

NOTES AND COMMENTS

A CAGE WENT IN SEARCH OF A BIRD: POSITIVE LAW AND FRANZ KAFKA

Arvind Narain*

Sanjay Bavikatte**

After wading through contracts property law and the CPC one begins to believe in positive law. The notion of law as a neutral system of rules, begins to become a part of you, and you begin to be a part of the law.

It is at this crucial juncture that Franz Kafka has a role to play.¹ Kafka struggles with our lawyers' minds as he attempts to bring us down to material reality, to change abstract rules into flesh and blood and to show us, what the world thinks of the law and lawyers.

It is not easy reading for a lawyer to be, to see law from the perspective of the victim. We are used to law from the perspective of the imperial law. Our law is sanitized. This article will deal with the dominant tradition in legal thinking as praxis, and will then look at Kafka's concept of law.

THE POSITIVE TRADITION

Hans Kelsen in 1934 wrote "Jurisprudence in a wholly uncritical fashion was mixed up with psychology and biology, with ethics and theology. There is today hardly a single social science into whose province jurisprudence feels itself unfitted to enter, even thinking indeed to enhance its scientific status by such conjunction with other disciplines. The real science of law is of course lost in the process."²

Kelsen continues by noting that "the pure theory of law separates the concept of the legal completely from that of the moral norm and establishes the law in a specific system independent of the moral law."³ Thus positivism as embodied in

* IV Year B.A., LL.B. (Hons.), NLSIU.

** III Year B.A., LL.B. (Hons.), NLSIU.

1 Franz Kafka (1883-1924) was a Czech novelist, who has written perspectively about the insane structures an individual has to confront in the 20th century, namely the laws, state of bureaucracy. His best known works are "The Trial", "The Castle" and a short story "The Judgment".

2 Hans Kelsen, *The Pure Theory of Law*, cited in M.D.A. Freeman, *Lloyd's Introduction to Jurisprudence* 291 (1994).

3 *Id.*

Kelsen is pre-eminently an obsession with the objectivity of law. The way this objectivity is sought to be achieved, is by separating law from politics.

WHAT KAFKA HAS TO SAY

In contrast to this heavy dose of legal theory from Kelsen, what Kafka has to tell us, in "The Trial" is a story. "The Trial" is the story of a man, Joseph K who is arbitrarily arrested, but is somehow, by the awesome force, which the legal discourse asserts on him, is forced to play the role of a guilty man, who even has to go through the motion of defending himself.

Joseph K is forced to engage a lawyer who does not believe he can secure his client's acquittal, but nevertheless takes up his case. As the novel grinds to a halt, we see Joseph K gets subtly trapped in the interstices of the law. Slowly but surely, he surrendered himself to the law.⁴

What we get in Kafka is a narrative in which the violence, the anger, and a feeling of utter meaninglessness is restored to the law. We see the law as a system which is capable of doing incredible violence to human being.

It is here that a reference to Marx becomes apposite. Marx was a materialist philosopher. He believed that any theory, which did not conform to the material conditions of reality, was a form of false consciousness.⁵ There had to a match between theory and practice, if the theory was not to be a tool of exploitation.

Kafka is talking about a situation, in which human beings find themselves. When Kelsen writes his pure theory, he floats free human history, both individual and collective. Kelsen talks in abstractions and abstractions according to the materialist tradition function as a tool of exploitation. When Kelsen talks of the separation of law from morals Kelsen is striving for objectivity and value neutrality. The possibility of such a position of claiming objectivity, itself being a political position is not raised by Kelsen.

It should be noted that law is politics, meaning that it has a certain purpose to serve in society. Thus the separation of law from morals, and the position that the law is "objective" serves to legitimize the existing legal order.⁶ By claiming objectivity when in reality, the interests of status quoist elements are being served Kelsen legitimizes the legal order.

4 Franz Kafka, *The Trial* 251 (1935).

5 See Louis Althusser, *The future lasts a long time*, 223 (1990). Althusser, a structuralist Marxist notes, a belief in a cleansing operation, which involves a critical education in the layer of ideological notions which are simply taken as given, thus allowing contact with reality without extraneous additions. It will be contended in this article, that it high time jurisprudence came in for a cleansing operation.

6 See the Critical Legal Studies school, Lloyd's jurisprudence provides an introduction. Also see "Critical Legal Studies: An introduction". 14 *British Journal of Law and Society*, 1-105 (1987).

It may be contended that positivism is a theory and Kafka writes stories, and that we cannot use stories to critique theories.⁷ The answer lies precisely in the fact that some theories match with stories, positivism does not. The theories we are talking about are those, which are based in materialist traditions. It gives just one example. Foucault believes that power is to be analysed as an effect, not as theory. The meaning being: Let's not have theories of power, let's see the way power operates in society.⁸ In the same way, let's not have theories of law, but let's see the way law operates in society. It is in this sense that Kafka has more to say on the living law than Kelsen.

THE INTERNALIZATION OF LAW

At one nightmarish point in "The Trial", Joseph K watches a law student carry a woman who works in the courts, to the examining magistrates at the latter's command. This is what Kafka has to say.

K ran a few steps after (the student) ready to seize and if necessary to throttle him, when the woman said: "It's no use, the Examining magistrate has sent for me, I daren't go with you; this little monster," she patted the student's face, "this little monster won't let me go." "And you don't want to be set free", cried K, laying his hand on the shoulder of the student, who snapped at it with his teeth. "No" cried, the woman, pushing K, away with both hands ...⁹

Another character notes, "perhaps none of us is hard hearted, we should be glad to help everybody, yet as law court officials we easily take on the appearance of being hard hearted and of not wishing to help."¹⁰ Finally when Joseph K is being led to be shot, he realizes something. He suddenly realized the futility of resistance. There would be nothing heroic in it were he to resist, to make difficulties for his companions, to snatch at the last appearance of life by struggling.¹¹

What is common to all three quotations, is that there is an effect, which law as an instrument of power, has on the different characters. In the woman there is a submission to authority, which is voluntary, in the law clerk, there is a realization of the way law changes his human nature, and in Joseph K it leads to a kind of resignation.

7 For another line of argument which will not be taken up here see Christopher Norris, "Law, Deconstruction and Resistance to Theory", 15 *British Journal of Laws Society*, 166 (1988). Following Derrida, Norris argues that there is nothing sacrosanct about philosophy. It is ultimately a language game. Hence the privileging of philosophy over literature is destroyed, thereby giving Kafka as much legitimacy as Kelsen or Hart.

8 Paul Rabinow (Ed.), *The Foucault Reader*, 4 (1984).

9 Franz Kafka, *supra* n. 4 at 65.

10 *Ibid.* at 79.

11 *Ibid.* at 247.

The point being made is that law functions on human beings. In terms of Foucauldian analysis, legal power just does not repress, it also creates. In this case, the legal discourse creates mindsets and ways of thinking and conceptualizing the world. The law functions as a mechanism within human beings. There is an internalization of authority, such that this feeling of surveillance becomes a part of the human being.

The effect of this creation of the human personality by legal discourse, is best seen in Joseph K's statement. There is a profound passivity in Joseph K as he surrenders himself to the law. The important point being that Joseph K is ideologically conditioned to give up. There is no possibility of resistance, because the legal discourse as described in "The Trial" functions to disempower.

The law is not a neutral set of rules, but a practice which works at the superstructural level, to create people who are disciplined by it. Law is thus a part of the larger societal process, which aims at creating docile, submissive, authority craving individuals.¹²

If we counterpoise this alternative jurisprudence outlines above, with Hart's, traditional jurisprudence, we see that what Hart talks about is "the internal point of view". What this in essence means is that "law is seen through the eyes of judges and lawyers. Thus for example, the question it addresses are those which concern judges and lawyers. Nothing that passes as (positivist) legal theory has ever adopted a victim of defendant perspective ..."¹³

What Kafka does is challenge this prioritization. Why should legal theory, be from the internal point of view? More fundamentally, if you espouse a viewpoint which says law should be seen from the "internal point of view", whose interests are being served?

The answers are clear. The aim of seeing law, from an "internal point of view" is just a fancy name for legitimizing law, using the tired tool of objectivity. The concept of objectivity which is sought to be privileged, is contested severely by Kafka's, depiction of the same positive law, which in its "objective" effect, lead to the submissive, authority craving individual.

CONCLUSION

Positivist law, is the cage in search of the bird. To a large extent, we as members of the legal world, are already within the cage. To a lawyer, jurisprudence means, that Bible of positive law, Salmond on jurisprudence.

12 M. Foucault, *Discipline and Punish: The Birth of the Prison* (1979).

13 Alan Hunt, "The Critique of Law: What is Critical about Critical Legal Theory", 14 *British Journal of Law; Society*, 1 (1987).

This article is an attempt at introducing resistance to the project of positive law, that of constituting us as subjects of laws empire. What has been sought to be shown, is the essential premises of positive law, with an exploration of their invalidity, based on the simple point that they describe human beings who don't exist, and then build by theories to legitimize status quoist institutions.

The aim is to open up a space within law, from where the primacy of law, can be resisted. Once the objectivity of law is exposed as a sham as has been sought to be portrayed through an analysis of "The Trial", the next step is to rethink our allegiances to the forms of the law.

The reason why a critique of positivist law is especially important in the India context is two fold:

Firstly alternative schools of jurisprudence, vis-a-vis feminism, critical legal studies or post modernism, have made virtually no headway in India.

Secondly, this absence of theoretical input, makes in very difficult to critique immoral action based on positivist notions. To give just one example, India's top lawyers had no compunctions about fighting against the government of India in the Bhopal gas leak case. We never had an article in a legal journal, of how the concept of the adversarial system with its purported aim of achieving justice, is just a facade behind which the interests of capital and the acquisition of capital are being served. There was never any critique of professional ethics, and the status quoist interest which are served by such a concept.

Hence this article ...