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CONCEPTUALISING HUMAN RIGHTS AS INTERNATIONAL CONSTITUTIONAL GUARANTEES: PROMISES AND PERILS OF COMPARATIVISM

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I. Introduction

During the last few decades the issue of constitutionalisation of international law has been one of the popular subjects for scholarly analysis and discussion in international law. International constitutionalism pursues two broad interrelated aims: to present international law as a unified system thus countering fragmentation tendencies and to conceptualise restraints on the arbitrary exercise of power, mostly by states, at the international level. Human rights play a prominent role in almost all writings on international constitutionalism. Often, human rights are regarded as hallmarks of the constitutionalisation processes at the international level. However, a detailed analysis of the role human rights play or are called to play in the process of constitutionalisation of international law is lacking. International human rights are simply compared to national constitutional rights guarantees. An unverified and unexamined presumption is often made that international human rights do fulfil the same functions as national constitutional rights guarantees. To many proponents of international constitutionalism, establishing parallels between national constitutional structures and functions and developments at the level of international law is the ultimate measure of constitutional or constitutionalising nature of international law.

This contribution questions the adequacy, efficiency and necessity of an approach associating international human rights with national constitutional guarantees. The main argument developed is the following: while human rights and national constitutional rights do at times fulfil same or similar functions, they do not function in the same way. Therefore, using one to theorise, develop or elucidate the other can create distortions and deprive the mechanism of its capacity to fulfil these functions. In order to develop this argument the contribution utilises literary theory tools developed by Deleuze and Guattari in their work *Kafka: Towards the Minor Literature*.[1] The choice of these tools is justified by their emphasis on the mode of functioning of particular themes instead of focus on their meaning. The emphasis on "how it functions" also allows drawing a distinction between functions themselves that might be similar and the mechanism allowing their fulfilment that can be different.

The contribution starts by presenting Deleuze and Guattari's analytical tools within the context of literary analysis. A brief discussion of the main features of scholarly debates on international constitutionalism follows. This debate is analysed through the lens of some of the tools developed by Deleuze and Guattari. The

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[1] G. Deleuze and F. Guattari, *Kafka: pour une litérature mineure*, Les éditions de minuit, 1975. Translated into English as *Kafka: Towards a Minor Literature*, University of Minnesota Press, 1986. All further references are to the English translation.

contribution concludes with some general suggestions about the future of comparative approaches in law.

II. Literary Analysis and Comparativism

When analysing the work of Kafka, Deleuze and Guattari adopt an approach that departs from traditional literary analysis focused on meaning. They first define the oeuvre produced by Kafka as a minor literature. Minor literature has according to Deleuze and Guattari three characteristics: "the deterritorialization of language, the connection of the individual to a political immediacy, and the collective assemblage of enunciation".[2] As a next step, they investigate how the oeuvre of Kafka functions as a minor literature, how it produces these effects that characterise it as a minor literature, what mechanisms are at work in this oeuvre. One of the key ideas for this investigation is expressed in the following way: "It is absolutely useless to look for a theme in a writer if one hasn't asked exactly what its importance is in the work-that is, how it functions (and not what its 'sense' is)".[3]

Another important characteristic of Deleuze and Guattari's approach to keep in mind is the following. They do not isolate one or several works of Kafka, but approach everything written by Kafka: his letters, novels and stories, as a single oeuvre. This again goes against one of the traditional approaches in literary studies: namely division of literary production in genres and the related isolation of works produced by an author from each other. For Deleuze and Guattari, the possibility to understand how a particular theme or idea functions is open only if everything produced by a single author is viewed as interconnected and equally important.

At first glance, Deleuze and Guattari's approach might resonate with functionalism in comparative law.[4] However, apart from interest in functions, these two approaches have nothing in common. Functionalism in comparative law can take a variety of forms. However, the fundamental question a functionalist asks is: *what* function fulfils a particular notion or concept. Thus, meaning attributed to functions continues to be the focal point of functionalist analysis. Deleuze and Guattari's approach is different. They investigate *how* the oeuvre in its totality (not its parts) functions. Thus, there are two important differences between functionalism in comparative law tradition and Deleuze and Guattari's analysis: first the emphasis shifts from "what" to "how" and second, no division in parts occurs.

In order to arrive at an understanding of "how" of the functioning of Kafka's oeuvre, Deleuze and Guattari conceptualise Kafka's oeuvre as a machinic assemblage producing movements that are never complete, finished, but through their communication with each other constitute a complete oeuvre. In order to understand how this assemblage functions, trace its movements and their emergence, Deleuze and Guattari necessarily have to identify its building blocs that form series through connectors uniting these blocs and series. The goal is not to discover any final result or meaning produced by this assemblage but simply to understand how it functions.

The way Deleuze and Guattari depict the functioning of the machinic assemblage created by Kafka's oeuvre is particularly interesting. Running the danger of simplification but keeping in mind the need for brevity the findings of

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[2] *Ibid,* p.18.
[3] *Ibid*, p.45.
[4] See eg R. Michaels, "The Functional Method of Comparative Law", in M. Reimann & R. Zimmermann (eds.), *The Oxford Handbook of Comparative Law* 339-382 (2006)

Deleuze and Guattari essential for the further discussion can be summarised as follows. The assemblage commences to be built through creation of machinic indexes that will become parts of the assemblage and thus the assemblage in process of being build seems to indicate some mysterious function. The best example of such machinic indexes is provided by Kafka's animalistic stories that can be read as complete finished works conveying some hidden meaning. However, if we realise that these indexes are only parts or signs of an assemblage – and thinking of Kafka's writings as a single oeuvre helps not stopping our reading at this stage – we can at some point understand how these parts fit together and what type of assemblage they compose. The assemblage at work becomes visible in novels. However, Deleuze and Guattari distinguish assemblages from abstract machines that are also sort of finished assemblages that don't function or no longer function.[5] The assemblages themselves can function in two ways: they can be in process of being assembled or they can work towards their own dismantling: "Writing has a double function: to translate everything into assemblages and to dismantle the assemblages. The two are the same thing".[6] Therefore there is an intimate link between abstract machines and machinic assemblages. Abstract machines can help evaluate degree and mode of assemblages: to what extent assemblages are real in the sense of their capacity to dismantle themselves and not mere abstract machines. The image of the transcendental law is an abstract machine, whereas the immanent field of justice is associated in Deleuze and Guattari with a machinic assemblage. Of course, it is crucial to understand what are the building blocs, the connectors within the assemblage, but these are just steppingstones towards the understanding of the functioning of the machinic assemblage.[7]

When Deleuze and Guattari describe the way different blocs and series are connected in Kafka's oeuvre they identify two states or topographies that are used sometimes separately, but more often appear as a mixture in Kafka's works. The first state is described as a series of blocks that revolve around the centre represented by a tower but separated from the centre and between them. This model is very similar to the image of planets revolving around a star; therefore they name it "astronomical model". Blocks in this model are described as being distant and close. They are distant from the tower at the centre but also from other blocks in the circle. The proximity/closeness is created by the fact that there is always communication through the central tower. Thanks to the mediating role of the centre even blocks that are situated at the opposite sides of the circle are actually closer than it might appear. This topography is used, for example in the story "The Great Wall of China" or in "The Castle" to describe the relationship between the village and the castle. In the second state, the blocks are also separated, but are placed on a continuous line. Each block that is also an office has a door to an infinite hallway, but doors are quite far away one from another. On the other side these blocks/offices merge, they have backdoors that are contiguous. Blocks are faraway and contiguous.[8] They are faraway if we look through the hallway because even offices that are next to each other have doors separated by quite a long distance. However, they are contiguous if

[5] Deleuze and Guattari, *supra* note 1, p.47.
[6] *Ibid.*
[7] "This functioning of the assemblage can be explained only if one takes it apart to examine both the elements that make it up and the nature of its linkages." Deleuze and Guattari, *supra* note 1, p.53.
[8] For a good visual illustration see *Ibid.*, p.74.

we think about the backdoors and their emergence into a common room or place. This topography is used for example in the description of the inn's hallway with rooms where officials from the castle stay when they visit the village.

The astronomical model dominates when Kafka has to deal with transcendental law and hierarchy. The second, hallway model, is associated with the new bureaucracy of capitalism and socialism. Deleuze and Guattari describe these two states as "[l]evels in a celestial hierarchy and contiguity of virtually underground offices".[9] Significantly, these two topographies do not need to be always separated. They can mix in unexpected and strange ways. From this point of view, the Castle provides the best example of mixing of two topographies. Deleuze and Guattari use them simply as analytical tools helpful to understand connections and structures put in place by some assemblages and machines.

This brief discussion of the Deleuze and Guattari's approach to minor literature and their way of looking at how this functions within the oeuvre of Kafka served to introduce basic methodological tools that will be used to take a renewed look at the approach to human rights in scholarly debates on international constitutionalism. Before engaging in a more substantive discussion of what could be the outcome of applying this methodology to public international law issue of constitutionalisation, it is important first to elaborate on the justifications for thinking that this is at all possible and can lead to any results that make sense. Can we talk about an oeuvre, an assemblage or assemblages produced not by a single author but by a multiplicity if authors? Not by authors of a literary oeuvre but by scholars (international lawyers in our case)? Since international lawyers produce written work, they also produce an oeuvre, although it is not a literary oeuvre in the traditional sense. It is more difficult to deal with the multiplicity of authors. It is possible however, to approach as a single oeuvre, not only writings of a particular international law scholar, but also writings constituting international law as such. International law abides by quite strict rules that determine its disciplinary boundaries, accepted styles, themes etc. This produces certain unity that can be analysed as a connected whole (an assemblage or a machine we'll see later).

III. How it Functions

In this part we will look at the international law and international human rights as a part of this branch of law through the prism of Deleuze and Guattari's methodology. The aim is to re-examine the usefulness and adequacy of the conceptualisation of international human rights as international constitutional guarantees that utilises national constitutional rights protection as a model.

I will use just some examples in relation to the topic of constitutionalisation of international law. It will not be possible to draw a full picture within the limits of an article but some most telling features will be highlighted.

The discussion around constitutionalisation of international law was developed in the scholarly theoretical work on some fundamental topics of public international law.[10] It is conceived as a way of looking at the system of international law and

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[9] *Ibid.*, p.75.

[10] For some recent examples in a chronological order see J. L. Dunoff and J. R. Trachtman (eds.) *Ruling The World? Constitutionalism, International Law, and Global Governance*, Cambridge University Press, 2009; J. Klabbers, A. Peters and G. Ulfstein, *The Constitutionalization Of International Law*, Oxford University Press, 2009; J. Habermas, "The Crisis of the European Union in the Light of a

interpreting it in a purposeful way. International law scholars articulated a variety of approaches to constitutionalisation of international law, but the structuring objective and the need to explain the purpose of international law remain present in all versions.

The need for the purposeful fulfilment of international law resonates with the theme of transcendent law and guilt in interpretations of Kafka. The search for purpose, for structure – even if a pluralist structure – and the energy and enthusiasm this topic attracts is comparable to energy and enthusiasm with which some protagonists of Kafka's novels attempt to enter in contact with law: K. in 'The Castle' with his desire to establish and maintain contact with the castle or the man from the country in the parable 'Before the Law'. The parallel is reinforced by the fact that Deleuze and Guattari demonstrate how the idea of transcendental law is linked to hierarchy and hierarchical power relations. Kafka's protagonists always come with the belief that if only they are able to reach toward a higher-ranking person, they will achieve their goal. Many versions of international constitutionalism are based on the very same belief: if only we would have a clear established hierarchy within the system of international law, problems would be solved.[11] International lawyers working within this stream of international constitutionalism also attempt to demonstrate how this hierarchy is emerging within the system of international law. The use of the notion of *jus cogens* is exemplary in this regard. This notion is often put forward as a proof of at least partly constitutional or constitutionalising nature of international law.[12] However, the concept itself is difficult to grasp. The authors themselves do not discuss it in too much detail and do not explain how precisely the concept of *jus cogens* is able to set a firm priority of some constitutional values. If we look at the way the concept of *jus cogens* functions in practice, we will notice the following: As the law in Kafka's novels and stories, it remains inaccessible, always there for everyone as for the man from the country in the parable 'Before the Law' but always delayed in its promise. All wronged parties attempt to call *jus cogens* forward, to hear their testimony or plea: Belgium in the name of victims of international crimes in the *Arrest Warrant* case,[13] Bosnia and

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Constitutionalization of International Law" (2012) 23 *European Journal of International Law* pp.335-348; T. Kleinlein, *Konstitutionalisierung im Völkerrecht: Konstruktion und Elemente einer idealistischen Völkerrechtslehre*, Springer, 2011; C. Schwöbel, *Global Constitutionalism in International Legal Perspective*, Martinus Nijhoff, 2011; N. Krisch, *Beyond Constitutionalism: The Pluralist Structure of Postnational Law*, Oxford University Press, 2012; G. Teubner, *Constitutional Fragments: Societal Constitutionalism and Globalisation*, Oxford University Press, 2012; A. Somek, *The Cosmopolitan Constitution*, Oxford University Press, 2014; P. F. Kjaer, *Constitutionalism in the Global Realm*, Routledge, 2014; A. O'Donoghue, *Constitutionalism in Global Constitutionalisation*, Cambridge University Press, 2014.

[11] It should be emphasised that not all constitutionalist interpretations of international law appeal to hierarchical structures or notions. Some of the authors propose an attempt to break with hierarchical reasoning in international law. The most prominent examples are works of Günther Teubner and Nico Krisch. This fact is acknowledged in my reading of international constitutionalism in the next paragraph.

[12] For some examples see E. De Wet, "The Emergence of International and Regional Value Systems as a Manifestation of the Emerging International Constitutional Order", (2006) 19 *Leiden Journal of International Law* pp. 611-632, at p.616-7 in particular; A. Peters, "Compensatory Constitutionalism: the Function and Potential of Fundamental International Norms and Structures", (2006) 19 *Leiden Journal of International Law* pp. 579-610, at p. 598 in particular.

[13] *Case Concerning the Arrest Warrant of 11 April 2000* (*Democratic Republic of Congo v Belgium*) Judgment of 14 February 2002, [2002] ICJ Rep 3, 23 para 56.

Herzegovina in the name of victims of genocide in the *Genocide Convention* case,[14] Italy and Greece in the name of victims of forced labour and war crimes in the *State Immunities* case.[15] But *jus cogens* are already gone or not yet here as all the bureaucrats in "The Castle," like Klamm they are elusive. You can get a glimpse of them through a keyhole or a hidden hole but you can never actually speak to them. They might appear as an illumination when we do not know whether things are really getting darker around us or whether our eyes are merely deceiving us. But even this illumination appears only when it's too late and it does not bring the expected. However, when you do not expect them, *jus cogens* are there although nobody needs them and they do not bring about anything: like in the *Belgium v. Senegal* case,[16] like in the *Kosovo advisory opinion*.[17]

Other versions of international constitutionalism mirror the disillusionment or rather a realisation to which Kafka's protagonists come: that justice is not hierarchy but contiguity, that it is always "in the office next door", that we all are functionaries of justice. This is a particularly powerful vision in Günter Teubner's societal constitutionalism where he argues that each social system produces its own constitution, also in the transnational sphere.[18] However, by framing his search, his discovery in constitutionalist terms[19] as many others he reveals his need for the abstract machines of transcendental law that he produces because of his attachment to immanent justice, he reveals his desire for justice in the form of transcendental law. This effort could be compared using the topographies of Deleuze and Guattari to a hallway constituted of blocs that are themselves astronomical models. The hierarchy might not be immediately visible, but it reappears in new forms and under new names. Thus, for example the language of centre and periphery used by some scholars[20] in their effort to provide a new reading of constitutional developments at the global level slightly re-arranges the astronomical model but fundamentally keeps the shape in place. Perhaps there is no tower in the centre of the new model, but the hierarchical structuring is maintained through the definition of periphery in

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[14] *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (*Bosnia and Herzegovina v Serbia and Montenegro*), Judgment of 26 February 2007, [2007] ICJ Rep 43, 111, para 161.
[15] *Jurisdictional Immunities of the State (Germany v Italy*: Greece intervening), Judgment of 3 February 2012, [2012] ICJ Rep 99, para 93 and 95 in particular.
[16] *Questions Relating to the Obligation to Prosecute or Extradite* (*Belgium v Senegal*), Judgment of 20 July 2012, [2012] ICJ Rep 422, 457, para 99.
[17] *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion of 22 July 2010, [2010] ICJ Rep 403, 437, para 81.
[18] See for example Teubner (n 9) pp.7-8.
[19] The very conceptual framework developed by Teubner is couched by himself in constitutional terms: 'If one wishes to conceive at all of a "global constitution", the only possible blueprint is that of particular constitutions of each of these global fragments – nations, transnational regimes, regional structures-connected to each other in a constitutional conflict of laws.' *Ibid.*, p. 14.
[20] Andreas Fischer-Lescano is a prominent example in this regard, but this language can also be identified in Teubner. See in general A. Fischer-Lescano, *Globalverfassung: Die Geltungsbegründung des Menschenrechte*, Velbrück Wissenschaft, 2005; G. Teubner, "Global Bukowina: Legal Pluralism in the World-Society" in G. Teubner (ed.) *Global Law Without a State* (Ashgate, 1996) 3, p.10 in particular. The fact that the vision of center and periphery is fundamental to their reading of constitutionalisation at the global level is clearly stated in A. Fischer-Lescano and G. Teubner, "Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law" (2004) 25 *Michigan Journal of International Law* pp.999-1046, at pp.1012-3 in particular.

opposition to and as being situated at a distance from the centre.[21] Thanks to the idea of pluralism the peripheral blocks are disconnected between them precisely like blocks in the astronomical model but kept together through their relationship to the centre, through their distance from the centre.

This brief analysis makes apparent a very intimate relationship in discussions around constitutionalisation of international law between abstract machines of transcendental law linked to hierarchy and machinic assemblages of immanence of justice and desire linked to contiguity. As in Kafka's work, there are two movements: first the assemblage in process of constituting itself and then the assemblage in process of dismantling itself that continue reappearing and replacing each other. The transcendental abstract machine of law does not exist separately or independently of the immanence of the machinic assemblage of justice. They are both necessary elements of the same assemblage: "the transcendence of the law was an abstract machine, but the law exists only in the immanence of the machinic assemblage of justice."[22] The connectors between the abstract machine of law and the immanence of the machinic assemblage of justice are international lawyers themselves. Their desire for justice transforms itself into theories about international constitutionalism expressed in terms/blocs of the traditional vocabulary anchored in transcendence and hierarchy, these blocks revolving around the invisible centre. What makes modern visions of transcendental law peculiar is the void or the unknown at the centre. In the contemporary debates scholars like Teubner or Fischer-Lescano are more interested in the periphery and its dynamics. The centre and its functions become forgotten and obscured. However, it remains omnipresent at least as a structuring element: the point of attraction around which other peripheral blocks revolve. Thus, the lawyers build an abstract machine of the hierarchy of desires for justice, the desire for justice drives them towards transcendental law and its hierarchy. In doing so, at times they realise as Kafka's protagonists that justice is an immanent field, they realise its contiguity but because of the law's preference for content over expression, they continue to build hierarchical transcendental structures in the immanent field of justice. Also because of the disciplinary preference for finished abstract machines it is difficult to continue working with assemblages that dismantle themselves without proposing something that is assembled, finished as an abstract machine. Similarly, because by definition an abstract machine is something that does not work yet or does not work any more, it is easy to speculate about its significance without paying attention to the functions.

The above brief description of the discussion around constitutionalisation of international law stands in contrast to the standard account of the main feature of national constitutions: clear hierarchy and entrenchment. International law is often criticised for its less structured, less hierarchical character as compared to many western national legal systems. This remains true even in the today's more complex and developed international system. As demonstrated above, international law tends towards imitating some of the characteristics of domestic legal systems while remaining functionally distinct from them. When I look at the way international law

[21] Interestingly, Fischer-Lescano who seems to adhere to the second stream associated at the first sight with contiguity acknowledges more clearly his need for the astronomical model by keeping *jus cogens* at the center of his analysis. *See* Fischer-Lescano, *Globalverfassung*, (n 19) generally and pp.216-30 in particular.

[22] Deleuze and Guattari, *supra* note 1, p.51.

functions, I remember Kafka's 'The Castle'. It has an appearance of an astronomic model with a centre (the castle) that gives an impression of a height around which everything moves thus conveying an impression of a hierarchical system. However, the closer you come to it, the more you realise that the castle is actually "an extensive complex of buildings […] crowded close together. If you hadn't known it was a castle you might have taken it for a small town."[23] The tower itself "now turned out to belong to a dwelling",[24] is not really a tower. You also realise that the most insignificant of personages can have as much impact as the most high-ranking bureaucrats. Thus, as in the Castle, the hierarchical structure mixes up with the contiguity and fluidity of immanence. However, public international law has difficulties fully recognising the immanent field of justice, its machinic assemblage and its dismantling function. International law has learned to resist and counter these later aspects of its functioning under the guise of abstract machines. The idea of constitutionalisation of international law and the use of human rights in justifications of international law's constitutional and thus hierarchical and structured character are signs of this resistance. This resistance and appeal to hierarchical structures modelled upon domestic legal systems can potentially lead to a dysfunction of international law, including human rights. In order to continue functioning and fulfilling its functions human rights as a part of international law need the mixture of contiguity and hierarchy that is the main feature of public international law. If the contiguity is completely replaced by hierarchy, the system will not be able to function.

International system of human rights protection has different mechanisms that allow it to fulfil certain functions similar to functions performed by national constitutional rights. Advocates of international constitutionalism who attempt to say that international human rights are comparable and should be modelled upon national constitutional rights because they fulfil the same function commit a mistake. They disregard the fact that the mechanism that allows international human rights to fulfil a function similar to that of national constitutional rights is different. To put it more clearly: we can imagine existence of two systems within which similar functions are fulfilled by two mechanisms functioning differently. If we attempt to restructure one of the systems using the other as a model because we believe that this other system fulfils the function more efficiently, we might completely destroy the first system because we do not pay attention to the way the system functions as a whole. By making some adjustments only in relation to the mechanism that fulfils the particular function, we distort the entire system that will perhaps at the end have no mechanism at all to fulfil the function we wanted to fix or improve.

From a broader perspective of comparative law methodologies, the lesson to be learned is that meanings are as important as mechanism and constructions. We cannot simply focus on a type of function without paying attention to how precisely this function functions within the system as whole. Otherwise we run the danger of distorting and destroying the system.

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[23] F. Kafka, *The Castle*, trans. Anthea Bell, Oxford University Press, 2009, p.11.

[24] *Ibid*.