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Luka BARAMIDZE
Grigol Robakidze University, Georgia*

The "Kafkaesque" in Judicial Reasoning: A Comparative Review of American and European Practices

• **Abstract** •

"Kafkaesque" perspective in judicial reasoning means, that law lacks intrinsic content. From this point of view, the conclusion can be drawn that both law and justice are empty in the context of Kafka's reality. Just because of these essential characters, they exist only due to their internal paradoxes or reification. As a result, something with no real form or content acquires a "phantom objectivity" through its highly formalized and bureaucratic form which are the main features of a "Kafkaesque" situation. Therefore, justice and the law become reduced to their result or verdict, possessing no real content until they are presented to a person involved. Therefore, a law that Kafka writes about is given in their experience to people who obey the law but have no knowledge of its content. So, such an emptiness of law is one of the characteristics of "Kafkaesque". That's why for outsiders, the law is irrational and inaccessible. On the other hand, it would not be impossible to recognize that such a nightmare situation needs to be revealed to be avoided. In this regard, the method of deconstruction only performs functions of diagnosing law systems by identifying their becoming empty of any content. However, it needs to be considered that deconstruction is often mistaken for destruction. However, according to the view presented in this article, deconstruction means exposing the underlying meanings both as juridical practices and their theories. This is one of the reasons why "Kafkaesque" performs the function of deconstruction towards the law and the legal system exposing their very content. The function of legal deconstruction largely determines the legal value of "Kafkaesque". Moreover, beyond deconstruction, it also embodies a (re) constructive function, manifested in promoting new principles of law.

Keywords: Kafkaesque law, Justice, Nightmare, System, Standard.

* ORCID ID: 0000-0002-7779-2195; address: Giorgi Brtskinvale Street 31, Tbilisi, Georgia; e-mail: baramidze.l@yahoo.com

Introduction

The article according to its aims deals with four aspects of justice systems: I) The "Kafkaesque" perspective in the American legal practice, II) The "Kafkaesque" perspective in the practice of the European Court of Human Rights III) The "Kafkaesque" perspective in the context of the European Court of Justice, and IV) The "Kafkaesque" perspective in the context of the European Court of Justice.

The analysis of the presented examples paradigmatic to justice systems shows that legal systems should not be irrational but fair, predictable, and rational. Moreover, they often testify to the arbitrariness and inaccessibility of modern legal systems. More than that, considering Kafkaesque as a standard of justice will make it possible for the judges' decision-making process to be based on shared values of rational choice. The legal evolution of the term "Kafkaesque" and the tendency to treat it as a standard of justice allows us to see how individual judges incorporate their commitment to rational choice and the rational decision-making process into their decisions.

In today's world judges and legal commentators often highlight certain similarities between the Kafkaesque legal system and the modern one. It is about the tendency of increasing bureaucratization of the system and the perverted bureaucratic logic based on which decisions are made. It is significant that "Kafkaesque" is used both to protect the interests of the plaintiff and the judicial system, which shows the growing tendency to use it as a standard of justice. This allows for the formation of a fair legal system based on liberal democracy and common law traditions. So, both the Kafkaesque legal evolution and the tendency to make it a standard of justice can be said to be parallel processes, and neither institutional nor national borders are a barrier to its spread. In addition, applying "Kafkaesque" to violate human rights indicates a growing tendency to make Kafkaesque justice a standard. It also shows that this phenomenon can be considered in the context of the "living instrument doctrine", which examines the issue not in the founders' imagination, but in the prism of today's circumstances.

Methods

This article aims to emphasize similarities and differences between American and European courts' practices about "Kafkaesque" based on the comparative method. The comparative method includes two aspects. On the one hand, a comparison is made between the federal and state levels of American justice in order to highlight their specificities. On the other hand, the comparative method allows

for the identification of the peculiarities of European courts including national ones. It also uses some elements of the deconstruction method to reveal characteristics of justice practices. Comments made by lawyers or other commentators about the decisions made by judges from a "Kafkaesque perspective" are often devoid of real legal force.

In this article, commentators pose transcendent questions to judges. Such questions serve a deconstructive function in that they reveal their true meanings. This article attempts to pose transcendent, i.e., extra-legal, questions to commentators themselves in order to reveal their phantom nature. Such comments are nothing more than phantoms of a phantom, i.e., simulacrum. Making true decisions involves much more complex structures. The discussion of the law from the standpoint of justice is a somewhat transcendent question and performs a deconstructive function, since justice does not enter the structure of the law, but transcends it, i.e., goes beyond it. So, deconstruction has a dual nature: It shakes up the reality but provides an opportunity to ask more fundamental questions.

The method of deconstruction shows that Kafkaesque should not be a moral admonition for courts and judges, but should have real power.

The "Kafkaesque" Perspective in the American Legal Practice

It is well known that Kafka has many followers in the US courts (Potter, 2004, p. 3). More than that, US Supreme Court Justice Kennedy says that every lawyer should read Kafka's "The Trial" to see through the eyes of his clients how he perceives justice (Mason, 2014, p. 9). In the US legal use of Kafka's works in judicial reasoning is increasing at a rapid pace. US judges show exceptional sensitivity and creativity in citing Kafka as an authority. This is partly due to the horrible cases of real-life discussed by them (Mason, 2014, p. 9).

In *People v. Colletti*,[1] two defendants appealed their convictions, arguing that they were denied due process and the right to a fair trial because the state failed to provide them with records of witnesses' testimony given to a grand jury. The judge explained that the obligation to produce such records would inevitably lead to a Kafka-like dream in which police departments and prosecutors' offices would turn into clerical centers recording witness statements for later transmission to the defense. Until then, all the references emphasized the "Kafkaesque nightmare" that the court should avoid (Potter, 2004, p. 10). Justice Moran characterized the court as avoiding a Kafka-like dream instead of a "Kafkaesque nightmare".

[1] 242 N.E.2d 63, 101 Ill. App. 2d 51, 1968 Ill.

It would be appropriate, in this regard, to mention "Kafkaesque academic test" a phrase first used by Judge Borden in the case *State v. Crosby*[2] (Burns, 2014, p. 321). Interestingly, it has been used exclusively by Connecticut judges first in criminal cases and then in civic ones. There is another interesting phrase "Kafkaesque specter" of an incomprehensible ritual which means violating the defendant's right to have an interpretation (Burns, 2014, p. 324).

There is a significant opinion on how Europeans view American justice: Leading decisions of the European Court of Human Rights indicate several marked differences between its jurisprudence and that of the United States Supreme Court. Not only there are different attitudes reflected in such decisions, but also various attitudes towards the dignity of individuals (Shoenberger, 1989, p. 11). It can be said that it's not difficult to recognize in such practices the Kafkaesque paradox.

Based on analyzing the most characteristic features of different practices general conclusion can be drawn that judges often use the term "Kafkaesque" when they disagree with the decisions of other courts (Potter, 2004, p. 21). On the other hand, in some cases, judges do not include Kafka's name in their cases, but on the contrary, consider them to be part of Kafka's world. In 8 of the first 10 cases of Kafka's name being used in the US legal sphere the adjective "Kafkaesque" or "Kafka-like" is used (Potter, 2004, p. 6). Thus, the division of the justice system into federal and state levels is a kind of hierarchical structure, which raises the expectation that the Kafkaesque nightmare that occurs in individual state justice systems will be corrected at the federal level.

The "Kafkaesque" Perspective in the Practice of the European Court of Human Rights

It is well-known that in general Kafka's influence is also verifiable in the legal field since it is a reflection of social factors. Thus, the distances between subject and order can be shortened, once legal phenomena are analyzed over other biases (Kosop and de Souza-Lima, 2017, p. 1). Another author based on analyzing Kafka's novels claims that where individualization effects fail the extremes of individual judicialization are also at risk of failing. The author proposes ways to avoid the double bind of collectivism and individualism. There is a dilemma of union and human rights (Roberts, 2023, p. 3).

From the point of view of the evolution of "Kafkaesque", the judgments of the European Court of Human Rights are important, in which it points to Kaf-

[2] 348 S.C. 387, 398–399, 559 S.E.2d 352, 358–59. App.2001.

kaesque elements in the decisions made by national courts. At the same time, there are cases when the judges disagree with the decision of the European courts. The case *O'Keeffe v. Ireland*[3] represents an interesting vision of a Kafkaesque situation: Any crime is a perfectly nebulous and undefinable entity, yet Josef K. is guilty – guilt is beyond suspicion. This is part of its essence: If you are accused and found guilty, you are guilty of being accused; if you feel guilty, this proves your guilt because otherwise, you would not feel what you feel (Airaksinen, 2019, p. 7).

In *Regner v. Czech Republic*,[4] the Court found that the limitation of the applicant's rights was contrary to the domestic courts' power to fully consider the documents before them, and therefore the essence of the protection afforded by the right to a fair trial was not violated. The observance of the "strong standard of review" referred to in this case appears to be an important point not only in terms of the protection afforded by the right to a fair trial but also it is no less important both in the aspect of "Kafkaesque" legal evolution and its consideration as a standard of justice. On the other hand, there are views of representing AI as a kind of remedy for Kafkaesque. AI technology can be used for legal decision-making and decision-support without appearing Kafkaesque (Kemper, 2020, p. 1).

Such a degenerated approach serves to make the individuals the food of the Kafkaesque torture machine. The analysis of the case *Al-Dulimi and Montana Management Inc. vs Switzerland*,[5] reveals that to avoid a Kafkaesque situation, it is necessary to ensure normative consistency. The meaning of such consistency lies in the fact that the UN Security Council should share the same values of human rights as recognized by the European Court of Human Rights. This will make it possible to avoid a normative conflict. From the point of view of legal evolution, the term "Kafkaesque" will expand the area of use of its use, which will contribute to its tendency to become a standard of justice.

This article is aware of the fact that the literary source lacks legal force, but it visibly and symbolically embodies the vague procedures of a vague and unfathomable legal bureaucracy, which is absolutely contrary to the principles on which justice is based (Mason, 2014, pp. 77–91). However, the legal system sometimes perceives Kafka's works as a moral admonition for the courts. Thus, the European Court of Human Rights, which is the international court of the Council of Europe and interprets the European Convention on Human Rights, in certain cases uses Kafkaesque as a standard of interpretation.

[3] Application No. 35810/09, January 28, 2014.
[4] Application No. 35289/11, September 19, 2017.
[5] Application No. 5809/08, June 21, 2016.

"Kafkaesque" Perspective in the Context of the European Court of Justice

The situation is different concerning the European Court of Justice, which is the highest court of the European Union in matters of EU law. It interprets EU law and ensures its uniform application across EU member states under Article 263 of the Treaty on the functioning of the European Union. One of the important issues that will be raised in this regard concerns whether the European legal system is sovereign or not. The "Kadi" case is paradigmatic in this respect (Kokott and Sobotta, 2012, p. 1). The fact is that in the European Court of Justice in 2008 Kadi was acquitted because the judge was unable to substantiate the charges brought against him. But the court upheld the sanctions against Kadi, freezing his assets (*European Commission and Others v Yassin Abdullah Kadi*).[6] Kadi is not only a highly significant case from several internal systemic doctrinal perspectives, but it is also useful to study the case for examining the nature of the law itself. Kadi's saga demonstrates the legal system's ability to produce just outcomes in the face of unjust laws, as well as its potential, in a more complex and fragmented array of legal forces, to reinforce the sense that the nature of law is unknowable and inaccessible (Mason, 2014, p. 9). Some authors question such a situation and characterize it as juridical passivism at the European Court of Justice (Várnay, 2019, p. 129), claiming that judicial passivism in the "extensive sense" would also encompass situations where the Court is using its judicial (e.g. interpretative) role, but it does so in a manner which deviates from the teleological interpretation to which the Court has accustomed us. The analysis shows that it is necessary to "internalize" legal norms external to the European legal space to establish an autonomous legal system of the European Union, which implies the creation of a mechanism for the enforcement of court decisions.

The "Kafkaesque" Perspective in the Context of European National Courts

There is a view according to which the national measure does not come within the scope of the EU Charter of Fundamental Rights – the Court does not have jurisdiction (Várnay, 2019, p. 137). The Court has observed that it has no power to examine compatibility with the Charter of national legislation outside the scope of EU law (Várnay, 2019, p. 137).

[6] C-584/10, July 18, 2013.

When a legal situation does not come within the scope of EU law, the Court has no jurisdiction to rule on it and any provisions of the Charter relied upon cannot, of themselves, form the basis for such jurisdiction (Várnay, 2019, p. 137). On the other hand, Várnay says that "The Court could have displayed more proactivity and sought to reformulate the questions or rearticulate the referrals, as it had done in many other cases" (Várnay, 2019, p. 137).

An interesting reference to Kafka belongs to the genre of commentary. In 2019, journalist, commentator, and writer Jenny McCartney published a letter entitled: "The Kafkaesque Nightmare of British Justice", accompanied by the note: "British justice treats the accused like Kafka's Joseph K" (McCartney, 2019). "Kafkaesque nightmare" and "witch-hunting" of the British justice make Carl Beach's case paradigmatic in terms of "Kafkaesque" circumstances in the national justice system. Significantly, the presumption of innocence was ignored during the investigation process.

In terms of using "Kafkaesque" as a comment in the context of the decision made by the court, the decision made by the French court is interesting. A French court has ruled that 22 wind turbines in southern France are illegal and subject to dismantling. The judges of the Administrative Court of Marseille found that the builder did not have the authorization to install the 125-metre-high turbines and thus the wind farm is illegal. Kafkaesque dispute over "22 illegal wind turbines in the south of France", which acquired a somewhat comic character as Lida Kirchberger once used the term tragicomic to describe Kafkaesque (Kirchberger, 1986, p. 13).

On the other hand, the case of Andrea Rachaneli does not refer to the decision made by the national court, but on the contrary, the case refers to the decision that should have been made by the national court. The letter of Dimitri Kochenov, who analyzes this case as an epigraph, is prefaced with the following words: "Kafkaesque" is a word without any synonym. The gist of the case is as follows: The plaintiff was an Italian researcher working on a grant at the Max Planck Institute (MPI) in Germany. During that period, he was given a monthly grant to prepare for his Ph.D. in Germany and abroad. The applicant claimed that, during the period in which he worked, he was an employee under Article 45 of the Treaty on the Functioning of the European Union and was entitled to the same benefits as his German colleagues. The questions for the court were whether he could be considered a worker and whether there was discrimination when he was given less favorable conditions than a German by nationality. The Court found that the applicant could be a worker under Article 45 of the Treaty on the Functioning of the European Union if the activities were carried out for a certain period under the

direction of a constituent institution of that association and if he received remuneration for those activities – this was ultimately a matter for the national court to decide (*Andrea Raccanelli v Max-Planck-Gesellschaft zur Förderung der Wissenschaften eV*).[7] Moreover, the private legal nature of the Planck Institute was not important in determining the application of a particular article of the said treaty. A private law association acting in the public interest was required to adhere to the principle of non-discrimination about workers. Although the question is ultimately up to the national court, the court recognized that Article 45 of the Treaty has a horizontal and direct effect on the functioning of the European Union.

It is obvious that although the contextual use of "Kafkaesque" does not directly refer to the legal realm, its use should not be perceived as a moral admonition. It is about promoting awareness of the difficulties inherent in law as a social artifact that regulates the behavior of non-lawyers. In the end, this circumstance largely determines the legal value of "Kafkaesque".

Conclusion

Although the term "Kafkaesque" is widely used, it is certainly not a legal tool to be used by the courts or in the legal space in general. US courts at both levels show great diligence in using "Kafkaesque", which is not the case for European national courts. But this term is rarely used in the context of the decisions of the European courts when they critically assess the decisions of the national courts. On the other hand, there is the use of "Kafkaesque" in the context of decisions made by national courts. Contextual use is possible, even a separate genre of use of this adjective. Non-lawyer analysts are more likely to apply such practice. At the same time, the opinion expressed in the legal literature should be considered that Kafka and his "process" are much more referred to by the American and British legal opinion.

Based on Kafka's artistic descriptions, there is a particular emphasis on how in their experience justice is given to people who do not have the privilege of having an idea of the inner workings of the legal system. It is this moment, how a non-lawyer perceives law in Kafka's works, that is not considered by legal theorists until it is revealed in analyzed cases. There are at least two most important points: one is that law has an internal ability to "save itself" from difficult circumstances, And the second is that the unknowability and unattainability of law for those who obey it become clear to man. The law regulates behavior both *ex ante* by establishing its standards and *ex-post* by judicial decisions.

[7] C-94/07, July 17, 2008.

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