

## Review: Janko Ferk, *Recht ist ein "Prozeß": Über Kafkas Rechtsphilosophie* (1999)

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Janko Ferk, *Recht ist ein "Prozeß": Über Kafkas Rechtsphilosophie*. Vienna: Manz 1999, 116 pp.

[1] Is Kafka a "great Austrian writer" (p. 1), as the Austrian judge Janko Ferk states in the first sentence of his book on Kafka's legal philosophy? Who would dispute Kafka's "greatness", considering the vast amount of commentaries on him or that the word "Kafkaesque" made it into the dictionary. But would it not be a simplification to call the German-speaking Jew from Prague an "Austrian", especially with regard to this explosive mix of ethnicities present in Kafka's writing, crossing and disturbing each other? The coexistence of diverse traditions and cultures, one could argue, remains not only pivotal for the understanding of Kafka's prose in general, but particularly for Kafka's "legal philosophy" itself--if Kafka's prose even allows the use of such a monolithic term. Consider that after 1918, Kafka lived in the capital of the first Czechoslovakian republic and we know very well how important this new fact was for him. Could the central term "Law" with its oblique labyrinthine structure in Kafka's prose be separated from the particular Jewish, Yiddish, German, Austrian and Czech (legal) histories, traditions and cultures?

[2] Is Ferk's discussion of Kafka's legal philosophy "original" as Ferk confidently announces his own contribution in the preface? Does he fill a sourly needed gap in the research on Kafka and the law? Certainly, the recent research on this field by Ziolkowski(1), Heidsieck(2), Müller-Seidel(3) or Hebell,(4) to name a few, is still fragmentary on this highly important issue. For what is at stake is not merely the question of law itself, but also of its relation to ethics, storytelling, justice, power and violence, to authority, voluntary submission and resistance. In short, how does Kafka position himself within this complex network of interdependent forces? Will the legal expert Ferk provide us with the decisive insights into Kafka's legal theory? Ferk first recapitulates the main stages of the Kafka reception, from the first psychoanalytical discussion by H. Kaiser, to the famous essays of Jewish thinkers such as Benjamin, Arendt, Canetti and Camus, to the theological, existentialist and semiotic interpretations from the Fifties to the Eighties. He concludes that most interpretations of Kafka share a certain premises that tend to neglect the importance of law, power and the state for Kafka's writing (p. 16).

[3] Ferk repeatedly stresses that Kafka's writing consists of a juxtaposition of his biography (childhood, father, engagement with Felice Bauer) with the epochal crisis of his time (world war, widespread metaphysical doubts, legal reforms in Austro-Hungary). For Ferk, Kafka's incessant pursuit of truth and justice is the complementary flipside of his concise critique of the Austro-Hungarian legal system around 1914. Rather than rejecting previous biographical or theological interpretations of Kafka's *Trial* in favor of a positivistic legal analysis, Ferk attempts to reconcile both metaphysical and positivistic approaches: Josef K.'s struggle against a self-induced "inner court," combined with a desperate search for metaphysical truth runs parallel to K.s "real" arrest which points to Kafka's reflection on the changes in the legal system in Austro-Hungary between 1850 and 1914. Although Ferk never thematizes this inherent tension between metaphysical and positivistic notions of the "court," his whole analysis switches abruptly back and forth between both, thereby suggesting that the historical and theological analysis of justice and law in Kafka can and must coexist. But is it possible to avoid addressing this friction at all which after all is a rift in the scholarship haunting the distinct approaches to Kafka until today?

[4] When Ferk moves on to discuss Kafka's "spiritual biography", the influence of Schopenhauer, Nietzsche and the *Gnosis* for Kafka, Ferk's discussion is very much in line with the metaphysical-existentialist interpretations after world war II: the importance of the duality of world and God for Kafka, the human need for salvation and the importance of death as destiny and chance of man. In his discussion of Nietzsche's influence on Kafka, one would wish a reference to Bridgwater's important book *Kafka and Nietzsche* (5) and a discussion of the *Genealogy of Morality* with respect to Kafka's *Trial*. Ferk unfortunately does not explain what motivated his choice of analyzing the *Gnosis*, Schopenhauer and Nietzsche over Kafka's "spiritual companions", such as Kleist, Flaubert, Kierkegaard or Dostojewsky, whose texts are, as well known, filled with legal matters. The complete absence of all those writers from Ferk's book is quite astonishing. But even more astonishing is the almost complete omission of the Jewish or Yiddish background of Kafka's legal philosophy for which Benjamin, Scholem,(6) Grözinger,(7) Voigts (8) or Siegert (9) already laid important foundation.

[5] Ferk's book is clearly the strongest where it investigates the legal historical reforms in Austro-Hungary, here the judge from Klagenfurt is literally in his element. In those parts, Ferk formulates insights beyond Ziolkowski's and Heidsieck's investigations of Kafka and the legal context around 1914. Ferk illustrates the circulation of penal codes between England, France, Austro-Hungary in the Eighteenth and early Nineteenth centuries and draws convincing

parallels between the inquisitory legal proceedings which are based on secret and written investigations and the old Austro-Hungarian penal code before 1850. The reformed code of criminal procedure in 1850 and even more Julius Glaser's reforms of the code in 1873, which is still in place in Austria today, finally provided for a more modern code: In the modernized code, the role of judge and prosecutor are strictly separated, but more importantly, the secret investigative proceedings have to be resolved in an oral and public court hearing. However, as Ferk notes strongly, Kafka was acutely aware of the fact that some important inquisitory traces of the absolutist state remained intact even in the modern criminal codes. The figure of the *Untersuchungsrichter* and the secret investigative proceedings in Kafka's *Trial* testify to various atavistic features in modern law (secrecy, omnipotent investigation, inescapability of accusation, physiognomic-psychological judgement of body and character). Kafka's law professor in Prague, Hans Groß, arguably the founder of modern criminology, wrote the famous handbook for police and criminal investigators which served as a source for generations of detectives, crime story writers and novelists such as Kafka. Ferk discusses this handbook in a very compelling manner, Hans Groß' emphasis on the investigation of the criminal psyche, the creation of criminalistic evidence, the proper conduct of interrogations and above all, the omnipresent and all-encompassing attention, eagerness and diligence of the *Untersuchungsrichter*. Ferk could have referred to previous scholarship on Hans Groß and Kafka by W. Kittler (10) and Müller-Seidel (11). Especially the latter could have informed Ferk that A. Weber was on Kafka's dissertation committee, but was not Kafka's main supervisor.

[6] But unfortunately, Ferk does not prove the relevance of all of his observations for Kafka's *Trial*; precisely here would be the opportunity to connect the legal historical facts with the structure, narrative and composition of the novel. This is especially disappointing since, as Ferk and Kafka scholars know by now, that H. Groß arrested his son Otto Groß, one of the most prolific disciples of Sigmund Freud, in 1913 in Berlin in exactly the same fashion as Josef K. is arrested in the novel. This intriguing legal, psychoanalytic and literary triangle could provide for unique insights into Kafka's novel. How can Ferk, on the same page with his historical findings, write that we are dealing merely with K.'s metaphysical "inner court" (p. 39)? This court has certainly an important psychological dimension, but it is also, as Ferk himself demonstrated before, deeply inscribed in a historical legal discourse which cannot be simply subsumed "im Menschlich-Psychologischen" (p. 39).

[7] As soon as Ferk draws his first conclusions of Kafka's literary incorporation of legal matters, as soon as he attempts to demonstrate Kafka's appropriation of the legal controversies for the *Trial*, Ferk's conclusions become utterly trivial: Kafka's text was to illustrate a "Justizmord" (p. 41), it represents a document against the death penalty and renders visible a "klassischen Justizirrtum" (p. 60), "zumal ein Roman wie der *Prozeß* in summa ein Appell und Plädoyer für Menschlichkeit und Würde ist." (p. 68) Those humanistic conclusions are not only reducing Kafka's literary treatment of legal issues to a political critique, a rather poor one indeed, they are also fundamentally misleading, for Ferk confuses scattered statements made in the *Trial* with Kafka's own stance. The challenge of Kafka for law and a certain legal tradition consists of a particular literary analysis of the whole legal discourse which includes the liberal "Justizkritik" as impersonated for example by the traveler in the *Penal Colony*. The traveler is not "strictly" against the punishment-machine, as Ferk states (p. 69). One could rather argue for the opposite, that the traveler's initial critical objections against the machine turn more and more into a certain complicity and fascination.

[8] The pivotal question would rather be, how does Kafka distort his legal sources, how does the mutual import of law and literature function? Does the legal culture in Kafka's time follow the narratives of a certain legal *Mythopoetik* and how does he interrupt its premises with certain literary techniques in his novel? How is Kafka's literary writing itself intertwined with legal writing --setting laws, rules and norms for and within the literary institution? The remarkable and very disturbing trait in Kafka's novel is how "literary" the law becomes and to what extent legal matters determine the structure of his writing. Precisely here, Ferk's book falls apart into two separate fields instead of combining them, namely law as opposed to literature. Questions of injustice and legal history are strictly separated from the pursuit of inner truth, metaphysical guilt and the inner, psychological suffering. Rather than breaking the classical disciplinary barrier, Ferk confronts the reader at the very end with one of the most commonly held Kafka-stereotype: "Franz Kafka, dieser scheue, ängstliche und sanfte Mensch, schildert das Grauen geheimnisvoller Mißverständnisse sowie unverschuldeter Schuld und baut damit eine große Strafphantasie." (p. 105) It contradicts Ferk's entire project when he states that, philosophically speaking, there was only a spiritual world for Kafka (p. 105), then referring to the final judgement and to Kafka's religiosity. Those statements stand in stark contrast to recent scholarship on Kafka which incessantly convinces us of the inherent materiality and dirt of law, justice and punishment: that law has a matter, that law matters. Not many writers pointed to this crucial insight as much as Kafka: that the purity, majesty and neutrality of law is permanently compromised while at the same time remaining a very powerful phantasm.

[9] Although Ferk's entire project circles around law and injustice, he barely discusses the problem of authority, bureaucracy and power. Ferk mentions *en passant* A. Weber and the modern administered world, but here he could demonstrate to what extent bureaucracy and law are charged with religious sentiments. Consider the supreme law's promise of salvation, the investment of law in guilt, punishment and sacrifice or the cross-overs between bureaucracy and religion with respect to the question of perfection and completion or of obedience and hierarchy. It is certainly no surprise that Kafka himself in a letter to Brod mentions the uncanny closeness of modern bureaucracy to the essence

of human nature.

[10] Ferk admits that Kafka's penal system, just like Nietzsche's, rests on the notion of law as "Machtssystem" (p. 105) and that the failure of law elicits the "Gorgonenhaupt der Macht" (p. 30). Ferk also mentions Kafka's infamous father, the mystification of his authority (p. 58) Why does Ferk then never analyze the question of power and authority, especially since law is after all embedded in a discourse of power? Is law simply opposed to power, as Ferk seems to suggest, or is law itself power, including all the prejuridical, informal and normalizing micro-powers? Kafka might be one of the greatest theorists of law, because he confronts the reader with a decentralized, nomadic and postmetaphysical concept of law and power that is neither here or there, inside or outside, but deeply engrained in the entire social fabric. Ferk's firm separation of law and power, injustice and justice proves to be very questionable in light of Kafka's prose where not a single figure is above the fray? Can take the higher moral/legal ground and all agents belong to the lowest ranks.

[11] There is certainly no commentator's despair in Ferk's commentary on Kafka. He is completely untouched from postmodern political, legal or literary theories. Neither any insights of the "Critical Legal Studies" or the "Law and Literature" movements (which crowned Kafka to one of their standard bearers) enter his scholarship, nor cultural studies approaches such as from Gilman (12) or Anderson (13) nor positivistic findings of Kafka's legal context such as from W. Kittler, Müller-Seidel, Ziolkowski or Heidsieck. The reader will look for their contributions to the research and legacy of Kafka in vain. But the disadvantages of this omission show: although the Kafka scholarship in the United States and France belongs traditionally to the most progressive one, Ferk does not refer to a single English book on Kafka and only to one French book.

[12] Since Ferk stresses the theological dimension of the law in Kafka so strongly, one would wish for a discussion of the relation between law and the Cabbalah or to Jewish mysticism and the Yiddish theater. Moreover, a reference to the *Amtlichen Schriften* is missing as much as a remark to Kafka's work in the Workers Accident Insurance Bureau. Ferk quotes an array of secondary texts on Kafka, but he himself never engages with the literary texts he discusses. This might be the single biggest flaw of his book on Kafka's legal philosophy, for law and literature as much as Kafka himself maintain the closest ties to language. Ferk's avoidance, if not flight from textual analysis into commentaries on Kafka is most troubling. One could remind Ferk with the words from the priest, reminding Josef K.: "Du mußt nicht zuviel auf Meinungen achten. Die Schrift ist unveränderlich und die Meinungen sind oft nur ein Ausdruck der Verzweiflung darüber."

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(1) Ziolkowski, Theodore. *The Mirror of Justice: Literary Reflections of Legal Crisis* (Princeton 1997).

(2) Heidsieck, Arnold. *The Intellectual Contexts of Kafka's Fictions: Philosophy, Law, Religion* (Columbia, S.C. 1994).

(3) Müller-Seidel, Walter. *Die Deportation des Menschen. Kafkas Erzählung 'In der Strafkolonie' im europäischen Kontext* (Stuttgart 1986).

(4) Hebell, Claus. *Rechtstheoretische und Geistesgeschichtliche Voraussetzungen für das Werk Franz Kafkas. Analysiert an seinem Roman 'Der Prozess'* (Frankfurt/Main/Berlin/New York 1993).

(5) Bridgwater, Patrick. *Kafka and Nietzsche* (Bonn 1987).

(6) Schweppenhäuser, Hermann (ed.). *Benjamin über Kafka* (Frankfurt/Main 1981).

(7) Grözinger, Karl Erich. *Kafka und die Kabbala. Das Jüdische im Werk und Denken von Franz Kafka* (Frankfurt/Main 1992).

(8) Voigts, Manfred (ed.). *Franz Kafka 'Vor dem Gesetz'. Aufsätze und Materialien* (Würzburg 1994).

(9) Siegert, Bernhard, "Kartographien der Zerstreung. 'Jargon' und die Schrift der jüdischen Traditionsbewegung bei Kafka," in *Franz Kafka: Schriftverkehr*, ed. Wolf Kittler and Gerhard Neumann (Freiburg 1990), 222-247.

(10) Kittler, Wolf. "Schreibmaschinen, Sprechmaschinen. Effekte technischer Medien im Werk Franz Kafkas," in *Franz Kafka: Schriftverkehr* (see *supra* n. 9), 75-163.

(11) See *supra* n. 3.

(12) Gilman, Sander. *Franz Kafka. The Jewish Patient* (New York 1995).

(13) Anderson, Mark (ed.). *Reading Kafka: Prague, Politics, and the Fin de Siècle* (New York 1989) and *Kafka's Clothes: Ornament and Aestheticism in the Habsburg Fin de Siècle* (New York 1992).