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law's competing claims to authority**

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This is an accepted manuscript of a book chapter published by Routledge in [BOOK
TITLE] on [date of publication], available online:

<http://www.routledge.com/978-0415640312>

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The intractably unknowable nature of law: *Kadi*, Kafka and the law's competing claims to authority

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[Final accepted version]

Citation: Luke Mason, 'The Intractably Unknowable Nature of Law : *Kadi*, Kafka, and the Law's Competing Claims to Authority' in Matej Avbelj and others (eds), *Kadi on Trial: A Multifaceted Analysis of the Kadi Trial* (Routledge 2014).

Abstract:

This chapter draws upon the similarities between Mr *Kadi*'s case and that of the protagonist of Franz Kafka's *The Trial*, Josef K., to consider what such cases tell us about the nature of law in general. Constructing the idea of *law as experience*, depicted by Kafka in his broader *œuvre*, the chapter seeks to understand how the law, much vaunted as principled, rational and just, can produce the perception for those subject to it that it is in fact *unknowable* and *inaccessible*. The chapter argues that despite the 'happy ending' for our protagonist in the *Kadi* saga, the law produces this experience for those who are subject to it by virtue of its competing claims to authority. This internal conflict is neglected by mainstream legal theory, which tends to focus exclusively on *either* the law's claim to direct behaviour in advance *or* its claim to judge behaviour after the fact. In this way, *Kadi* is not only an extremely important case from myriad inter- and intra-systemic doctrinal perspectives, but also a fascinating case study to interrogate the nature of law itself. The *Kadi* saga demonstrates the legal system's ability to produce just outcomes in the face of unjust laws, but also its potential, in the increasingly complex and fragmented legal constellation, to exacerbate the unknowable and inaccessible nature of law as experienced by those who are subject to it. This chapter goes beyond the wide-ranging issues of constitutional theory usually discussed in relation to such cases as *Kadi* to ask more a more abstract question about the nature of law as a social artefact which makes demands of people who are not granted access to the inner workings of the legal system.

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1. Introducing *Kadi*, A new production of Kafka’s *The Trial*, starring Mr Kadi as Josef K.

The denouement of *Kadi II*¹ in the Grand Chamber of the Court of Justice might be read as the *Disneyfication* of Kafka’s *The Trial*,² a happy ending for our downtrodden protagonist. In Kafka’s famous tale, a man facing mysterious, seemingly *unknowable* accusations and a Byzantine legal system with no apparent means of redress or rectification is eventually executed with none of the accusations ever having become any clearer. In *Kadi II*, the Court’s forceful reconfirmation and aggressive application of the principle of ‘full review’ laid down by the same judicial body in *Kadi I*³ meant that Mr Kadi, originally facing similarly opaque accusations, was able to rely on his own ‘trial’ to *escape* this nightmarish scenario by having the Court strike down the measures applied to him. Indeed, the Court, in underlining the importance of the fundamental principle of *effective judicial protection*,⁴ in particular in the face of complex questions of intersystemic supremacy⁵ between legal systems and the delicate nature of anti-terrorism measures, might be seen as casting as antithetical to the values of the EU legal order the experience of law as unknowable and inaccessible which Kafka depicts so powerfully.

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1. Joined Cases C-584/10 P, C-593/10 P and C-595/10 P, *Commission, Council and United Kingdom v. Kadi*, judgment of the Grand Chamber of the CJEU of 18 July 2013, NYR, hereinafter, *Kadi II*
 2. Franz Kafka, *The Trial* (David Wyllie tr, Echo Library 2007)
 3. Joined Cases C-402/05 P and C-415/05 P, *Kadi and Al Barakaat* [2008] ECR I-06351, hereinafter, *Kadi I*, at para 326: ‘the Community judicature must, in accordance with the powers conferred on it by the EC Treaty, ensure the review, in principle the full review, of the lawfulness of all Community acts’.
 4. *Kadi II*, at para 133-134.
 5. *Ibid.* The court, at 133, seems to be making the point that effective judicial protection must be guaranteed by the EU legal order due to the fact that the UN Security Council’s procedures do not provide such protection. In this manner, the Security Council procedures seem to fail the Court’s *solange* test. Much of the discussion of *Kadi I* focused on the *solange* aspects of the judgment and the competing claims for supremacy in the international legal order. See in particular N Türküler Isiksel, ‘Fundamental Rights in the EU After *Kadi* and *Al Barakaat*’ (2010) 16 *European law journal* 551; Grainne De Burca, ‘European Court of Justice and the International Legal Order After *Kadi*, The’ (2010) 51 *Harv Int’l LJ* 1

However, it would be hasty to focus solely on the happy outcome (for Kadi, our own *K.*) in this particular case in seeking to understand what *Kadi* might tell us about the law when understood in the light of Kafka's work. This chapter takes advantage of the striking similarities between the cases of Mr Kadi and Josef K., and indeed their contrasting conclusions, to delve into the insights of Franz Kafka's fictional depictions of the law. These focused heavily, among other themes, on the experience of law for those who are subject to the legal system's demands but who do not have, at that moment at least, privileged access to its inner workings. This vision of law, as experienced by non-lawyers in the real world, is one not always fully considered by legal theorists until they become apparent in cases such as *Kadi*. While *Kadi* demonstrates the law's innate ability to 'redeem' itself in such circumstances, the case should also bring home to us the inherent unknowability and inaccessibility of the law for those who are subject to it, regardless of its myriad virtues so often highlighted by legal theorists.

Rather, therefore, than contributing to the literature on *Kadi* which focuses on intra- and inter-systemic normative conundra, this chapter seeks to understand law as it is experienced as a social artefact which primarily serves and seeks to regulate the actions of people who are not lawyers. It will highlight the complex *dual claim to authority* which law makes of those subject to it, an apparent paradox neglected by legal theorists because of the law's own apparent internal ability to dissolve it. Because the law seeks to regulate behaviour *ex ante* by laying down standards, while also attempting to judge behaviour *ex post* through adjudication, law is experienced much of the time in the manner depicted in Kafka's *The Trial* and brought out in the real-life case of *Kadi*. Legal systems are not blind to these dangers, however, and this *Kaskaesque* experience of law is often seen by Courts as contrary to fundamental principles which legal systems seek to uphold.

However, while such cases might produce happy endings for those such as Mr Kadi, the dual claims to authority which the law makes are always present; they are the essence of legal systems as we know them. Finally, this chapter will draw further on the *Kadi* saga to demonstrate that, beyond these conceptual concerns, certain empirically observable contemporary trends within the law are contributing additional complexity to this problem. Law is becoming more difficult to discover as we move from Kafka's already troubling *modernity* into a *post-modern* legal phase. The law's content seems to be fragmenting and growing in complexity as it becomes the tool of a technocratically driven world of *regulation*. At the same time, adjudication is also made more complex by a growing number of competing legal sources claiming entrenched or superior status. While these developments might carry the promise of better laws and better legal outcomes from a substantive perspective, they exacerbate the *unknowability* of law as it is experienced by people such as Kafka's Josef K. and our own Mr Kadi.

2. Kafka and the Law

The similarity between the ordeal of Mr Kadi and that of Josef K., the protagonist of Kafka's *The Trial*, has been pointed out elsewhere.⁶ Kafka's work, the meaning and significance of which will be discussed in this section, was described by WH Auden as representing for the Twentieth Century that which the work of Shakespeare and Dante represented for their own.⁷ The influence of Kafka's work has entered into mainstream Western culture to such an extent that the term 'Kafkaesque' is routinely used to describe situations of impenetrable bureaucracy and the more general feeling of hopelessness of the individual in the face of modernity and its intimidating institutions.

With this in mind, it would not be far-fetched to think that the Court in *Kadi* would also have apprehended the obvious Kafkaesque elements of Mr Kadi's now well documented predicament: his assets had been frozen by a *lex specialis*, yet he possessed no real knowledge of what he was accused of, nor a clear path for challenging the measures in question. The Kafkaesque nature of the scenario was seemingly complete when, following the the judgment of the Grand Chamber in *Kadi I*, ostensibly in his favour following the ruling by the CJEU that the measures in question were unlawful for failing to provide adequate reasons, the same sanctions were left in place with a view to simply redrafting them with scant additional detail.⁸ As outlined in the other chapters in this collection, the second *Kadi* judgment of the Grand Chamber made good on its own promise in *Kadi I*. It was held that even the expanded reasons given for the freezing of his assets were insufficient to *justify* the measures against him under EU law, in particular in view of the importance of *effective judicial protection*. Appearing to adopt a *solange*-type approach, the Court felt that the UN Security Council Ombudsman system was unable to provide such protection, and thus carried out its own substantive review of the provisions as they applied to Mr Kadi.

In its technical, *per curiam* judgments, the CJEU does not use such literary devices as references to Kafka or *The Trial* when delivering its opinions. Such references are however relatively

6 Filippo Fontanelli, 'Kadi II, or the Happy Ending of K's Trial' (*Diritti Comparati*, 29 July 2013) <<http://www.diritticomparati.it/2013/07/kadi-ii-or-the-happy-ending-of-ks-trial-court-of-justice-of-the-european-union-18-july-2013.html>>; Robert Schuetze, 'Coda: Kafka, Kadi, Kant' (*SSRN*, 11 September 2013) <<http://ssrn.com/abstract=2324574>> accessed 25 September 2013.

7 W.H. Auden, 'The Wandering Jew', 104 *New Republic*, 2 October 1941

8 On the 'Pyrrhic victory' in *Kadi I*, see Katja S Ziegler, 'Strengthening the Rule of Law, but Fragmenting International Law: The Kadi Decision of the ECJ from the Perspective of Human Rights' (2009) 9 *Human Rights Law Review* 288.

frequent in the more expansive linguistic context of American⁹ and English¹⁰ judicial opinions. While of course such literary sources lack any binding legal authority, such references tend to operate as a *symbol* or *illustrative device* to describe unacceptably opaque or dense legal or bureaucratic procedures, standing in stark contrast to principles perceived as inherent to the law. Similar references to Kafka can also be found in several judgments of the European Court of Human Rights,¹¹ and even in a number of opinions of the Advocate General to the CJEU.¹² The most apposite example however is Zinn J's judgment in *Abdelrazik v Canada*¹³ before the Federal Court of Canada. This case concerned similar issues to *Kadi* regarding the legality, under Canadian law and international law, of the implementation of listings under UN Security Council Resolution 1267. Zinn J stated that 'for a listed person [such a situation is] not unlike that of Josef K. in Kafka's *The Trial*,'¹⁴ this within a judgment which effectively declared Canada's implementation of the listing illegal.¹⁵ One can see the CJEU's judgment in *Kadi II* as reflecting similar concerns, heeding the apparent warnings of Kafka's work. Legal systems seem therefore to see Kafka's work as a morality tale for courts themselves. In this light, *Kadi*, were it recast as fiction, would seem more akin to optimistic accounts of the law and its ability to produce *just* outcomes, such as in *The Merchant of Venice*,¹⁶ or in the television series *Perry Mason*, where the courtroom is depicted as a forum in which a charismatic lawyer can utilise the procedures of the law to the benefit of someone facing false accusations or the application of unjust laws. Such a conclusion would however underestimate the depth of Kafka's critique of law and its relevance to understanding its particular characteristics highlighted in *Kadi*.

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- 9 For extremely detailed treatment of references to Kafka in American judicial opinions, see Brian Pinaire, 'Essential Kafka: Definition, Distention, and Dilution in Legal Rhetoric, The' (2007) 46 U Louisville L Rev 113; Parker B Potter Jr, 'Ordeal by Trial: Judicial References to the Nightmare World of Franz Kafka' (2004) 3 Pierce L Rev 195; Scott Finet, 'Franz Kafka's Trial as Symbol in Judicial Opinions' (1988) 12 Legal Stud F 23
- 10 A typical example can be found in the High Court decision in *Sepracor Inc* [1999] EWHC Patents 259, at para 14, where Laddie J remarks dismissively, 'A less sensible system could not have been dreamt up by Kafka.'
- 11 Unsurprisingly these concern issues related to the rights of those under arrest under Articles 5 ECHR. References to Kafka can be found, for instance, in *Murray v UK* (1995) 19 EHRR 193, and *Allen v UK* App no 25424/09 (ECHR, 12 July 2013).
- 12 AG VerLoren Van Themaat included references to Kafka in two separate Opinions: Case 79/81 *Baccini* (1982) ECR 1063, and Case 33/82 *Murri Freres v Commission* [1985] ECR 2759. Confusingly, in Case C-1/04 *Susanne Staubitz-Schreiber* [2006] ECR I-00701 AG Ruiz-Jarabo Colomer referred to the Kafkaesque ('Kafkiano' in the original Spanish) nature of a the developments of EU insolvency regulations because they had started off life within a treaty. Here the reference is of course to a famous transformation in another of Kafka's works!
- 13 *Abdelrazik v. Canada* (Minister of Foreign Affairs), 2009 FC 580 (CanLII), [2010] 1 FCR 267.
- 14 *Ibid*, para 53.
- 15 The idea that *Abdelrazik* can be seen as representing an effective remedy for Josef K. along similar lines to the parallel drawn in the present chapter can be found in Antonios Tzanakopoulos, 'An Effective Remedy for Josef K: Canadian Judge "Defies" Security Council Sanctions Through Interpretation' (*EJIL: Talk!*, 19 June 2009) <<http://www.ejiltalk.org/an-effective-remedy-for-josef-k-canadian-judge-defies-security-council-sanctions-through-interpretation/>> accessed 12 October 2013.
- 16 William Shakespeare, *The Merchant of Venice* (Wordsworth Classics 2000). Of course, in *The Merchant of Venice*, the 'lawyer' in question is really Portia, a leading character in the play.

Beyond the superficial similarities between Mr Kadi and Josef K.'s cases therefore, let us consider Kafka's depiction of law and the way it is experienced in his fiction. Kafka's work dealing with law and authority, and those subject to it, stretches beyond *The Trial* itself to several other stories of varying length. Kafka himself worked within the legal system and much in his fictional portrayals of the operation of the law, dismissed by Posner as fantastical and having little to say about actual legal doctrine,¹⁷ is based on his own experiences working for an insurance firm dealing with the special workers' injury compensation system within the Austro-Hungarian legal system.¹⁸ Kafka was a law graduate, and indeed once formulated a detailed idea for reform of the workers' insurance system, and was therefore very much *au fait* with the procedures of the law and their potential to contribute to both just and unjust outcomes. However, his fiction does not present law from the perspective of someone who is working within the legal system, but rather from the perspective of those who are subject to its demands with no access to its inner workings.

Several recurring themes emerge therefore in Kafka's treatment of the law. In *The Trial* itself, Josef K. wakes one morning to find that he is under arrest, although the legal system which then proceeds to subject him to 'trial' is very alien to any lawyer reading the novel, as it is to the protagonist who had considered himself relatively familiar with the law. Josef K. never learns what he is accused of, and is allowed to continue with his job in a bank while his 'trial' continues. The proceedings are very unorthodox, and many of the characters whom K. meets turn out to be in the service of the court. While many people offer him help with his case, none is particularly helpful in reality. There seems to be no way for K. to control his own fate, the law offers no way out and everything is against him. In the end, when he is led away, he accepts his fate, and is executed 'like a dog'.

*Before the Law*¹⁹ is a short story both published separately during Kafka's lifetime but also told by a prison chaplain in *The Trial* as a 'story within a story'. The protagonist, a man from the country, wishes to gain access to 'the law'. The law lies through an open doorway, which is guarded by a doorkeeper who stands 'before the law'. The man attempts to gain access to the law, believing it open to everyone. He is denied entry by the doorkeeper, who continues to refuse him entry despite accepting bribes. The man maintains hope that he will one day gain admission, but eventually grows old and dies, never having gained entry to the law. Before he dies the man asks the doorkeeper why no-one else had sought to enter. The doorkeeper tells him that this door

17 Richard A Posner, 'The Ethical Significance of Free Choice: A Reply to Professor West' (1985) 99 Harv L Rev 1431

18 For an excellent examination of how such experiences might have influenced his fiction, see Douglas E Litowitz, 'Franz Kafka's Outsider Jurisprudence' (2002) 27 Law & Social Inquiry 103, 108–12

19 Franz Kafka, 'Before The Law' in *The complete short stories of Franz Kafka* (Minerva 1992)

was only for him and that the door would now be closed.

In the very short story *The Problem Of Our Laws*,²⁰ the narrator describes a legal system which is controlled and known only by an elite, ‘the nobles’, who keep the content of the law secret. There is uncertainty regarding whether there is any substance to these ‘laws’ or whether ‘law’ is simply a name given to whatever the nobles happen to decree. Despite their subjugation, the people subject to the law prefer to continue living in this manner, accepting its authority. There are also numerous other works²¹ by Kafka in which powerful and seemingly irrational authority figure strongly, often with the full consent of those subject to it. Particularly noteworthy are *The Refusal*, where an authority figure who holds power for no apparent reason routinely rejects petitions by people who are ignorant of the law but accept the refusals despite their knowledge that they are inevitable, and *In The Penal Colony*, where an executioner operates a barbaric machine which kills the condemned by stitching words into their body. The executioner is so convinced of the justice of the machine and the sentences which it carries out that he executes himself using it.

3. Kafka’s vision of law as experience: unknowable and inaccessible

Kafka’s work has been subject to an extraordinary amount of analysis and commentary, not least by legal scholars. Although Posner maintains that it is not possible to draw any meaningful conclusions about the content of law from Kafka’s stories, or indeed any depiction of law in literature,²² this has certainly not prevented a large number legal theorists from seeking to develop themes from Kafka into more general theses about the law or its place in society. While Posner is right to insist that Kafka’s work cannot be treated as a doctrinal examination in the traditional sense, we should not therefore underestimate its value in seeking to engage with the *experience* of law for those who must live within a legal system. *The Trial* may not help us to understand the rules of criminal procedure in the Austro-Hungarian legal system, but it may tell us something about what it is like to be subject to such a procedure. The role of the legal theorist is to seek to make sense of this portrayal using his or her knowledge of law.

Looking solely at work which examines Kafka from the perspective of legal and political theory, there exist a plethora of attempts by influential scholars to make sense of what Kafka’s depiction of law and authority might represent. These include: an exploration of the search for a lost *Heimat* of community following a move from *Gemeinschaft* to *Gesellschaft*;²³ an illustration of

20 Franz Kafka, ‘The Problem with our Laws’ in *The complete short stories of Franz Kafka* (Minerva 1992)

21 Franz Kafka, *The complete short stories of Franz Kafka* (Minerva 1992)

22 Posner (n 17) 1356–59

23 Reza Banakar, ‘In Search of Heimat: a Note on Franz Kafka’s Concept of Law’ (2010) 22 *Law and Literature* 463

the questionable moral status of consent, given that Kafka's protagonists acquiesce to manifestly abhorrent treatment, thus bringing into question theories of justice and law, such as *law and economics*, and liberalism more generally, which are founded on the moral importance of autonomy and upholding voluntary transactions;²⁴ an examination of Jewish understandings of divine justice and violence, and human imitations thereof;²⁵ and a demonstration of the necessary lie that upholds any legal system, based as it is on a mere fictional validity.²⁶

These are all certainly themes which might fruitfully be explored in relation to both law and Kafka's work, yet none of them really seem to get to the crux of Kafka's depiction of *law* itself, which is instead characterised by its *unknowable* and *inaccessible* nature.²⁷ In Kafka's stories the law is present and people are subject to it, yet the *content* of the law is never revealed. In *The Trial*, the tension and absurdity of K.'s situation rests entirely on his ignorance of the charges and the workings of the trial which he feels powerless to influence. Similarly, in *The Problem Of Our Laws*, people are subject to a legal system which is so secret they are not even sure if it exists. In *Before The Law* this is depicted most graphically, with the protagonist's access to the law physically blocked, despite appearing possible due to the open door. Because access is denied, we never gain any insight into the *content* of the law. As Derrida characteristically puts it '*la loi est l'interdit*'.²⁸ Rather than proscribing behaviour, it is the law itself which is proscribed.

The law in Kafka's oeuvre therefore appears to possess no content. This has unwisely led some authors to conclude that the law *is*, both in Kafka and in reality, empty, existing merely by virtue of its inner paradoxes,²⁹ or through a process of *reification*,³⁰ whereby something with no real form or content obtains a 'phantom objectivity' due to its advanced formalised and bureaucratised appearance. Alternatively, law is reductively seen merely as its outcomes in the form of judgments, having no content before the outcome is reached.³¹ Such conclusions would

24 Robin West, 'Authority, Autonomy, and Choice: The Role of Consent in the Moral and Political Visions of Franz Kafka and Richard Posner' (2011) 99 *Harvard Law Review* 384

25 Walter Benjamin, 'Some Reflections on Kafka' in Hannah Arendt (ed), *Illuminations: Essays and Reflections* (Schocken Books 1999).

26 Jacques Derrida, 'Force of Law: The Mystical Foundation of Authority' in Drucilla Cornell (ed), *Deconstruction and the Possibility of Justice* (Routledge 1992); Haakan Gustafsson, "'As If': Behind Before the Law' (1996) 7 *Law and Critique* 99

27 Dominique Gros, 'Le "Gardien De La Loi," Selon Kafka' (2002) 14 *Law and Literature* 11; Patrick Glen, 'The Deconstruction and Reification of Law in Franz Kafka's 'Before the Law' and 'The Trial'' (2007) 17 *Southern California Interdisciplinary Law Journal* 23. A similar observation regarding the law's 'hidden' nature in Kafka is made in Fabrizio Sciacca, 'La Legge Nascosta: Il Paradosso Di Kafka' (1993) 70 *Rivista Internazionale di Filosofia del Diritto* 222

28 Jacques Derrida, 'Devant La Loi' (1983) 16 *Royal Institute of Philosophy Supplements* 173, 183

29 Derrida, *ibid.* and 'Force of Law' (n 16)

30 Glen (n 27), at 50-63.

31 Gunther Teubner, 'The Law Before Its Law: Franz Kafka on the (Im)possibility of Law's Self-Reflection' (2013) 14 *German Law Journal* 405, 413.

not shed much light on the nature of law, in general or in Kafka: as lawyers, we know that law does indeed possess content. Understanding Kafka in this way would merely therefore add credence to Posner's position that literature can tell us nothing about law. Kafka of course knew that the law possessed content, as he worked within the legal system. Kafka is writing about law as it is *experienced* by those who are subject to it but are *unaware* of its content.

Kafka's clever writing means that the reader also knows nothing of the law's content, and is thereby placed in the same position as the protagonists. It is perfectly conceivable that the law in these stories, *were* it to be revealed, would be a perfectly familiar legal system with familiar doctrines. US Supreme Court Judge Anthony Kennedy has also made this point, saying that all lawyers should read *The Trial* precisely to understand the law from the perspective of the client.³² Litowitz has described this as an example of 'outsider jurisprudence',³³ that is the law as it appears to those who are not familiar with the workings of the legal system. He seeks to contrast this with more traditional forms of 'outsider jurisprudence' (such as feminist jurisprudence or critical race theory) which seek to draw a connection between other forms of social marginalisation or minority status and the law.³⁴ He is right to reject such reductionism, as such perspectives, as *general theories of law*, are too simplistic to capture anything about the essence of law itself rather than the injustice of its content or application when these are subjected to critical analysis. Such theories thus recognise that law can play a significant part in wider forms of social exclusion, but they do not demonstrate how even those who are not marginalised in other ways can nonetheless suffer alienation at the hands of the law. Similarly, Banakar argues that Kafka's depiction of the law moves us past a vision of law as an instrument of social control towards the idea of law as a form of experience.³⁵ Kafka's insight is that the logic or rationality which appears evident to those within the workings of a legal system will not be apparent to those on the outside, to whom it appears illogical and irrational.³⁶ This sheds new light on the meaning of Luhmann's celebrated analysis of legal systems as *normatively closed*.³⁷ As Teubner argues, while theorists such as Habermas and Alexy celebrate the rational discourse which is inherent to law and its production, one's experience of law might nonetheless be one of anxiety and a sense of oppression.³⁸ The role of the legal theorist is to ensure that such important perspectives are accounted for and properly explained within a theory of law. A consideration of *Kadi II*, where the law itself confronts these issues, might help us in this task.

32 Terry Carter, 'A Justice Who Makes Time to Read, and Thinks All Lawyers Should, Too' *Chicago Daily Law Bulletin*, 26 January 1993, 2. Glen (n 27) also draws on this quote in his discussion of Kafka.

33 Litowitz (n 18)

34 *Ibid.* In particular see Litowitz's discussion of 'situational' outsiders and the law, 107-109.

35 Banakar (n 23)

36 *Ibid.*, 482.

37 See for instance, Niklas Luhmann, 'The Unity of the Legal System' in Gunther Teubner (ed), *Autopoietic Law: A New Approach to Law and Society* (Walter de Gruyter 1988)

38 Teubner, 'Law before Its Law' (n 31)(n 29), 420.

4. *Kadi* in the light of Kafka's theory of law

In *Kadi* the 'accused' must have felt subject to a mysterious *calumnia* similar to that experienced by Josef K.³⁹ and possessed no apparent means of challenging it. However, the respective outcomes of *Kadi I* and *II* suggest that the opaque procedures which Kafka is often seen as depicting in his work can be averted by operation of the law itself. Setting aside the myriad doctrinal and constitutional discussions concerning the pedigree of the norm which led to this outcome, and the relationship between different legal systems which caused many of the complexities in the case, the law would have appeared to have redeemed itself on this view. As literature, *The Trial* and *Before the Law* would be less powerful if Josef K.'s case were thrown out, or the doorkeeper eventually relented and allowed the man to enter. However, the foregoing discussions of Kafka's work have revealed a more complex depiction of law in Kafka than mere bureaucratic hurdles or infelicitous endings. If they depict something essential about the law, it should hold true regardless of the outcome of any particular case, happy or unhappy, such as that of *Kadi*.

In reality, the endings of Kafka's stories are not really part of Kafka's account of the law itself, but rather separate themes in Kafka's work concerning the willing acceptance of unjust authority by people who are subject to it, alongside a more general fatalism which infects his stories. In all his stories, those subject to the *unknowable* law seem to have it in their power to reject in some manner the course of events but choose not to. Mr Kadi evidently did not take this route, and the law itself offered him a just outcome. However, the law still put Mr Kadi through the same opaque and alienating experience which Josef K. had to endure. The experience of the law would have been identical, that is, an accusation which is difficult to understand, and a legal procedure which is equally opaque and threatening: Imagine for a moment being the accused in a case where your lawyer informs you that the outcome hinges on a favourable reading of the relationship between competing claims to supremacy in a pluralist international legal order! This is not to say that these are not valid and important questions upon which cases should indeed rest. It is instead to emphasise that they are *lawyers' questions*. The *experience* of law for those subject to it is bound to be less comprehensible precisely *because of* their intra-systemic importance. Here we begin to see how Kafka's fictional portrayal of the legal system is rooted firmly within the *reality* of people's experience of law even outside his fiction. What is it about law therefore, that most vaunted of social artefacts and the basis of the grand ideas of the *Rule of Law* and the *Rechtsstaat*, which produces this experience? Legal theory should not simply seek to make sense of law for lawyers. The following sections seek to sketch an account which makes sense of Kafka's vision of law and Mr Kadi's experience of the legal system and process.

5. Making sense of Kafka's theory of law: The law's dual claim to authority

As with Kafka's protagonists, Mr Kadi chose to put his *faith* in legal procedures which appeared

39 The famous first line of *The Trial* reads 'Someone must have slandered Josef K., for one morning, without having done anything truly wrong, he was arrested.'

hostile to him, but eventually found himself, and the law, redeemed.⁴⁰ Kafka's characters found no such redemption in the law. The experience of the legal system will have been similarly inaccessible and opaque to all of them however. Kadi's case can help us to understand two things about law highlighted in Kafka's work as law as experience. The first is a *conceptual* one, applicable to all legal systems. The law, as it is experienced by those subject to it, inherently makes two competing claims to authority, rendering it unknowable and inaccessible. The second, examined in the following section, is a contemporary, empirically observable trend in *post-modern* legal systems, that is their increasing complexity and fragmentation, which promise the *potential* of better, more precise legal outcomes, but an equal potential for the law to be experienced as even more irrational and unknowable. Let us deal with these two aspects in turn.

The idea of *law as experience* takes seriously the place of law in the world, rather than simply as a self-referential normative system whose content rests on some imagined or assumed validity. Law seen in this way is something that makes a claim on you, or more precisely on your actions. That law makes a claim on those subject to it is a widely, although not universally, shared position in much contemporary legal theory,⁴¹ yet the full complexity of these claims, and the relationship between them, are not generally appreciated. For those subject to the law, the law makes two claims to authority. On the one hand, it claims authority by providing you with rules which attempt to *pre-empt* your own practical reasoning, that is, your decision-making process.⁴² Accounts of law as a system of rules are prevalent in both contemporary positivist⁴³ and natural law theories⁴⁴ which stress the importance, either in fact or in ideal terms, of the *normative* form which law possesses. The basic point here is that law seeks to intervene in your reasoning process *ex ante*. The idea that law primarily takes this form, and makes this sort of claim, provides the basis for two of law's strongest redeeming features in moral and political theory, thus giving it the potential to transcend the simple status of handmaiden of the all powerful state. Firstly, theorists such as Fuller⁴⁵ explain how the law, taking this normative form, is able to provide a framework for action, enhancing the autonomy of those subject to it, by allowing them to predict the actions of others and of officials of the legal system. This in turn facilitates planning and the ability to direct ones own life. Secondly, also centring on the law's relationship

40 Gardner has sought to show how legal validity and effectiveness can be explained by people's 'faith' therein: John Gardner, 'Law as a Leap of Faith' in Sionaidh Douglas-Scott and others (eds), *Faith in Law* (Oxford, Hart 2000)

41 A survey of such positions can be found in John Gardner, 'How Law Claims, What Law Claims' in Matthias Klatt (ed), *Institutionalized Reason: The Jurisprudence of Robert Alexy* (Oxford University Press 2012)

42 This formulation is based on Raz's hugely influential account of rules as exclusionary reasons, first laid out in detail in Joseph Raz, *Practical Reason and Norms* (Hutchinson 1975)

43 Classic examples are: HLA Hart, *The Concept of Law (Clarendon Law Series), 2nd Ed.* (Clarendon Press 1997); Hans Kelsen, *General Theory of Law and State* (Harvard University Press 1945); Joseph Raz, *The Concept of a Legal System* (2nd ed., Clarendon Press 1980)

44 The centrality of law's normative character to the law's moral significance is present in both John Finnis, *Natural Law and Natural Rights* (Clarendon Press 1982); Lon Fuller, *The Morality of Law* (Yale University Press 1969)

45 Fuller (n 44), in particular Chapter 2.

with autonomy, Raz has stressed, using his service conception of authority, how the peremptory nature of law's claim to authority allows one to use law to better achieve one's own goals, relying on its likely better judgment where applicable.⁴⁶ On this view, the law's claims should not produce the anxiety which Kafka portrays in his work. However unjust the content of the law, it is presented in a way which permits planning and purports to perform a service for those subject to it.

However, the experience of law as unknowable and inaccessible stems primarily from its *competing* second claim to authority which exists contemporaneously and in concert with the first. This second claim can be seen in general theories of law which focus on the *adjudicatory* function of legal systems, as diverse as the legal realists⁴⁷ and Dworkinian interpretivism,⁴⁸ among others. As with *ex ante* authority visions of law, such theories can be seen as offering the law a form of redemption, in their case by promising a *just outcome* of some kind of another: regardless of the mistakes of the law-as-rules, a just judgment can be reached in court. What these law-as-adjudication theories have in common is their belief that law primarily consists in the passing of judgment, that is that it is essential to law's nature that it claims the authority to pass judgment on the past actions of those subject to it and declare on their legal status. This is an *ex post* claim to authority.

The insight of these latter theorists is perhaps somewhat lost on those who insist that law is essentially a system of rules. For such law-as-rules theorists, because those rules constitute the legal framework which *establishes* both the form and the content of any adjudication, and are therefore logically prior to it, these theorists fail to apprehend the *non-lawyer's* experience of this second claim to authority. For the lawyer, there is no dual claim to authority, as adjudication proceeds according to legal rules which are analytically and intra-systemically prior. Any apparent paradox of competing claims to authority is dissolved therefore by the law itself. For someone merely *subject* to the law however, any apparent guidance which rules provide *in advance* is offset to the law's parallel claim to pass judgment on your actions *after the fact*. Legal theorists may engage in fruitful debate about which of these claims is prior, more conceptually central, or morally more significant, yet this misses the crucial fact that for those outside the workings of the legal system, both claims to authority are *experienced* with equal force.

This dual claim to authority is the basis of the truth in Kafka's depiction of law as experience. The law makes contradictory claims on people's actions, meaning that regardless of how clear or precise the original *ex ante* norms are, or how reasonable, predictable or transparent the *ex post* adjudication is, one lives permanently in between these two stools of the law's competing claims

46 Joseph Raz, 'The Obligation to Obey: Revision and Tradition' (1984) 1 Notre Dame JL Ethics & Pub Pol'y 139

47 Oliver Wendell Holmes, 'The Path of the Law' (1897) 10 Harvard Law Review 457

48 Ronald Dworkin, *Law's Empire* (Hart 1998)

to authority. Law is, at once, an institution which claims to direct your behaviour in advance and then also judge it in retrospect. That these two functions are both necessary and desirable for numerous reasons, and linked in numerous ways, does not take away from the fact that, for those who are simply subject to the law's demands, this double claim to authority means that one can *never* be sure of what the law is requiring of you. Even when one thinks that one understands the law's *ex ante* requirements, the law reserves the right to come to a different conclusion, *ex post*, for better or worse.

How does this relate to Mr Kadi and Josef K.? Their respective cases are so powerful for lawyers because they bring home to those within the law what it is to experience the *unknowability* and *inaccessibility* of an institution which they usually experience and rationalise in terms of its inner-logic, rationality, openness and myriad other virtues. The unknowability and inaccessibility in *Kadi* and Kafka are self-evident due to their extremes. However, what this section has sought to show is that law, through its dual claim to authority – through its very nature – will *always* possess these alienating characteristics for those subject to the law without access to its inner workings. Due to its competing claims of authority one can *never* be sure what the law requires. One can of course hope for a just outcome, or at least a favourable one, which may well be forthcoming, but this does not remove the anxiety which one experiences while awaiting it.

6. Kafka, *Kadi* and the experience of law in post-modernity

If unknowability and inaccessibility are part of law's nature, therefore, how should one understand cases such as *Kadi*? One reading suggested above would see *Kadi II* as a happy ending to a Gothic tale, thus demonstrating the inherent goodness and redeeming potential of law in general, and the EU legal system in particular. On this view, Kafka's morality tales have been heeded as Mr Kadi has avoided the fate of Josef K., and the law has produced the just outcome which its adjudicatory system of authority promises. As the previous section concluded, however, the outcome of *The Trial* itself, or of any legal procedure is not the source of the unknowability and inaccessibility of the law and its workings. What *Kadi* represents is instead a case where these elements are brought to the attention of lawyers, for whom the law is, by definition, neither inaccessible nor unknowable. This is perhaps because the *Kadi* saga hinges on certain contemporary trends within the law and their tendency to *heighten* the level of unknowability and inaccessibility which lead to the alienating experience of law as depicted in Kafka. These trends take the form of the increasing *complexity* of both the *ex ante* claims to authority in the form of rules and the *ex post* claims to authority in the form of adjudication. While both of these trends contain the potential for better, more tailored laws and legal outcomes, they do this at the expense of any remaining *accessibility* or *knowability*. While Kafka's work is often understood as depicting the troubling aspects of *modernity*, the *Kadi* saga demonstrates particular developments in law's *post-modern* phase.

The first development is the increasing prevalence of technical regulatory-type laws and various forms of *lex specialis*, of which the targeted sanctions applied to Mr Kadi are an example. The increasing number and complexity of laws and their lack of generality can only add to the feeling of alienation of people seeking to plan their actions according to the law's commands or to use the law in their practical reasoning process. Laws are becoming more targeted towards specific problems, bringing the promise of more precisely engineered provisions, but also rendering the law more fragmented. In particular the use of *criminal* law and other sanctions to bolster the regulatory aims of government makes this problem particularly acute.⁴⁹

The second development is equally evident in *Kadi*. This is the increasing complexity of sources of law to be taken into consideration in the adjudication phase, in particular that which appears to possess hierarchical superiority or constitutional force, which has become equally fragmented.⁵⁰ Much of the literature on the Kadi saga has focused on the problems of the relationship between legal systems and their claims to supremacy, redolent of constitutional and legal *pluralism*. The tendency to seek to describe or advocate an 'integrated' inter-systemic approach to legal questions, drawing upon legal norms from a variety of competing sources which all claim hierarchical pre-eminence has become extremely prevalent. Even the *Kadi* judgments themselves, which are often seen⁵¹ as representing a form of hermetically sealed *dualist* approach to international law, are ultimately grounded on principles which form part of the EU system by virtue of their status in *other*, i.e. national,⁵² legal systems, and possibly also the international law itself.⁵³ The great advantage, from the broader perspective of justice and the law's ability to furnish it, is that such approaches, in their sensibilities to varying concerns and willingness to find a balance between different substantive claims, offer the possibility that a *better* outcome will be reached: the court can find a combination of sources which produces the outcome which the case requires. However, as mentioned above, the reality of such adjudicatory considerations, when looked at from the perspective of those *subject* to the law is somewhat different. While they might hold out hope for a favourable outcome to their case, which may or may not arrive, this judicial balancing of a plurality of legal values of varying pedigree is far from accessible.

49 On this issue, and the related *maxim ignorantia juris non excusat*, see Andrew Ashworth, 'Ignorance of the Criminal Law, and Duties to Avoid It' (2011) 74 *The Modern Law Review* 1

50 Gunther Teubner, 'Global Bukowina' in Gunther Teubner (ed), *Global Law without a State* (Ashgate 1997)

51 In relation to *Kadi*, see the literature cited at n 5.

52 See for instance the discussion regarding the place and pedigree of general principles and fundamental rights in EU law in Case 11/70 *Internationale Handelsgesellschaft* [1970] ECR 1125, para 4.

53 This is the general idea of *solange*-type controls representing a dialectic whereby values inherent within the legal system being scrutinised are the very basis for review. An argument of a similar type can be found in WT Eijsbouts and LFM Besselink, "'The Law of Laws" - Overcoming Pluralism' (2008) 4 *European Constitutional Law Review* 395

The fragmented and increasingly complex nature of modern legal systems and their interaction can only serve to exacerbate the impact of conflicting claims to authority of law which make Kafka's depiction of law as experience so powerful. Law has an *inherently* unknowable nature for those who are subject to it. However, this is always a question of degree. *Kadi* is an illustration that, beyond law's inescapable unknowability due to its competing claims on people who are subject to it, legal systems can contribute greatly to this alienating experience by making law *even less* knowable and its processes *even less* accessible. Douglas-Scott has recently and powerfully described this 'post-modern', post-systemic fragmented constellation of law – these new forms of legal pluralism – by drawing parallels with more general post-modern themes of chaos and fragmentation of meaning in literature and art, seeking to demonstrate the absurdities and alienation that such an explosion in competing signs brings.⁵⁴

However, by considering Kafka's depiction of law as experience we are able to see the consequences of this fragmentation in terms of how people *relate* to law. While Douglas-Scott concludes her work with the argument that the standards of justice which inform the law might still prevail within such a complex system, *pace Kadi II*, such a view risks neglecting the place that an accessible and comprehensible legal system *itself* has in a just society, regardless of the justness of discrete instances of adjudication. What the judgment in *Kadi II* shows is that these inaccessible legal processes are capable of comprehending the danger of their own incomprehensibility. While the inner workings of the law are indeed inaccessible to those subject to it, thus making the law inherently unknowable, the law contains not only the promise of redemption in terms of just outcomes to cases before it, but also redemption in the form of some relief from the extremes of law's own inaccessibility. To prevent more people from enduring Josef K.'s plight, the law must *present itself* as something which is both accessible and knowable. If people subject to the law *perceive* it as rational and comprehensible they are spared the anxiety of both Mr Kadi and Josef K. This however would require the law to pull back from its current fragmentation, with the consequent danger of less suitable, even less just, laws and judgments. The UN Security Council, the original source of Mr Kadi's woes, has already begun to make its sanctions less targeted in nature in response to the rulings of the CJEU and other courts. It is far from evident that this is a better solution. Here it is the law itself, rather than those subject to it, which finds itself in a double-bind.

54 Sionaidh Douglas-Scott, *Law After Modernity* (Hart 2013) in particular Ch 4.