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Oddagrein

Greinarnar í hesi útgávuni umrøða hugtakið *lóg* úr trimum ymiskum sjónarhornum.

Í fyrstu greinini viðger Kristian Joensen, námslektari á Fróðskaparsetri Føroya, spurningin, um statshugtakið, við serligum atliti til um Cookoyggjar og Niue, eru statir eftir altjóðarætti. Hann førir fram, at svarið valdast, um spurt verður útfrá sjónarhorninum á antin sokallaðu *deklaratorisku* ella *konstitutivu* fatanini av, hvønn týdning viðurkenning frá øðrum statum hevur á statshugtakið.

Mikael Karlsson, atknýttur professari í lóg, viðger í næstu greinini áskoðanirnar hjá sankta Thomas Akinas á, um *lóg*, sum hugtak, er *bindandi* og samspælið millum eginleikarnar hjá lógini at ávikavist *binda* og *áleggja skyldur at verða lýðin*. Viðkomandi spurningar verða settir, sum t.d. um bindandi eginleikin hjá lógini er grundaður á, at lógin er stuðlað við tvingsilstiltøkum. Um lógarskipanin er grundleggjandi ein tvingsilsskipan? Um hesin eginleikin hevur røtur í siðvenju. Um tað kann javnmetast at verða *bundin av lógini* og at *hava skyldu at akta hana*. Um *tvingsil* ella *siðvenja* kunnu skapa slíkar *skyldur*. Og at enda: hvat er *ein skylda*, hóast alt?

Í triðju greinini viðger Frederick Schauer, professari í lóg á University of Virginia, hvussu dómarar, og onnur við viðkomandi heimildum taka avgerðir í truplum málum. Greinin viðgerð samspælið millum ymiskar fatanir av hvussu *lógin* verður nýtt í trupulum málum, við serligum atliti til, um ein *einans* kann og eigur at nýta lógina, hóast eingin áseting er um viðurskiftini í einum trupulum máli, ella í hvønn mun og undir hvørjum treytum, lógin loyvir dómarum og øðrum, ið taka løgfrøðiligar avgerðir, at leita *víðari* enn til lógina til tess at røkka niðurstøður teirra.

Hóast greinarnar ikki viðgera *serføroysk* viðurskifti, kunnu evnini tó sigast at vera eins viðkomandi fyri føroyska løgdømið, sum fyri onnur løgdømi kring heimin. Bæði í søguligum høpi, í mun til verandi støðu, og í mun til altjóða samfelagið, geva evnini íblástur til at seta spurningar sum: *í hvønn eru Føroyar ein statur sambært altjóða lóg*? Hesin spurningur er luttvíst viðgjørdur í áhugaverdari grein eftir Halgir Winther Poulsen *Eru føroyingar tjóð?,* sum varð útgiving í *Føroyskum Lógar Riti* í 2001.

Eisini er áhugavert at spyrja, um føroysk lóg annahvørt er *bindandi* ella *skyldu-*

1 LLM í almennari altjóða lóg og MA í stjórnmálafrøði og altjóða viðurskiftum frá University of Aberdeen.

bindandi, antin tí hon er stuðlað av møguligum tvingsilsátøkum, tí hon er siðvenja, orsakað av moralskari sannføring ella av øðrum orsøkum. Ella í hvønn mun vit kenna okkum bundin ella skyldubundin at vera lógini lýðin.

Evnið í triðju greinini er somu leiðis viðkomandi føroyska løgdømið, sum lutfalsliga í stóran mun er grundað á, og *lænir* úr, útlendskum lógarskipanum, umframt at orkan í lógarverkinum er lutfalsliga avmarkað í mun til onnur lond. Stórur tørvur er tí á gransking og undirvísing í føroyskum lógarviðurskiftum, og vónandi fara evnini í hesari útgávu at kveikja áhuga og íblástur fyri lesaran.

Editorial

The articles of this edition address at the concept of law from three different perspectives.

In the first article, Kristian Joensen, teaching lecturer at the University of Faroe Islands, analyses the state-concept, with special focus on whether the Cook Islands and Niue are states according to international law. He argues that the answer depends on whether you ask from the perspective of the so called declarative or constitutive understanding of which importance the recognition from other states has on the state-concept.

In the second article, Mikael Karlsson, affiliated professor of law, attempts to explicate the views of St. Thomas Aquinas concerning the binding nature of law and the relationship between a law's being *binding* and it's *imposing an obligation to obey*. Relevant questions are analysed, for instance whether the binding nature of law is based on coercion? Is the legal order fundamentally a coercive order? Does their entrenchment lie in custom? And is being *bound by a law* the same thing as having an *obligation to obey it*? Could *coercion* or *custom* create such an *obligation*? And what is an *obligation*, anyway?

In the third article Frederick Schauer, professor of law at the University of Virginia School of Law, analyses how judges, and others with relevant authority, decide hard cases. The article analyses the interactions between different understandings of how *the law* is used in hard cases, with special focus on whether one only can and ought to use the law, even if there is no specific content of the matters of a hard case, or to what extent and under which circumstances the law allows judges and others who make legal decisions to look outside the law in order to reach a conclusion.

Even if the articles do not address unique Faroese matters the topcis can be said to be as important for the Faroese jurisdiction, as it is for other jurisdictions around the world. Both in historical context, in relation to the present situation and in respect to the international community, the topics inspire the reader to ask: *to what extent are the Faroe Islands a state according to international law*? This question is partially addressed in the interesting article by Halgir Winther Poulsen *Are the Faroese a Nation? w*hich was published in the Faroese Law Review in 2001.

It is also interesting to ask to what extent Faroese law is binding or obligating either because it is supported by coercive measures? Because of custom? Because

of moral conviction or for other reasons? or to what extent we feel bound or obliged to obey the law?

The topic of the third article is likewise relevant for the Faroese jurisdiction which in relatively to a large extent is based on, and *borrows* from, foreign legal system, and in addition the resources of the legal system are relatively limited compared to other countries. Therefore there is a fundamental need for research and education in Faroese legal matters, and hopefully the topics of this edition will arouse interest and inspiration for the reader.

Lógin hjá Føroyskum Lógar Riti

§ 1. Føroyskt Lógar Rit (FLR) er óheft løgfrøðiligt tíðarrit.

§ 2. FLR skipar fyri at útgeva tilfar, ið lýsir og greinar mál av týdningi fyri føroyska lógarøkið.

§ 3. FLR verður stýrt av eini ritstjórn, sum er hægsti myndugleiki.

§ 4. Ritstjórnin verður vald á hvørjum ári. Øll lógkøn og stjórnarkøn kunnu møta á fundi at velja ritstjórnina. Fráfarandi ritstjórin skipar fyri valinum eftir vanligari mannagongd.

Hesir limir skulu veljast:
A. Ritstjórin
B. 5-9 lógkøn ella stjórnarkøn.
C. Eitt umboð fyri løgfrøði- ella samfelagsdeildina á Fróðskaparsetrinum, sum er sjálvvalt og verður roknað sum partur partur av teim 6-10 ritstjórnarlimunum.

§ 5. Blaðið verður fíggjað við stuðli frá almennum myndugleikum og privatum stuðlum. Eftir samráðingar við nevndu stuðlar ger ritstjórnin eina fíggjarreglugerð at galda fyri umsitingina av øllum pengum og fæi hjá FLR. Verður felagið avtikið, skal allur peningur, ið felagið eigur, fara til Granskingargrunn Føroya.

Galdandi frá 9. juni 2005.

Í ritstjórnini sita:

A. Bárður A. Ísheim
B. Kristian Joensen
B. Kári Durhuus
B. Oda Strøm
B. Magnus Ennistíg
B. Eli Thorsteinsson
B. Brian Sjúrðarson
C. Bárður Larsen

Kristian Joensen[1]

Eru Cookoyggjar og Niue statir eftir altjóðarætti?

Úrtak

Henda greinin viðger spurningin um statshugtakið við serligum atliti til um Cookoyggjar og Niue eru statir eftir altjóðarætti. Høvundurin førir fram, at spurningurin, um Cookoyggjar og Niue eru statir, kann býtast í fýra undirspurningar, um londini eru statir de-jure ella de-facto eftir ávíkavist altjóðarætti og stjórnarrætti. Víðari førir høvundurin fram, at svarið valdast, um spurt verður útfrá sjónarhorninum á antin deklaratorisku ella konstitutivu fatanini av, hvønn týdning viðurkenning frá øðrum statum hevur á statshugtakið.

Abstract

This essay examines the topic of statehood exemplified by the question of whether the Cook Islands and Niue are states according to international law. The author posits that the question of statehood with respect to these two territories can be categorized into four sub-questions: whether or not they have respectively de-facto or de-jure statehood under either international law or constitutional law. The author further argues that the answer depends on wheter you take the declaratory view or the contitutive view on the importance of state recognition.

1 Námslektari í løgfrøði og MA í lóg á Fróðskaparsetri Føroya.

1. Inngangur

Í hesari greinini fari eg at viðgera spurningin um statshugtakið við serligum atliti til, um serstøku eindirnar Cookoyggjar og Niue eru statir eftir altjóðarætti.

Fyrst fari eg at viðgera treytirnar, ið altjóðarættur setur, fyri at ein eind kann metast at vera ein statur. Í hesum sambandi komi eg inn á tvey ráðandi ástøði í altjóðarætti, ið hava serligan týdning fyri spurningin. Talan er um sokallaðu *deklaratorisku* fatanina og *konstitutivu* fatanina. Tað, sum skilur hesar fatanirnar, er leikluturin, sum viðurkenning frá øðrum statum hevur á nevnda spurning.

Síðani fari eg at viðgera serligu ríkisrættarstøðuna hjá Cookoyggjum og Niue, har eg fari at umrøða, hvussu henda støðan er ment við tíðini.

At enda meti eg um, hvørt Cookoyggjar og Niue kunna roknast at vera statir sambært treytunum í altjóðarætti.

2. Statshugtakið í altjóðarætti

Søguliga sæð hava sum nevnt tvær fatanir havt serligan týdning fyri, hvat skal til fyri at ein politisk eind kann sigast at verða eina statur eftir altjóðarætti. Talan er um *deklaratorisku* fatanina og *konstitutivu* fatanina. Sambært *deklaratorisku* fatanini er ein statur til óheft av, um aðrir statir viðurkenna hetta ella ikki. Ein viðurkenning er sostatt bert ein staðfesting av einum veruleika, ið finst frammanundan viðurkenningini.

Tann *konstitutiva* fatanin er hinvegin, at tað er viðurkenningin, ið skapar ein stat. Sostatt gerst ein politisk eind ella eitt løgdømi ein statur við tað, at aðrir statir viðurkenna hetta.[2] Hesar báðar fataninar hava ymiskar avleiðingar viðvíkjandi týdninginum av atlitum fyri at góðtaka eina eind sum ein stat. Eftir tí konstitutivu fatanini hava atlit ikki stóran týdning, tí at tað avgerandi er, um aðrir statir viðurkenna eindina.

Hinvegin hava slík atlit stóran týdning eftir deklaratorisku fatanini. Hetta leiðir til ein tørv at menna slík atlit. Gjøgnum tíðina hava stjórnar- og altjóðarættarkøn gjørt listar av slíkum atlitum.

2 William Thomas Worster, "Law, politics, and the conception of the state in state recognition theory", Boston University International Law Journal, [Vol. 27:115], 2009, s. 118.

Eitt skjal, ið hevur havt stóran týdning í hesum sambandi, er Montevideosáttmálin, ið nøkur amerikansk lond, harímillum USA, viðtóku í 1933. Grein 1 í sáttmálanum ljóðar soleiðis: [3]

> *The state as a person of international law should possess the following qualifications:*
> *(a) a permanent population;*
> *(b) a defined territory;*
> *(c) government; and*
> *(d) capacity to enter into relations with the other states.*

Montevideo sáttmálin[4] vrakar úttrykkiliga viðurkenning sum eitt atlit í grein 3, og kann sostatt sigast at hava eina deklaratoriska fatan av statshugtakinum. Til ber at seta spurnartekin við týdningin av Montevideo sáttmálanum. Talan er hóast alt um ein regionalan sáttmála, ið bert fá lond hava samtykt, og er hann ikki í sær sjálvum bindandi fyri flest lond í heiminum.

Hinvegin er sáttmálin eitt týðandi søguligt skjal, og umboðar tað ráðandi fatanina millum lond av altjóðarætti um hesa tíðina. Tað, at eitt stórveldi sum USA var ein av sáttmálapørtunum, gevur honum eisini ein týdning, sum hann neyvan hevði havt annars.

Atlitini í Montevideo sáttmálanum eru í øllum førum umboðandi fyri, hvørji atlit stuðlar av deklaratorisku fatanini hava sett fram í bókmentunum, og eru tey í stóran mun ein kodifisering av reglum, ið longu vóru viðurkendar frammanundan.

Hetta førir við sær, at fleiri av reglunum í sáttmálanum møguliga longu eru partur av sokallaða *jus cogens,* og harvið longu eru bindandi fyri altjóða samfelagið sum eina heild.[5]

Men hvussu skulu atlitini í sáttmálanum tulkast? Tað eru nógv løgdømi, ið liva upp til tey flestu ella enntá øll atlitini, men sum ongin hóast tað vildi sagt eru statir.

Hetta ger seg serliga galdandi fyri lond ella landaøki, sum hava nógv sjálvstýri, eisini viðvíkjandi uttanríkispolitikki, men sum framvegis tekniskt sæð eru partur av einum størri stati. Hetta ger tað týðandi at hyggja eftir møguligum

3 *Montevideo Convention on the Rights and Duties of States, 1933*, § 1, frá: www.ilsa.org/Jessup/Jessup15/Montevideo%20Convention.pdf (Seinast vitjað 14.11.2022).

4 Montevideo Convention 1933, § 3.

5 Ole Spiermann, *Moderne Folkeret, 3.* omarbejdede udgave, Jurist- og Økonomforbundets forlag, 2006, s. 17.

ræðisavmarkingum. Eru tað nakrar stjórnarrættarligar avmarkingar ella bindingar, ið forða løgdøminum at handla frítt?

Ein onnur treyt, sum nakrir høvundar hava sett fram fyri at viðurkenna eina eind sum ein stat eftir altjóða lóg er, lógligheit. Tað vil siga, at kravt verður, at politiska eindin, ið talan er um, skal vera stovnsett á lógligan hátt. Hetta vil eitt nú føra við sær, at eitt nú landøki, ið lýsa fullveldi sum úrslit av einari innrás ikki eftir hesari fatanini kunnu metast sum statir og harvið ikki hava tey rættindi, sum statir hava. Eitt nú sigur Thomas Grant í greinini *Defining Statehood: The Montevideo Convention and its Discontents* hetta um lógligheit:

> *In the 1950s and early 1960s, Lauterpacht (editing the Oppenheim treatise) and Cavaré (in his Droit International Public Positif) were not as bold as later writers would be in asserting international legality as a prerequisite to statehood; but their writings began to hint at the view, to develop in connection with the Rhodesian crisis of the 1960s and 1970s, that statehood, in addition to involving effective control, also required adherence to minimum international legal standards.*[6]

Hetta atlitið er eisini júst tað, sum aloftast forðar londum sum Taiwan og ymiskum landaøkjum undir ræði á uppreistrarbólkum at vinna sær viðurkenning sum statir. Tað sama ger seg galdandi fyri eitt nú Norðurkýpros.

Tað er eisini áhugavert fyri spurningin, um Niue ella Cookoyggjar eru statir, at tað er viðurkent, at altjóðarættur ikki hevur nakað krav til stødd.[7]

3. Støðan hjá Cookoyggjum og Niue
3.1 Cookoyggjar

Cookoyggjar hava havt eitt formligt tilknýti til Nýsæland síðani 1901, tá ið Nýsæland fekk Stórabretland at lata seg innlima oyggjarnar. Tá, ið ST varð stovnað í 1945, komu oyggjarnar á listan yvir ikki-sjálvstýrandi øki. Av hesi orsøk hevði New Zealand fráboðanarskyldu yvir fyri ST eftir grein 73(e) í stovningarsáttmálanum.[8]

6 Thomas D. Grant, "Defining Statehood: The Montevideo Convention and its Discontents", 37 Colum. J. Transnat'l L. 403 1998-1999

7 D. P. O'Connel siteraður í Grant 1999 s. 412

8 *Charter of the United Nations*, chapter 11, 1945, frá: www.un.org/en/about-us/un-charter/chapter-11 (Seinast vitjað 14.11.2022)

Sambært ST-aðalfundarsamtykt 1541 frá 1960, skuldu øll ikki-sjálvstýrandi øki fáa tríggjar møguleikar at velja í fyri at gerast sjálvstýrandi: [9]

1. *Stovnan sum ein sjálvstøðugan stat*
2. *Frælsan felagsskap við ein sjálvstøðugan stat*
3. *Innliman í ein sjálvstøðugan stat*

Tá ið eitt øki fær fult sjálvstýri, steðgar fráboðanarsskyldan.

Møguleiki 2 var ikki kendur áðrenn samtyktina, og tað, sum samtyktin segði um frælsan felagsskap, var ikki serliga ítøkiligt. Tað vóru bert fáar treytir: at skipanin var frívilliga vald á upplýstum grundarlagi, at økið hevði egna stjórnarskipan, innanhýsis sjálvstýri og rættin av sínum eintingum at broyta støðu seinni og skipa seg sum ein sjálvstøðugan stat.

Í 1965 var val á Cookoyggjum um framtíðarstøðuna. Í hesum sambandi samtykti Nýsælendska lóggávutingið Cook Islands Constitution Act, sum er karmalógin um nýggju skipanina hjá Cookoyggjum. Nýggja stjórnarskipanin varð viðløgd sum fylgiskjal til lógina. Orðingin um stjórnarskipanina var fylgjandi:

> *The Constitution set out in the Schedule shall be the Constitution of the Cook Islands and shall be the supreme law of the Cook Islands.*[10]

Henda lógin fekk gildi í 1965. Sama ár viðurkendi ST nýggju skipanina sum eitt dømi um frælsan felagsskap við ST-aðalfundar samtykt 2064, og sostatt helt fráboðanarskyldan hjá Nýsælandi uppat. [11]

Sum ST fataði skipanina í 1965, høvdu Cookoyggjar fingið fult internt sjálvstýri, men hvussu við uttanríkispolitikki? Karmalógin hevur í § 5 hesa áseting um uttanríkispolitikk:

9 UNGA 1541 (XV.), 15.12.1960, *Principles which should guide Members in determining whether or not an obligation exists to transmit the information called for under Article 73 e of the Charter*, frá: www.ilsa.org/Jessup/Jessup10/basicmats/ga1541.pdf (Seinast vitjað 14.11.2022)

10 *Cook Islands Constitution Act 1964*, frá: www.legislation.govt.nz/act/public/1964/0069/latest/whole.html#DLM354069 (Seinast vitjað 14.11.2022)

11 UNGA 2064 (XX), 16.12.1965, *Question of the Cook Islands*, frá: www.digitallibrary.un.org/record/203557/files/A_RES_2064%28XX%29-EN.pdf?ln=en (Seinast vitjað 14.11.2022)

> *Nothing in this Act or in the Constitution shall affect the responsibilities of Her Majesty the Queen in right of New Zealand for the external affairs and defence of the Cook Islands, those responsibilities to be discharged after consultation by the Prime Minister of New Zealand with the Premier of the Cook Islands.*[12]

Henda orðing leggur upp til, at uttanríkismál eru tað, sum vit í okkara skipan vildu kallað felagsmál. Men praksis, síðani nýggja skipanin varð innført í 1965, hevur so líðandi víst eina aðra mynd. Cookoyggjar hava frá byrjan, men serliga síðani 1980, havt ein alsamt størri leiklut á uttanríkispolitiska økinum.

Cookoyggjar eru fullgildugir limir í fleiri altjóða og millumtjóða felagsskapum, hava bilateralar sáttmálar við fleiri lond og eru við í fleiri multilateralum avtalum. Alt hetta er gjørt í egnum navni og av egnum initiativi. Útyvir hetta hava Cookoyggjar eisini diplomatiskt samband við fleiri einstøk lond og ES sum felagsskap.[13]

Longu í 1973 við brævaskifti millum forsætisráðharrarnar í Cookoyggjum og Nýsælandi, staðfesti Nýsælendska stjórnin, at meiningin við § 5 í karmaógini var, at Nýsælendska stjórnin skuldi stuðla Cookoyggjum á uttanríkispolitiska økinum, men at stjórnin á oyggjunum var fræls til at føra sín egna politikk.[14] Lógarteksturin sjálvur nevnir, at uttanríkispolitiska ábyrgdin, sum formliga liggur hjá drotningini,[15] skal útinnast eftir ráførslu millum teir báðar forsætisráðharrarnar.[16]

Hvussu hetta virkar í praksis, er ST-sáttmálin um verju av osonlagnum eitt dømi um. Tá ið Nýsæland ratifiseraði sáttmálan av fyrstan tíð í 1987, varð boðað frá, at hann skuldi eisini galda fyri Cookoyggjar. Orsøkin var, at stjórnin í Cookoyggjum hevði biðið um hetta.

12 *Cook Islands: Constitutional Status and International Personality*. Legal Division, Ministry of Foreign Affairs and Trade, Wellington, Nýsæland, Mai 2005 (Seinast vitjað 14.11.2022)

13 Sí fótnotu 13.

14 *Voyage to Statehood: The Cook Islands Story*. Frá: www.web.archive.org/web/20151222081947/http:/www.cook-islands.gov.ck (Seinast vitjað 14.11.2022)

15 Nú konginum.

16 Henda orðing minnir um okkara egna Fámjinsskjal.

Í 2003 tóku Cookoyggjar sjálvstøðugt undir við sáttmálanum, og sum úrslit av hesum boðaði Nýsæland ST frá, at teir ikki longur mettu seg bundnar av sáttmálanum viðvíkjandi Cookoyggjum, tí at oyggjarnar nú sjálvar høvdu tikið hesa ábyrgd á seg.[17] Tað vil í fyrstu atløgu siga, at New Zealand ikki kann innganga sáttmálar fyri Cookoyggjar uttan teirra samtykki og í aðru atløgu, at Cookoyggjar hava fullan rætt sjálvar at innganga í slíkar sáttmálar av sínum eintingum og í egnum navni.

Tað, at hetta er fatanin hjá Nýsælandi, kom til sjóndar í fráboðan til ST í 1988. Sambært hesari fráboðan skuldu, altjóða sáttmálar inngingnir av Nýsælandi, ikki longur umfata Cookoyggjar.[18]

Í 2001 vóru 100 ár liðin, síðani Cookoyggjar komu undir Nýsælendskt vald. Sum partur av hátíðarhaldinum av hesum skrivaðu báðir forsætisráðharrarnir undir eina yvirlýsing um støðuna hjá Cookoyggjum. Tað eru serliga ásetingarnar í § 4 til 6 um uttanríkispolitikk og diplomatisk viðurskifti, sum hava áhuga.[19] Millum annað staðfestir § 4, at Cookoyggjar í sínum viðurskiftum við umheimin virka *as a sovereign and independent state*. Tað er áhugavert, at orðið *as* er valt í hesum samanhangi, tí hetta er nærum ein viðurkenning av Cookoyggjum sum sjálvstøðugum stati.

Hvørji eru so viðurskiftini, sum higartil hava sátt iva í altjóða samfelagnum og millum serfrøðingar, um Cookoyggjar er ein statur ella ikki?

Ein trupulleiki er spurningurin um ríkisborgararætt. Ein aðaltáttur við skipanini hjá Cookoyggjum er, at allir íbúgvarnir eru ríkisborgarar í Nýsælandi.[20]

17 Declaration and notes www.web.archive.org/web/20141011104855/http://ozone.unep.org/new_site/en/notes.php?country_id=125 (Seinast vitjað 14.11.2022)

18 Eg havi ikki funnið sjálva fráboðanina, men fleiri ymiskar keldur nevna hana. Eitt dømi um slíka er *"The Cook Islands and Free Association: Understanding the nature & practice of the special relationship with New Zealand"* hjá "Ministry of Foreign Affairs & Immigration" á Cookoyggjum, sum nevnir hesa fráboðan á síðu 3. Hetta skjal er at finna her: www.web.archive.org/web/20160214141625/http://www.mfai.gov.ck/attachments/article/233/Summary%20Sheet%20NZ%20and%20CKI.pdf (Seinast vitjað 14.11.2022)

19 *Joint Centenary Declaration of The Principles of the Relationship between the Cook Islands and New Zealand*, 2001, frá: www.mfat.govt.nz/assets/Countries-and-Regions/Pacific/Cook-Islands/Cook-Islands-2001-Joint-Centenary-Declaration-signed.pdf (Seinast vitjað 14.11.2022)

20 Sí fótnotu 17.

Hetta er millum annað ein av orsøkunum til, at løgdeildin í Nýsælendska uttanríkisráðnum í 2005 segði:

> *The maturity of the Cook Island's international personality does not mean that the Cook Island is, in constitutional terms, an independent sovereign state.*[21]

Eisini tað, at Charles kongur er statsleiðari í sínum leikluti sum kongur í Nýsælandi,[22] og ikki hevur sjálvstøðugt kongaheiti har, vísir seg at hava týdning. Cookoyggjar eru eitt nú ikki sjálvstøðugur limur í Commonwealth of Nations og sambært *letters patent*, sum regulerar umboðið hjá konginum í Nýsælandi, Governor-General, so umfatar *Our Realm of New Zealand* millum annað Cookoyggjar.[23] Hugtakið *realm,* tá ið tað kemur til kongin, er vanliga ein tilvísing til teir sjálvstøðugu statirnar, ið hann er statsleiðari fyri, eitt nú Avstralia, Nýsæland og Canada.

Sæð frá føroyskum sjónarmiði er tað áhugavert, at Danmark í 2006 viðurkendi Cookoyggjar sum ein stat. Í bókini *Moderne Folkeret* undrast altjóðarættarserfrøðingurin Ole Spiermann á hesa viðurkenning, tí at Cookoyggjar, sambært honum, ikki krevja slíka viðurkenning.[24]

3.2 Niue

Hóast tey viðkomandi løgfrøðiligu skjølini viðvíkjandi Niue eru nærum identisk við tey hjá Cookoyggjum, so eru tað onkrir munir millum tey bæði londini. Serliga er hetta orsakað av tí heilt lítla fólkatalinum hjá Niue, sum liggur um 1600 fólk ella so.[25] Hetta ger, at Niue er meira heft at Nýsælandi, enn Cookoyggjar eru. Tað sæst millum annað aftur í onkrum ásetingum sum Niue Constitution Act hevur, ið ikki eru at finna í Cook Islands Constitution Act. Serliga § 7 ið ljóðar so:

21 *Letters Patent Constituting the Office of Governor-General of New Zealand*, 1983, from: www.legislation.govt.nz/regulation/public/1983/0225/latest/whole.html (Seinast vitjað 14.11.2022)

22 Hann er ikki sjálvstøðugt kongur á Cookoyggjum, men bert sum liður í hansara leikluti sum kongur í Nýsælandi.

23 Sí fótnotu 24.

24 Ole Spiermann, *Moderne Folkeret*, 3. omarbejdede udgave, Jurist- og Økonomforbundets forlag, 2006, s. 199. Serliga nota 44.

25 www.worldometers.info/world-population/niue-population/ (Seinast vitjað 12.11.2022)

> *It shall be a continuing responsibility of the Government of New Zealand to provide necessary economic and administrative assistance to Niue.*[26]

Tað er ivasamt, um hendan ásetingin broytir støðuna hjá Niue eftir altjóða rætti. Tó skal sigast, at av praktiskum ávum handlar Nýsæland oftari vegna Niue á uttanríkisøkinum, meðan Cookoyggjar handla fyri tað mesta egna vegna. Hetta kann fatast, sum um Niue ikki hevur tað neyðugu heimildina til at handla í millumtjóða viðurskiftum, men hetta er at misskilja Montevideo sáttmálan við tað, at førleiki í tí samanhanginum bert merkir tann løgfrøðiligi rætturin at innganga í sáttmálar og gerast limur í altjóða felagsskapum. Tann rætturin hjá Niue er óavmarkaður, og Nýsæland kann bert handla uttanríkispolitiskt teirra vegna, og við teirra samtykki.

4. Greining og niðurstøða

Eru Cookoyggjar og Niue statir? Tað er ikki ein lættur spurningur at svara. Fyri at gera spurningin einfaldari, er neyðugt at hava nakrar skilnaðir í huga. Ein slíkur skilnaður er skilnaðurin millum altjóða lóg og innlendislóg. Spurningurin um støðuna hjá Cookoyggjum og Niue kann hava ymiskt svar, alt eftir hvør samanhangurin er. Altjóða rættur tekur ikki beinleiðis støðu til innanhýsis stjórnarættarligu viðurskiftini í teimum einstøku statunum. Statirnir eru í stóran mun frælsir at skipa seg, sum teimum lystir og at velja tær politisku og stjórnarættarligu skipanirnar, teir hava hug til. Hetta er ein beinleiðis avleiðing av teirra fullveldi.

Hetta hevur so aftur við sær, at statir kunnu skipa seg stjórnarrættarliga á ein hátt, ið hevur avbjóðingar við sær fyri altjóða rætt.

Annar týðandi skilnaður er tann væl kendi skilnaðurin millum *de jure* og *de facto*. *De jure* lýsir viðurskifti frá einum formligum sjónarhorni. Hvat sigur lógin um hvussu viðurskiftini eru? *De facto* vísír hinvegin til, hvussu viðurskifti virka í roynd og veru.

26 *Niue Constitution Act 1974*, frá: www.legislation.govt.nz/act/public/1974/0042/latest/whole.html#DLM412778 (Seinast vitjað 14.11.2022)

Við hesum báðum skilnaðunum í huga kunnu vit deila spurningin í hesari greinini í fýra undirspurningar fyri hvønn av Cookoyggjum og Niue:

1. Eru teir *de jure* statir sambært altjóðarætti?
2. Eru teir *de facto* statir sambært altjóðarætti?
3. Eru teir *de jure* statir, tá ið tað kemur til Nýsælendskan stjórnarrætt?
4. Eru teir *de facto* statir, tá ið tað kemur til Nýsælendskan stjórnarrætt?

Tað, ið ger fyrsta spurningin so truplan, er, tað sertaka stjórnarrættarliga sambandið londini bæði hava við Nýsæland. Í veruleikanum er ongin beinleiðis samanbarilig skipan.[27] Grundað á dynamisku rættarskipanina, Nýsæland hevur *arvað* úr Stórabretlandi, er sjálvræðið hjá Cookoyggjum og Niue vaksið munandi, síðani skipanin við frælsum felagsskapi varð innført.

Um spurningurin varð settur í 1965, er ongin ivi um, at svarið hevði verið, at Cookoyggjar ikki eru ein statur, hvørki *de facto* ella *de jure*. Tað er áhugavert, at allar broytingarnar síðani eru hendar, uttan at karmalógin, *Cook Islands Constitution Act,* er broytt við einum orði.

Hesar broytingarnar hava ført við sær, at Cookoyggjar og Niue nú mugu metast sum *de facto* statir. Londini bæði hava øll rættindi, alt vald og allar skyldur, ið statir hava.

Hvør er so støðan *de jure*? Svarið til tann spurningin valdast, um útgangsstøði verður tikið í *deklaratorisku* fatanini ella *konstitutivu* fatanini av týdninginum av viðurkenning av statum. Sambært deklaratorisku fatanini er avgerandi fyri, um eitt løgdømi kann roknast sum ein statur, at tað livir upp til nakrar objektivar treytir. Cookoyggjar og Niue liva upp til allar vanligu treytirnar, ið settar hava verið.

Um vit taka Montevideo sáttmálan sum dømi, so hava Cookoyggjar og Niue fastbúgvandi fólk, skilmarka umveldi og eina stjórn, sum er før fyri at taka sær av uttanríkisviðurskiftum. Harumframt er ongin ivi, um at skipanin við frælsum felagsskapi millum ávíkavist Cookoyggjar og Niue og Nýsæland er stovnsett lógliga bæði eftir Nýsælendskum stjórnarrætti og eftir altjóða rætti. Skipanin

27 Tað tættasta er skipanin við frælsum felagsskapi sum Mikronesiasamveldi, Palau og Marshalloyggjar hava við USA. Hesi londini eru tó uttan iva statir, hava egnan ríkisborgararætt og eru limir í ST. Harumframt eru teirra viðurskifti við USA regulerað í sáttmálum.

er insett við Nýsælendskari lóg[28] og er hareftir góðkend av ST-aðalfundinum.[29] Tað er ongin triði statur, ið ger krav upp á umveldið hjá Cookoyggjum ella Niue.

Uttanríkisheimildirnar hjá Cookoyggjum og Niue skilja londini frá eitt nú statum í samveldisskipanum sum í USA. Sostatt mugu Cookoyggjar og Niue metast sum statir eftir *deklaratorisku* fatanini.

Tað, at hesi londini bæði deila ríkisborgararætt við Nýsæland, er ein praktisk fyriskipan, og er eitt mál fyri teirra innanýsis stjórnarrætt. Í sjálvum sær kann hetta ikki sigast at skala teirra støðu sum statur. Tó má ríkisborgaraskapur metast sum ein týðandi eginleiki við einum stati. Tað mest ivasama við støðuni hjá hesum báðum londunum er ikki, at allir íbúgvarnir hava Nýsælendskan ríkisborgararætt, men heldur at teir ikki eisini hava egnan ríkisborgararætt. Tað skal tó sigast, at londini hava fult ræði á sínum útlendingapolitikki, og taka einsamøll avgerð um, hvørjum tey loyva inn á sítt umveldi.

Formliga heitið á teirra statsleiðara broytir heldur ikki viðurskiftini, tí at hetta er ikki regulerað í altjóðarætti. Andorra er eitt annað dømi um eitt land við einari serligari skipan, tá ið talan er um statsleiðarar. Andorra hevur tvey statsyvirhøvd við tað, at forsetin í Fraklandi og ein spanskur bispur eru samprinsar í Andorra.[30] Hetta er ikki ein spurningur um altjóðarætt. Ein meginregla í altjóðarætti er júst, at statir kunnu skipa seg sum teir hava hug. Sostatt kann hetta í sjálvum sær ikki føra til aðra niðurstøðu, enn at londini bæði eru statir.

Hvat so við konstitutivu fatanini? Cookoyggjar og Niue hava ikki formligar yvirlýsingar um viðurkenning frá øðrum statum.[31] Men tey hava diplomatisk sambond við nógv lond, og hava í egnum navni inngingið sáttmálar við nógv lond. Hetta er ein óbeinleiðis viðurkenning av londunum sum statir. Tað er áhugavert, at eitt av londunum, tey hava gjørt sáttmálar við, og hava diplomatiskt samband við, er Nýsæland.

Spurningurin gerst so, hvussu umfatandi viðurkenning mann kann krevja eftir konstitutivu fatanini fyri, at ein statur kann sigast at vera vorðin til sum úrslit

28 Sí fótnotu 16.

29 Sí fótnotu 15.

30 Sí § 43 í grundlógini hjá Andorra, tøk her: www.andorramania.com/constit_gb.htm (Seinast vitjað 02.12.2022)

31 Danmark er at síggja til eitt undantak við tað, at Danmark sambært Ole Spiermann viðurkendi Cookoyggjar sum stat í 2006. Sí Ole Spierman, *Moderne Folkeret*, 3. omarbejdede udgave, Jurist- og Økonomforbundets forlag, 2006, s.199. Serliga fótnotu 44 á nevndu síðu.

av viðurkenningunum og um Cookoyggjar og Niue koma upp um hesa gáttina. Avgerandi fyri hetta er, hvussu vit skulu tulka tað, at summi lond ikki hava inngingið sáttmálar ella diplomatiskt samband við tey. Tað er trupult at lesa ein politikk burtur úr, hvat lond ikki gera. Tað er væl hugsandi, at lond, sum enn ikki hava gjørt hetta, ikki hava havt høvið til tess. Hetta merkir ikki neyðturviliga, at tey ikki viðurkenna Cookoyggjar og Niue sum statir. Um so er, er tað niðurstøðan eftir konstitivu fatanini, at Cookoyggjar og Niue eru statir eftir altjóðarætti.

Viðvíkjandi triðja og fjórða spurninginum gera somu *de facto* viðurskiftini seg galdandi fyri bæði altjóða rætt og stjórnarrætt. Sostatt má einhvør, ið heldur upp á at londini ikki eru *de facto* statir eftir stjórnarrætti, grundgeva fyri, hví metingin skal vera øðrvísi, enn eftir altjóðarætti.

De jure støðan eftir stjórnarrætti er heldur truplari at greina. Sum áður nevnt eru Cookoyggjar og Niue partur av sokallaða *Realm of New Zealand* og hevur henda eindin felags statsleiðara og ríkisborgararætt. Hesi viðurskiftini fingu Nýsælendska uttanríkisráðið at siga, at Cookoyggjar ikki eru *in constitutional terms, an independent sovereign state*.[32]

Givið at stjórnirnar á Cookoyggjum og Niue ikki hava sett seg upp ímóti hesi fatanini, er mest náttúrliga niðurstøðan, at tá ið tað kemur til innanhýsis stjórnarrættin hjá *Realm of New Zealand*, eru Cookoyggjar og Niue ikki at meta sum sjálvstøðugir statir. Men sum *Letters Patent* vísir, eru tey tó at meta sum sjálvstýrandi statir. Júst hvør munurin er millum hesi bæði hugtøkini er uttan fyri rásarúmið á hesi greinini.

32 Tað sama má metast at galda fyri Niue.

Mikael M. Karlsson*

St. Thomas Aquinas on the Binding Nature of Law[1]

Abstract

This paper attempts to explicate the views of St. Thomas Aquinas, as they are presented in his "Treatise on Law" (*Summa Theologiæ* IaIIæ 90-97), concerning the binding nature of law and the relationship between a law's being *binding* and it's *imposing an obligation to obey*.

In the Western tradition, most writers on the nature of law, ancient and modern, have maintained that laws, strictly so called, are binding. But they have not been of one mind as to what this means or what accounts for the purportedly binding nature of law. Does this binding character lie in law's being backed by sanctions, penalties, or punishments for disobedience? That is, is the legal order fundamentally a coercive order? Or does it lie in their entrenchment in custom? Or something else? And is being *bound by a law* the same thing as being *obligated to obey it*? Could *coercion* or *custom* create such an *obligation*? And what is *obligation*, anyway?

Here, the author argues that St. Thomas understands bindingness, in the relevant sense, to amount to the rational necessity of following a rule or ordinance. The beings bound by reason to follow rules or ordinances may themselves be rational or non-rational. But all natural beings are bound by reason to follow the rules

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1 The original version of this paper was presented at the international conference "Athafnir, vilji og lög: Málbing um athafna- og lögspeki heilags Tómasar af Aquino" (Action, Will and Law: Seminar on St. Thomas Aquinas' Philosophy of Law and Action), held on October 1st, 2004, at the University of Akureyri, in honor of the publication of the first Icelandic translation of the philosophical core of St. Thomas' so-called "Treatise on Law" (*Summa Theologiæ IaIIæ* 90-97) as *Um lög* (On Law), tr. Þórður Kristinsson (Reykjavík: Hið íslenska bókmenntafélag, 2004); and the inspection of this translation occasioned a re-examination of St. Thomas' views, reflected in this paper. This explains the references in the paper to particular choices of the Icelandic translator. Although these might seem at first sight to be of little interest to the general reader, in fact the Icelandic examples, along with remarks about the 2004 translation, are instructive and have therefore been left in.

that God has set for them. In the case of non-rational beings, the reason is God's and the necessity of following His ordinances is implanted in them by God.

They are thus *bound*, but clearly not *obligated*, to follow these ordinances of reason. What God has implanted in human beings is reason itself, including practical reason, the first precept of which is that the good is to be pursued and evil avoided. Properly framed human laws are built upon this precept. The obligation to obey the law is the rational understanding that to do so is to pursue the good and a rational creature must therefore obey. This ability to reflect rationally upon what is to be done or avoided is *conscience*.

To be *obligated* is to be *bound in conscience*, as St. Thomas words it. St. Thomas appears to conclude that unless human law is binding in conscience, other varieties of bindingness are simply irrelevant to its credentials as human law.

Úrtak

Greinin roynir at lýsa áskoðanirnar hjá sankta Thomas Aquinas, við støði í „Treatise on Law" (*Summa Theologiæ* IaIIæ 90-97), sum viðger spurningarnar: um *lóg*, sum hugtak, er *bindandi;* og samspælið millum eginleikarnar hjá lógini at ávikavist *binda* og *áleggja skyldur at verða lýðin*.

Sambært vesturlendskari siðvenju, hava flestu høvundarnir, ið hava umrøtt hugtakið *lóg* - bæði í fornari og nýggjari tíð - hildið upp á, at lógir eru bindandi. Tó hevur breið semja ikki verið um, nágreiniliga hvat hetta merkir, ella hvørjar treytirnar eru fyri, at hugtakið *lóg* er sokallað bindandi. Er hesin bindandi eginleikin hjá lógini grundaður á, at lógin er stuðlað við tvingsilstiltøkum, sekt ella revsing fyri ólýdni? Er lógarskipanin, við øðrum orðum, grundleggjandi ein tvingsilsskipan? Ella hevur hesin eginleikin røtur í siðvenju? Ella onkra aðrastaðni? Og kann tað javnmetast at verða *bundin av lógini* og at *vera skyldubundin at akta hana*? Kann *tvingsil* ella *siðvenja* skapa slíka *skyldubinding*? Og hvat er *ein skyldubinding*, hóast alt?

Í hesum høpi argumenterar høvundurin fyri, at sankta Thomas skilir hugtakið *binding*, at vera tað sama sum at á ein viðkomandi hátt at fylgja einari reglu ella lógarskipan orsaka av *skynsamari neyðturviligheit*. Tær verur, ið orsaka av skynsemi eru bundnar til at fylgja reglum ella lógarskipanum kunnu sjálvar vera antin skynsamar ella óskynsamar. Men allar náttúrligar verur eru bundnar av skynsemi at fylgja reglunum, sum Gud hevur givið teimum. Tá tað kemur til óskynsamar verur, er skynsemið Guds og neyðturviligheitina at fylgja lógarskipanum hansara, hevur Gud sett í tær.

Tær eru sostatt *bundnar*, men ikki *skyldubundnar*, at fylgja hesum skynsemisskipanum. Tað, ið Gud hevur sett í menniskju, er skynsemi sjálvt, harundir praktiskt skynsemi, hvørs fyrsta fyriskipan er, at strembað eigur at vera ímóti tí góða, og hitt ónda eigur at vera skýggjað. Allar menniskjasligar lógir, ið eru smíðaðar á rættan og rímuligan hátt, byggja á hesa fyriskipan. Skyldan at vera lógini lýðin, byggir á skynsomu fatanina av, at hetta er ein stremban eftir tí góða, og ein skynsom vera má tískil vera lýðin. Hesin førleiki at hugsa skynsamt um hvat skal gerast ella ikki gerast kenna vit sum *samvitska*.

At *vera skyldubundin* er at vera *bundin av samvitsku*, sum sankta Thomas orðar tað. Sankta Thomas letur til at koma til ta niðurstøðu, at uttan so at menniskjaslig lóg bindir umvegis samvitskuna, eru aðrir møguligir formar fyri binding heilt einfalt óviðkomandi fyri at umboða menniskjasliga lóg.

1. The Binding Nature of Law

In those chapters of his *Summa Theologiæ* that have come to be known as the "Treatise on Law", and most especially IaIIæ.90-97, St. Thomas Aquinas articulates a *theory of law* in the sense in which philosophers speak of such things. Above all else, St. Thomas' objective is to give an account of the *nature* of law—that is, of what it is for something to have the special *character* that belongs to law.

One of St. Thomas' most important claims in this regard is that law is *binding: lex,* he claims (in a false etymology) "is derived from *ligare* (to bind) because it obliges (*obligare*) one to act." (IaIIæ.90.1.corpus)[2] But, he adds more specifically, "[I]t belongs properly to a law to bind one to do or not do something" (IaIIæ.90.4.arg.2), or conversely stated, if something is not binding, then it has not the character of law, according to St. Thomas.

2 Quotations are from the translation of *Summa Theologiæ* produced by the Fathers of the English Dominican Province (Benziger Brothers edition, 1947). This is no longer the standard English translation, but in various ways it compares favorably with newer translations. Since the readers of this journal may not be familiar with the standard form of citations to the *Summa Theologiæ*, I will provide a short explanation.
The *Summa Theologiæ* (or *Summa Theologica*), written between 1265 and 1274, is divided into three Parts (large sections), with the second of these being divided again in two. These are referred to as *Prima Pars* (Ia), *Prima Secundæ Partis* (IaIIae), *Secunda Secundæ Partis* (IIaIIae), and *Tertia Pars* (IIIa). There is also a supplement to the third part, *Supplementum Tertiæ Partis* (XP IIIae).
Each of the parts is divided into Questions (Q), and each Question is divided into a Preface (P) and a number of Articles (A). Each Article addresses a particular question that St. Thomas means to be answered affirmatively. Within each article, specific objections ("arg.") to an affirmative answer are first presented ("arg. 1" would be the first objection), followed by St. Thomas' affirmative answer with supporting reasons (this is the body, or *corpus* of the Article), followed by replies ("ad.") to the specific objections presented initially ("ad. 1" would be the reply to the first objection).
Examples: "IaIIæ.90.4.arg.2" would refer to the reply to the second objection in Article 4 of Question 90 in the first Part of the Second Part; "IaIIæ.90.1.corpus" would refer to the corpus of Article 1 of Question 90 in the first Part of the Second Part; while "IaIIæ.93.5.ad 1" would refer to the reply to the first objection in Article 5 of Question 93 in the first Part of the Second Part. As you see, "Q" and "A" are often omitted from the citations, and the typography and orthography of the citations may vary somewhat from these examples.
The so-called "Treatise on Law" belongs to the First Part of the Second Part (IaIIae) and extends from Q 90 to Q 108; but only QQ 90-97 are generally thought to be of special interest for modern legal theory.

2. Obligation and Moral Necessity

But what is it for something to be *binding* in the relevant sense? From much of what St. Thomas says, it is tempting to suppose that what is meant is that law is binding in the sense of placing those subjects to it under an obligation to act in accordance with what law prescribes, for, as St. Thomas remarks, "it belongs to law to command and to forbid." (IaIIæ.90.2.arg.1).

We may keep in mind the difference, in English, between being *obligated* and being *obliged* to which H. L. A. Hart famously drew attention.[3] Both involve being placed under a certain necessity, but in the case of being obligated, the necessity in question is *moral* necessity, whereas in the case of being obliged the necessity may be of another—or alternatively of a wider—sort.

In associating the notion of *being obligated* with moral necessity, I am in fact disagreeing with Hart: not concerning his distinction between being *obligated* and being *obliged* but concerning his account of being obligated. For Hart is a dualist about being obligated; he gives a different account of the obligation involved in being *morally* obligated and in being *legally* obligated.

It is hard to see from his discussion in the *Concept of Law* what common definition *obligation* would fulfil in the two cases (any such definition would have to be extremely thin). I understand obligation *as such* to be a single phenomenon, whether we speak of *moral* or of *legal* obligation.[4] And I believe that it is to be understood as the *moral necessity* of acting in a certain way.[5]

When we are legally obligated, this moral necessity attaches to an action because (or partly because) of a legal mandate. When we are morally obligated, this necessity attaches to an action for reasons other than a legal mandate, reasons that we call "moral" in a rather broad sense.

I speak of *moral necessity* in the sense that St. Thomas would have understood it: *the rational necessity of pursuing good and avoiding evil*, reflecting what he announces to be the first precept of practical reason (see IaIIæ.91.3.corpus).

3 See his *Concept of Law*, 2nd ed. (Oxford: Oxford University Press, 1994), pp. 82-91.

4 Just to be as clear as possible on a matter that has often led to confusion and misunderstanding: my point is not that *moral obligations* and *legal obligations*—or that *being morally obligated* and *being legally obligated*—are the same sort of thing but rather that *what it is to be obligated* is the same in both cases.

5 However, see note 7.

This topic cannot be fully explicated within the confines of the present paper but is taken up below in connection with the important idea, introduced by St. Thomas in IaIIæ.96.4. of *bindingness in conscience*; and I have developed my own views on this topic elsewhere.[6]

3. *Obligo*

At any rate, if we understand St. Thomas to have in mind what I have called *moral necessity,* then we may translate St. Thomas' *obligo* (to bind) into English as *to obligate*, or in Icelandic, as *að skuldbinda* (to obligate)[7] and this is indeed the choice made in the 2004 Icelandic translation of the "Treatise on Law".[8] But the Latin *obligo* does not necessarily mean *to obligate,* it may mean also *to oblige,* and its most literal meaning is simply *to bind*. In this last-mentioned sense, it is, practically speaking, a synonym of *ligo.* Thus, whatever St. Thomas' teaching may ultimately be, his Latin "*dicitur enim lex a ligando, quia obligat ad agendum*" might be alternatively rendered in English as:

> *lex* is derived from *ligare* because it obligates one to act

which is the effect of the Icelandic translation,[9] or, with the Dominican Fathers as:

> *lex* is derived from *ligare* because it obliges one to act

or, finally, as:

> *lex* is derived from *ligare* because it binds one to act

6 See my "Roots of Legal Normativity", in *Analisi e diritto 2000*, P. Comanducci & R. Guastini, eds. (G. Giapichelli Editore, 2000), pp. 97-112. Hart also views being obliged as a psychological condition; I disagree with that as well, as can be seen in the article here referred to. I would like to thank Paolo Comanducci for pointing out to me (in December 2005) the necessity of raising these points in the present paper.

7 More literally, one can say that "að skuldbinda" means "to bind as a matter of duty". "Að vera skuldbundinn" would translate into English as "to be duty-bound". The suggestion of the translation seems to be that "að skuldbinda" means to bind morally, but it leaves room for a more "legalistic" interpretation, wherein one is bound as a matter of legal duty or the duty of station. In this sense, one might be, for example, "skuldbundinn" to organize the extermination of the Jews; Adolph Eichmann clearly considered such to be his duty.

8 See note 1.

9 „[O]rðið *lög (lex)* er dregið af *binda (ligare),* með því að þau skuldbinda mann til breytni." (The word *law (lex)* is derived from [the verb] to *bind (ligare)* on account of its obligating a man to act).

The third is the least interpretive, and in that way the safest, of the alternatives. In general, the Dominican Fathers translate *obligo*, where it occurs in St. Thomas' text, as *to bind*, whereas the Icelandic text generally uses *að skuldbinda* (to obligate, to bind morally).

4. Bindingness Beyond Obligation—the Ambit of Rational Necessitation

What considerations militate against taking St. Thomas' general notion of *bindingness* to be that of *moral bindingness* and thus militate against translating his *obligo* as *to obligate*? There are several.

First, St. Thomas claims that it is the essence, or proper nature, of law to be *binding*. This implies that all of the kinds of law which he distinguishes have this character. These include, as those who have read the *Treatise on Law* may recall, what he calls *eternal* law *(lex aeterna), natural* law *(lex naturalis), human* law *(lex humana)* and *divine* law *(lex divina)*. These are distinguished in Question XCI, and each is further discussed in subsequent chapters. It is not my purpose here to discuss these varieties of law in any detail. But in the present connection, a problem is presented by eternal law.

What is eternal law? It is not easy to give a brief account of St. Thomas' theory with precision, but the idea may be gathered pretty well from this passage from (IaIIæ.93.1.corpus):

> God … is the creator of all things, in relation to which He stands as the artificer of the products of his art… He governs all the acts and movements that are to be found in each single creature… Therefore, as the type of the Divine Wisdom in so far as by It all things are created, has the character of art, exemplear, or idea, so the type of Divine Wisdom as moving all things to their due end bears the character of law... [T]he eternal law is nothing else than the type of Divine Wisdom, as directing all actions and movements.

We may simplify St. Thomas' account by saying that eternal law comprises what in English are often referred to as *the laws of nature*, for instance the law of gravity, here conceived as "set" by the Creator by making them the principles of the *actions and movements* of natural beings.

> … God imprints on the whole of nature the principles of its proper actions. And so, in this way, God is said to command the whole of nature… (IaIIæ.93.5.corpus)

In Icelandic such internal principles are not called *laws* (*lög*) but are referred to by other, related, words, such as *lögmál.* Icelandic linguistic practice is indicative of a deep difference between laws in the ordinary sense, which fall within what St. Thomas calls *human law* (and, arguably, also to some extent what he calls *natural law*) and laws in the sense of principles of nature.

St. Thomas fully recognizes this deep difference, but he nevertheless includes laws of nature under *lex.* As such, he evidently means to say that they are *binding* in the sense of Question XC, where he sets out the features definitive of *lex* as such. These features are summed up in IaIIæ.90.4.corpus, where St. Thomas states that law is:

> … nothing other than an ordinance of reason for the common good, made by him who has care of the community, and promulgated.

Although unstated in the sentence just quoted, the binding character of law is a part of this package; for in the same passage St. Thomas maintains—for instance, in connection with promulgation—that "…in order that a law obtain the binding force which is proper to a law" it must be promulgated. (IaIIæ.90.4.corpus)

In IaIIæ 93.5 and 93.6, St. Thomas maintains that natural contingents are subject to the eternal law *(naturalia contingentia . . . subsint legi aeternae)* and that non-rational creatures are subject to the eternal law "by partaking of the eternal law by way of an inward moving principle" (IaIIæ.93.6.corpus). And least we think that the language of *rational ordinances,* the *common good* and *promulgation* could not be meant to apply here, St. Thomas emphasizes the reverse:

> The impressions of an inward active principle is to natural things what the promulgation of law is to men, because law, by being promulgated, imprints on man a directive principle. (IaIIæ.93.5.ad 1)

Evidently, therefore, eternal law is understood by St. Thomas to be *binding* upon natural contingents in the sense of Question XC.[10] But surely St. Thomas does not suppose that non-rational beings (many inanimate) are *obligated* to act in accordance with the internal principles of action and movement that God has imprinted upon them. Indeed, even the notion of *being obliged* does not fit such examples. Obligation, whether the reference is to being obligated or to being obliged, is a kind of subjection to rational necessity: the sort of necessity to which rational creatures can be subjected in virtue of their being rational creatures. This is Kant's view and, I believe, St. Thomas' view as well—in fact, I suppose that Kant was here inspired by St. Thomas, who, unlike ancient writers, made obligation a central subject in the philosophy of law and moral philosophy.

Be that as it may, we have now seen one argument that *obligo,* as it is featured in Question XC, does not there mean *to oblige,* or *to obligate,* as it would be natural to suppose, but refers to a wider notion of *subjection to necessity in action or movement.* This necessity may in principle be physical, rational, logical, moral, or practical. This paper will not enter into any deep discussion of all of these various forms of necessity, but certain points in this connection will come to light in the course of our discussion. Just now, I will consider some further arguments to the conclusion already reached.

10 The modern reader may find St. Thomas' view on these matters to be very far-fetched, deriving from a world view—God as the universal legislator—whose validity most of us no longer recognize, even if we are religious believers. Such a reader may find the application of such notions as *command*, *promulgation*, and *bindingness* to the inanimate natural world an objectionable distortion of these important concepts. Be that as it may, St. Thomas clearly does apply these notions to nature as a whole, inanimate as well as animate, non-rational as well as rational. This yields the very wide notion of *bindingness* discussed in this paper. If we were to "modernize" St. Thomas' view, restricting the notions in question to animate—and more specifically only to rational—creatures, then the notion of bindingness would evidently come down to rational necessitation. Whether that would entirely obviate the need for St. Thomas to distinguish the special category of "bindingness in conscience", discussed below, cannot be considered in the present paper.

5. Custom and Coercion

My second argument brings in what St. Thomas says about custom and coercion. Those who read St. Thomas as conceiving the characteristically binding force of law as a kind of moral force, where an agent lies under an obligation to act or forbear from acting in a given way, may find certain assertions uncomfortable. In (IaIIæ.90.3.ad 2), St. Thomas maintains that:

> A private person cannot lead another to virtue efficaciously; for he can only advise, and if his advice not be taken, it has no coercive power, such as the law should have, in order to prove an efficacious inducement to virtue ... [T]his coercive power is vested in the whole people or in some public personage, to whom it belongs to inflict penalties…

This hints at the view that the binding character of law is, at least in part, founded in its commands being backed by punishments and penalties, an ancient idea which was articulated in its most interesting form some six hundred years after St. Thomas by John Austin in his *Province of Jurisprudence Determined* (1832).[11] Normally, Austin's account is taken to be substantively opposed to that of St. Thomas.

This remark of St. Thomas' can, however, be turned by understanding it to concern an adjunct—perhaps a desirable adjunct—to law rather than a comment upon law's essential character. The thought is that being backed by penalties is not what makes law *binding,* in the sense of imposing an obligation, but what makes law effective as a social institution, i.e. that it gets people to do what they are already obligated to do. Indeed, in Question XCII, which deals with the "effects of law" *(effectus legis)*, St. Thomas comments that people, at least sometimes, obey the law through fear of punishment, rather than from virtue or from a dictate of reason. (IaIIæ.92.1.ad 2) But this strategy seems not to be very easily applied to St. Thomas' assertion in Question XCVI (wherein he refers back to Question XC) that:

> The notion of law contains two things: first, that it is a rule of human acts; secondly, that it has coercive power. (IaIIæ.96.5.corpus)

11 An articulate current advocate of this view is Frederick Schauer; see his article, "Was Austin Right After All? On the Role of Sanctions in a Theory of Law", in Ratio Juris, Vol. 23 No. 1 March 2010, 1–21, and his book, *The Force of Law* (Cambridge, Mass. & London: Harvard University Press, 2015).

This makes it seem that coercion is more intimately related to law's binding character than the suggested *turning* strategy—and the idea that the relevant binding force is that of obligation—accounts for.

Together with this, we may consider St. Thomas' remark in Question XCVII, that "when a law is changed, the binding power of the law is diminished, in so far as custom is abolished" (IaIIæ.97.2.corpus).[12] This is hard to accommodate to the idea that the binding power of law comes down to the power of obligation—to moral necessity—since there is no evident connection between moral necessity and the power of custom. Custom may support an unjust law, for example, which St. Thomas maintains to be no law at all (e.g. at IaIIæ.95.2.corpus, and cf. IaIIæ.96.4.corpus); and conversely an obligatory precept may be antithetical to custom.

6. Bindingness in the Forum of Conscience

It seems from this that both coercion and custom can provide, or contribute to, the binding character of law referred to in Question XC. Now coercion and custom seem not to impose any obligations *per se*.[13] But they may both be described as subjecting an agent to a kind of necessity in action. Unlike the case of the actions of non-rational beings necessitated by eternal law, coercion and custom arguably subject only rational agents to practical necessity; but, as in the former case, this sort of necessity is wider, or perhaps other, than moral necessity. Thus, again, that law binds, evidently comes down to something wider than its imposing obligations.

Thirdly and finally in this series of considerations, I want to assess the import of Question XCVI, article 4, where St. Thomas considers the question of whether human law "has the power to bind a man in conscience" *(habent vim obligandi in foro conscientiae)*. In the prologue to Question XCVI, the question is posed, in the translation of the Dominican Fathers, "Whether [human law] binds men in conscience?" The Icelandic translation asks *Hvort lög manna skuldbindi samvisku mannsins?* (Whether human laws bind the human conscience?). Oddly enough,

12 It has to be noted that St. Thomas does not use the verb *obligo* here but rather *constringo*. The Latin passage reads: *Unde quando mutatur lex, diminuitur vis constrictiva legis, inquantum tollitur consuetudo*. I thank Pierluigi Chiassoni for pointing this out and for other comments that he made on this paper. *Constringo* means *to bind* and is a virtual synonym for *ligo*. It therefore seems that the Dominican Fathers' translation of "vis constrictiva legis" as "the binding power of the law" is reasonable; they construe St. Thomas as using *vis constrictiva* as a stylistic variant of *vis obliganda*. There is nevertheless an opening here for a critic of my interpretation.

13 But see the discussion in my article, "Roots of Legal Normativity" (note 6, above), esp. 105-106.

however, the Latin text asks whether human law *imponat homini necessitam quantum ad forum conscientae*, that is, fairly literally, whether it "imposes a necessity (or compulsion) upon man in the forum of conscience". The verb *obligo* does not occur. Similarly, in the first lines of Question 96, article 4, the Dominican Fathers have St. Thomas asserting that "It would seem that human law does not bind a man in conscience", which is rendered in the Icelandic as: "*[þ]að virðist að lög skuldbindi ekki samvisku mannsins*" (It appears that laws do not obligate the human conscience). But St. Thomas' Latin text reads: "*Videtur quod lex humana non imponat necessitam in foro conscientiae*" (It appears that human law does not impose a necessity in the forum of conscience). Again, the verb *obligo* is missing.

I do not speak here of mistranslation, for what the translators have done, justifiably enough, is to take St. Thomas to be referring, in these introductory lines, to what he discusses in the relevant *corpus,* when he says that:

> *Leges positae humanitus ve1 sunt iustae, vel iniustae. Si quidem iustae sint, habent vim obligandi in foro conscientiae.* (IaIIæ.96.4.corpus)

This may be rendered correctly enough, as in the translation of the Dominican Fathers, "Laws framed by men are either just or unjust. If they are just they have the power of binding in conscience"; or as in the Icelandic translation, "*[L]ög sem maðurinn setur eru annaðhvort réttlát eða ranglát. Ef þau eru réttlát, þá fá þau kraft sinn til að binda samviskuna…*" (The laws set by man are either just or unjust. If they are just, they acquire the power to bind conscience), though in this instance, a bit oddly, the translator avoids the translation "*skuldbindandi kraftur*" (the power to obligate).

If we make the connection in the opposite direction, so to speak, from the translators, we may see that the *binding* of an agent in the forum of conscience is described, in the introductory lines, simply as the imposition of a certain sort of necessity for action. The bindingness is the simple imposition of a necessity of this sort, while the aspect of obligation comes in as a further specification of a certain *sort* of practical necessity, that is, necessity in conscience. For I take it that being *bound in conscience*, in this text of St. Thomas, is what we often, and more normally, describe as *being obligated*.

7. Legal Obligation and the Pursuit of the Good

Bindingness in conscience is not the bindingness introduced in Question XC as a characteristic of law, although it falls, as a specific variety, under bindingness in that more generic sense. The generic bindingness essential to law cannot be

bindingness in conscience—the necessity of obligation—since eternal law, which is *lex,* binds natural contingents to certain sorts of action but does not obligate or even oblige them to act. Eternal law is, by the way, not the only example that shows this, but we need not multiply examples here.

Bindingness in conscience is a form of rational necessitation and is that form which I believe it proper to describe as moral necessitation. Importantly, not all rational necessitation is moral necessitation. For it is not only practical reason that imposes moral necessity or obligation upon a rational agent. Theoretical reason also subjects us to necessity. For example the Law of Non-contradiction, which is a prescription of reason, forbids us to affirm and deny the same thing at the same time. I have no doubt that St. Thomas would include the Law of Non-contradiction as *lex,* and as binding upon rational creatures. But although we are bound to avoid contradiction, it is doubtful that we are duty-bound or obligated to do so. What we are duty-bound to do, generally speaking, is to pursue and do good and avoid evil.

As St. Thomas tells us in Question XCIV, on natural law:

> [T]he first principle in the practical reason is one founded on the notion of good, namely, that the good is what all desire. Hence, this is the first precept of law, that good is to be pursued and done, and evil is to be avoided. All other precepts of the natural law are based upon this, so that whatever the practical reason naturally apprehends as man's good belongs to the precepts of the natural law as something to be done or avoided. (IaIIæ.94.2.corpus)

Natural law, according to St. Thomas, consists in the precepts of reason, which derive from eternal law in the sense that God has made reason the essential principle of human thought and action. It is thus evident to St. Thomas that natural law is binding upon man, *qua* rational creature, in the forum of conscience. He raises the question with regard to human law as something that does not derive from natural law by what we now call deduction, but by making "determinations" about particular sorts of actions.

> These particular determinations, devised by human reason, are called human laws, provided the other essential conditions of law be observed…(IaIIæ.91.3.corpus)

So, he is moved to ask, are these human laws, like natural law, binding in conscience? His answer is that they are, provided that they conform with natural law, which sets rational constraints upon human law-making. Being constraints of practical rationality, the rational necessity imposed upon an agent by such human law as conforms with the essential conditions of law, is moral necessity.

Human laws (so-called) which do not conform with those essential conditions:

> … are like acts of violence rather than laws, because, as Augustine says, "a law that is not just seems to be no law at all… " [S]uch laws do not bind in conscience, except perhaps in order to avoid scandal or disturbance. (IaIIæ.96.4.corpus)

8. Bindingness in Conscience is Essential to Human Law

Someone might think to present us, at this point, with the following problem: If, as I have argued, binding force may derive from such things as coercion or custom, and these may attach to unjust human laws (using the term "law" generously)—laws which violate the principles of practical reason—may such laws not then also be binding? The answer is, first, that they may indeed be binding: they may subject an agent, indeed a rational agent, to the necessity (or to a certain sort of necessity) to act in a certain way. But, this will not render them binding in conscience. They will not thereby impose obligations upon a rational agent.

Secondly, bindingness is said to be a necessary characteristic of law; but it is nowhere implied that it is sufficient. A rule may bind without having the character of law, because it may not have the other characteristics essential to law, for example that of being ordered to the common good.

St. Thomas is in no doubt about the possibility of there being systems of coercive rules, set by human beings, which bind through coercion or custom, without binding in conscience. But these will not be systems of human law. Human law has a special character to which coercion and custom make no contribution unless harnessed to the requirements of reason, in particular, practical reason. If they are so harnessed, then, St. Thomas seems to imply, they may contribute in an essential way to human law as a set of binding precepts. But even if this is the case, the morally binding character of law is prior, in that, unless human law is binding in conscience, other varieties of bindingness are simply irrelevant to its credentials as human law.

Frederick Schauer[1]

A Frame Without a Picture: On the Relevance of Law to the Decision of Hard Cases

Abstract

How are judges (and others) to decide hard cases? One view says that even in hard cases it is *law all the way down*, as Justice Elena Kagan put it in the United States Senate Judiciary Committee hearings considering her nomination to the Supreme Court. But another view, widely held among many legal positivists, acknowledges that law at some point runs out, and that in such instances judges and other legal decision-makers must go beyond the law in reaching their conclusions. And although these two positions seem in conflict, dealing with this apparent conflict requires an understanding of what makes a hard case hard and of what inputs into legal decisions are to be considered as law. This essay considers the question of the role of law in the decision of hard cases and concludes with even further questions about how different answers to the question about the role of law in the decision of hard cases reflect different views not only about the nature of judicial decision-making but also about the capacities of judges and the legal system.

Úrtak

Hvussu eiga dómarar, og onnur, at taka avgerðir í truplum málum? Sambært eini áskoðan er tað galdandi, sjálvt í trupulum málum, at lóg er *allan vegin niður,* sum Elena Kagan dómari mælti í rættarnevndini hjá senatinum í USA, tá hennara tilnevning til hægstarætt varð viðgjørd. Onnur áskoðan, ið serliga er væl dámd millum løgfrøðiligar positivistar, viðurkennir hinvegin at lógin til tíðir ikki er fullkomin, og at í slíkum støðum mugu dómarar og onnur, ið taka løgfrøðiligar avgerðir, leita víðari enn lógina, til tess at røkka niðurstøður teirra. Hesar áskoðanir tykjast at vera í stríð við hvørja aðra, men til tess at handfara hetta sokallaða stríðið, krevst nærri kunning um júst hvat ger eitt mál trupult og um hvørji atlit, ið vera tikin í lógaravgerðum, eiga at verða umrødd sum *lóg*. Hendan greinin umrøður leiklutin

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hjá lógini, tá avgerðir skulu takast í truplum málum, og endar við at seta víðari spurningar um, hvussu ymisk svar upp á spurningin um leiklutin, ið lógin hevur í sambandi við at avgerðir verða tiknar í truplum málum, endurspeglar ymiskar áskoðanir, ikki bara um grundarlagið fyri rættarligum dómaraavgerðum, men eisini um førleikarnar hjá dómarum og lógarskipanini.

Introduction

The great Austrian legal philosopher Hans Kelsen often likened law to a frame without a picture.[2] For Kelsen, *no* legal decision is ever completely determined by the law. Every application of law, Kelsen insisted, is ultimately determined by non-legal empirical and philosophical considerations, while nevertheless being bounded by constraints set by the law. Hence the metaphor of the frame without a picture.

In insisting that *every* decision by a court or other legal actor, and *every* application of the law to particular facts and particular situations, necessarily involves non-legal factors, Kelsen staked out a position that seems extreme. It is not immediately apparent, for example, that concluding that a driver driving at eighty miles per hour is violating the law specifying a limit of sixty-five requires recourse to factors other than *the law*.[3] And thus a more familiar and intuitively sound conclusion is that there are indeed applications of the law that are based

2 Hans Kelsen, *Pure Theory of Law* (Max Knight trans., Univ. of California Press, 1967), 245, 350-351; Hans Kelsen, *Introduction to the Problems of Legal Theory* (Bonnie L. Paulson & Stanley L. Paulson trans., Clarendon/Oxford, 1992), 80. Useful commentary on this idea includes Iain Stewart, "The Critical Legal Science of Hans Kelsen," *Journal of Law & Society*, 17 (1990), 273-308; Lars Vinx, *The Guardians of the Constitution: Hans Kelsen and Carl Schmitt on the Limits of Constitutional Law* (Cambridge University Press, 2015); Lars Vinx, *Hans Kelsen's Pure Theory of Law: Legality and Legitimacy* (Oxford University Press, 2007), 153.

3 Concluding that the driver was violating the law does, to be sure, require knowledge of the language in which the law is written, as well as the mathematical proposition that eighty is greater than sixty-five. But Kelsen had something more than this in mind. Specifically, he believed that there was no rigid distinction between law-creation and law-application, and thus that even what appear to be routine applications involve at least some law-creation. See Hans Kelsen, "Pure Theory of Law," *Law Quarterly Review*, 51 (1935), 517-614, at 519-521. For commentary, see Brian Bix, "Positively Positivism," *Virginia Law Review*, 85 (1999), 889-923, at 908; Drury Stevenson, "To Whom Is the Law Addressed?" *Yale Law & Policy Review*, 21 (2003), 105-167, at 134 n.118. But the view that applying the rule as stated in the text to driving at eighty miles per hour involves law-creation incorporates, to put it mildly, a non-standard and counter-intuitive view of law creation.

only on the law.[4] Even those who believe this, however, perhaps most prominently Kelsen's approximate contemporary and jurisprudential *rival* H.L.A. Hart, also acknowledge that there are disputes and applications as to which the existing law does not supply an answer.[5] These are the hard cases, and they arise, for Hart, when there are *gaps* in the law,[6] or when some putative application of a legal rule lies in the *penumbra* of that rule.[7]

Here, Hart argued, the law has run out, and judges, especially, should then in the exercise of their discretion make decisions in much the same way that a legislator would make them, accordingly drawing on all of the normative, empirical, and

4 Or at least only on the law and on basic understandings of language, logic, arithmetic, and non-controversial empirical propositions.

5 H.L.A. Hart, *The Concept of Law* (Penelope A. Bulloch, Joseph Raz & Leslie Green eds., 3d ed. 2012) (1961), 124-136. For commentary on Hart on this point, see Michael Martin, *The Legal Philosophy of H.L.A. Hart: A Critical Appraisal* (Temple University Press, 1987), 50-63; Scott J. Shapiro, *Legality* (Harvard University Press, 2011), 234-240; Frederick Schauer, "Easy Cases," *Southern California Law Review*, 58 (1985), 399-440.

6 For careful and prominent analyses of the idea of a gap in the law, see Pablo E. Navarro & Jorge L. Rodríguez, *Deontic Logic and Legal Systems* (Cambridge University Press, 2014), 158-175; Joseph Raz. *The Autonomy of Law: Essays on Law and Morality* (Clarendon/Oxford, 1979), 70-77; John Gardner, "Concerning Permissive Sources and Gaps," *Oxford Journal of Legal Studies*, 8 (1988), 457-461. And compare Ronald Dworkin, "No Right Answer,?" in P.M.S. Hacker & J. Raz (eds.), *Law, Morality, and Society: Essays in Honour of H.L.A. Hart* (Clarendon/Oxford, 1977), 58-84; Ronald Dworkin, "On Gaps in the Law," in Paul Amselek & Neil MacCormick (eds.), *Contrversies About Law's Ontology* (Edinburgh University Press, 1991), 84-90.
Kelsen is complicated on this point. Although he maintained that no legal decision is completely determined by the law, Kelsen also insisted, seemingly in contradiction, that there were no gaps in the law. See Eugenio Bulygin, "Kelsen on the Completeness and Consistency of Law," in Luís Duarte d'Almeida, John Gardner, & Leslie Green (eds), *Kelsen Revisited: New Essays on the Pure Theory of Law* (Hart Publishing, 2013), 225-244. But the contradiction can be resolved by noting that Kelsen believed that the law provided a "frame" for every application, even as that frame was never sufficient conclusively to resolve a particular application within that frame.

7 See also H.L.A. Hart, "Positivism and the Separation of Law and Morals," *Harvard Law Review*, 71 (1958), 593-629, at 612-613. For commentary, see Brian Bix, *Law, Language, and Legal Determinacy* (Clarendon/Oxford, 1993), 7-35; Frederick Schauer, "A Critical Guide to Vehicles in the Park," *NYU Law Review*, 83 (2008), 1109-1134; Anthony J. Sebok, "Finding Wittgenstein at the Core of the Rule of Recognition," *SMU Law Review*, 52 (1999), 75-109.

policy resources that a legislator would use.[8] And although Hart, unlike Kelsen, believed that this characterization applied only to some and not to all decisions by courts and other legal actors, Hart did agree with Kelsen to the extent of believing that in these penumbral or *gap* cases the law had little role to play in determining the final result.[9]

Kelsen and Hart do not, of course, exhaust the universe of jurisprudential positions. Nevertheless, the contrast between the two suggests that an important question about the decision of hard cases is the issue of the role that law *qua* law plays in such decisions. And unless we tautologically define law as what judges do, it is hardly self-evident that law is a major component of the decision of hard cases.[10] But, as Ronald Dworkin has famously emphasized,[11] nor is it self-evident that law is *not* an important factor in the decision of hard cases. Exploring this question, however, requires that we have some understanding of what a hard case is, as well as some understanding of what law is. This paper will accordingly start by addressing those interrelated questions as a precursor to proceeding to the heart of the matter.

8 See Jules L. Coleman & Brian Leiter, "Legal Positivism," in Dennis Patterson (ed.), *A Companion to Philosophy of Law and Legal Theory* (Blackwell, 1996), 241-260, at 249-251; Roger A. Shiner, "Hart on Judicial Discretion," *Problema* 5 (2011), 341-362. And on the necessity of going beyond the law, narrowly defined, in the decision of hard cases, but with less focus on Hartian exegesis, see David Lyons, "Derivability, Defensibility, and the Justification of Judicial Decisions," in *Moral Aspects of Legal Theory: Essays on Law, Justice, and Political Responsibility* (Cambridge University Press, 1993), 119-140.

9 See H.L.A. Hart, *The Concept of Law*, *op. cit.* note 2, at 272-274; H.L.A. Hart, "Discretion," *Harvard Law Review*, 127 (2013), 652-665; Nicola Lacey, "The Path Not Taken: H.L.A. Hart's Harvard Essay on Discretion," *Harvard Law Review*, 127 (2013), 636-651. For a critique of Hart on just this point, see Margaret Martin, "Method Matters: Non-normative Jurisprudence and the Re-Mystification of the Law," in Jorge Luis Fabra-Zamora & Gonzalo Villa Rosas (eds.), *Conceptual Jurisprudence: Methodological Issues, Classical Questions and New Approaches* (Springer, 2021), 53-74.

10 The terminology is both tricky and important. Joseph Raz, prominently, distinguishes law from legal reasoning, and includes within the idea of legal reasoning all sorts of considerations, especially moral considerations, that are not exclusive to legal reasoning, however important they may be to reasoning *simpliciter*. Joseph Raz, "On the Autonomy of Legal Reasoning," *Ratio Juris*, 6 (1993), 1-15.

11 Ronald Dworkin, "The Model of Rules," in *Taking Rights Seriously* (Duckworth, 1977).

By way of introductory example, consider the comments of now-Justice Elena Kagan when questioned by Senator Jon Kyl at the Senate Judiciary Committee hearings held to consider her nomination to the Supreme Court. Asked about the role of empathy in deciding hard cases, Justice Kagan said, *I think it's law all the way down*.[12] In the context in which the question was asked, Justice Kagan's response was plainly politically and strategically correct. Indeed, in one form or another all nominees to the Supreme Court these days say much the same thing,[13] recognizing that claiming to rely on empathy, policy, politics, ideology, and anything else other than what Ruth Gavison has aptly described as *first stage law*[14] can be hazardous to a nominee's chances of confirmation. But politics and strategy aside, was Justice Kagan right? Is it really just law all the way down? That is the question I seek to answer in this paper.

12 Paul Kane, "Kagan sidesteps empathy question, says 'it's law all the way down.'" *Washington Post*, June 29, 2010.

13 Thus, Justice Sonia Sotomayor, questioned at her hearings about the role of "empathy" and "heart" in judging, responded that "[i]t's not the heart that compels conclusions in cases, it's the law." Arrie W. Davis, "The Richness of Experience, Empathy, and the Role of the Judge: The Senate Confirmation Hearings for Judge Sonia Sotomayor," *University of Baltimore Law Forum*, 40 (2009), 1038, at 6. And then there is the widely but misleadingly mocked observation by Chief Justice Roberts that being a judge is like a baseball umpire calling balls and strikes. For a largely sympathetic description and analysis, see Charles Fried, "Balls and Strikes," *Emory Law Journal*, 64 (2012), 641-662. The Chief Justice's critics, perhaps assisted by ignorance of what an umpire actually does, assumed that Roberts was claiming that the process was entirely mechanical, involving no judgment and no close cases. But Roberts was claiming nothing of the kind. Rather, he was only drawing a distinction between making rules and applying rules that are made by someone else.

14 Ruth Gavison, "Comment," in *Issues in Contemporary Legal Philosophy: The Influence of H.L.A. Hart* (Ruth Gavison ed., Clarendon Press, 1987), 21, 30-31; Ruth Gavison, "Legal Theory and the Role of Rules," *Harvard Journal of Law and Public Policy*, 14 (1991), 727, at 740-41. In referring to "first stage law," Gavison means to designate the kinds of things that ordinary people think of as the law, including (the texts of) constitutions, statutes, regulations, and reported judicial decisions, but not including politics, policy, morality, and similar factors. And Gavison's idea can be understood as a descendent of Jeremy Bentham's (normative) view that law works best when it is easily identifiable and easily understandable with minimal intervention by lawyers and judges. See David Lyons, "Founders and Foundations of Legal Positivism," *Michigan Law Review*, 82 (1984); 722-739; Gerald J. Postema, "Legal Positivism: Early Foundations," in Andrei Marmor (ed.), *Routledge Companion to Philosophy of Law* (Routledge, 2012), 30-47; Frederick Schauer, "Positivism Before Hart," *Canadian Journal of Law and Jurisprudence,* 24 (2011), 455-471.

Just Enough Jurisprudence

This paper is hardly the appropriate occasion for offering a comprehensive theory of just what law is, yet it remains the case that some conception of law and its scope is a necessary prerequisite to examining the role of law in the decision of hard cases. More specifically, such an examination presupposes at least some possibly pre-theoretical understanding of what we mean by *law*. And one of the things that makes this presupposition important is that the broader our understanding of law, the less interesting becomes the question of the role that law *qua* law plays in the decision of hard cases. Consider, most prominently these days, the account of law offered by Ronald Dworkin.[15] Although Dworkin repeatedly insisted that neither defining law nor defining the word *law* was part of his agenda,[16] Dworkin's approach is nevertheless characterized by an increasingly capacious understanding of the domain of law. For Dworkin, law is what judges do, and the legal domain – law's empire -- includes not only the kinds of things that appear in law books, but also the vast universe of political and moral principles, even those that cannot be identified by a Hartian rule of recognition.[17] Indeed, it was precisely the alleged inability of the positivist and Hartian picture to explain the actual use by judges of moral and political principles that, for Dworkin, and even in his earliest writings, rendered that picture as descriptively inaccurate as it was normatively unappealing.

15 Especially in Ronald Dworkin, *Justice in Robes* (Harvard University Press, 2008), and Ronald Dworkin, *Law's Empire* (Harvard University Press, 1986). Some distinctive Dworkinian themes begin to emerge in Ronald Dworkin, *Taking Rights Seriously* (London: Duckworth, 1977), but the conception of law to be found in the earlier work is arguably somewhat narrower.

16 Ronald Dworkin, "A Reply by Ronald Dworkin," in *Ronald Dworkin and Contemporary Jurisprudence* (Marshall Cohen ed., Routledge, 1984), 247, 250; Ronald Dworkin, "Legal Theory and the Problem of Sense," in Gavison, *op. cit.* note 13, at 9, 16. In *Law's Empire*, at 413, Dworkin comes around to defining law as an "attitude," but that assertion does not say very much about the question of which sources or factors count as part of the legal attitude and which do not.

17 Dworkin, as is well known, limited law's empire to the empire of principle, believing that questions of policy were for legislatures and not for courts. *Law's Empire*, *op. cit.* note 14, at 178-184, 221-224. Descriptively, however, this part of Dworkin's program is not even close to correct; making decisions on the basis of policy has long been as much a part of what judges, especially common law judges, do as is making decisions on the basis of principle. See John Bell, *Policy Arguments in Judicial Decisions* (Clarendon Press, 1983); Melvin Aron Eisenberg, *The Nature of the Common Law* (Harvard University Press, 1988).

Although the account that has come to be known as inclusive legal positivism purports to be able to explain the use of moral principles, political principles, and much else from a positivist perspective,[18] there is little empirical space between Dworkin's position and inclusive positivism, as Dworkin himself insisted.[19] But for my purposes here, the important point is that the inclusivist account threatens to make the answer to the question I address here trivially true. That is, if pretty much anything can count as law as long as judges use it and as long as lawyers argue from it, which is the basic claim of inclusive legal positivism, then it is close to pointless not only to ask about the contribution of law to the decision of hard cases, but also even to raise the kinds of questions that have characterized American Legal Realism.[20]

Thus, the question I ask makes sense only under a view of law's domain that is narrower than Dworkin's and narrower than what is allowed, even if not required, by inclusive legal positivism. This view, which bears some affinity with Ruth Gavison's idea of first-stage law, and also with what has come to be known as exclusive legal positivism,[21] might be caricatured, but not without some accuracy,

18 Wilfrid J. Waluchow, *Inclusive Legal Positivism* (Clarendon Press, 1994); Leslie Green & Thomas Adams, "Legal Positivism," *Stanford Encyclopedia of Philosophy*, www.plato.stanford.edu/archives/win2019/entries/legal-positivism/. See also H.L.A. Hart's posthumous embrace of what he labels "soft positivism" in "Postscript," in H.L.A. Hart, *op. cit.* note 2, and the defense of "incorporationism" in Jules L. Coleman, "Negative and Positive Positivism," *Journal of Legal Studies*, 11 (1982), 139-164.

19 Ronald Dworkin, "Thirty Years On," *Harvard Law Review*, 115 (2002), 1655-1687. See also Adrian Vermeule, *Common Good Constitutionalism* (Polity, 2022), at 8, 190 n.15.

20 One way of characterizing the central Realist claim is as arguing that the universe of traditional legal materials has far less of an effect on judicial decisions in hard appellate cases, and maybe even in litigated cases more generally, than the standard picture of law has long maintained. See Jerome Frank, *Law and the Modern Mind* (Brentano's 1930); Karl N. Llewellyn, *The Theory of Rules* (Frederick Schauer ed., University of Chicago Press, 2011) (1938-1939); Max Radin, "The Theory of Judicial Decision: Or How Judges Think," *American Bar Association Journal*, 11 (1925), 357-362; Frederick Schauer, "Legal Realism Untamed," *Texas Law Review*, 91 (2013), 749-780. The only way to test the Realist claim empirically, however, is by employing a conception of law and legal sources that is narrower than the "anything goes" approach of inclusive legal positivism. See Brian Leiter, *Naturalizing Jurisprudence: Essays in American Legal Realism and Naturalism in Legal Philosophy* (Oxford University Press, 2007), 121-122, 134-135.

21 See Green & Adams, *op. cit.* note 17; Andrei Marmor, "Exclusive Legal Positivism," in *Oxford Handbook of Jurisprudence and Philosophy of Law* (Jules L. Coleman, Scott J. Shapiro & Kenneth Einar Himma eds., Oxford University Press 2004); Scott J. Shapiro, "On Hart's Way Out," *Legal Theory*, 4 (1998), 469-507.

as understanding law as including, at least presumptively, all and only the material found in books published by the West Publishing Company, or only the kinds of norms, principles, rules, etc., that are taught in basic law school courses, or that that can be found in the books typically collected by law libraries, and so on.

This caricature – law is the stuff found in books published by the West Publishing Company – captures with (or despite) its caricature two important ideas. One is that the understanding of what counts as law is ultimately empirical and sociological, as the Hartian rule of recognition idea reflects. And the other is that law is a limited domain, such that not every socially accepted norm is for that reason a legal norm.[22] Indeed, it might be more accurate to understand the domain of law not so much as limited but rather as non-congruent with the social domain both in terms of what it includes and in terms of what it excludes. Some accepted social norms are not legal norms. Failing to respond to a gift with a thank-you note is not a basis for a legal cause of action despite the fact that the failure breaches a widely accepted social norm. And so too with showing up in sweat clothes at an event explicitly described as *black tie*. Conversely, certain legal norms – stare decisis, for example – provide the basis for a legal argument or legal conclusion but may be far less acceptable outside of the legal system than within.[23]

This account of law becomes even more realistic if we understand the limited domain of legal materials as presumptive and not conclusive. In most advanced legal systems, and perhaps to a greater extent in the American legal system than elsewhere,[24] law-generated results are subject to override when those results appear

22 Frederick Schauer, "The Limited Domain of the Law," *Virginia Law Review*, 90 (2004), 1909-1956.

23 Although stare decisis is not an unfamiliar claim in families with multiple children, for example, its oddness outside the legal system was captured by Oliver Wendell Holmes's observation that it was "revolting" that courts would be bound by precedents that "persist ... for no better reasons than ... that so it was laid down in the time of Henry IV." Oliver W. Holmes, Jr., "The Path of the Law," *Harvard Law Review,* 10 (1897), 457-478.

24 See P.S. Atiyah & Robert S. Summers, *Form and Substance in Anglo-American Law: A Comparative Study of Legal Reasoning, Legal Theory, and Legal Institutions* (Clarendon Press, 1987), arguing that American law is more formal than English law in the sense of being more willing to find ways to avoid outcomes that are literal or accurate products of existing law but which are nevertheless deficient on moral, policy, or pragmatic grounds.

to adjudicators as immoral, impolitic, inefficient, or otherwise unwise.[25] Compared even to other common law systems, American law is largely anti-formal, with American judges appearing to be sociologically and politically empowered to avoid the harshness of first-stage law to a greater extent than is found elsewhere, and with American judges more comfortable than their counterparts elsewhere in understanding this power as part of their role. But even in the United States, it seems safe to conclude that there is a limited domain of conventional legal materials and conventional legal sources – statutes, official regulations, reported judicial decisions, accepted canons of interpretation, and authoritative secondary materials such as the Federalist Papers and the Restatements – that, at least presumptively, is understood to provide the basis for legal decisions. And with this understanding in hand, we can then ask what follows from the existence of this limited domain of rule-of-recognition-recognized legal materials.

The Varieties of Hard Cases

Seeing law as a limited domain of rule-of-recognition-recognized norms, rules, principles, and other authoritative sources allows us to distinguish two importantly different kinds of hard cases. One kind, of lesser importance here, is the hard case in which a legally straightforward or *easy* outcome is nevertheless morally or otherwise objectionable.[26] The legal outcome is hard to swallow.

25 The characterization of the non-conclusiveness of the legal result as an "override" by non-legal factors is shorthand for the much more complex topic of defeasibility, a topic that includes the various mechanisms by which the legal result will not in the final analysis determine the outcome. See Jordi Ferrer Beltrán & Giovanni Battista Ratti (eds.), *The Logic of Legal Requirements: Essays on Defeasibility* (Oxford University Press, 2012); Luís Duarte d'Almeida, *Allowing for Exceptions: A Theory of Defences and Defeasibility in Law* (Oxford University Press, 2015).

26 Although the phrase "easy cases" is ubiquitous, it is important to recognize that easy cases – cases in which the law provides a straightforward answer – are not necessarily easy in the sense of the answer being obvious and quickly ascertained. There is a straightforward and non-controversial answer to the question, "What is the number of American presidents to the eighth power divided by the cube root of 115,731 multiplied by the number of nautical miles between South Pomfret, Vermont, and Darwin, Australia," but coming up with that straightforward and non-controversial answer will not be easy. See Leslie Green, "Notes to the Third Edition," in Hart, *op. cit.* note 4, at 319.

Riggs v. Palmer,[27] prominently discussed by Benjamin Cardozo,[28] Henry Hart and Albert Sacks,[29] and more recently by Ronald Dworkin,[30] provides a good example of this kind of hard case.[31] As both the majority and dissenting opinions in *Riggs* explicitly accepted, the most directly applicable authoritative legal source, the New York Statute of Wills, would have allowed the murdering grandson to inherit under the terms of his grandfather's will despite the fact that it was the grandson who caused his grandfather's death by poisoning him.[32] As a matter of positive law narrowly understood, this was an easy case, but the result easily produced by the law was so morally uncomfortable to the majority that it strained to find a way to avoid the most obvious legal result. Much the same, albeit with judges less willing to depart from the straightforward legal outcome, were decisions under the Fugitive Slave Acts.[33] More recent and more amusing is the United States Supreme Court case of *United States v. Yates*,[34] in which the most straightforward legal outcome seemed to a bare majority of Supreme Court justices to be so at

27 22 N.E. 188 (N.Y. 1889).

28 Benjamin N. Cardozo, *The Nature of the Judicial Process* (Yale University Press, 1921), 89-91.

29 Henry M. Hart & Albert M. Sacks, *The Legal Process: Basic Problems in the Masking and Application of Law* (William N. Eskridge, Jr. & Philip P. Frickey eds., Foundation Press, 1994) (1958), 68-102.

30 Dworkin, *Taking Rights Seriously*, *op. cit.* note 14, at 23; Dworkin, *Law's Empire*, *op. cit.* note 14, at 15-20.

31 For extensive discussion of *Riggs* and the commentary it spawned, see Caleb Nelson, *Statutory Interpretation* (Foundation Press, 2011), 5-27. And for a perceptive jurisprudential analysis, see Sari Kisilevsky, "Hard Cases and Legal Validity: The Internal Moral Significance of the Law," in Fabra-Zamora & Rosas, *op. cit.* note 8, 197-223.

32 "Elmer was clearly named as a beneficiary in the will, the will was validly enacted, and there was no positive law overriding the Statute if Wills, the governing statute at the time, or prohibiting murders from inheriting." Kisilevsky, *op. cit.* note 30, at 198.

33 Compare Robert M. Cover, *Justice Accused: Antislavery and the Judicial Process* (Yale University Press, 1984), with Peter Karsten, "Revisiting the Critiques of Those Who Upheld the Fugitive Slave Acts in the 1840s and '50s," *American Journal of Legal History*, 58 (2018), 291-325. And see also Allen Johnson, "The Constitutionality of the Fugitive Slave Acts," *Yale Law Journal*, 31 (1921), 161-182.

34 574 U.S. 528 (2015).

odds with both common sense and with the intent of Congress as to justify an outcome that departed from that most straightforward legal outcome.[35]

For purposes of this essay, the point is not whether courts avoiding the most straightforward legal outcome are behaving properly or not, or whether they are acting consistently or inconsistently with the accepted norms of adjudication. The point is only that this kind of hard case – the case in which there is a straightforward or easy legal answer as a matter of positive law but in which the legal answer is for moral or other reasons objectionable – is different from the more conventional type of hard case -- the case in which the conventional legal materials conventionally interpreted do not provide an answer.

To repeat the point made above, both the definition and frequency of this latter (and more common) type of hard case is a function of just what we understand law to be, and just what we understand the limited domain of the law to include. If law includes not only statutes, regulations, reported cases and so on but also morality and policy, then the likelihood of there being gaps in the law, although still logically possible, as a vast literature on moral dilemmas has made clear,[36] is, for most litigated cases, still vanishingly small as an empirical matter. Although the judges in *Riggs v. Palmer* differed about which sources could legitimately factor in a judicial decision, and although they implicitly differed about whether moral considerations could override the most obvious indications of the most directly relevant positive law source, they did not disagree about the moral question itself. If all of the judges had, counterfactually, agreed that morality was relevant to their decision, it is unlikely that there would have been a dissenting opinion. Thus, the division in *Riggs* is a product of how broadly or narrowly we understand the domain of the law. If we understand law broadly to include considerations of morality and policy, then there may be few genuinely hard cases. But if we understand law more narrowly, then it is likely that there will be an appreciable number of genuinely legally hard cases – cases in which the law narrowly understood does not resolve the matter before the court.

35 Mr. Yates was a small commercial fisherman who had thrown undersized groupers back into the sea to avoid prosecution for taking undersized fish, behavior that literally violated the Sarbanes-Oxley Act, which was designed to penalize banking and related financial fraud, but which by its terms prohibited the destruction of any "tangible object" with the aim of avoiding prosecution. The language was plainly intended to deal with the destruction of records on paper, computer disks, and the like, and not undersized fish, a fact that was dispositive to five justices, but irrelevant to the dissenters, who took the literal language of the statute to be dispositive.

36 See Walter Sinnott-Armstrong, *Moral Dilemmas* (Blackwell, 1988).

Even with this narrower understanding of law, an understanding according to which there are many legally hard cases, these hard cases will come in multiple varieties. One variety is the more conventional type of legal gap – the legally unprovided for case. The world being what it is, and human foresight being what it is,[37] there will be acts and events and disputes that are simply not covered by the law at all. The law is silent. And this is the traditional understanding of the kind of hard case often characterized as a gap in the law.[38]

There is another variety of hard case, however, one that is a function not of too little law but of too much. At times legal rules and principles of roughly equivalent status will conflict, and so there will be hard cases occasioned by a conflict of legal rules, especially, as is usually the case, when there is no second-order rule specifying how such conflicts should be resolved.[39] Consider, for example, the 1978 United States Supreme Court case of *United Steelworkers of America, AFL-CIO-CLC v. Weber*.[40] The case dealt with the permissibility under Title VII of the Civil Rights Act of 1964 of a corporation's race-conscious affirmative action plan regarding hiring and promotion. Without getting into the details of the governing statute, the case involved a conflict between the well-recognized principle of statutory interpretation that clear evidence of congressional intent would trump explicit statutory language to the contrary, a principle accepted by the majority, and the equally well-accepted principle of statutory interpretation, on which the dissent relied, that resort to legislative intent is precluded when the language of the statute is clear. As a result, one rule-of-recognition-recognized principle of positive law pointed to one outcome and another rule-of-recognition-recognized principle of positive law pointed to the opposite outcome, with there

37 As Hart put it, law, whose strictures regulate behavior that post-dates the creation of the relevant legal source, suffers from the "twin handicaps" of ignorance of fact and indeterminacy if aim. Hart, *op cit.* note 3, at 128. In other words, we cannot perfectly predict the future, and we cannot perfectly know what we would want to do when we get there.

38 See Raz, *op. cit.* note 4; Gardner, *op. cit.* note 4.

39 In the civil law world, and in the legal theory produced in that world, the topic of normative conflicts looms large. See Pierluigi Chiassoni & Carla Huerta Ochoa, "The Troublesome Duet: Antinomies and Gaps in Civil Law Jurisprudence," in Luka Burazin, Michael Steven Green, & Giorgio Pino (eds.), *Jurisprudence in the Mirror: The Civil Law World Meets the Common Law World* (Oxford University Press, forthcoming 2023). The topic is far less prominent in common law legal theory, perhaps because the messiness of the common law makes such conflicts far more frequent and, perhaps consequently, far less of a worry.

40 443 U.S. 193 (1978).

being no accepted second-order principle that would resolve the conflict.[41] The consequence is that existence of legal sources pointing in different but mutually exclusive directions creates a hard case.

The third variety of hard case arises, relatedly, from the fact that in most common law systems there are no principles of priority – *rules of order*, with due respect to Colonel Roberts – among the rule-of-recognition-recognized sources. Here *Riggs v. Palmer* is again instructive. Assuming, controversially, that the majority was correct in saying that broad legal principles such as *no person may profit from their own wrong*, ancient treatises such as Rutherford's *Institutes*, United States Supreme Court opinions dealing with a different situation under a different statute, and the law of Quebec, among others, all counted as legitimate (even if permissive and not mandatory[42]) legal sources, then how was a court to determine the priority among the different sources? Hart casually noted the problem in *The Concept of Law*,[43] and seemed to imply that a type of secondary rule would deal with the problem, but in fact, and unlike the case in many or even most civil law jurisdictions, neither the system that Hart knew best nor most other common systems have many such rules of priority among conflicting types of recognized sources. The existence of such rules would not eliminate the possibility of such hard cases, either because the rules of priority would themselves have penumbras or because there might still be conflicts among second-order priority rules that are not resolved by third-order rules. Still, we might reasonably expect that priority rules would reduce the frequency of genuinely hard cases, and, conversely, we should not be surprised that the lack of such rules in most common law systems at least partly contributes to the concern about hard cases that pervades the literature in such systems.

On the Role of Law in Legally Hard Cases

If we put aside those hard cases that are hard because the legally easy or straightforward outcome is hard to swallow for moral, political, or pragmatic reasons, we are then left with hard cases that are legally hard because the

41 The ubiquity of this problem with respect to the canons of statutory interpretation was famously documented in Karl N. Llewellyn, "Remarks on the Theory of Appellate Decision, and the Rues or Canons about How Statutes Are To Be Construed," *Vanderbilt Law Review*, 3 (1950), 395-406.

42 See Gardner, *op. cit.* note 4. See also the distinction between mandatory and optional sources in Frederick Schauer, "Authority and Authorities," *Virginia Law Review*, 95 (2008), 1931-1961.

43 Hart, *op. cit.* note 3, at 95 (noting but not discussing that a rule of recognition might specify an "order of superiority" among conflicting rules).

law, understood in a narrow and positivist way, is either silent or in some way internally multi-vocal, arguably supporting any of multiple opposing outcomes. And it is here that the conventional positivist approach is to acknowledge that in such cases the decision-maker must exercise discretion, and to exercise that discretion in much the same way as we might expect a legislator making a policy decision to act.[44]

In important respects, however, this traditional positivist account is too simple, failing to offer an empirically accurate account of just what judges actually do when they are confronted with one of these hard cases.[45] And to understand why the Hartian *act like a legislator* account is too crude and consequently inaccurate, we should look to part, but only part, of the Dworkinian account.

Dworkin's account of judicial decision-making in fact consists of two distinct components, one of which is somewhere between controversial and wrong, but the other of which is highly instructive and arguably descriptively accurate. The more controversial part, or perhaps parts, of Dworkin's account include three related claims -- first, that every application of law involves interpretation in a rich sense; second, that interpretation necessarily requires recourse to moral considerations; and, third, closely related to the first two, that what we think of as *the law* necessarily includes a host of considerations of a jurisdiction's political morality, thus undercutting the positivist distinction between law and non-law, or between law and other considerations of principle, even if not of policy.[46] And although this is not the place to evaluate this account in depth, I note here that one of the things that makes Dworkin's account controversial, and arguably wrong, is that it ignores the way in which a positivist conception of rule-of-recognition-recognized sources – *the law* -- might have presumptive force even if on occasion this presumptive force is overridden. It is not irrelevant, for example, that most courts dealing with the kind of situation presented in *Riggs v. Palmer* have allowed unworthy beneficiaries to inherit, even beneficiaries who

44 By far the best and most thorough analysis of this quasi-legislative role and attitude is that provides by Geoffrey Marshall. G. Marshall, "Positivism, Adjudication, and Democracy," in Hacker & Raz, *op. cit.* note 4, 132-144.

45 See Gardner, *op. cit.* note 4, persuasively arguing both that the Hartian legislative account is inaccurate but also that the Dworkinian "one right answer" account fails to recognize that the exercise of judgment and discretion in hard cases need not either point to a singularly right answer or require going beyond the boundaries of law, positivistically defined.

46 See Dworkin, "A Reply," *op. cit.* note 14, at 263.

were in some way culpably responsible for the testator's demise.[47] To be sure, *Riggs* represents an example of a decision in which the presumption that the conventionally and narrowly understood law would control was overcome, but it is a mistake to take the occasional example of first-stage law not controlling as representing an accurate picture of how law routinely operates.[48] Although especially egregious outcomes produced by following the first-stage law might, as in *Riggs*, lead a court to look for ways of avoiding such outcomes, far more often courts follow the law even when the legal outcome would vary from the all-things-other-than-the-law-considered outcome, and especially so when the law-based outcome, even if suboptimal, falls short of representing a moral or political outrage.[49]

47 I have developed this argument, with examples from the case law, in Schauer, "The Limited Domain of the Law," *op. cit.* note 21, and also in Frederick Schauer, "Constitutional Invocations," *Fordham Law Review*, 65 (1997), 1295-1312.

48 In his discussion of why the standard speed limit is or is not an easy case, *Law's Empire*, *op. cit.* note 14, at 353-354, Dworkin argues that a car exceeding the posted speed limit looks easy only because we have presupposed the answer to the embedded questions of political morality but not because those questions are not presented. Duncan Kennedy seems to say much the same thing in arguing that as long as judges have the power to set aside the literal meaning of the law in some cases, then *every* case presents the issue of whether this is a case in which that literal meaning should be set aside. Duncan Kennedy, "Legal Formality," *Journal of Legal Studies*, 2 (1973), 351-398. But both Dworkin and Kennedy appear to ignore the psychological or phenomenological importance of the way in which in most legal systems the most straightforward reading of the positive law precludes recourse to other factors unless the positive-law-avoiding factors are so egregious as to intrude on what otherwise is a straightforward or "easy" case in which such factors are not even considered. See Frederick Schauer, *Playing By the Rules: A Philosophical Examination of Rule-Based Decision-Making in Law and in Life* (Clarendon/Oxford, 1991), 145-146.

49 There is considerable support for the proposition that ordinary citizens and non-legal officials will rarely follow the law when it diverges from what those citizens and officials would do absent the law unless following the law is supported by sanctions for non-following. See Frederick Schauer, *The Force of Law* (Harvard University Press, 2015), 57-74, 201-205 (describing and referencing the social science literature). But because judges may have preferences for law *qua* law, or preferences for working with and within the law that lay people do not have (see Richard Posner, "Social Norms and the Law: An Economic Approach," *American Economic Review*, 87 (1997), 365-369; Frederick Schauer, "Preferences for Law,?" *Law & Social Inquiry*, 42 (2017), 87-99), it is not surprising, as many of the unworthy beneficiary cases other than *Riggs* show, that these preferences for law by judges will often produce outcome other than those that would have been produced by the same decision-makers making decisions not governed by law.

Although Dworkin's conception of the size and scope of law's empire is thus open to challenge, the question of what counts as law is analytically distinct from the question of what to do with the law that counts. And here we have much to learn from Dworkin's earlier contributions, even if we largely reject the expansion of law's domain that we see in his later work. Consider, for example, two of Dworkin's earlier examples. In describing what the chess official should do when one player accuses another of aggressive and distracting smiling, an activity not literally covered by the rules of chess, Dworkin suggests that the good official will make the decision most compatible with the underlying point of the game.[50] Importantly, it is not the morally best decision, or the politically best decision, but, more narrowly, the decision most compatible with the smaller category of the rules and principles and function of the *character* of the *enterprise* of chess. The theory of chess, if you will, but not the theory of games, and not the theory of human interaction, and not the theory of morality.

Or consider Dworkin's roughly contemporaneous example of the interpreter of literature attempting to assess whether David Copperfield had a homosexual relationship with Steerforth, a question that the novel does not explicitly answer.[51] Importantly, the interpreter does not attempt to determine whether one answer or another is most compatible with the entire Dickens *oeuvre*, or most compatible with nineteenth century English literature, or with nineteenth century England. And certainly not with which answer is politically or morally better. Rather, the interpreter engages in a task that is in some sense internal, reaching the conclusion that fits best with everything else that is in *this* novel, and only in this novel.[52]

These examples are directly relevant to the task we address here. If the positive law does not give us an answer to the question of how to decide a particular hard case, a judge with more modest decisional ambitions than Dworkin's Hercules might simply try to make the decision most compatible with the area of law within which the question arises, or with an even narrower conception of the relevant field with which this decision should fit. This will require judgment, to be sure, and there may not be a single right answer to how this judgment will or should be exercised, but, importantly, it does not necessarily require recourse to *extra-legal* sources.[53] The well-known *in pari materia* principle of statutory interpretation,[54] according to which a statute should be interpreted in a way

50 Dworkin, *Taking Rights Seriously*, *op. cit.* note 14, at 101-105.

51 Dworkin, "No Right Answer?" *op. cit.* note 4, at 73-82.

52 My colleague Leslie Kendrick, who knows about such things, informs me that this "internalist" view is what characterizes the so-called New Criticism in literary theory.

53 Gardner, *op. cit.* note 4.

54 See Nelson, *op. cit.* note 30, at 486-506.

that makes the entire statute internally coherent, or that makes the statute as interpreted compatible with other statutes dealing with the same subject, is the positive law embodiment of what Dworkin seems to be attempting to say with these two examples. But the principle of *in pari materia* does not instruct the interpreter to make the decision that best fits with the entire *corpus juris*,[55] and certainly not with the norms, values, and principles of society at large.

The message here is that a decision-maker faced with a question not clearly answered by the positive law, whether because of absence of dispositive legal guidance or because of multiple and conflicting legal rules and principles, can still make a decision solely on the basis of the law. This might involve making the decision most compatible with other parts of the law, or it might involve reaching the conclusion that best furthers the underlying point or purposes of the more particular area of law. Or it might involve analogizing the particular problem before the court to some previous similar but not identical decision.[56] And in almost all such cases the only resources at work appear to be legal resources narrowly understood.

None of this is to deny the problem of underdetermination. Just as no one theory can uniquely explain a series of empirical observations,[57] so too is there no uniquely correct interpretation of a work of literature, or of the rules of chess, or of a body of law. But just as the possibility of different interpretations

55 But for the documented suggestion that the Roberts Court is increasingly doing just that in its statutory interpretation cases, see Anita S. Krishnakumar, "Cracking the Whole Code Rule," *NYU Law Review*, 96 (2021), 76-159.

56 Whether analogizing from existing law to new situations involves going outside of the law implicates longstanding debates about analogy and precedent, and about whether the determination of similarity is internal to the items compared or necessarily demands recourse to considerations external to the compared items. See Larry Alexander & Emily Sherwin, *Advanced Introduction to Legal Reasoning* (Elgar, 2021), 114-130. For what it is worth, my own view is that locating similarity and analogy necessarily involves going outside of the existing law, but not so far outside as to be usefully compared with legislation. See Frederick Schauer & Barbara A. Spellman, "Precedent and Similarity," in Timothy Endicott et al. (eds.), *Philosophical Foundations of Precedent* (Oxford University Press, forthcoming 2022); Frederick Schauer & Barbara A. Spellman, "Analogy, Expertise, and Experience," *University of Chicago Law Review*, 84 (2017), 249-268.

57 See Pierre Duhem, *The Aim and Structure of Physical Theory* (P. Wiener trans., Princeton University Press, 1954 (1914); Willard Van Orman Quine, "Two Dogmas of Empiricism," in *From a Logical Point of View* (Harvard University Press, 1951), 20-46. See generally Kyle Stanford, "Underdetermination of Scientific Theory," *Stanford Encyclopedia of Philosophy*, www.plato.stanford.edu/archives/win21/entries/scientific-underdetermination (2021).

does not make it impossible to adopt the *attitude* (Dworkin's word) of trying to locate the best interpretation, so too, whether in literature, in chess, or in law, can we imagine a decision-maker faced with a hard case as seeking to locate the answer that fits best with the existing law on some subject, or the existing law more broadly, but still not drawing on resources other than those that would be available to a judge who restricts her inquiry and her research to legal sources identified as legal by the prevailing rule of recognition.

Although the problem of underdetermination can thus be thought of as not necessarily fatal to the interpretivist enterprise positivistically understood, it remains the case that some judge or other legal decision-maker might still find that after exhausting all of the available legal resources the law not only does not provide a uniquely correct answer but also does not seem to provide an answer that is legally superior to some number of alternatives. And it is at this point that legal positivists would say that judges must exercise their discretion in a strong sense and make a decision drawing on many of the sources and resources that a legislator would employ in making new law. Or, to put the same point in different language, the positivist position is that such decisions, even if made by judges, are not actually *legal* decisions, except insofar as it is the law in its empowering mode the puts the judge in the position of having to reach a decision in such cases. Each in their own way, both the earlier Dworkin and John Gardner[58] caution us not to assume too quickly that the law and its characteristic methods do not suggest an approach to the decision of hard cases; but agreeing that that is so does not mean that there will not be cases in which neither the law not its methods will suggest an answer, even if not the one right answer. And for this admittedly small category, it will be both expected and legitimate for legal decision-makers to depart from the law and, roughly, act as if they were legislators.

A Sociological Coda

By itself, the claim that the law answers many questions, but that when the law runs out judges must exercise non-legal discretion, does not seem especially problematic. Perhaps it seems problematic if we start with the assumptions that most judges are not elected, that their democratic legitimacy is therefore in question, and that allowing judges to authorize state coercion based on judgments that do not rely on the comparative advantage of the judge is itself problematic. This seems part of the concern that motivates Dworkin, a concern that is perhaps alleviated if we think of judges deciding hard cases as relying on the law, and thus doing something that is within the special province of legally trained and legally experienced judges. Under this view, a view that Justice Kagan's statement

58 *Op. cit.* note 4.

quoted above reflects, and that echoes similar statements made by all other recent nominees, judges who are not experts in policy or empathy preserve their legitimacy by sticking to the law. And if there are cases that cannot be decided according to the law, then judges maintain the aura of legitimacy and expertise by insisting, even if disingenuously, that it is *law all the way down*.

The problem with this view is that it is either wrong or that it presupposes a capacious understanding of law that treats as law, by definition, all of those things that would factor in a decision even when the positive law, narrowly defined, does not provide an answer. In other words, defining law broadly serves strategic and political purposes. But it does so at the expense of softening the boundaries between positive law – first stage law, in Gavison's sense – and everything else. If lawyers and therefore judges are indeed masters of all they survey, then this strategic move is both understandable and defensible. But if there is something that is the comparative advantage of judges as compared to economists, philosophers, administrative officials, and elected policy-makers, then defining law too broadly risks losing the sense of this comparative advantage, or at least distinctiveness.

Definitions of law, and especially public rather than academic ones, can accordingly be understood as serving strategic, political, psychological, and sociological purposes. If we say, with Kelsen and Hart and the positivist tradition,[59] that many of the various things that judges do and judges use are not part of the law, however legitimate it may be for judges to do them and use them, we are being modest about what law is and what law can do, and therefore being modest about what lawyers do. But if we say, with Dworkin, that law's empire includes the full range of moral principles, including the principles of political morality, we are setting up lawyers and judges as having a comparative advantage that little in their training or selection leads us to believe they actually have. Questions about what judges should use in the decision of hard cases are consequently questions that go to just what lawyers and judges are good at and good for. Insofar as the Dworkinian answers this question in such a capacious way as to make it surprising when coming from other players of vital social roles such as dentists and plumbers, we are left to wonder about what it is that leads lawyers but not dentists,[60] judges but not plumbers, to have such a hegemonic and non-modest conception of their place in a complex society.

59 And so too, prominently, with Joseph Raz, who distinguishes between law and legal reasoning, arguing that much that lawyers and judges do, even if legitimately so, does not draw on law as Raz and other exclusive positivists narrowly define it. Joseph Raz, "Postema on Law's Autonomy and Public Practical Reasons," *Legal Theory*, 4 (1998), 1-20.

60 My casual research indicates that there is no book entitled "Dentistry's Empire." And I suspect that if there were, it would be about teeth and gums and little more.

Much of the foregoing can be seen as compatible with the view, controversial in some jurisprudential circles, that our understandings of law and of the word *law* are not merely descriptive. If we recognize, as I think we should recognize, that we as a society *create* our concept of law in light of larger or deeper purposes,[61] then we can see that how we understand the role of law in the decision of hard cases is a function not only of what we understand a hard case to be but also what we understand law to be. And once we understand this, we can see that many conceptions of law are themselves products of views about what judges are doing in deciding hard cases, what resources they bring to bear in making those decisions, and whether there is reason to believe that judges as a class especially and comparatively competent in deploying those resources.

61 See Frederick Schauer, "The Social Construction of the Concept of Law: A Reply to Julie Dickson," *Oxford Journal of Legal Studies*, 25 (2005), 493-501. See also Frederick Schauer, "Normative Legal Positivism," in Patricia Mindus & Torben Spaak (eds.), *Cambridge Companion to Legal Positivism* (Cambridge, 2021), 61-78; Frederick Schauer, :Law as a Malleable Artifact," in L. Burazain, K. Himma, & C. Roversi (eds.), *Law as an Artifact* (Oxford, 2018), 29043; Frederick Schauer, "Official Obedience and the Politics of Defining "Law,'" *Southern California Law Review*, 86 (2013), 1165-1194.