§ 14 From the Furies to 'Off with Their Heads': The Complex Inter-Relation between Law and Power in the Legal-Literary Canon

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I. Introduction

What is the relation between law and power? Philosophers and legal theorists have argued either that law limits power or that law is an instrument of power, many a times presenting these as two contradictory options. This article addresses the issue from a Law and Literature perspective- It suggests that a worthwhile approximation to an answer to this question can be found in poems, short stories, plays and novels, which illustrate the association between the two. It proposes that literature shows us how the relation between law and power is complex and ambivalent. The

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works to be discussed here teach us that while law controls power, it is also its source of legitimization. Paradoxically, when law is present in literary works, it is sometimes portrayed as an instrument of power[1]. This is because the aspects of power in the law may become prevalent and used against the individual. Therefore, law cannot be understood without power.

Literature is a good place to ask ourselves how law and power relate. In novels, short stories, plays and poems the reader can encounter the tension between law and power in a way that is particularly revealing. In this paper, this will be analysed through three literary texts: Aeschylus' trilogy *The Oresteia*, Lewis Carroll children's story *Alice's Adventures in Wonderland* and Franz Kafka's unfinished novel *The Trial.* Each of these highlights a different aspect of the multi-faceted relation between law and power. These texts have been chosen because they question law as an institution, as the expression of a social order, rather than addressing how a statue, rule or norm fails in a particular case. That is why, even though these literary texts correspond to different ages, jurisdictions, languages and political models, all three tackle the broader problem of the relation between law and power.

The paper begins by analysing *Oresteia*, in which Aeschylus presents us a world without law, where power is unregulated. In the play, law is created in order to replace vengeance and stop the eternal cycle of violence. Law becomes the instrument by which power is limited, controlled and regulated. At the same time, the Greek tragedian illustrates how power is the origin of law, making force and violence part of its foundation.

Once law has been established, the next issue to be tackled is understanding the complex relation between law and power in the daily practice of the law. To answer this, the paper analyses *Alice's Adventures in Wonderland*. In Lewis Carroll's children story, law turns out to be the language of power. In the text, there is a clear warning: the aspects of power in the law can become dominant, making it as dangerous as the uncontrolled power that exists before law prevails.

Finally, the paper analyses how law and power in modern law interact through Kafka's *The Trial*. In this unfinished novel, law is taken over by power, and is converted into its instrument. Law no longer controls

1 For Menke this same paradox is present in the relation between law and violence. While law seems to be the opposite of violence, ending revenge, it is also considered a kind of violence. Christoph Menke, 'Law and Violence' (2010) 22 Law & Literature 1.

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power but is instead abused by authorities. Citizens cannot understand the system, though they becomes dependent on it. In their eyes, law becomes an illegitimate form of violence.

In this way, by analysing the *Oresteia*, *Alice's Adventures in Wonderland* and *The Trial*, the multifaceted relation between law and power can be better understood. Law is not only the tool by which power is controlled, nor merely an instrument by which power can express itself. While power is the origin of law, its legitimation source, at the same time law is created to control power. Furthermore, law is the language of power and can be misused by authorities against the individual. In that sense, law can be transformed into a tool as dangerous as uncontrolled power. Literature teaches us that these complex relations between law and power can operate simultaneously.

II. The Oresteia: Law as the Institutionalization of Power

Can we imagine a world without law? This is a question that authors have asked themselves in various ways. Many novels, short stories and plays have portrayed groups of people without orderly society nor rules that allow them to constitute themselves as a community. These literary texts portray the world without law or place their stories in geographical spaces law cannot reach (such as woods or deserted islands). Such stories are particularly relevant to developing a better understanding of the relation between power and law, as it shows how power would act without any constraint.

Perhaps one of the most important texts to depict a world without law and its consequences is Aeschylus' trilogy, *The Oresteia*. In it, the Greek tragedian tells the story of Agamemnon after the Trojan war. Having left for Troy ten years earlier, Agamemnon returns, victorious, to his home, realm and his wife Clytemnestra. She is furious with her husband, who before leaving for Troy had sacrificed their daughter Iphigenia in order to have favourable winds for his voyage. During his absence, Clytemnestra ruled the kingdom, and has not only been planning her revenge, but has also taken a lover, Aegisthus. Clytemnestra waits for an opportune moment and slays Agamemnon with a sword. She defends herself, claiming she has done no more than take justice for her daughter Iphigenia's sacrifice. A few years pass, and Orestes, the son of Clytemnestra and Agamemnon, returns from exile and meets his sister Electra. Together they plot to kill their mother and Aegisthus. Finally, Orestes murders them, avenging his father's death. As Clytemnestra does not have any

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blood relative willing to pursue revenge for her murder, the Furies, the goddesses of vengeance, take on that role and follow Orestes through his exile. While the Furies hunt Orestes, Apollo, who had persuaded him to kill Clytemnestra, protects him. Orestes arrives in Athens, where he asks Athena for protection and aid in resolving the issue with the Furies, who accept her jurisdiction. Athena decides to create a permanent court, the Areopagus, which will decide this particular case and all future disputes. The trial begins and Orestes confesses that he killed his mother in order to avenge Agamemnon's murder. Apollo appears as a witness and says that the act that he asked Orestes to do was just. Athena requests that the judges vote and declares that if the ballots come out even, Orestes will be acquitted, the same idea that would become the Roman *in dubio pro reo* principle[2]. This indeed occurs, with Orestes and the Furies receiving the same number of votes, meaning Orestes is acquitted[3]. The Furies are enraged with the outcome and feel that the old laws have been trespassed. Athena persuades them to accept the decision and transforms them from Furies into Eumenides, protectors of Athens' prosperity.

Traditionally, this play has been interpreted as marking the transition from a system based on revenge for resolving disputes to a rational, orderly and institutional manner of attaining justice and maintaining peace[4]. In this sense, the creation of the Areopagus court represents a huge step in Western law, as it promises an end to the eternal cycle of revenge and conflicts can be resolved in front of an impartial judge. Under this interpretation, the play is a celebration of this evolution, showing Athenians

2 Theodore Ziolkowski, *The Mirror of Justice. Literary Reflections of Legal Crises* (Princeton University Press 2003) 36.

3 There have been different interpretations in this regard. For some, it is Athena's vote that makes the result equal on each side, and Athena votes again in order to acquit Orestes. In that case it is Athena's interference that saves Orestes. For others, there was a tie in the result and Athena's vote is added only once the result is known. Delfim F Leão, 'The Legal Horizon of the Oresteia: The Crime of Homicide and the Founding of the Areopagus' in Edward M Harris, Delfim F Leão and PJ Rhodes (eds), *Law and Drama in Ancient Greece* (Bloomsbury 2013) 53.

4 Similar interpretations of this trilogy as the transformation of a revenge system into a rational impartial system of adjudication of justice can be found in James Boyd White, *Heracles' Bow. Essays on the Rhetoric and Poetics of the Law* (University of Wisconsin Press 1985) ch 8. Telling stories in the law and in ordinary life. The Oresteia and 'Noon Wine'; Richard Posner, *Law and Literature* (Third Edition, Harvard University Press 2009) 86 onwards; Paul Gewirtz, 'Aeschylus' Law' (1988) 101 Harvard Law Review 1043; Ziolkowski (n 2) ch 2. The Birth of Justice from the Spirit of Tragedy; CW MacLeod, 'Politics and the Oresteia' (1982) 102 The Journal of Hellenic Studies 124.

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the importance of the creation of impartial courts. In fact, the audience would have recognized in the depiction of the Areopagus all the characteristics of what they understood of as a court[5].

Even though the *Oresteia* shows us the creation of the Areopagus and the first murder trial in Athens, it is really a metaphor for the birth of law[6]. Of course, as Theodore Ziolkowski has explained, it is not that the Greeks did not have rules, but rather that they had a prelegal society in which acts such as homicide were considered a personal matter that did not concern the community[7]. What has been transcended is the private manner of resolving conflicts, according to which each person has to take justice into their own hands, which gave rise to an endless cycle of violence. This alternative is represented by the Furies, the deities of revenge. Instead, a social system is born, through which the community resolves conflicts that arise among its members. It is through the Areopagus that problems will now be confronted, by means of an impartial jury of citizens. Deeds such as homicide are no longer a private matter, but a preoccupation of the community as a whole. In this context, law not only replaces vengeance but also puts an end to violence. Therefore, the Furies have to be persuaded to abandon their vicious ways and are integrated into the new order, in which they will occupy a different role. As Ziolkowski has argued, 'Aeschylus regarded the establishment of legal institutions as the very foundation of civilized society'[8] [9].

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5 To see the similarities between the Athenian courts and Aeschylus depiction of the Areopagus, see Alan H Sommerstein, 'Oreste's Trial and Athenian Homicide Procedure' in Edward M Harris, Delfim F Leão and PJ Rhodes (eds), *Law and Drama in Ancient Greece* (Bloomsbury 2013); Leão (n 3).

6 For example, 'Further, Aeschylus has excluded from his trial scene all the specific features of procedure on the Areopagus; the court thus becomes in our play the representative of law as a whole, and all the more because it is judging the first murder-case of all time.' MacLeod (n 4) 127–128.

7 Ziolkowski (n 2) 20.

8 ibid 33.

9 law, is utterly misleading." For some scholars the notion of vengeance is not abandoned in the new order, nor is the Court of the Areopagus different to violence. See Hugh Lloyd-Jones, *The Justice of Zeus* (Second Edition, University of California Press 1983) 94; Maria Aristodemou, *Law and Literature. Journeys from Her to Eternity* (Oxford University Press 2000) ch 3. Theatre as woman re-playing the word: towards the triumph of the flesh in Aeschylus Oresteia; DD Raphael, *Concepts of Justice* (Oxford University Press 2004) ch 3. Aeschylus' Oresteia: The development of

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Another aspect of the *Oresteia* that should not be ignored is the role that power plays in the trilogy. The *Oresteia*, like other tragedies, does not tell the story of an ordinary person, but is instead interested in narrating the life and actions of highborn characters and divinities. Agamemnon and Clytemnestra are the king and queen of Mycenae. Behind their revenge story we also find the issue of the legitimacy of power. When Agamemnon leaves for the war, Clytemnestra stays in power:

> Leader: we've come, Clytemnestra. We respect your power. Right it is to honour the warlord's woman once he leaves the throne.[10]

However, when Agamemnon returns, the queen will no longer rule. Therefore, when Clytemnestra kills her husband, she not only avenges her daughter Iphigenia, but also becomes the reigning queen. As she explains to Aegisthus in the final words of the first play:

> Clytaemnestra: Let them howl – they're impotent. You and I have power now. We will set the house in order once for all.[11]

Likewise, not only has Orestes been exiled and deprived of the possibility of defending or mourning his father, but he has also been robbed of his throne. Had Clytemnestra been punished according to custom for the murder of her husband, she would have had to face exile and Orestes would have succeeded his father. This is why, when Orestes murders his mother, he not only avenges his father, but he also regains his throne.

> Orestes: Father, king, no royal death you died – give me the power now to rule our house.[12]

Viewed from this perspective, the Areopagus' decision becomes even more important. Not only are they deciding between Orestes and the Furies, but they are judging whether Orestes is the legitimate king of Mycenae. Orestes' legitimacy depends on the fact that he is acquitted. He knows this and when he is cleared of the charge of murder he says:

> Orestes: O Pallas Athena – you, you save my house! I was shorn of the fatherland but you reclaim it for me (…).[13]

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development of justice; David Cohen, 'The Theodicy of Aeschylus: Justice and Tyranny in the "Oresteia"' (1986) 33 Greece & Rome 129.

10 Aeschylus, *The Oresteia. Agamemnon, The Libation Bearers, The Eumenides* (Robert Fagles tr, Penguin Books 1979) 112.

11 ibid 172.

12 ibid 198.

13 ibid 265.

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Clearly, an important message of the *Oresteia* is that power is institutionalized through law as a form of legitimate violence.

Furthermore, the relation between law and power is even more complex when one analyses the creation of the Areopagus as the Athenian court for all future disputes. It is crucial to clarify that the foundation of this court is an act of power, in this case a divine command. Athena uses her authority to create the Areopagus. Even though Athena persuades Orestes and the Furies that granting jurisdiction to this court is the best alternative, and convinces them to accept its decision, still she does so from a position of divine authority[14]. Because of this, for Paul Gewirtz, *The Oresteia* shows how violence is present in the foundation of law[15]. The legal system may replace a barbaric method of resolving conflicts, but it is still a violent procedure[16] that has force in its base[17]. Athena replaces the terror of the goddesses of revenge with fear of law. Moreover, as Maria Aristodemou has argued, in the end the issue between Orestes and the Furies is not actually resolved through the court, but through Athena's authority and the creation of the rule of the *indubio pro reo*. Given that the trial ends in a deadlock, the fact that one position prevails over the other means it is ultimately an issue of power and politics[18]. For Aeschylus division is unavoidably present in the origin of law, and it is only through power that it can be resolved. From the creation of law onwards, it will be law's power, its violence, that will resolve divisions in society.

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14 For Lloyd-Jones, what has been understood as Athena using persuasive language to convince the Furies is actually a mixture of threads and bribery. Lloyd-Jones (n 9) 92. Another interpretation is given by Manderson, who proposes that Athena's role in the courtroom is of the jurisprudent. She uses her persuasive skills to advance a certain view of the law, a non-legalistic one, by which not all cases are the same, so that in each the parties have to be heard and the circumstances understood. The Furies, in contrast, would represent the most legalistic of all characters in the trilogy. In this context, Athena's persuasive language is pedagogical, not threatening. Athena would not use her authority and does not impose a judgement. In that sense, law would be more persuasive than violent. Desmond Manderson, 'Athena's Way: The Jurisprudence of the Oresteia' (2019) 15 Law, Culture and the Humanities 253.

15 The idea that the origin of law is violence is also present in philosophers such as Walter Benjamin. Walter Benjamin, 'Critique of Violence' in Peter Demetz (ed), Walter Benjamin, *Reflections. Essays, Aphorisms, Autobiographical Writings* (Mariner Books 2019).

16 Gewirtz (n 4).

17 Cohen (n 9).

18 Aristodemou (n 9) ch 3. Theatre as woman re-playing the word: towards the triumph of the flesh in Aeschylus Oresteia.

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To better understand the relation between law and power in this context, it is worth considering the incorporation of the Furies into the legal system. One possible interpretation is that Athena completely transforms the nature of these mythological creatures. They have to leave violence behind in order to be integrated. Vengeance is completely abandoned. This explains why they are re-named: they are no longer Furies, but Eumenides. This explanation fits the notion that *The Oresteia* depicts the transformation of a violent system of revenge into the rationality of law and order. On another possible reading, the Furies are accepted into law but do not necessarily change their nature. This would mean that law is not exclusively rational, but also incorporates forms of institutionalized violence and revenge[19]. In Gewirtz's terms, the furies bring fear into the law and make it an intrinsic part of the new system[20].

This interpretation is particularly relevant to understanding the relation between law and power. Legitimate violence and fear are part of the legal system, as law transforms and institutionalizes them into power. Before the Furies were included in the new order, they were violent beings that took justice into their own hands. Now, because they are part of a legitimate legal system, they are agents of the courts[21], they have the power to assist it, while they are regulated and limited in a determinate jurisdiction and competence. In this sense, law comes to control, limit and regulate power.

The Oresteia teaches us valuable lessons on the complex relation between law and power when the former first comes into being. In that moment, power is institutionalized as a form of legitimate violence. At the same time, law is the instrument that will control and limit it. Moreover, power is also the source of law, making force and violence part of its foundation.

19 The idea that law is a form of violence is also present in philosophers such as Walter Benjamin. Moreover, legal theorists such as Robert Cover have also studied the relation between law and violence, highlighting the importance of violence for law, making law a form of violence. Benjamin (n 15); Robert Cover, 'Violence and the Word' in Martha Minow, Michael Ryan and Austin Serat (eds), *Narrative, Violence and the Law. The Essays of Robert Cover* (The University of Michigan Press 2001).

20 Gewirtz (n 4).

21 Ziolkowski (n 2) 36.

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III. Alice's Adventures in Wonderland: Law as the Language of Power

Once courts are created and law is institutionalized, one should ask what we can learn about the relation between law and power in the daily practice of law. In that context, it is relevant to emphasize that different authors have insisted on how law is a very particular kind of language: the language of power. For instance, James Boyd White has advocated for an understanding of law as an art, as a specific form of language that law students need to learn to speak and write. Moreover, he suggests that it is a special kind of language: the language of power[22]. For the *Law as Literature* perspective, *imperium* is what actually distinguishes law from other forms of literary expression: law has power, while literature lacks it[23].

Likewise, it is worth noting Robert Cover's suggestion that the words of the law need and presuppose violence. The texts that judges produce need a whole structure of violence to make them stand. In that sense, interpretation becomes a practical endeavor by which threats and deeds of violence are generated in an effective way. Through secondary rules they become reality, as they transform words into acts. In this way, legal interpretation is incomplete without forms of violence that sustain it and make all actors comply[24].

Who best illustrates how law is or can become a language of power is the Queen of Hearts in *Alice's Adventures in Wonderland*. In Lewis Carroll's children story, law is constantly present while Alice follows a White Rabbit down his rabbit hole and arrives in Wonderland, where she meets the Cheshire Cat, the Mad Hatter, the March Hare and the Queen of Hearts, among others. Wonderland is filled with rules, most of them absurd and illogical for Alice[25]. As the story develops, the reader realizes that this is a peculiar juridical system in which power and law become one, law is converted into the language of power. Carroll presents us with a satire of

22 See, for example, James Boyd White, 'The Cultural Background of The Legal Imagination' in Austin Sarat, Cathrine O Frank Frank and Matthew Anderson (eds), *Teaching Law and Literature.* (The Modern Language Association of America 2011) 33.

23 See, for example, Robin West, 'Literature, Culture and Law at Duke University' in Austin Sarat, Cathrine O Frank and Matthew Anderson (eds), *Teaching Law and Literature* (The Modern Language Association of America 2011) 101.

24 Cover (n 19).

25 For a reading of Wonderland as a legal system and its portrayal of the rule of law see: Mary Liston, 'The Rule of Law Through the Looking Glass' (2009) 21 Law & Literature 42; Catherine Siemann, 'Curiouser and Curiouser: Law in the Alice Books' (2012) 24 Law & Literature 430.

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the English judicial system of his time. Law is embodied in the Queen of Hearts, who, as the law-giver, will go around her realm and condemn people to execution. 'Off with his head', 'off with her head' and 'off with their heads' are probably the most repeated phrases in the book. We even hear them before we see her; every once in a while, the rumour that she has condemned someone reaches us. Once we get to meet her, we will hear it constantly. Almost every character that Alice encounters will be sentenced at least once.

Perhaps the closest theoretical framework to the Wonderland world is that described in the legal positivism of Jeremy Bentham and John Austin: law becomes a command given by the sovereign to his subjects that has a sanction in case that it is not followed[26]. In Wonderland, everyone seems to fail to comply with the Queen's sometimes impossible commands, which explains why there are so many convictions. This produces terror in the subjects, as the reader can clearly see in the gardeners who are painting the white roses red because they are afraid that the Queen will notice that the flowers are of a different colour than the ones she had chosen. This distress is predictable, as in this world, there appears to be only one sanction: 'off with their heads'. In this way, for the Wonderland subjects, law is nothing more than the verbalization of the Queen's power. Even though power has been institutionalized and expresses itself through law, it has not been necessarily controlled. Instead, power has been concentrated in the monarch, who can act discretionally. Hence, law's design includes the potentially arbitrary and abusive use of power.

Interestingly enough, the Queen's sanctions, her instructions of execution, are not actually fulfilled. Alice suggests that if they were, there would be no subjects nor realm left; the Queen would have killed all of them by the end of the game of croquet. The characters that Alice meets are all terrified of the Queen, they recognize her words as law and they all seem to think that they could be executed by her command, but this never happens. In the Gryphon's words:

> 'It's all her fancy, that: they never execute nobody, you know.'[27]

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26 Bentham's and Austin's theories were written during the first half of the XIX century. In fact, Austin's 'The Province of Jurisprudence Determined' became influential only after its second edition, which was published in 1861, just two years before Lewis Carroll published *Alice's Adventures in Wonderland*.

27 Lewis Carroll, *Alice's Adventures in Wonderland and Through the Looking-Glass* (Barnes & Noble Classics 2004) 108.

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As the story develops, the reader realizes what is happening: when the Queen condemns her subject to execution, the King of Hearts, who has at least as much power as law-giver as his wife, reverses each and every one of her sentences.

> As they walked off together, Alice heard the King say in a low voice, to the company generally, 'you are all pardoned'.[28]

While no one is executed, the Queen is lied to, so that she thinks her commands have been complied with. Since in Wonderland law is a language of power, the Queen's orders end up not being executed because each time the King deprives her of her power. As the King of Hearts takes away her authority, her words, her commands, loose their law status. In this way, the King removes the *imperium* from the Queen's words, transforming her legal commands into mere utterances.

One should not be surprised, then, that in this context courts become senseless. Exactly what most worried Aeschylus, the institutionalization of courts, is now depicted as absurd. This is illustrated in the trial scene in the end of *Alice's Adventures in Wonderland*. The Knave of Hearts is accused by the Queen of Hearts of stealing her tarts. She takes him to court, where her husband, the King of Hearts, is the not-so-impartial judge. The trial also features a jury composed of different animals who do not know how to act nor what they should be doing. The trial is absurd from start to finish. The White Rabbit, who acts as court's trumpeter and herald, tries to give it a certain order and logic. While he attempts to preserve or create the idea of due process, no one really cares about respecting the procedures. The King of Hearts, the judge, wants the jury's verdict right after the accusation, without any evidence or defence, he also threatens thrice to execute one of the witnesses:

> 'Give your evidence' (…) 'and don't be nervous, or I'll have you executed on the spot.'[29]
> 'Give your evidence,' the King repeated angrily, 'or I'll have you executed, whether you're nervous or not.'[30]
> 'You *must* remember,' remarked the King, 'or I'll have you executed.'[31]

28 ibid 107.
29 ibid 129.
30 ibid.
31 ibid 130.

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At the same time, the evidence that is presented is interpreted in an illogical way:

> 'If you didn't sign it [the letter presented as evidence]' said the King, 'that only makes the matter worse. You *must* have meant some mischief, or else you'd have signed your name like an honest man.'[32]

Meanwhile, the Queen, the plaintiff, threatens the audience in the Court:

> 'Collar that Dormouse!' (…) 'Behead that Dormouse! Turn that Dormouse out of court! Suppress him! Pinch him! Off with his whiskers!'[33]

The Queen even wants the King to sentence before the jury has stated their verdict:

> 'Sentence first- verdict afterwards.'[34]

The absurd reaches its peak when Alice, called up as a witness, is sentenced to death by the plaintiff, the Queen of Hearts.

> 'Stuff and nonsense!' said Alice loudly. 'The idea of having the sentence first!'
> 'Hold your tongue!' said the Queen turning purple.
> 'I won't!' said Alice.
> 'Off with her head!' the Queen shouted at the top of her voice. Nobody moved.[35]

In this trial not only do we see how any notion of due process is destroyed, but once again the assimilation of law and power is complete. The fact that the Queen of Hearts convicts Alice while acting as plaintiff demonstrates this. Worst of all, Alice was not even accused of stealing the tarts, but called to the trial as a witness. Perhaps the best evidence that law is only a form of power is metaphorically represented in Alice's reaction to her conviction. A few minutes before she is called to give her evidence, Alice feels that she is starting to grow back to her normal size. When she is accused of stealing the Queen's tarts, she has regained her natural height, and realizes that she is not part of the jurisdiction of Wonderland. Alice understands that she is not one of the Queen's subjects, and that as such the Queen, who now looks small and insignificant, has no power over her. As the Queen loses power, she lacks any jurisdiction over Alice. Her commands, her norms, have no effect over Alice, who can defend herself from the Queen:

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32 ibid 138.
33 ibid 132.
34 ibid 140.
35 ibid.

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> 'Off with her head!' the Queen shouted at the top of her voice. Nobody moved.
> 'Who cares for *you*?' said Alice (she had grown to her full size by this time)
> 'You are nothing but a pack of cards!'[36]

In this way, as Alice understands her freedom from the Queen's power and the jurisdiction of Wonderland, the spell is broken and she is able to leave this kingdom and return home. As Alice denies the Queen's power over her, the entire legal system of Wonderland loses its efficacy. In that sense Alice is privileged, since she is able to escape the jurisdiction that assimilates power with law. According to Ian Ward, this is the ultimate security that the story has, the events of the story are placed within a dream, we know that Alice lives in our world and in the end, she is restored to it[37]. The spell can be broken. Alice is lucky, but many other literary characters do not share her good fortune.

IV. The Trial: Law as the Instrument of Power

Is the assimilation of law and power possible in modern law? Or is this a phenomenon that expires with the end of the absolute monarchy and the creation of the modern state? In order to answer these questions, Franz Kafka's unfinished novel, *The Trial* is worth examining. While the portrayal of law is just one of the many possibilities that the story opens up for interpretation, this paper focuses on those relevant aspects of the novel to analyse the complex relation between law and power in a modern scenario. As we move from Lewis Carroll's portrayal of a dream world which one can ultimately control to the Kafkian day nightmare from which it is impossible to escape, it is worth noting that both the fairy tale and the tragedy depict the same problem. Like Lewis Carroll, Kafka illustrates the relation between law and power through his works, but he does it with a different cast of characters. Power is no longer represented in an absolute monarch, like the Queen of Hearts of *Alice's Adventures in Wonderland*[38]. Kafka addresses a new form of authority that appeared and was deepening during the twentieth century: the bureaucracy. Like us, Joseph K. no longer faces a power centralized in a particular person, but

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36 ibid.

37 Ian Ward, *Law and Literature. Possibilities and Perspectives* (Cambridge University Press 1995) 102.

38 For a brief comparison of *Alice's Adventures in Wonderland* and *The Trial* see Posner (n 4) 182.

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a hierarchical organization. We have left Wonderland and now face the particularities of the twentieth century. As W.H. Auden proposed, Kafka represents the spirit of our ages. Similarly, in Harold Bloom's view, he is the most canonical writer of our century[39]. This suggests that Kafka's work may be the best place to analyse the relation between power and modern law.

The Trial tells the story of Joseph K., a bank official who wakes up one day to be notified that he has been arrested and will be prosecuted in a criminal trial for an unspecified charge. As the story unravels, this particular court system reveals its strangest characteristics: it operates in attics, in secretive forms, neither the investigation nor the accusation is public, and its procedures and laws are completely mysterious. K. will meet various characters throughout the story that relate in one way or another to the court. As much as he tries to understand the system, each time it becomes more cryptic. Each step he takes seems to show worse aspects of this strange court. For example, he will learn from Titorelli, the court's official painter, that an acquittal is not really a viable option in this system, he does not know of even one case in which this had been the result. Given this fact, he recommends that K. considers which of the other options he prefers: *apparent acquittal* or *protraction*. In the case of apparent acquittal, one must get a letter signed by many judges which states the innocence of the individual.

> '(…) When you are acquitted in this sense, it means the charge against you is dropped for the moment but continues to hover over you, and can be reinstated the moment an order comes from above. (…) Someday – quite unexpectedly – some judge or other takes a closer look at the file, realizes that the case is still active, and orders an immediate arrest. I'm assuming here that a long time has passed between the apparent acquittal and the new arrest; that's possible, and I know of such cases; but it is equally possible that the acquitted individual leaves the court, returns home, and finds agents already there, waiting to arrest him again. Then of course his life as a free man is over.' 'And the trial begins all over again?' K. asked, almost incredulously. 'Of course,' said the painter, 'the trial begins all over again, but it is again possible, just as before, to secure an apparent acquittal.'[40]

39 Harold Bloom, *The Western Canon. The Books and School of the Ages* (Riverhead Books 1995) 416, 424.

40 Franz Kafka, *The Trial* (Breon Mitchell tr, Schocken Books 1998) 158–159.

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The second alternative is *protraction*:

> '(…) Protraction is when the trial is constantly kept at the lowest stage. To accomplish this the defendant and his helper, in particular his helper, must remain in constant personal contact with the court. (…) You can't let the trial out of your sight; you have to visit the relevant judge at regular intervals, and any extra chance you get as well, and try to keep him as well disposed as possible in all ways; if you don't know the judge personally, you have to try to influence him through judges you do know, although you still don't dare dispense with the direct conferences. If nothing is omitted in this respect, you can be sufficiently assured that the trial will never progress beyond its initial stage. The trial doesn't end of course, but the defendant is almost as safe from a conviction as he would be as a free man. (…)'[41]

Sadly, the reader can see that there is no real escape from the court's world; once one is under its control there is no way out. Finally, K. will be executed without ever even knowing what he was accused of or being heard by the court.

> Where was the judge he'd never seen? Where was the high court he'd never reached?[42]

These are some of K.'s last thoughts.

Is *The Trial* really about law? Some scholars, such as Richard Posner, have questioned this idea. For him, centring the novel around the idea of law is misleading, since Kafka is portraying many other metaphysical issues of the modern world and the individual[43]. Moreover, it seems that the atrocities and the absurdities that the reader sees in the novel cannot be law. The story illustrates a system more similar to totalitarian states than those in which the rule of law prevails[44]. In effect Posner is arguing that *the Trial* is not really about law because Kafka's depiction does not fit his own understanding of what law should be, his particular view of it as a judge and legal scholar[45].

This article follows Theodore Ziolkowski's view, according to which Kafka's works *are* about law; perhaps not exclusively so, but the legal system has a central role in them. Although Kafka was a lawyer, he worked

41 ibid 160.
42 ibid 231.
43 Posner (n 4) 170 onwards.
44 ibid 184.
45 Patrick J Glen, 'Franz Kafka, Lawrence Joseph, and the Possibilities of Jurisprudential Literature' (2011) 21 Southern California Interdisciplinary Law Journal 47, 50.

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as an insurance officer for the Worker's Accident Insurance Institute. He was a lawyer-bureaucrat: he knew the worst of those two worlds. In any case, Kafka was directly involved with law for more than twenty years and this is reflected in his texts[46]. In that sense, Ziolkowski suggests that the novel must be read as a burlesque parody of familiar legal procedures through which Kafka is talking about the modern crisis of law. Moreover, he is advocating for the protection of the individual through clear rules[47].

In *The Trial*, law has been taken over by power. It is the same situation as in *Alice's Adventures in Wonderland*; law has become only an instrument of power. The difference is that this time there is no monarch or specific authority one can recognize. Instead, power is situated in a highly complex organization which the common citizen cannot penetrate or understand. Moreover, neither K. nor the reader will encounter a judge. We are confronted with the court bureaucracy, an institution in which power is dispersed. It is not clear who is taking decisions, which makes accountability an impossible goal. Furthermore, the citizen, who cannot understand this complex organization, will become completely dependent on it. No aspect of his or her life will be free from this institution. Law is used by some larger system in order to control its subjects' lives entirely.

In the case of *The Trial*, we see the tragedy that can unfold if law becomes only an expression of power. One of the worse aspects of this in the novel is that the citizen never knows who is responsible for what is happening. Power cannot be checked by any form of accountability. In fact, every person that is part of the organization abuses his or her small portion of power. Meanwhile, the citizen has no individual rights against this misuse of power.

Another relevant aspect of the novel has been the interpretation that *The Trial* shows the terrible effects that the juridical system can have when the citizen does not understand the complex machinery that modern law is[48]. In H.L.A. Hart's terms, Kafka shows us the external point of view[49]. This would mean that it is not necessary that the legal system K. confronts is completely absurd; it is just that he does not understand it. Interestingly

46 To see the connection between Kafka's own cases and his novels and stories see Reza Banakar, 'In Search of Heimat: A Note on Franz Kafka's Concept of Law' (2010) 22 Law & Literature 463.

47 Ziolkowski (n 2) ch chapter 11. The Modern Crisis of Law.

48 See for example Glen (n 45); Banakar (n 46).

49 For the distinction Hart makes between the external and the internal point of view of law see HLA Hart, *The Concept of Law* (Third Edition, Oxford University Press 2012) 88–91.

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enough, Kafka does not portray the internal point of view. The reader never gets to see how the system is understood in the inside, we only know that for some characters all this seems logical. *The Trial* is a novel that is centred on the external point of view, on how the citizen perceives law adjudication.

In that case, Kafka's warning is absolutely clear: even though law may seem very coherent and rational to lawyers, legislators and judges, for the citizen it may appear only as a manifestation of power. While for some, the legal system is a rational system to resolve conflicts, for most it is a nightmare. The individual becomes powerless in front of this organization and has no defence of his own rights. Law is not only absurd for the common man, but also violent.

An important characteristic of Kafka's portrayal is that in this legal system justice and law are completely separated[50]. As the citizen looks to the law seeking justice, the law responds that this is not its objective. As the citizen hopes the law will defend him or herself, there will be no answer. K.'s first reaction to having representatives of the court in his room is to turn to law for protection:

> What sort of men were they? What were they talking about? What office did they represent? After all, K. lived in a state governed by law, there was universal peace, all statutes were in force; who dared assault him in his own lodgings?[51]

In *The Trial*, the legal system is so powerful that it creates an all-encompassing reality for the citizen. It seems that even legal rules have disappeared from Kafka's world: there is only the application of a mysterious law that may or may not even exist. At the same time, the citizen feels lost and oppressed under an arbitrary system that relies on secret rules and procedures. Worst of all, as the citizen does not understand the law, power is no longer a legitimate form of violence, just pure violence. For example, the reader tends to assume that K. was innocent, but this is not necessarily the case. Kafka, in one of his diaries, refers to his own character as 'the guilty one'[52]. However, even assuming K. is guilty, and the legal system proceeds in a valid way, the reader would still feel that the protagonist is subject

50 For Banakar, this paradox of modern law is natural due to the way law strives towards generality and universality while justice requires the recognition of singularity and specificity. Banakar (n 46) 480.

51 Kafka (n 40) 6.

52 Roberto Buonamano, 'Kafka and Legal Critique' (2016) 25 Griffith Law Review 581, 584.

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to power and force. If power and law are completely assimilated in the modern state, and the citizen is completely deprived of its understanding of it, it seems that law becomes only an illegitimate form of violence.

V. Conclusion

What is the relation between law and power? From the analysis of three literary works, we can conclude that it is a multifaceted and highly complex interrelationship. In some texts, such as Aeschylus' trilogy *The Oresteia*, which is a metaphor of the birth of law, we saw how law replaces vengeance and breaks the eternal cycle of violence. The solution to the problem of vengeance, violence and unchecked power was law. In that context, power is institutionalized by law since it is recognized as a form of legitimate violence. At the same time, law is the instrument by which power is limited, controlled and regulated. Paradoxically, while law institutionalizes power, the latter is also the origin of law, making force and violence part of its foundation.

Once this highly complex relation between power and law in the birth of law has been analysed, we asked for the connection between them in the daily practice of law. As we analysed *Alice's Adventures in Wonderland* and *The Trial* we concluded that law is not always able to stand as an instrument that controls power. The relation between law and power is as complicated as ever. To start with, it was claimed that law has sometimes been understood as a language of power. In the case of Lewis Carroll's children's story, law becomes little more than the verbalization of the Queen's power. At the same time, in a world in which power and law are completely assimilated, the legal system becomes an absurdity. Because Alice refuses to accept the jurisdiction of Wonderland, she is able to escape it. K., sadly, will not be as lucky.

Finally, through an examination of Kafka's unfinished novel *The Trial*, the dangers of understanding modern law as a form of power were analysed. In the story, law is taken over by power and the former becomes the latter's instrument through a hierarchical and bureaucratic organization. Just like in *Alice's Adventures in Wonderland*, law no longer constrains power, but it is abused by the authorities. This has a dangerous effect: the citizen cannot understand the system, but he or she will become completely dependent on it. For the citizen, law is only an illegitimate form of violence. In this way, in *The Trial*, we have left the rule of law and have returned to the world of tragedy.

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We can conclude that by analysing the *Oresteia*, *Alice's Adventures in Wonderland* and *The Trial*, the multifaceted relation between law and power can be better understood. Law is not only the tool by which power is controlled, nor merely an instrument by which power can express itself. While power is the origin of law, its legitimation source, at the same time law is created to control power. Furthermore, law is the language of power and can be misused by authorities against the individual. In that sense, law can be transformed into a tool as dangerous as uncontrolled power. Literature teaches us that these complex relations between law and power can operate simultaneously.

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