



## Introduction

### A Context and Plan of Work

Constitutionalism understood broadly is a concept that addresses emergence, restriction and legitimation of power and authority. Traditionally, concepts of constitutions and constitutionalism developed from within particular communities, mostly states. In this sense, international or global constitutionalism<sup>1</sup> implies a qualitative shift in thinking: how to apply constitutional concepts beyond nation-states and bounded communities. Global constitutionalism as a way of reflecting upon authority and power at the global level proliferated with the intensification of processes subsumed under the heading of globalisation.

Global constitutionalism is a popular subject within the field of public international law,<sup>2</sup> although many international law scholars adopt a rather sceptical attitude towards the idea of global constitutionalism.<sup>3</sup> The basic idea behind the modern international constitutionalist movement is the necessity to introduce better control over the exercise of power at the global level. Human rights form a core of the global constitutionalist project. Imitating modern nation-state constitutions emanating from Western legal and political tradition, which views constitutional rights as guarantees against state interference with individual freedoms,

<sup>1</sup> The choice and the use of the terms ‘international constitutionalism’ or ‘global constitutionalism’ will be explained and justified at the beginning of Chapter 1.

<sup>2</sup> For some recent examples, in chronological order, see Dunoff and Trachtman (eds.) *Ruling the World* (2009); Klabbers, Peters and Ulfstein, *Constitutionalization* (2009); Kleinlein, *Konstitutionalisierung* (2011); Schwöbel, *Global Constitutionalism* (2011); Krisch, *Beyond Constitutionalism* (2012); Teubner, *Constitutional Fragments* (2012); Habermas, ‘Crisis’ (2012); Somek, *Cosmopolitan Constitution* (2014); Kjaer, *Constitutionalism* (2014); O’Donoghue, *Constitutionalism* (2014); Bhandari, *Global Constitutionalism* (2016).

<sup>3</sup> For an overview of skeptics see d’Aspremont, ‘International Legal Constitutionalism’ or Werner, ‘Never-Ending Closure’.

various theories of international constitutionalism postulate human rights as limits on and protections against the arbitrary use of power by states and other global actors. However, the relationship between human rights and the project of international constitutionalism is articulated in the doctrine of public international law only rudimentarily. When human rights are discussed as a part of theories of international constitutionalism, the discussions are very brief and based on generalisations. The majority of the existing discussions are grounded in the following two fundamental assumptions:

- Global constitutionalism can only be developed by mimicking national constitutional orders of Western nation-states;<sup>4</sup>
- International human rights law forms an unchallengeable basis for the project of global constitutionalism.<sup>5</sup>

These assumptions emerge from an uncritical belief in the undisputable positive nature and effect of human rights as well as the presumption in favour of the Western constitutional experience. The absence of an alternative language and imagery able to address the need for limiting the exercise of power at the global level is also a serious obstacle. While some alternatives to the idea of global constitutionalism as a device for reflecting upon ordering and power constraints at the global level have emerged – such as, for example, the literature on transnational or global pluralism or global administrative law – they also rely to a greater or smaller extent on human rights without examining the underlying assumptions behind this reliance.

The present study takes a critical view on the issue of global constitutionalism and its relationship to the international protection of human rights. The place attributed to human rights within global constitutionalism is particularly important for several reasons. The introduction of

<sup>4</sup> See e.g. the discussion of constitutional features of international human rights in Gardbaum, 'Human Rights', 238. For a more explicit example, see Paulus' contribution to the same volume where he evaluates the 'progress and potential of constitutionalisation in general international law ... using established principles of domestic constitutions'. Paulus, 'International Legal System', 90.

<sup>5</sup> This is a general idea that follows from the almost complete absence of any consideration by the theories of global constitutionalism of the existing literature taking a critical stand with regard to the international system of human rights protection. Even if the existence of this critical literature is acknowledged, the usefulness and use of human rights is maintained in the absence of any substitute. An exemplary statement would be 'Who could deny the worldwide validity, higher right, and constitutional rank of universal human rights?' Teubner, *Constitutional Fragments*, 124.

human rights into the constitutional structures of nation-states and now of the international community is said to form a cornerstone of effective protection of individuals against the arbitrary use of power. However, if the human rights promise of protection is just an illusion, the danger of abuses and misuse is real and significant. Moreover, power-holders will be able to excuse their abuses by reference to the supposedly constitutional structure that integrates human rights protection. In order to prevent human rights from becoming a more authoritative legitimating device in the hands of power-holders, there is an urgent need to understand how human rights function within the project of constitutionalisation in international law. There is also a need to find an alternative language and imagery for the desire that drives international lawyers towards the production of constitutional theories. While many share idealistic aspirations of global constitutionalism, such as promoting individual well-being and imposing constraints on power exercised by global actors, the implications and consequences of the uncritical use of constitutionalist language relying on human rights can be problematic.

The idea of human rights forming one of the central building blocks of theories of global constitutionalism has itself been subjected to strong critical analysis by some scholars.<sup>6</sup> Therefore, this study pursues two interrelated aims: (1) to examine how human rights function within the emerging global (possibly constitutional) order and reassess their role at the global level (explored in Chapters 1 and 2); and (2) to suggest strategies for developing an alternative imagery that is able to respond to global constitutionalism's idealistic aspirations while avoiding conventional traps (explored in Chapters 3 and 4). In achieving its aims, the study argues that dominant paradigms of global constitutionalism are based on an exclusion/inclusion dynamic that always necessarily leads to some degree of arbitrariness and injustice. Therefore, the study argues for a rethinking of dominant paradigms of global constitutionalism. With regard to human rights, the main argument is that human rights do not function as constraints on the arbitrary exercise of power and protections of individuals in the way assumed in global constitutionalist discourse. To the contrary, they represent one of the central mechanisms maintaining the exclusion/inclusion dynamic with its injustices. Therefore, there is a need for alternative mechanisms of power-constraint and individual protection. In order to overcome the dominant paradigms of global constitutionalism these alternative mechanisms need to be searched for in non-Western,

<sup>6</sup> See e.g. Chandler, *Rethinking*; Douzinas, *Human Rights*; Kennedy, *Dark Sides*.

non-state-centred contexts. This study proposes alternatives based on analyses of ancient Greece and early Islam. As a result of these analyses, the proposed alternative vision of global constitutionalism focuses on the broad aim of enabling a happy life together and suggests strategies to move away from exclusion/inclusion logic towards the idea of belonging.

In order to achieve the objectives and develop a persuasive argument, an interdisciplinary approach, understood here as the use of methodologies and insights from disciplines other than law for the analysis of legal issues, appeared indispensable. The interdisciplinary methodology adopted in this study is twofold. On the one hand, methodologies and insights from other disciplines oriented the general approach of this study: the way questions are asked, the structure and the way of looking for alternatives. The core of this interdisciplinary element is constituted by the methodological approaches derived from the works of Giorgio Agamben<sup>7</sup> and Gilles Deleuze and Félix Guattari.<sup>8</sup> Therefore, before proceeding towards the analysis of substantive issues, the next part of this introduction clarifies these methodological approaches and some of their central tools. On the other hand, when discussing specific issues in order to gain deeper insights into particular sub-areas, analyses from other disciplines, mostly sociology, became indispensable. These alternative interdisciplinary insights are justified and clarified in the relevant parts of this study.

The substantive discussion of this study starts with a general overview of the place of constitutionalism in public international law. In this first chapter some definitions of basic concepts are provided, followed by a critical review of the scholarly views on the issue of global constitutionalism using paradigmatic and functional analysis. In order to identify relevant paradigms within the doctrine of global constitutionalism, existing theories are approached with three main questions in mind: What role do individuals play within the proposed system? What meaning and place is attributed to states and sovereignty? What is the nature of the political that various constitutionalisms presuppose? The examination of these questions will assist in getting a better understanding of how precisely human rights function within particular theories of global constitutionalism, a question that will be examined in Chapter 2. Overall, Chapter 1 concludes that all paradigms of global

<sup>7</sup> The main reference in this regard is Agamben, *Signature*.

<sup>8</sup> The work of these authors that forms the basis for the methodological reflections in this study is Deleuze and Guattari, *Kafka*.

constitutionalism are based on an exclusion/inclusion dynamic that necessarily leaves some groups of human beings out of the realm of protection, and thus produces arbitrariness and injustice. For each paradigm the chapter also offers a reflection on possible ways of overcoming the exclusion/inclusion dynamic.

Chapter 2 takes a critical view of the functioning of human rights. Since the main question that the chapter examines is how human rights function, the use of a sociological system theory appeared to be the most appropriate tool. After examining and comparing the historical functioning of constitutional rights in national constitutional systems and the functioning of human rights at the international level, the chapter comes to the following conclusions. First, it is still difficult to draw a clear picture of the functioning of international human rights. However, in the present state of knowledge about the functioning of human rights, we can affirm with certainty that human rights do not function similarly to constitutional rights in domestic settings. More significantly, while human rights do occasionally protect individuals against abuses of power, this is not their main goal. The main mechanism human rights activate is the exclusion/inclusion mechanism identified as common to all paradigms, which were covered in Chapter 1. Therefore, relying on human rights to constrain arbitrary exercise of power will necessarily produce arbitrary results. The chapter concludes that there is an urgent need for alternative mechanisms for power constraints and individual protections at the global level.

Chapter 3 explores these alternative accounts of power control. Since the initial criticism of current theories of global constitutionalism that gave impetus to this research mainly focuses on the predominance of Western constitutional experience (Eurocentrism) and the unquestioned acceptance of rights language (rights-oriented nature), I selected one non-Western normative order (Islam) and one non-legal normative order (ancient Greece) to examine some alternative strategies for power control. These alternative strategies combined with suggestions about overcoming the exclusion/inclusion dynamic formulated in relation to paradigms of global constitutionalism point towards the idea of belonging as the guiding tool for reorienting global ordering. The Chapter 4 represents a summary of the analysis and further reflections articulating how the project of global constitutionalism as a happy life together could potentially become part of the reoriented idea of global ordering as belonging.

## B On Methodology

The approach adopted in this study emerged out of a strongly felt need for a deep and multifaceted understanding of the issues involved and the conviction that such an understanding could only materialise through the application of a methodology allowing for the approach of issues from a new angle. At the same time, it was necessary that this new angle have the potential of leading the study into the direction determined by its objectives without predetermining outcomes and conclusions: that is, to examine how human rights function as parts of the theories of global constitutionalism and open up a new language and imagery for dealing with issues that lead international law scholars into the direction of global constitutionalism. In order to achieve these objectives, it was important to find an appropriate perspective that could guide the reflection on these issues, a sort of a meta-method that guides the thinking process and orients the way questions are asked without necessarily re-emerging in the discussion of substantive issues. This section clarifies this meta-method.

The first important preoccupation relates to the almost complete absence of an in-depth discussion of the mechanism of human rights within the existing theories of global constitutionalism. The dominant literature rather proceeds from an untested and unquestioned assumption that human rights with their current functions will become or are already part of global constitutionalism. For some authors the very existence and functioning of human rights in their present form in international law becomes proof of existence of the constitutionalised international society. In order to interrogate this problem anew, Deleuze and Guattari's literary analysis method of looking at how a particular theme functions within an author's oeuvre provided an inspiration.

The phenomenon of global constitutionalism, and its links to human rights, is a modern, contemporary development. However, it has a history, albeit perhaps not a very long one compared to some other problems of humanity. Simultaneously, one of the main objectives in undertaking this study was also to project the ideas developing around human rights and constitutionalisation of international law into the future, proposing innovative visions and language. Thus, present, past and future needed to come together in a non-linear way to reveal new insights. Giorgio Agamben's depiction of philosophical archaeology as a future anterior that gains access to the present for the first time<sup>9</sup> provided an ideal framework in this regard.

<sup>9</sup> Agamben, *Signature*, 106.

In what follows, I present my understanding of these two approaches: Agamben's philosophical archaeology and Deleuze and Guattari's method of literary analysis, and I justify in more detail their influence on and usefulness for the present study.

### 1 *Agamben and Philosophical Archaeology*

The three essays on method published within a single volume entitled *The Signature of All Things: On Method* deal with different but inter-related issues of paradigm, signature and philosophical archaeology. The essay on philosophical archaeology is placed as the third and final of the three essays. The most interesting characteristic of philosophical archaeology is its relationship to time. As the term 'archaeology' indicates, it deals with the past and the origin (*archē*). However, the relationship to the past and access to the past is of a particular nature. The origin is also understood in a particular way. Summarising the aim of philosophical archaeology, Agamben states, 'the point of archaeology is to gain access to the present for the first time, beyond memory and forgetting or, rather, at the threshold of their indifference.'<sup>10</sup> The access to the present is gained for the first time because the 'origin' that is at stake is not some temporarily locatable moment in the past, but 'a moment of arising' that was 'covered over and neutralized by tradition'.<sup>11</sup> This neutralisation is compared to repression in psychoanalysis so that what was repressed becomes unconscious and haunts the present.<sup>12</sup> However, unlike in psychoanalysis, the goal is not 'to restore a previous stage, but to decompose, displace, and ultimately, bypass it in order to go back *not to its content, but to the modalities, circumstances, and moments* in which the split, by means of repression, constituted it as origin'.<sup>13</sup> It will become clear that this emphasis on modalities and circumstances as opposed to content is an important aspect that unites philosophical archaeology with Deleuze and Guattari's approach. It should also be noted that this access to the modalities in which the split occurred is particularly relevant for Chapter 2, where the suppressed exclusion/inclusion dynamic of human rights is revealed.

Agamben emphasises the necessity to engage anew sources and tradition that is only possible if the tradition is confronted through deconstruction of 'the *paradigms, techniques, and practices* through which tradition regulates the forms of transmission, conditions access to

<sup>10</sup> Ibid.    <sup>11</sup> Ibid., 105.    <sup>12</sup> Ibid., 96–98, 102–103.    <sup>13</sup> Ibid., 103, emphasis added.

sources, and in the final analysis determines *the very status of the knowing subject*.<sup>14</sup> Three aspects of this statement need to be highlighted. Firstly, the importance of paradigms as building blocks on the way towards achieving the aim of philosophical archaeology is emphasised. This explains why the first chapter of the study is dedicated to identifying relevant paradigms within the theories of constitutionalisation of international law. Secondly, the statement places paradigms at the same level of importance as technics and practices. Deleuze and Guattari propose one methodology that is particularly useful in identifying and understanding any aspect related to the functioning of a particular phenomenon, including techniques and practices. Therefore, Agamben's method of philosophical archaeology is combined with Deleuze and Guattari's method, which will be addressed below.

One final observation on philosophical archaeology is necessary. It creates a very peculiar relationship between the past, the present and the future that serves well the purposes of this study. It simultaneously allows us to gain access to the present through a deeper engagement with the past, but also to imagine the future because the space opening up in the past is projected into the future.

## 2 *Deleuze and Guattari: Machinic Assemblage and How It Functions*

The second methodological approach is inspired by one specific work of Deleuze and Guattari, their book *Kafka: Towards a Minor Literature*. In this book they approach the works of Kafka as a minor literature and provide their interpretation of how Kafka's oeuvre functions as such. The notion of minor literature itself is not central to our purposes. Therefore, I will just briefly define it in order to facilitate the subsequent discussion of Deleuze and Guattari's approach.<sup>15</sup> The methodological tools that I borrow from this book are developed by Deleuze and Guattari in order to explain *how* Kafka's oeuvre *functions* as a minor literature.

According to Deleuze and Guattari the following are the three characteristics of a minor literature: 'the language is affected by high coefficient of deterritorialisation'; 'everything in them is political'; and 'in it everything takes on a collective value'.<sup>16</sup> They argue that Kafka was an

<sup>14</sup> Ibid., 89, emphasis added.

<sup>15</sup> For a more detailed discussion of the notion of minor literature and reading international law as a minor literature see Yahyaoui Krivenko, 'International Law'.

<sup>16</sup> Deleuze and Guattari, *Kafka*, 16–17.



author of a minor literature and they want to understand the mechanisms that allow Kafka to operate as an author of minor literature. In order to achieve this, Deleuze and Guattari adopt a particular approach that influenced this study.

Deleuze and Guattari proceed from a few fundamental principles that need to be highlighted from the outset. Firstly, they refuse a search for a structure with formal binary oppositions.<sup>17</sup> Instead, they use their terminology of machinery, machines and assemblages that emphasises the interconnectedness of everything and the equal importance of every single element, movement, gesture. This also implies an absence of distinction between inside and outside, and emphasis on process rather than form. Thus, they refuse the search for some hidden and fundamental meaning, focusing instead on understanding functioning, the way a particular theme or image works within the author's oeuvre. In this sense, traditional literary interpretation in their case and traditional doctrinal approach of international law in the case of this study become useless. This emphasis on functioning and mechanisms has several affinities with Agamben's depiction of philosophical archaeology. When Agamben says that the movement towards the past of philosophical archaeology is not towards its content, but towards its modalities and circumstances,<sup>18</sup> it resonates with the following observation by Deleuze and Guattari that summarises well the essence of their approach: '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).'<sup>19</sup> In order to understand this functioning of Kafka's oeuvre, Deleuze and Guattari adopt a particular perspective and terminology. Running the danger of simplification but keeping in mind the need for brevity, I describe below the elements essential for my further discussion and for understanding the approach of the present study.

Kafka's oeuvre is described as a machinic assemblage. In order to understand how this assemblage functions, we also need to identify its building blocks, its elements and how they are connected to each other. The assemblage commences to be built through creation of machinic indexes that will become parts of the assemblage. This assemblage being built 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.

<sup>17</sup> Ibid., 7.      <sup>18</sup> See note 13 above and the accompanying text.

<sup>19</sup> Deleuze and Guattari, *Kafka*, 45.

However, if we realise that these indexes are only parts or signs of an assemblage – and thinking of Kafka's writings as single oeuvre helps in achieving this realisation – 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 but don't function or no longer function.<sup>20</sup> The assemblages themselves can function in two ways: they can be in the 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.'<sup>21</sup> 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. (Transcendental law and immanent field of justice can be given as examples of abstract machine and machinic assemblage, respectively.) Chapter 1 focuses on identifying paradigms of global constitutionalism as building blocks or indexes in Deleuze and Guattari's terminology, while Chapter 2 depicts human rights as a particular type of mechanism.

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 the basic methodological background that is used to attempt a renewed look at the issue of constitutionalisation of international law and its relationship to human rights. Against the background of this discussion by Deleuze and Guattari it became obvious that the fundamental question this study needs to address is *how* human rights function within the oeuvre of public international law, not what function they fulfil or what meaning they have.

One final point that needs justification is the transposition of this method from the analysis of the works produced by one single author to the body of literature emanating from a variety of authors. Since international lawyers produce written work, they also produce an oeuvre, although it is not a literary oeuvre in the traditional sense. We can 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 a

<sup>20</sup> Ibid., 47.    <sup>21</sup> Ibid.