

"[P]roceedings are generally kept secret not only from the public but also from the accused. Only as far as that is possible, of course, but it is possible to a very large extent. And the accused doesn't get to see the court records either, and it's very difficult to infer what's in the court records from what's been said during questioning based on them, especially for the accused who is in a difficult situation and is faced with every possible worry to distract him." [3. P. 138].

It is furthermore revealed by his lawyer that defence is not really allowed to appear before the court, but only being tolerated [3. P. 137]. What is more, once the higher courts get involved, the defendant cannot even be contacted by his lawyer [3. P. 146]. The painter Titorelli later adds that the rules in the legal system "are [...] many and varied, and, above all, [some of them are] secret" [3. P. 181]. Further details on the functioning of the legal systems are revealed by the painter:

"The courts don't make their final conclusions public, not even the judges are allowed to know about them, so that all we know about these earlier cases are just legends." [3. P. 184].

These passages should suffice to establish a single thread that runs through Kafka's novel. Josef K. does not suffer because he is accused of committing a criminal act, he suffers because he is not able to acquire any viable information about the nature of the crime he is accused of, the proof of him committing the crime is not disclosed to him or his lawyer, he does not seem to have access to laws which would apply to his case. Nothing that he does could really affect the outcome of the trial [4. P. 74]. He is therefore compared to a fly, caught in a spider's net [1. P. 172]. What we face in Kafka's novel *The Trial* is the lack of legal certainty in criminal legal procedure [5. P. 29]. The same pattern can be seen in his short story *In the Penal Colony*, where the rationale behind such procedural rules are briefly explained: a trial where the defendant would be given the opportunity to defend himself would only bring forth confusion and lies by the defence [6. P. 5].

The conclusion that Josef K. was not crushed by the fear of punishment is important because it reminds us of the reason to treat the defendant not as a mere object, but a subject of the proceedings. It reminds us of the importance of (re)evaluating the extent to which measures of concealed (secret) investigation are legitimate in modern criminal law [7. P. 14]. It reminds us that legal principals like *ne bis in idem*, the principle of legality as well as rules regarding the disclosure of evidence and access to court files do not merely serve the purpose of ensuring a fair criminal legal procedure. They furthermore serve the purpose of ensuring that the trial itself does not break the defendant under its

sheer weight, i. e. because of the legal uncertainty that the defendant faces during the trial. And the only way to lift the veil of uncertainty is to ensure that information asymmetry is a rare exception rather than the rule of the criminal legal procedure.

Literature

1. Posner R. A. Pravo in Literatura, Pravna fakulteta in Cankarjeva Založba: Ljubljana 2003.
2. Virk T. Nedostopnost absolutnega, in: F. Kafka: Proces, translated by J. Udovič, Delo: Ljubljana 2004. P. 205-217.
3. Kafka F. The Trial, translated by D. Wyllie. E-book: <https://www.planetebook.com/free-ebooks/the-trial.pdf> (accessed 20. 1. 2019).
4. Ferk J. Pravo je "Proces", GV založba: Ljubljana 2007.
5. Ambrož M. Razsežnosti procesa. // Pravna praksa. – 2009. – №47. – P. 29.
6. Kafka F. In the Penal Colony, translated by Ian Johnston, GlobalGrey: London 2015.
7. Jenull H. Kafkov "Proces" – med literarno fikcijo in kazenskopravno resničnostjo. // Odvetnik. – 2009 – №46. – P. 14-16.

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УЧАСТЬ ПРАВОЗАХИСНИКІВ У ПРОЦЕДУРІ РОЗГЛЯДУ СПРАВ ЄВРОПЕЙСЬКИМ СУДОМ З ПРАВ ЛЮДИНИ

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