Beyond Indeterminacy and Self-Contradiction in Law: Transnational Abductions and Treaty Interpretation in *U.S.* v. *Alvarez-Machain*

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> [H]uman laws cannot have the unerring quality of scientifically demonstrated conclusions. Not every rule need possess final infallibility and certainty; as much as is possible in its class is enough.
> St. Thomas *(Summa Theologica,* Ia-2ae. xci. 3, ad 3)[1]

Introduction

In both international and domestic law the interpretation of normative texts generates continual academic, legal and political controversy. Courts and other interpreters often resolve difficult moral and political questions when they interpret the law. At times the text seems to compel a certain result, and at others, as in the *Alvarez-Machain*[2] case, there are quite persuasive arguments for diverging interpretations leading to radically different results. When a court, an administrative agency or a State adopts one of several conflicting interpretations, those whose desired outcome is not endorsed are usually incensed and the decision engenders political conflict. Because of its obvious importance for the legal system and a law-based society, scholars have written extensively on interpretation. But despite the political controversies and intensive intellectual reflection, the underlying questions remain substantially unresolved.

The critical legal studies movement and other sceptical and post-modem writers have sparked recent debate by questioning the legitimacy of the Rule of Law based on two arguments related to interpretation. Critical scholars assert, on the one hand,

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1 **Translation from T. Gilby, *St. Thomas Aquinas, Philosophical Texts* (1982) 363, para. 1063.**

2 ***Unites States v. Alvarez-Machain,* 60 U.S.L.W. 4523, 112 S.Ct. 2188, (16 June 1992).**

that legal rules are indeterminate and judicial interpretation is, consequently, of a mostly rhetorical nature and, on the other, that modem legal thought is plagued by inherent contradictions or dilemmas. As a result, while there are other issues relative to interpretation, three related questions stand out as needing answers at present - the first two concern the determinacy debate and the third the self-contradiction question:

1) To what extent are legal rules indeterminate?
2) What is the function of legal rules in interpretive legal decision-making? and
3) If interpreters in modern legal systems are caught in a dilemma, what are its contours and what is its significance?

In this article, I address these theoretical questions in the context of the concrete treaty interpretation problem raised in *United States* v. *Alvarez-Machain.*

I. *US v. Alvarez-Machain* and the Extradition Treaty Interpretation

A. The Background to the Case and the Judicial Decisions

On 14 December 1992, Judge Edward Rafeedie of the US District Court for the Central District of California found that the charges against Dr. Humberto Alvarez-Machain had been 'based on hunches and the wildest speculation...' and he ordered the United States government to release the Mexican doctor from prison - for the second time.[3] The Department of Justice did not appeal this dismissal for lack of evidence and released Dr. Alvarez-Machain. He returned to Guadalajara, and the Mexican government has brought no charges against him.[4]

Alvarez-Machain's return to Mexico ends his odyssey in the US criminal justice system that began with his abduction in Mexico by US Drug Enforcement Agency (DEA) hirees who brought him forcibly to the United States for trial in connection with the brutal torture and murder of DEA agent Enrique Camarena. It does not, however, annul the controversial US Supreme Court precedent interpreting the US/Mexico Extradition Treaty[5] and upholding the jurisdiction of US courts to try Dr. Alvarez-Machain despite the illegal manner in which the US government obtained custody over him. Here I examine just one of the several thorny questions raised in the *Alvarez-Machain* litigation - the interpretation of the US/Mexico Extradition Treaty.[6]

3 Mydans, 'Judge Clears Mexican in Agent's Killing', *N.Y. Times,* 15 December 1992, at A20.

4 Telephone interview with Adriana Gomez, spokesperson (encargada de prensa) for the Mexican Embassy in Madrid (22 February 1993).

5 Extradition Treaty 4 May 1978, US/Mexico, 31 U.S.T. 5061, T.I.A.S. No. 9556, entered into force 25 January 1980.

6 There are several other important issues that arose during the litigation which have been dealt with frequently by international legal scholars. See, e.g., Dickinson, 'Jurisdiction Following Seizure or Arrest in Violation of International Law', 28 *AJIL* (1934) 231; Mann, 'Reflections on the

The shocking nature of events preceding the attempted prosecution of Dr. Alvarez-Machain are an important factor in the interpretational positions taken by the various actors in the litigation and, thus, deserve consideration. The facts involve a disquieting collision between the exigencies of effective transnational law enforcement and the need to uphold the Rule of Law and the respect for the rights of individuals accused of crimes. As a result, they give rise to strong reactions on both sides of the issue.

1. The Camarena Murder

The case has its origins in the 1985 torture and murder of DEA agent Enrique Camarena and a Mexican pilot, Alfredo Zavala-Avelar. Camarena was working in Mexico investigating the operations of major drug cartels and the possible link between high-ranking Mexican officials and the multi-billion dollar drug business. On 7 February 1985, Camarena was kidnapped outside the American consulate in Guadalajara, Mexico. One month later his mutilated body was found about sixty miles outside of Guadalajara along with the body of Zavala-A velar.[7]

On 30 January 1985, a sixth superseding indictment was returned in the District Court for the Central District of California charging twenty-two persons in the Camarena murder case, one of whom was Dr. Alvarez-Machain, an obstetrician practising in Guadalajara, Mexico. The doctor was accused by the DEA of the heinous crime of prolonging agent Camarena's life so that his abductors could continue to torture and interrogate him. The indictment also charged several present and former Mexican government and police officials.

2. The Abduction of Alvarez-Machain

In its efforts to bring suspects in the Camarena murder case before US criminal courts, the DEA resorted to covert forcible abductions of foreign nationals from their homelands in three instances. Dr. Alvarez-Machain's abduction was the last and most notorious of the three.[8] For reasons about which we can only speculate, the DEA, and perhaps higher level Justice Department officials, decided not to use the overt legal mechanisms provided by the bilateral Extradition Treaty between the US and Mexico to attempt to obtain custody of Dr. Alvarez-Machain. Rather, in December of 1989 they began under the table negotiations with the Mexican Federal Judicial Police in an effort to obtain his informal rendition. When these

Prosecution of Persons Abducted in Breach of International Law', in *International Law at a Time of Perplexity, Essays in Honour of Shabtai Rosenne* (1989) 407; Glennon, "State-Sponsored Abduction: A Comment on *United States v. Alvarez-Machain'*, 86 *AJ1L* (1992) 746; and Halberstam, 'In Defence of the Supreme Court Decision in *Alvarez-Machain', S6AJIL* (1992) 736.

7 ***United States v. Caro-Quintero,* 745 F.Supp. 599.601-602 (CD. Cal. 1990).**

8 **For discussion of the other two abductions see Lowenfeld, 'US Law Enforcement Abroad: The Constitution and International Law Continued', *S4AJIL* (1990) 444.**

negotiations fell through, DEA agent Hector Berellez arranged to pay several Mexicans to abduct Alvarez-Machain in Mexico and deliver him to the DEA officers in the US. On 2 April 1990, at about 7:45 p.m., Dr. Alvarez-Machain had just finished treating a patient when five or six armed men burst into his office. One of them showed him a badge which appeared to be of the Mexican federal police. Another put a gun to his head and told him that if he did not cooperate he would be shot. The abductors took Dr. Alvarez-Machain to a house in Guadalajara. From there they took him by car to Leon where they boarded a twin engine airplane that took them to El Paso, Texas. When he arrived in El Paso on 3 April, DEA agents placed Dr. Alvarez-Machain under arrest.

3. The Decisions of the Lower Courts

Before the Federal District Court (the trial court for cases arising under federal jurisdiction) Dr. Alvarez-Machain challenged the jurisdiction over his person based on the illegality of the manner in which he was apprehended. He made several different arguments, but the District Court based its decision on a finding that the Mexican doctor's abduction violated the US/Mexico Extradition Treaty. Holding that the remedy for the treaty violation in such cases is the return of the individual to the country from which he was abducted, the Court dismissed the case and ordered the United States to return Dr. Alvarez-Machain to the territory of Mexico.

The United States Justice Department appealed the decision to the US Court of Appeals for the Ninth Circuit. In a brief *per curiam* opinion, the Circuit Court affirmed the lower court's decision,[9] adopting its holding in the case of Alvarez-Machain's co-defendant Rene Verdugo-Urquidez,[10] which, under similar facts, held that the abduction of Verdugo-Urquidez, if authorized or sponsored by the United States, violated the US/Mexico Extradition Treaty.[11]

Because the Supreme Court opinion in *Alvarez-Machain* was argued mostly in reference to the *Verdugo-Urquidez* decision, the latter deserves discussion. The Ninth Circuit in *Verdugo-Urquidez* based its decision on the limited issue of whether the forcible removal of an individual from the territory of one of the States Parties to the US/Mexico Extradition Treaty by agents of the other State Party violates the treaty.

The Circuit Court began its interpretation of the treaty with an examination of its underlying purposes. The Court held that extradition treaties have three purposes. First, because nations are under no general international law obligation to surrender persons sought by another nation on criminal charges, extradition treaties exist to create mutual obligations to surrender individuals in specifically defined circumstances and to provide procedures for such surrender. Second, the substantive

9 ***U.S.* v. *Alvarez Machain*, 946 F.2d 1466 (1991).**

10 ***U.S. v. Verdugo-Urquidez*, 939 F.2d 1341 (9th Cir. 1991), vacated, 60 U.S.L.W. 3852 (23 June 1992).**

11 **Ibid., at 1362.**

and procedural requirements that extradition treaties impose as a prerequisite to surrender constitute a means of safeguarding the sovereignty of the signatory nations; and finally, extradition treaties are intended to ensure the fair treatment of individuals. The Circuit Court cited the provisions in the US/ Mexico Treaty that place substantive limits on extradition and concluded that their purpose is to protect the sovereign rights of the parties to the treaty. It pointed out that these provisions would be 'utterly frustrated if a kidnapping were held to be a permissible course of government conduct'.'[12]

The Circuit Court mentioned 'general principles of international law' related to transnational abductions as relevant to the background assumptions that inform the making of extradition treaties. It concluded that the reason extradition treaties do not expressly deny nations the power to forcibly remove individuals from another is because the parties assume that such conduct is impermissible, and extradition treaties only make sense if read as purposive documents based on this assumption.

The logic of the Circuit Court's opinion is to me quite persuasive. It did not, however, convince six members of the US Supreme Court.

4. The Supreme Court Decision

After dealing briefly with the US case-law on transnational abductions, Chief Justice Rehnquist, who wrote for the majority, presented an interpretation of the Extradition Treaty diametrically opposed to that of the Circuit Court. He interpreted the Treaty on four different levels.

First, the Chief Justice looked to the treaty's terms to determine its meaning and stated that the US/Mexico Extradition Treaty

> says nothing about the obligations of the United States and Mexico to refrain from forcible abductions of people from the territory of the other nation, or the consequences under the Treaty if such an abduction occurs.[13]

Second, he did not accept the position of Alvarez-Machain and the Circuit Court of Appeals that the substantive limits on extradition contained in the treaty would make no sense if the signatories were free to resort to kidnapping. Rather, he adopted the Justice Department's more limited view of the purpose of extradition treaties.

> Extradition treaties exist so as to impose mutual obligations to surrender individuals in certain defined sets of circumstances, following established procedures.[14]

Thus, the purpose of the Extradition Treaty, according to Rehnquist, is in essence to overcome the inexistence of an obligation under general international law on the

12 Ibid., at 1350.
13 *Alvarez-Machain,* 60 U.S.L.W., at 4525.
14 Ibid., at 4526.

part of one nation to deliver up persons wanted in another nation on criminal charges. He implicitly rejects the idea that extradition treaties have the additional purpose of protecting the sovereignty of States that adhere to them.

Third, Chief Justice Rehnquist analyzed the 'history of negotiation and practice under the Treaty'. With respect to the history of the Treaty, the Chief Justice asserts that the

> Mexican government was made aware, as early as 1906, of the *Ker* doctrine, and the United States position that it applied to forcible abductions made outside the terms of the United States/Mexico Extradition Treaty. Nonetheless, the current version of the Treaty, signed in 1978, does not attempt to establish a rule that would in any way curtail the effect of *Ker*. '5

Finally, the Chief Justice refuted the arguments made by Alvarez-Machain and the Circuit Court that general international law norms prohibiting transnational abductions should inform the interpretation of the Treaty, and that a term prohibiting abductions was not included in the treaty because they are clearly prohibited under international law. Essentially, he argued that the international law relied on by Alvarez-Machain does not relate to the practice of nations in regard to extradition treaties. He was not willing to find that the Treaty

> acts as a prohibition against a violation of the general principle of international law that one government may not 'exercise its police power in the territory of another state'. 16

He further asserted that examples of 'the practice of nations under customary international law' by which one nation will return an individual forcibly abducted upon the protest of the nation from which he or she is abducted 'are of little aid in construing the terms of an extradition treaty, or the authority of a court to later try an individual who has been so abducted'.[17]

The dissenting opinion, written by Justice Stevens on behalf of himself, Justice Blackman and Justice O'Connor, incorporates the arguments set forth in the Circuit Court opinion discussed above. I will not repeat those arguments here. However, some aspects of Justice Stevens' opinion are worthy of note. His analysis of the use of customary international law norms to inform the interpretation of the Treaty contrast starkly with the opinion of the Chief Justice. Justice Stevens affirmed the existence of a 'uniform consensus of international opinion' that international law prohibits a nation from sending its agents to the territory of another nation to apprehend a person accused of committing a crime. In this context, he argued, 'it is

15 Ibid. *Ker v. Illinois*, 119 U.S. 436 (1888), was a case in which the US Supreme Court upheld the jurisdiction of an Illinois court to try the defendant, Ker, despite the fact that he was before the court because a person acting in his private capacity had kidnapped him from Peru to bring him to the US for trial.

16 Ibid., at 4527, citing Brief for Respondent at 16.

17 Ibid., at 4527, n. 15.

shocking that a party to an extradition treaty might believe that it has secretly reserved the right to make seizures of citizens in the other party's territory'.[18]

B. The Interpretation of the US/Mexico Extradition Treaty

The abduction of Dr. Alvarez-Machain by agents of the US government gives rise to a difficult interpretational question. The decisions at each jurisdictional level in this case centred on the interpretation of the US/Mexico Extradition Treaty and arrived at opposite results. The language of the Treaty cannot be said to be determinate of whether or not such an abduction violates its terms, and discussions of the parties' intent and the purpose of the treaty were equally inconclusive. As the litigation shows, there are convincing arguments on both sides of the issue, and as a matter of interpretation there seems to be no indisputably right or wrong answer.

The construction of the Extradition Treaty is further complicated by the moral and political controversy surrounding the case. There are two strong opposing gut - interpretive constructs - reactions to the facts. Many (myself included) are outraged at a decision holding that an extradition treaty permits the police forces of one nation to kidnap a citizen of another nation and transport him by force out of his country and into jail in the kidnapper's territory in flagrant violation of undisputed norms of international law. Others would be equally infuriated by a decision that would allow a wanted torturer/murderer to avoid arrest and prosecution by taking refuge in a country that refuses his extradition.[19]

Given the emotional and intractable nature of the underlying dispute and the inconclusiveness of the treaty interpretation, it is no mystery that a case such as *Alvarez-Machain* brings to light the problems inherent in the use of the interpretation of legal texts as a means of dispute resolution. It would appear that we could argue endlessly about what is the best policy option or the 'one right answer' to the interpretational question. Therefore, if we are to have any hope of finding a satisfactory explanation of this case, we must look deeper into the nature of the dispute resolution process. But this of course will move the discussion onto a more abstract plane, because any effort to dig beyond the facts and legal arguments of the case will quickly lead to the mineral-veined bedrock of theoretical questions underlying the interpretation issue and the Rule of Law itself: Do rules have a

18 **Ibid., at 4530 (citations omitted). Both Mexico and Canada filed *amicus* briefs interpreting the US/Mexico and US/Canada Extradition Treaties, respectively, as prohibiting arrests in the territory of one State Party by another State Party without the former's consent. See, *U.S. v. Alvarez-Machain, Brief for the United Mexican States as Amicus Curiae in Support of Affirmance,* docket No. 91-712, at 10-13 and *Brief of the Government of Canada as Amicus Curiae in Support of Respondent,* docket No. 91-712, at 5-14.**

19 **It is not entirely clear that such a problem existed in the *Alvarez-Machain* case. Mexico has prosecuted and convicted numerous members of the drug ring that killed DEA agent Camarena, including the defendant whose name headed this case before the District Court, Rafael Caro-Quintero, who has been jailed on a forty-year sentence. See, Brief for United Mexican States, *supra* note 18, at 26, n. 24.**

knowable meaning? Do they determine the outcomes of legal conflicts? What is the function of legal rules in the decisional process? In the next part, I will apply my particular hammer and chisel to see if a crack can be made in these problems.

II. Theoretical Questions on the Interpretation of Treaties as Normative Texts

Because the normative text being construed does not provide definitive resolution in cases like *Alvarez-Machain,* interpretation has long vexed legal theorists and practitioners. The recent debate over the determinism of legal rules has only fuelled the intellectual wildfire. As is often the case in theoretical debates, there exists in theory about interpretation a clash between two extreme positions based on a common conception of the object being studied. On one end, are the formalist positions of the strict textualists, and on the other, are the radically sceptical, critical legal scholars. Their common idea is the orthodox view of law. The formalists accept it and the sceptics reject it. Here I will sketch this concept of law and the positions of the formalists and sceptics, and show how they lead us into a dilemma. In the final subsection, I will put forth the outlines of a distinct conception of the law that can help move us beyond the dilemma.

A. The Orthodox View of Interpretation

Under the traditional understanding of legal interpretation, the task of the interpreter is to ascertain and apply the commands or decisions of the institutions who drafted the instrument being interpreted - States in international law, legislatures in domestic law. Interpreters must limit themselves to saying what the normative text means, relying on its language, structure and history.[20] Central to this concept is the distinction between law-making and law-applying - legislation and adjudication. Law-makers are legitimated to decide what the rules are to be, and law-appliers, lacking such legitimation, are to faithfully carry out the commands of the law-maker. They are not to legislate or amend the laws they interpret. Laws established by preset procedures form an edifice inhabited by men who are to execute them faithfully or apply them objectively to resolve disputes.

This model of the law has been strongly endorsed in the theory and practice of treaty interpretation in international law, the International Court of Justice being among its principle exponents. Its opinion in the *Admission to the United Nations Case* concisely states the traditional understanding of the interpreter's role:

20 Cass Sunstein has called this the agency view of interpretation under which courts are to act as mere agents carrying out the will of the legislature. 'Interpreting Statutes in the Regulatory State', 103 *Harv. L Rev.* (1989) 405,415.

> The Court considers it necessary to say that the first duty of a tribunal which is called upon to interpret and apply the provisions of a treaty is to endeavour to give effect to them in their natural and ordinary meaning in the context in which they occur. If the relevant words in their natural and ordinary meaning make sense in their context, that is the end of the matter.[21]

The interpreter's job, according to the Court, is to ascertain the meaning of the drafter's words and give them effect. The interpretive process under this view is an almost mechanical act of reading and acting according to the text's commands.

In the above passage, the International Court of Justice endorses the most strictly orthodox approach to interpretation, textualism. In the traditional debate over treaty interpretation, three schools of thought - the textualist, subjectivist and teleological - have vied for prominence. Each school of thought, which were represented by different camps in the International Law Commission debates over the draft articles for the Vienna Convention on the Law of Treaties, can be viewed as a variation of the orthodox view of interpretation. They emphasize different means of attaining the goal of implementing the drafter's commands - a search for the text's meaning, the drafter's intent or the text's purposes - but all understand the role of the interpreter as applying law as created by the law-maker.[22]

The proponents of each of these methods - textualist, subjectivist, teleological - have been able to lay substantial criticisms on the others.[23] Essentially, the arguments against each approach show that it fails to meet the demand of the orthodox view of interpretation that judges and other interpreters carry out the commands or decisions of the drafters of the text they are interpreting rather than engage in free-handed law making. I believe that it is the recognition of this failure that has lead many legal scholars to challenge the traditional way of viewing interpretation.

B. Challenges to the Orthodox View

I. Indeterminacy and Interpretive Constructs

The writers who work to shake the orthodox foundation of legal interpretation challenge two basic and closely related assumptions that underlie the traditional understanding:

21 ICJ Reports (1950) 1,8.

22 These approaches are more or less paralleled in the traditional arguments over statutory interpretation in the United States, with some idiosyncrasies. For a summary of the US domestic debate see, Sunstein, *supra* note 20, at 415-437. See also, Vagts, 'Treaty Interpretation and the New American Ways of Law Reading', 4 *EJIL* (1993) 472.

23 In the debates that preceded the Vienna Convention the advocates of each approach offered cogent criticisms of the other approaches. See Jacobs, 'Varieties of Approach to Treaty Interpretation: with Special Reference to the Draft Convention on the Law of Treaties before the Vienna Diplomatic Conference', 18 *ICLQ* (1969) 318, 338-343. For a critical analysis of why each position is always open to attack, see M. Koskenniemi, *From Apology to Utopia, The Structure of International Legal Argument* (1989) 291-302.

1) that legal rules are determinate; and
2) that factors external to the law and the text under consideration do not or should not play a role in the application or interpretation of law.

Two kindred, and at times overlapping, camps, the critical legal studies movement and conventionalism, tend to deny that normative texts and rules or theories of interpretation have a meaningful role in determining how judges decide questions of interpretation. That is, they assert that legal rules are not determinate and that factors external to the text give rise to interpretive decisions.

(a) Textual Indeterminacy

The first argument both critical scholars and conventionalists use attempts to show that normative texts are indeterminate. At the outset, I should point out that the recent and abundant analyses of determinacy tend to cover, and at times confuse, two intertwined but slightly different concepts. One is meaning determinacy: do texts determine their own meaning? In other words, do normative texts have, as the International Court of Justice assumes, a natural and ordinary meaning independent of interpretation? The second concept is outcome determinacy: does the text under consideration determine the outcome of the legal dispute being resolved via its interpretation?

Stanley Fish, a conventionalist, asserts the existence of meaning indeterminacy when he argues that the mere act of picking up a text and reading it is an act of interpretation, and hence an unrestrained intentional act.[24] According to Fish, normative texts are not self-defining, and their interpretation cannot be constrained by appealing to another rule - a rule of interpretation or general principle of law - to limit interpretive freedom. The creation of additional rules fails to limit interpretive freedom because these rules are also variously interpretable and leave the reader interpretively free.[25] In other words, rules of interpretation are texts and they too are open to interpretation. Those who assert outcome indeterminacy argue that a reasonable argument always exists to show that any particular fact situation conflicts or does not conflict with, a given rule,[26] and that a decision-maker may choose among available rules, principles and exceptions to reach a desired outcome.[27] Consequently, they argue, legal rules cannot determine the outcomes of legal disputes.

24 **Fish, 'Don't Know Much About the Middle Ages: Posner on Law and Literature", 97 *Yale L.J.* (1988)777,778.**

25 **Fish. 'Fish v. Fiss', 36 *Stan. L Rev.* (1984) 1325, 1326.**

26 **The thesis of rule indeterminacy has its philosophical origins in Wittgenstein's analysis of rules. This was our paradox: no course of action could be determined by a rule, because every course of action can be made out to accord with the rule. The answer was: if everything can be made out to accord with the rule, then it can also be made out to conflict with it. And so there would be neither accord nor conflict here. L. Wittgenstein, *Philosophical Investigations* (G.E.M. Anscombe trans., 3rded., 1958) para. 201.**

27 **Singer, "The Player and the Cards: Nihilism and Legal Theory', 94 *Yale LJ.* (1984) 1,22.**

(b) Non-Textual Factors

The second argument that the critical legal scholars and the conventionalists have in common may be stated in the following way. There exists something beyond legal texts and arguments that make interpretive decisions come out the way they do. For the critical legal scholars and the conventionalists, interpretations and judicial decisions presenting interpretive arguments are little more than *post hoc* rhetorical devices to justify a decision made on grounds other than that presented in the argument. The two movements differ somewhat as to what the alternative grounds are.

Many critical legal scholars argue that decisions are not determined by any coherent legal theory or by the law itself but by factors external to the law such as the institutional setting, customs of the community, and the role and ideology of the decision-maker.[28] Put another way, all logical argument must start from an accepted premise from which logical inferences can be drawn. The premises upon which legal arguments are based cannot be found within legal arguments themselves nor in positive law, but come from the extra-legal assumptions, experience, cultural background and biases of the interpreter. These external premises are referred to as 'interpretive constructs' and are applied by judges unreflectively to decide important issues at stake in each case.[29] Legal arguments, according to the critical scholars, do not include these premises, but rather flow from them, without ever expressly admitting that these are in fact the premises of the decision.[30] Interpretive constructs are not just the personal biases of individual interpreters, but are often assumptions and biases existing within the legal community as a whole.[31]

Based in part on their arguments of indeterminacy and the existence of interpretive constructs, some critical legal scholars conclude that the current legal system is illegitimate because the real bases of decision-making remain covert, thus maintaining a false appearance that law application is neutral and separate from 'openended disputes about the basic terms of social life, disputes that people call ideological, philosophical or visionary'.[32]

28 **See Singer, *supra* note 27, at 22. Unger, "The Critical Legal Studies Movement', 96 *Harv. L Rev.* (1983)561,569.**

29 **Kelman, "Interpretive Construction in the Substantive Criminal Law', 33 *Stan. L Rev.* (1981) 591. Cass Sunstein refers to interpretive constructs as 'extratextual' or 'background' norms; *supra* note 20, at 443 and following.**

30 **I would agree with this line of argument to the extent that it demonstrates that law is not a closed, complete and coherent logical system. Whether this means, as many critical scholars argue, that law is therefore not a legitimate system seems to me open tp debate. Even some very simple mathematical systems, such as arithmetic, have been shown by the mathematician Kurt Gödel to be similarly incomplete. See M.M. Waldrop, *Complexity* (1992) 328.**

This argument also demonstrates that for law to work as a coherent system there must be a set of a priori principles from which logical argument for other rules in the system can be derived. Positive law as a system depends, ironically, on the existence of natural law. The problem, of course, is demonstrating what these principles are.

31 **Koskenniemi refers to these community wide assumptions as the 'deep structure' of the law. Koskenniemi, *supra* note 23, at XTX, n. 3.**

32 **Unger, 'The Critical Legal Studies Movement', 96 *Harv. L Rev.* (1983) 561,569, at 564.**

The conventionalists, as represented by Stanley Fish, agree to some extent that decisions are the result of interpretive constructs, but view these constructs as something inherent in human decision-making.

> To put the matter baldly, already-in-place interpretive constructs are a condition of consciousness. It may be ... that the thinking that goes on within them is biased (which means no more than that it has direction) but without them (a pun seriously intended) there would be no thinking at all... [I]t makes no sense to condemn as 'non-rational' the reasoning that proceeds within interpretive constructs because that's the only kind of rationality there is.33

In Fish's view, judicial decisions follow not from legal reasoning, but from the fact that judges are deeply embedded in, and form a part of, institutional history. For Fish, written legal arguments are wholly distinct from legal decision-making and are made by interpreters only after the decision is made in order to present it in a form that fits within the field of practice of legal decision-making.[34]

(c) Assessment of Indeterminacy and Interpretive Constructs

The conventionalists and the critical legal scholars have effectively weakened the foundations of orthodox interpretive theory by casting doubt over both its basic assumptions. Their arguments on indeterminacy ring true to any practising attorney who has observed that in many cases there are sound legal arguments supporting the conflicting results desired by both parties to the litigation. And any experienced lawyer also knows that which judge hears his case can be as important to the result as the law and facts. Nevertheless, I agree with those who criticize the indeterminacy thesis as overstated. There do exist within the legal system 'easy cases' in which a legal rule applied to a set of facts leads to one and only one possible or 'rational' outcome. For an easy case to exist a rule must have an objectively clear meaning and the fact situation to which it is applied must clearly violate or not violate the rule.[35] The application of a rule of interpretation may turn some hard cases into easy cases. The number of easy cases that exist, moreover, is far greater than that reflected in court dockets or in patent disputes among States. How many conflicts never are litigated because an attorney tells her client, 'this is a sure loser' and how many States never choose a particular course of action because it clearly violates some rule of international law?

The existence of easy cases and points of objectivity, however, does not totally support the orthodox view against the indeterminacy thesis. As there are easy cases,

33 Fish, 'Dennis Martinez and Uses of Theory', 96 *Yale LJ.* (1987) 1773, at 1795-1796.

34 In his most recent book. Fish makes explicit that in interpretation 'the name of the game has always been polities'. S. Fish, *There's No Such Thing as Free Speech and It's a Good Thing, Too* (1994)111.

35 The more sophisticated critical legal writers recognize the existence of easy cases and of 'objectively' clear rules in meaning and application. See Duncan Kennedy, 'Freedom and Constraint in Adjudication: A Critical Phenomenology', 36 /. *Legal Educ.* (1986) 518.

there are also 'hard cases', those that have more than one reasonable and practically possible outcome based on the application of the legal rules at issue. By definition, legal rules in hard cases are at least outcome indeterminate. And hard cases appear to make up a very large portion of the disputes in any legal system. If they did not, and the application of a normative text to a set of facts did lead to precise outcomes in all cases, there would be little or no litigation over interpretation and very few dissenting judicial opinions. *Alvarez-Machain* was a hard case and demonstrates that the existence of a legal text and the application of a particular interpretive approach are not always outcome determinate.

The sceptical writers have also made it difficult to hold that legal decisions are or can be based on legal rules alone. Some disjunction does exist between the exposition of a legal argument and the actual decision being made by a judge or other interpreter. Legal arguments in hard cases are often presented as syllogistic progressions from a set of general principles to a single correct result, but other legal arguments applying the same general principles, or other equally applicable general principles, can usually lead to two or more distinct results in the same case. Thus, the legal argument and the normative text upon which it is based cannot alone be the basis for the decision; that is, there must be some reason beyond the legal logic presented in a case why one judge prefers one legal argument and one result while another judge prefers others.

This said, I do not think that it is necessary to accept the total disjunction between legal arguments and judicial decisions asserted by Fish and the critical legal studies movement. Both the more extreme critical legal thinkers and Fish deny legal texts and legal rules a role in forming judicial interpretations, but they simply assert this as a fact rather than demonstrating it by argument or with evidence from a study of actual practice.[36] They assume that the factors external to the legal rules are what determine interpretations but do not prove it.[37] At the very least, in easy cases the rule determines the decision because there is no possible decision other

36 Fish offers the argument that because all rules can only be read interpreu'vely, no rule can possibly constrain the interpreter. Fish, 'Fish v. Fiss', *supra* note 25, at 1326. This argument fails for two reasons. First, it assumes that rules can only be read interpretively rather than proves it. Second, even if we are always interpreting when reading and applying rules, that does not mean that the rules themselves do not have a function in restricting their interpretation or, more importantly, that a specific rule in a specific case cannot determine a specific judge's decision.

37 The debate between the believers in the indeterminacy of legal rules and those who believe in rule determinacy is in some sense a chicken/egg debate. Which came first, the rule or the decision? For Fish and the critical legal thinkers, the decision, arrived at for reasons external to the normative text under consideration, is prior to the statement of the interpretation of the rule, that is prior to the rule. For those who advocate determinacy in the law, the rule and its interpretation lead to a given result and thus are prior to the decision. I believe that the correct answer in this setting is the same as that in the chicken/egg debate. Which came first? Neither. The existence of chickens and eggs is part of a process, evolution. There was no first chicken, nor any first egg, but a prior organism in the evolutionary process that was neither a chicken nor an egg. Similarly, the answer to the question of whether rules determine outcomes or whether decisions already made on other grounds give rise to a *post hoc* expression of a rule is neither. Like the chicken and the egg, each gives rise to the other in a dynamic process of change.

than that which accords with the rule. At least in some instances legal reasoning and legal decision-making converge.

2. The Interpreter's Dilemma

At this point, I would like to emphasize just how seismic the existence of indeterminacy and decisions based on interpretive constructs can be for the Rule of Law. Some form of the orthodox view of interpretation is necessary for law to govern society. As H.L.A. Hart put it:

> [i]f it were not possible to communicate general rules of conduct, which multitudes of individuals could understand, without further direction, as requiring from them certain conduct when the occasion arose, nothing we now recognize as law could exist 38

State executives and courts applying the law must to some extent carry out the commands or agreements contained in normative texts and act consistently with them. Interpreters in a system based on law must make decisions according to the law. If they cannot, because legal rules are indeterminate, or they do not, because their decisions result from interpretive constructs, then law becomes superfluous.

The orthodox model of interpretation is, thus, necessary to a law-based system. However, if we accept, and I think we must, that texts are often both meaning and outcome indeterminate and that factors external to the text play a role in judicial decisions, then the concept of the interpreter applying texts according to their natural and ordinary meaning, purposes or drafter's intentions is an inadequate guide to, and an incomplete description of, interpretive behaviour. Hence, we have the interpreter's dilemma: the Rule of Law requires that he follow the commands of the drafters of normative texts, but he will often find that it is not possible to do so.

Moreover, at times the interpreter will find that the ordinary meaning of the rule when applied to the facts before him will lead to a result that does not accord with what he believes the drafters really meant or with his or anybody's sense of justice. Should he then decide according to his sense of justice? If he does this, then he will be violating the first rule of interpretation, follow the commands of the drafters; don't amend or legislate. If he does not, he will endorse a bad result. How can he know, in any case, when the outcome is absurd enough to warrant ignoring or rewriting the text? The interpreter's paradox is thus complicated by the not infrequent clash between material justice (what an interpreter and perhaps almost everyone thinks is right) and formal or legal justice (what the rule tells the interpreter to do). This is the second prong of the interpreter's dilemma: for law to work, interpreters must be bound by the law, and at the same time, for law to work, interpreters must be free to make decisions according to their and the community's sense of justice.

38 H.L. A. Hart, *The Concept of Law* (1979) 121.

The lack of resolution of the interpretation question in law results, I believe, from the inability to solve the interpreter's dilemma. It is at the centre of all debate over interpretation, though it is not often overtly addressed. Legal academics and judges tend to approach the dilemma in three ways. They avoid and displace it. They appeal to theories and rules external to the legal texts which interpreters should use to interpret them when legislative commands are vague or cannot be followed. Or they hold out the dilemma, or one aspect of it, as demonstrating that the legal system is internally inconsistent and, hence, illegitimate.

In the group of avoiders and displacers I would include most courts and traditional theorists. The International Court of Justice provides a good example of the difficulties posed by the dilemma for the traditional model. The court has repeatedly announced its fidelity to the orthodox view by stating that '[i]t is the duty of the Court to interpret Treaties, not revise them'.[39] The Court, not unaware of the problems of a strict adherence to textualism, also displaces the interpreter's dilemma from meaning to intent when it states that if the text is ambiguous or leads to an unreasonable result, resort may be had to other methods of interpretation 'to ascertain what the parties really did mean when they used these words'.[40] Such displacement will only lead our interpreter deeper into the dilemma. Appeals to context, drafter's intent and the object and purpose are likely to increase the uncertainty of his inquiry as he moves up the ladder of abstraction. As I indicated above, in *Alvarez-Machain* the debate centred almost entirely on the intent of the US and Mexico in drafting the Extradition Treaty and its purpose and both sides were able to muster quite persuasive arguments for their desired antithetic interpretations.

A frequent response by academics to the interpreter's dilemma is to create some sort of meta-rule or theory of interpretation to limit interpreters' discretion or to guide interpreters when they deem it necessary to move beyond the text. A look at one such theory helps to show why these attempts fail to solve the interpreter's dilemma. In international law, Myres McDougal and his collaborators have developed a meta-theory based on a policy-oriented jurisprudence. Under this approach, an interpreter should seek to implement the 'genuine shared expectations' of the parties, and

> in the absence of appropriate indices of genuine shared expectations, established decision-makers must have recourse to general community policies for supplementation... Established decision-makers must police even the genuine shared expectations of the participants in international agreements for their compatibility with basic constitutional community policies.[41]

39 ***Interpretation of Peace Treaties with Bulgaria, Hungary and Romania (second phase),*** **ICJ Reports (1950) 221, 229; and** ***Case Concerning Rights of Nationals of the United States of America in Morocco (France v. U.S.A.),*** **ICJ Reports (1952) 196.**

40 ***Admission to the United Nations Case,*** **ICJ Reports (1950) 1,8.**

41 **M. McDougal, H. Lasswell and J. Miller,** ***The Interpretation of Agreements and World Public Order*** **(1967) 104.**

Theories such as this certainly do help us understand the interpreter's role in the legal system, and to the extent that they help decision-makers arrive at and justify decisions despite the dilemma, they are useful tools. However, they do not in fact provide a solution for our perplexed interpreter. First, as Fish points out, if legal rules are indeterminate or open to interpretation, then so is any meta-theory designed to correct that problem. For example, under McDougal's meta-rule, there is no set determinate source of shared expectations nor constitutional community policies to which an interpreter can appeal to make his decision. Different candidates for the parties' expectations can be developed that justify diverging results and any set of community policies will be open to varying interpretations. Second, when a scholar proposes a meta-rule, he is likely to reproduce rather than solve the dilemma. The commands of the legislature or treaty drafters are replaced by those contained in the meta-rule. Hence, the paradox of the necessity and inadequacy of the orthodox view is repeated; that is, the interpreter must act consistently with the theory but will at times find that the theory either does not tell him what to do or that it leads to a bad result.

The final approach to the interpretation dilemma is that of the critical legal studies movement, which uses such contradictions in the legal system as one means to 'deconstruct' it. Critical legal scholarship holds that the interpretation dilemma is yet another manifestation of the fact that 'liberal' legal thought is not capable of generating a coherent theory that justifies separating law from politics and ideology or law making from law application and interpretation.[42] If the critical position is merely an attack on formalist approaches to law, I would have to agree with it. The interpretation dilemma and other contradictions in the legal system belie formalism. Whether such contradictions can be used as a means of deconstructing law or delegitimating the use of legal norms as means for ordering society is quite another question, one I address in the next section.

C. Beyond Indeterminacy and the Interpretation Dilemma: Rules as Dynamics, Law as Complexity

1. Dynamics and Detefminacy

We can begin to answer the indeterminacy question and work our way through (though not completely solve) the related interpreter's dilemma by viewing legal norms in a different light, a light which I believe makes it easier to see how they work. Part of the problem in both the determinist and indeterminist camps and among those working within and unable to solve the interpretation dilemma is that they view rules as discrete and universally similar objects - concrete building blocks for the legal tower. Rules, however, are more like processes than objects and

42 See Unger, 'Liberal Political Theory", in A.C. Hutchinson (ed.). *Critical Legal Studies* (1989) 28-33. For a critical analysis of the interpreter's paradox in international law, see Koskenniemi, *supra* note 23, at 8-40, and on treaty interpretation in particular, *id.*, at 291-302.

the law more like a river than a building. Rules are what I will call dynamics. If rules are viewed as objects, then the properties they can be said to have must be in some sense absolute, in the way that window glass is transparent. A non-transparent window is a wall. Likewise, rules seen as objects must either be determinate or indeterminate. Determinists say rules have the property of fixed meaning and outcome determinacy. The indeterminists in contrast hold that because rules do not have these properties, they fail to be the objects the determinists say they are; they are mere epiphenomena in relation to legal decisions.[43] However, if rules are seen as processes or dynamics that form part of a complex system, they need not exhibit fixed properties in order to be significant phenomena. They need not always be either determinate or indeterminate of their meaning or of judicial decisions, but can and, I hold, do have a reciprocal and changing relationship to other rules, judicial decision-making, interpretive constructs and to the field of action they are intended to regulate.[44]

The first step, then, in understanding rule determinacy is to see that rules are not all equally determinate or indeterminate. As Thomas Franck points out 'determinacy varies from rule to rule' and we can differentiate rules according to their level of determinacy.[45] However, such an analysis is only the beginning of an inquiry into determinacy. We must further ask why and when a rule can be considered determinate or not determinate and account for change in the determinacy of rules over time.

These questions can only be answered in relation to other factors in the system. If viewed in isolation, rules can have the appearance of simple objects; they are static and relatively uncomplicated. But even the simplest of rules becomes complex and dynamic when seen in the real world in which it operates in relation to other rules and the myriad of factors that go into legal decision-making. If we take one piece of the system and analyze it in isolation, like a rule or a set of interpretive constructs, not only will we be unable to understand the system as a whole, but our understanding of the piece we are studying will be fragmentary.

A rule is determinate not only because it is simple and its language unambiguous. But because:

1) it does not conflict with other rules in the system;
2) the interpretive constructs related to the rule are universally or almost universally shared among interpreters;
3) the field of action being regulated is relatively simple; and

43 **For a discussion of Epiphenomenalism in critical legal thought see Solum, 'On the Indeterminacy Crisis: Critiquing Critical Dogma', 54 *U. Ch. L Rev.* (1987) 462,484-488.**

44 **Fish seems to recognize this interaction between rules and decisions when he states that 'rules have a circular or mutually dependent relationship to the field of action in that they make sense only in reference to the very regularities they are thought to bring about'. Fish, 'Fish v. Fiss', *supra* note 25, at 1328.**

45 **T. Franck, *The Power of Legitimacy among Nations* (1990) 56-90. Lawrence Solum similarly categorizes rules according to their level of determinacy. See Solum, *supra* note 43, at 473.**

4) the normative decision-making (dispute resolution) procedures are functional, authoritative and regarded as legitimate.

Likewise, indeterminate rules can be indeterminate not just because their language is imprecise and vague; but because they conflict with other rules in the system; because the interpretive constructs related to them are not shared and will be contested; because the field of action being regulated is highly complicated; or because the interpreter/decision-maker lacks legitimacy. This multitude of factors makes rules and their determinism very complex and changing. If any one changes, it can alter the relationship between them and affect the determinism of rules. As a result, different rules exhibit different qualities depending on their own nature and their relationship to other factors in the system, a complex relationship that is in constant flux.

A good example of different levels of rule precision and determinacy from outside of law can be found in the game of chess. There are two sets of rules for the game of chess. One set is the rules for moving the pieces. They are very simple: 'A king may move only one space per move and may move horizontally, vertically or diagonally in any direction'. The interpretive constructs, like which piece is considered a 'king' and that 'the rules are never to be modified', are universal and uncontested. The field of action being regulated by the rule is extremely simple. And there is no conflict between the king-moving rule and the other rules in the system. Hence, no chess-player moves a king two spaces.

The second set of rules for chess are the rules for playing a winning game. These rules are complex, usually contained in complicated books and programmes for chess-playing computers. The field of action being regulated is also complex beyond imagination. It is estimated that the total number of possible moves in chess is 10 to the 120th power. There have not been that many micro seconds since the Big Bang.[46] Added to this essentially infinite number of possible moves is the uncertainty created by not ever knowing what move your opponent will make next. Obviously, it is impossible to write simple rules to determinately govern action in such a complex field. The player will frequently be faced with a choice between alternate moves that are valid under the rules. Nevertheless, sets of rules for winning chess have been written and they function as rules even though they are indeterminate as to what a player should do in a given situation. Computer scientists have been able to write computer programmes - essentially sets of rules - that allow computers to beat even the best human players. At least in chess, indeterminate rules have a function - what I call a channelling function - and can be guides to action.

Legal norms, like chess rules, are variously determinate because of the river of factors outlined above. In law there do exist large numbers of rules like the king-moving rule in chess. Most rules for traffic regulation are such rules: 'Stop at red lights'. The rule is simple, the interpretive constructs related to it are universal and

46 M.M. Waldrop, *supra* note 30, at 151.

non-controversial, it rarely conflicts with other rules, the field of action being regulated, car driving, is relatively uncomplex, and the dispute resolution system, the courts, is effective and generally regarded as legitimate. The world of human interaction, of course, also presents situations that are even more complicated than winning the game of chess, and the possible combinations of variables affecting rule determinacy is daunting. Thus, there are necessarily large numbers of complicated and indeterminate rules in any legal system. Determinacy is not the same for all norms.

The matter is complicated further because determinacy is not fixed over time for any given norm. In the literature on determinism, the changing nature of rule determinacy has inspired both optimists and pessimists. Thomas Franck has stated that 'a reasonable pursuit of greater determinacy is, seemingly, a primordial drive of rule systems...' He is able to cite several examples from international law to support this claim.[47] Among the pessimists is Anthony D'Amato who claims that all rules obey a kind of second law of thermodynamics in that over time they become increasingly uncertain and increasingly unable to guide action as they were intended.[48]

As is so often the case in theoretical disagreements, both the pessimists and the optimists are correct. Norms can enjoy varying levels of determinacy and become more or less determinate over time depending on changes in the above outlined factors. Some norms, like 'stop at red lights' are stable and determinate over long periods of time because all the factors continue without change. Some rules will, as the optimists claim, become increasingly determinate over time as the factors that caused their indeterminacy change. International regulation of State jurisdiction over the continental shelf is a good example.[49]

Finally - though I am sure I have not exhausted the possibilities - some norms, as the pessimists point out, are in a constant state of determinacy decay. D'Amato's analysis of the relationship between tax codes, judicial interpretation and tax avoidance behaviour is a great example. When a tax law is passed, wealthy tax payers - their lawyers - immediately begin to look for ways to comply technically with the law but avoid paying taxes. In my terms, the field of action changes in response to the legal norm. The legal norm must then either change or become useless letter, commanding that certain formal requirements be met without the government ever collecting the tax the legislature intended it to have. Of course when the rule changes, either by legislative gap-filling, administrative ruling or judicial decision, the tax planners will find new ways to comply without paying taxes, which will cause the rule to change and become more complex, hence less determinate, in a continuous process in which the norm is never stable.[50]

47 Franck, *supra* note 45, at 62-63.
48 D'Amato, 'Legal Uncertainty', 71 *Col. L Rev.* (1983).
49 Franck, *supra* note 45, at 63.
50 D'Amato, 'Can Legislatures Constrain Judicial Interpretations of Statutes?', 75 *Va. Law. Rev.* (1989)561,586-587.

Our understanding of normative texts, interpretation and indeterminacy can be advanced by looking at these distinctions among rules based on their determinacy and the elements that originate them. There exists a process of interaction between rules, decisions, interpretive constructs, the field of action and other processes that is variable, continuous and coevolutional. The confines of this article do not permit a complete titration of these processes, but a look at the relationship between rules and interpretive constructs in the context of the *Alvarez-Machain* case helps to demonstrate the interactive nature of the relations between them all.

Rules and interpretive constructs are both open to constant change and affect each other mutually. Essentially, there are two interrelated kinds of interpretive constructs. First, are those described by Fish that allow us to read texts with meaning. For instance, the set of knowledge that allows a judge to know that he is reading an extradition treaty when one is put before him. In order to recognize and comprehend the treaty, he must already know the language it is written in and have an idea of what an extradition treaty is and what it is intended to regulate. I will call these 'internal constructs' because they relate to the meaning of the rule itself. The second type of constructs, to which critical legal scholars tend to refer, are 'external' in the sense that they do not act to define the rule, but to define the decision-maker's approach to the rule and the problem under consideration - his political, social and moral preferences. An example from this case would be the fact that Chief Justice Rehnquist is a middle-aged, white, politically conservative, US born and educated lawyer who probably believes that the moral good done by prosecuting Dr. Alvarez-Machain is superior to the moral wrong done by kidnapping him.

Both types of interpretative constructs stand in a reciprocal relationship to legal rules. As Fish points out, internal constructs give meaning to normative texts because we can only know what a text means if we have sufficient knowledge to place it in a context and understand its function. The question that Fish fails to ask, however, is where did these internal constructs come from. The answer, of course, is that they are formed by reading normative texts and reading or hearing explanations of such texts. Thus, the interpretive constructs are not prior to the texts but part of the same process in which both the normative texts and the internal constructs are being developed. The texts help to form the constructs which in turn give meaning to the texts which again help form the constructs.[51] Neither the texts nor the constructs are static but change over time, in part due to the effect one has over the other. That is why legal arguments, normative texts and rules of interpretation are important. Legal arguments about a certain case can persuade decision-makers and change their understanding of, for example, what an extradition treaty is. It is not hard to imagine a judge who was ambivalent as to whether or not extradition treaties prohibit cross-border abductions (her prior knowledge and assumptions about

51 Hans-Georg Gadamer argues forcefully that when we read a text it alters our beliefs at the same time as we interpret the text according to our pre-existing beliefs. H.-G. Gadamer, *Truth and Method* (Garret Barden and John Cumming, trans., 1975) 272-273.

extradition treaties did not answer this question) and made up her mind based on reading the treaty and the arguments presented by the parties.

The relationship between external constructs and legal rules is perhaps a bit more difficult to see. The critical legal thinkers are clearly correct when they assert that the institutional role and the cultural, political and moral biases of an interpreter influence greatly his or her interpretation of a legal rule. If you know a judge's political ideology and moral beliefs, you can often predict how he will decide in a case of political or moral import, almost without reference to the legal arguments presented in the case. Prior to hearing any of the legal arguments in *Alvarez-Machain*, I think we could safely predict that the Chief Justice would, if he could find suitable arguments, rule in favour of aggressive executive law enforcement and that Justice Blackmun would take the contrary position and defend the civil rights of Dr. Alvarez-Machain. But some critical scholars go too far because they tend to assign these biases a determinative role exclusive of the legal rules at work in a given case.[52] How would they explain the vote of Justice O'Connor, clearly a conservative, who joined in the dissent's argument in favour of releasing Dr. Alvarez-Machain? Does she have some bias against aggressive law enforcement or in favour of Mexican doctors? Maybe if we knew enough about her cultural, political and moral background we could find the reason there for her decision. But maybe not. Such a proposition would have to be proven, and the critical writers have not done so.

The problem with viewing an individual's external constructs as determinative of her legal interpretations is that political, cultural and moral beliefs are not set in stone, but rather are in a continuous process of formation and can change over time. How many Supreme Court Justices are appointed for their political outlook and end up making decisions from the bench that are quite contrary to that perspective? Furthermore, I assert that exposure to legal rules and arguments, which are often morally and politically significant, influence the formation and change of external interpretive constructs. If this is true, then the reciprocal relationship between external constructs and the interpretation of law exists. Part of, and perhaps a major part of, our political and moral beliefs comes from our acceptance of the legal rules we are taught. Moreover, for those persons, like most judges, who believe that legal rules have moral force, a knowledge of what a legal rule is or a persuasive argument in favour of one interpretation of the rule will change their view of what is morally and politically proper. Law is not merely a product of politics, morality and culture, but helps to form them.[53] In ignorance of the legal rules, one may have an opinion on whether cross-border kidnappings of suspected torturers/murderers is wrong. But this does not mean that opinion is impervious to change with knowledge of the legal

52 See Singer, *supra* note 27, at 20-21.

53 Duncan Kennedy, a leading critical scholar, put forth a similar view when he wrote that 'P]aw is an aspect of the social totality, not just the tail of the dog'. Duncan Kennedy, 'Legal Education as Training for Hierarchy', in D. Kairys (ed.), *The Politics of Law: A Progressive Critique* (1982) 40, 49.

rules. Justice O'Connor may have been at first inclined to vote with the majority, but after hearing Dr. Alvarez-Machain's arguments based on the existence of an international law prohibition of cross-border kidnappings, she may have come to the conclusion that such actions are wrong because they are prohibited by the US/Mexico Extradition Treaty.

Moreover, the existence of legal rules and a legal system limit the influence that external constructs have on decision-making. Even had he wanted to, the Chief Justice could not, for example, have successfully ordered the immediate execution of Dr. Alvarez-Machain. Such a decision is not within range of his powers, as defined by legal rules such as the Constitution, the Judiciary Act and the US Criminal Code. The order simply would not be carried out by the other actors in the system because they would not perceive it as legal or legitimate. In fact, such an idea would most certainly never enter the head of the Chief Justice because his sense of what is correct behaviour on the part of a Supreme Court Justice has been formed by the very legal rules that prohibit them from ordering summary executions.

In sum, the relationships between normative texts and interpretive constructs are complicated and reciprocal. A similar analysis could be made for the other factors in the system. Rules are variably determinate, and do not all stand in the same relationship to the other dynamics. The interaction between these factors will depend on the nature of each. Moreover, they are not static objects which stand in an unaltering, linear relationship to one another, but are interrelated processes that evolve over time through the pressures for change that each exerts upon the other. The relations between them are not merely bilateral but multilateral in that they all affect each other reciprocally and simultaneously. As a result, the task of understanding any social system regulated by law and its components - here we are concerned with understanding legal rules - is arduous, and I think our comprehension will always be incomplete. My purpose here is not to fully describe such systems or the position of normative texts in them but to begin to investigate their complex and dynamic nature.

2. Freedom, Order, Contradiction and Complexity

This analysis of rules as dynamics has been directed towards understanding the indeterminacy debate and the function of normative texts, but it also puts us on the path to dealing with the interpreter's dilemma. If legal rules are dynamics, then law must be seen as a complex, variable system combining elements of order and stability and freedom and change. It is not a perfect, stable, closed, logical system, nor is it a wide open, political playing field where anything goes and nothing is predictable. Rather, it is a system in flux that never quite locks into rigid order nor dissolves into chaos.

Before moving forward, I must backtrack a bit. Above, I argued that interpreters are caught in a paradox between the demand that rules bind them and the necessity

or inevitability of making decisions free of rules. I believe this paradox is a practical corollary to one of the most focused insights of the critical legal studies movement. A basic contradiction pervades modern legal thought: individual freedom can only be achieved through a social order that restricts individual freedom.[54]

The freedom/order paradox is at the root of the critical legal analysis of international law and is the source of the self-contradiction it finds in international legal argument. While not entirely of one mind, critical writers agree on the fundamental contradiction in international legal thought: international law is based on the consent of autonomous sovereigns (freedom) but must be able to create norms that are authoritative and binding on these independent agents (order). Norms of international law, according to these authors, must be both responsive to the wills of sovereign States and be capable of binding those same States. International legal argument is, therefore, incapable of resolution because these two strands are incompatible and mutually exclusive, yet neither can be abandoned in favour of the other.

In reference to sources doctrine, David Kennedy defines the two contradictory positions as hard rhetorics (normativity based on consent) and soft rhetorics (norms binding regardless of consent).[55] According to Anthony Carty's reading of Kennedy, these doctrines are rhetorics and the extremes must be avoided because they lack a referent. That is, they do not refer to any real phenomenon external to themselves. Neither actual consent by States nor objective norms can be proven to exist as the basis of international law.[56]

The critical writers' statement of the contradiction and analysis of international legal argument are, I believe, quite accurate. However, the lack of resolution between the competing views of international law is not just a product of international legal discourse. Rather, the contradiction is a characteristic of the international system (international law and the society it is intended to regulate) itself, which is complex and vexed by the conflicting needs of order and freedom. The number of points of determinism and the amount of order in international law and society are considerably less than in a domestic legal system. But it is still a normative dynamic system poised between stagnate order and chaos. The fact that the extremes are not (I would say cannot be) fully endorsed in international law is not just a rhetorical device used to avoid confronting the inherent contradiction in international legal discourse. Rather, international law moves back and forth between the competing doctrines of consent and objective order to allow for the existence of both order and freedom.

54 See Duncan Kennedy, 'The Structure of Blackstone's Commentaries', *Buffalo Law Rev.* (1979) 28; and in general, R. Unger, *Knowledge and Politics* (1975).

55 David Kennedy, *International Legal Structures* (1987) 29-33. Koskenniemi presents a similar analysis, *supra* note 23, at 40. Koskenniemi also addresses the freedom/order problem more directly. See, *id.*, at 424.

56 Carty, 'Critical International Law: Recent Trends in the Theory of International Law', 2 *EJIL* (1991)66,72-75.

But this movement does not mean that international law is purely rhetorical or incapable of resolving disputes and ordering interstate relations; rather, it results from the need to function in the face of two competing necessities in international society, rule-based order and autonomy. Hence, the consent and objective order doctrines have a referent. Each refers to a different but existing aspect of international society, where the conflicting needs of autonomy and objective order are always present. If critical writers conclude that international legal discourse lacks a referent, it is because they exclude it at the outset.[57] It is precisely because they criticize international law as closed logical system that the contradiction strikes the critical writers as so powerfully delegitimating. However, the contradiction becomes more comprehensible and less problematic if international law is viewed as an open, dynamic, complex system that coevolves with the social system it aims to regulate.

It is crucial, I believe, to understand that the freedom order/paradox is not merely contained in legal thought, but is also a social fact that conditions the law. It exists in part because some combination of order and freedom are necessary for the existence of human society. Neither absolute order nor absolute freedom is possible. Absolute order is not possible because we are not omniscient. Absolute freedom is not possible because human subsistence and procreation require some level of social order. The more complex the society, the more order is needed to keep it functioning and the more often freedom will have to be exercised as the increase in variables causes an increase in the need to make choices.

The paradox is intensified because freedom and order are not mutually exclusive opposites (that they are is an erroneous premise of critical argument that leads to the conclusion that law is not coherent). The absence of order does not translate necessarily into an increase in freedom. For example, while the activity of States in the seas was essentially unlimited by the international law of the period after the Peace of Utrecht (1713), any particular State's freedom to conduct commerce, fish or make war could be severely curtailed by another State's exercise of its nearly unrestricted freedom to use force. The conditioned prohibition on the use of force in modern international law enhances the freedom of States to carry out all other activities on and under the seas because they can no longer be stymied by other States' use of the freedom to make war. Hence, the freedom of a particular State and even of all States to operate on the high seas is greatly enhanced by a rule that limits some aspect of that freedom. In other words, to preserve and enhance their sovereignty, States need an objective order capable of overruling their sovereignty. The freedom/order paradox is not, then, merely a product of liberal legal theory, but a practical dilemma for States and other human societies which law must help to solve but cannot completely eliminate.

In this light, it comes as no surprise that legal theorists have not discovered a solution to this paradox. We most likely never will. To demand, as some critical

57 See, e.g., Kennedy, *supra* note 55, at 7.

legal thinkers do, that modern legal thought create, in the abstract, a coherent theory to resolve the freedom/order paradox is to ask for divine wisdom. But as the French jurist M. Pierre Tourtoulon said, '[t]here is no need to throw to the dogs everything that is not fit for the altars of the gods'.[58] To be useful, our critique ought to be more realistic and ask: how does the modern legal system deal with the paradox? what mix of freedom and order does it create and for whom? and, to be critical, does that mix allow for a functional legal system and coincide with the moral basis of modern legal systems or with our own ethics?

Here I will not analyze the freedom/order paradox in general abstract terms, but rather look at one concrete manifestation that has concerned us thus far, the interpreter's paradox. The answers to the questions of what mix of freedom is created for interpreters and how the system deals with the paradox are interrelated. We have seen above that legal rules are neither wholly determinate nor indeterminate of interpretive decisions. There exists a gradient of determinacy from nearly absolute to almost non-existent upon which particular norms can move via changes in numerous interrelated factors.

Hence, for our interpreter freedom and order exist simultaneously and alternately. He is bound by stable determinate rules and less bound by less determinate and less stable rules. Herein lies the modern legal system's answer (partial as it is) to the interpreter's paradox. Law interpreters and appliers are constantly moving back and forth between rule-bound decisions and free or arbitrary decisions. They are constrained to a greater or lesser degree depending on the rules under consideration and the facts to which they are applied. But they are not entirely rule-bound nor entirely free to follow their whims. They work in a state of 'complexity' between the formalist's rigid order and the sceptic's chaos.[59]

In specific disputes resolved through the interpretation of normative texts the system appears highly problematic; many decisions will appear - or be - arbitrary. By taking advantage of the indeterminacy in the US/Mexico Extradition Treaty and in the position of international law in the US legal system, a majority of the Supreme Court was able to uphold the prosecution of Dr. Alvarez-Machain despite

58 Cited in Cohen, 'The Ethical Basis of Legal Criticism', 41 *Yale LJ.* (1931) 201,206.

59 The concept of 'complexity' is an emerging theory in other physical and social sciences. Complexity as a science is essentially the study of the relationship between order and chaos in physical, biological and social systems. As a phenomenon it is a class of behaviours between the extremes of order and chaos 'in which the components of the system never quite lock into place, yet never quite dissolve into turbulence either'. Waldrop, *Complexity, supra* note 30, at 293. It focuses on complex adaptive systems that are ordered but constantly reshaping themselves. The relevance of such a science for the study of law is apparent, since the essence of law is an attempt to bring order to a universe, human interaction, that often tends towards disorder. I believe complexity theory will help us to understand the relationship between freedom and order in legal systems.

I am not the only one to see the analogy between new areas of study in other sciences and the law. Professor R.E. Scott in the George Wythe Lecture at the College of William and Mary put forth the argument that 'chaos theory' (the theoretical mother of complexity theory) can be used to understand the tensions inherent in the legal system (An essay based on this lecture is forthcoming in the *William and Mary Law Review).*

a clear rule of international law prohibiting his abduction. Such a decision is in a sense arbitrary because under the rules it applied and interpreted, the Court could have reached either of two opposite results: permit Dr. Alvarez-Machain's trial or set him free.

Nevertheless, as a whole the system functions because there are points of determinacy and procedures by which an area of the law can be made more determinate. For example, lower level judicial decisions can be overturned on appeal, as the Supreme Court, much to the satisfaction of the Justice Department, did in *Alvarez-Machain.* The Supreme Court used determinate language to 'correct' the decisions of the lower courts that were based on indeterminate language and to decide definitively that abductions do not violate the Treaty. Similarly, text drafters can use determinate language to correct interpretations not to their liking if they deem it necessary and find it politically possible. The US and Mexico could, for instance, renegotiate the Treaty and add a clause that states specifically that an individual kidnapped by one of the States Parties in the territory of the other cannot be tried in the courts of the kidnapping country until he has been returned to the State in which he was abducted. The US Congress has in fact held hearings to determine whether a unilateral US law to the same effect would be desirable. I confidently assert that no person in Dr. Alvarez-Machain's position would be held for trial in the face of such a rule established in a treaty or domestic legislation. Hence, the system is able to move back towards being rule-bound, but never quite gets there because new flexibility can always be found in the near infinite space of legal norms. The existence of some determinacy and the possibility for correction do not solve the problem of abuse by interpreterS'in all the specific cases where it might arise, but it keeps the system from becoming purely discretionary.

As determinism binds interpreters in some cases and creates order in the system, the existence of some indeterminacy and change creates flexibility in the system and allows interpreters to resolve specific cases according to their criteria of rationality and justice (or, more cynically, their personal preferences). This flexibility does not guarantee that the application of determinate rules will not at times lead to irrational and unjust results, but it does keep the system as a whole form locking into a stagnate, rule-bound order.

Under this analysis, the interpreter's dilemma does not disappear. He still must face the contradiction of being obliged to follow the rules contained in normative texts and at the same time being free to give meaning to vague rules and reach reasonable and just results in specific cases. But the dilemma thus viewed is not a sign of a problem of rhetorical self-contradiction in legal thought, but a result of the legal system's complex nature and the real existence of contradictory demands on it and, hence, interpreters. Thus, the interpreter's dilemma, far from being a basis for delegitimating the system, is in fact integral to it and necessary for its proper functioning. The system must always be moving between order and freedom because it cannot function at either extreme.

Within interpretation, I would define the extremes as rule-bound (order) and rule-free (chaos). A rule-bound system would be one such as that envisioned by formalists and strict textualists in which all legal rules have definite and unchanging meaning. I suggest that such a system, if it could be created, would be too stagnate to function in unstable human society. Rule application would be dysfunctional because the changing nature of the field of practice being regulated and other factors in the system would over time make large numbers of rules obsolete and the results from their application irrational.

A rule-free system would be one in which adjudication took place without reference to any predetermined rules or principles. To the extent that they are not nihilists, critical legal thinkers envision a system in which there is 'an openended dispute about the basic terms of social life', which by their argument cannot be bound by preset formal rules and procedures. For example, Koskenniemi proposes for international law a system that

> involves venturing into history, economics and sociology on the one hand and politics on the other. It involves the isolation and appreciation of what is significant in the particular case...

His formulation

> gives no intrinsic weight to solutions, once adopted, and it is ready to make constant adjustments once this seems called for. 60

Such a system, lacking in formal rules and authority in which all issues are perpetually open and in need of continuous direct resolution - and subsequent re-resolution - is likely to degenerate into a might-makes-right chaos in which authority does not come from the legal system or power structures but from the ability to use force effectively. A classic Hobbesian state of nature. For instance, if treaties establishing borders between States are considered indeterminate and incapable of objective application, then States will be in constant need of determining their physical frontiers, each always being able to argue for a new drawing of the map, without the others being able to point to the previous drawing as embodying an objectively verifiable agreement on the borders. It is hard to see how such a situation could lead to anything but constant border wars. Particularly because if we are talking of a rule-free system, then the use of force to resolve disputes cannot be limited. That would be a preset rule. The prevention of such a chaos was certainly a primary motivation for the creation of border delineation treaties and the prohibition of the use of force against a State's territorial integrity contained in Article 2, paragraph 4 of the UN Charter.

Even if life did not become solitary, poor, nasty, brutish and short under a rule-free system, the costs and time needed for constant resolution would grind the system to a halt. We might imagine that rules regarding diplomatic relations,

60 Koskenniemi, *supra* note 23, at 497.

codified in the Vienna Convention, were open to constant unlimited renegotiation. The immunity of each diplomat would have to be negotiated separately, and could be challenged by either the sending or the host State at any moment. That is, diplomats would have to spend an incredible portion of their time simply negotiating their own status only to find that the results of their efforts could not be relied on in future disputes over their status.

Modern legal systems function precisely because they neither create rules as unmovable stone blocks nor allow for perpetual and limitless redefinition. The fluidity and complexity of the system allows it to contain contradictory elements and remain in a state of perpetual flux between excessively rigid order and chaos without collapsing under the resulting- apparent logical inconsistency. Perhaps a non-self-contradicting system would be better, but in an imperfect and constantly changing world, I think that all we can ask for is an imperfect system that is flexible enough to self-correct (self-correction is a characteristic of many complex systems) at least some of its defects. That is, in partial answer to the third question posed above - a practical and moral judgment - I would conclude that modern legal systems are functional with respect to interpretation. Interpreters' decisions, taken as a whole, reflect, though imperfectly, the rules law attempts to create for society as well as the values of that part of society which makes the laws. The values enforced may not always be those we take to be the basis for our legal system, and I certainly disagree with some of those rules and values. But I am not sure that changing the means by which the values are implemented - i.e. creating a system that does away with the interpreter's dilemma or the freedom/order paradox more generally - will much help me on that account.

Conclusions

In the balance of the interpretation of the US/Mexico Extradition Treaty hung the freedom of Dr. Humberto Alvarez-Machain, the quest to do justice for the torture and murder of Enrique Camarena and the protection of Mexico's territorial sovereignty. Because the stakes are so high, the use of the interpretation of legal rules for resolving disputes and determining the limits of the State's exercise of coercive force must be steeped in legitimacy. Under the orthodox view of interpretation, interpreters' decisions are legitimate because they merely carry out the will of the legislature who wrote the law or the States who signed the treaty. The critical legal scholars' arguments on indeterminacy and interpretive constructs have undercut this justification by demonstrating that interpreters cannot simply do the text drafters' bidding, even if that means to carry out the drafters' intentions or the text's purposes. The most sceptical critical analysis concludes that dispute resolution through interpretation has no justification and that legal rules have no real function.

The interpreter's dilemma - that he must, and at the same time cannot always, do what the drafters of normative texts direct - is perhaps more than anything a crisis of justification. In a law-based system, interpreters gain their legitimacy because they are applying rules that come from a legitimate source. They are not generally legitimated to make or amend the rules. Yet they must in some sense do so.

In order to understand indeterminacy and work out the interpreters' dilemma, I have presented a concept of norms as dynamics and law as a complex system in flux between order and chaos. Norms have different levels of determinacy and change over time in response to other changing processes. Interpreters are constantly moving between rule-bound, partly rule-bound and rule-free decisions based on the variables with which they are confronted. This allows them and the legal system to function notwithstanding the contradictory demands of order and freedom. Such a system is problematic, but functional. This modified view of interpreters' activity obviously requires a change in their claim to legitimacy.

In a complex system, justification is not easy. An interpreter's legitimacy cannot come in a direct line from the rule giver, but at the same time it cannot be completely detached from it. He gains a good measure of legitimacy because he is in fact applying and following rules made by the drafter. But because rule-applying does not describe the whole of what he does - he must give meaning to texts and make decisions not entirely governed by rules - the interpreter's role must also have a justification independent of the drafter of the normative text. That is, he must be justified in confronting the interpreter's paradox by moving between rule-bound and less rule-bound decisions.

I believe this is in fact the case. Courts in municipal law systems are justified by their constitutional position as a coequal branch of the government and their role as dispute resolvers and arbiters of justice. States, the principal interpreters of treaties, are justified by their dual role of drafter and interpreter. The International Court of Justice is perhaps the exception that proves the rule. The Court insists on working within the orthodox view of interpretation despite the practical impossibility of actually doing so. This indicates that the members of the Court believe that its sole justification rests in its function as a nearly mechanical applier of the treaties written by States. Might the scant utilization of the Court by States to resolve their conflicts be explained in part by this disjunction between the Court's source of legitimacy and the reality of the judicial function?

An understanding of legal rules as dynamics and law as a complex shifting system permits this dual justification of the interpreter's role. First of all, contrary to some conventionalists and critical legal scholars, I conclude that normative texts and rules of interpretation matter in a practical sense because they are a part of the decision-making process. Their content, along with the interpretive process of establishing that content, constrain interpreters to varying degrees and thus directly affect the outcomes of cases being litigated and disputes being negotiated. In some cases, they limit the possible outcomes to one. In other cases, they serve to channel

the resolution process. When normative texts are not outcome determinate, they set the perimeters of possible outcomes, define what must be considered and channel the debate in a certain direction. Legal rules and rules of interpretation provide the language to be used by contending parties and the dispute resolution system, and that in itself is a constraint on interpreters. If rules count, then interpreters can gain legitimacy from the fact that they apply rules that come from a legitimate source.

Secondly, a dual justification is possible because under a dynamic understanding of norms, rules are not all that matters. A multitude of factors go into shaping the relationship between rule, field of action and decision, not the least of which are the social, moral and political situation of the interpreter. As a consequence, interpreters are inevitably social, moral and political actors. When deciding interpretive disputes they frequently make moral and political decisions. They must be - and as I indicated above, I believe are -justified in so doing, or they will often act without justification and be deprived of a good part of their legitimacy.

Finally, a dual justification is necessary because neither justification - rule-applier nor justice-giver - can stand alone. If an interpreter finds his justification only in being an applier of the texts he reads, then he is open to easy attack from rule sceptics like the critical legal scholars. He will have no means of legitimating his decisions in hard cases where the rule does not tell him what to do. If, on the other hand, an interpreter can only claim legitimacy as a just arbiter of disputes, then he will always be vulnerable to claims that he has acted capriciously and ignored the rule he is supposedly interpreting.

I bring up this last contradiction - interpreters must be legitimated as rule-appliers and as moral and political decision-makers - in the conclusion for two reasons. The ultimate ends of theory are to describe, understand and justify (or delegitimate) practice. The body of this article has been an effort to describe and understand the practice of interpretation of legal rules to solve conflicts. It would be incomplete if it did not arrive at a justification based on the analysis presented.

The other reason for ending with a contradiction is that it supports my general conclusion. Theorists who strive to delegitimate rule interpretation as a means of dispute resolution have two lines of attack: indeterminacy and self-contradiction. The existence of indeterminate rules leads the interpreter into his dilemma. But the dilemma has a solution, and becomes a solution, via a more complete understanding of rule determinacy. The complexity and fluidity of the matrix in which legal rules exist allow interpreters to be bound and not bound or bound to varying degrees by different rules in different situations. This in turn allows the legal system to function in the face of the contrary demands of freedom and order. Apparent logical inconsistency is not always a bad thing, it can be a response to conflicting necessities.

Indeterminacy and the self-contradiction it creates for interpreters, then, are not adequate grounds for criticizing the Rule of Law. Because law is complex, fluid and

non-linear, its deconstruction cannot be based on simple statements of linear logic such as:

> Interpreters must follow the text. The text cannot be followed because it is indeterminate. Therefore, there is a logical contradiction and interpretation is a farce.

There is not always a linear relationship between rule and decision, but linear relationships are not the only kind that exist nor the only relations capable of providing justification for using law to order society and settle conflicts. The task for one who wishes to be truly critical is far more involved than a search for logical inconsistencies. She must find a non-linear means of attack that matches the complexity and changeability of the object of her criticism. A tower will tumble if you shake its foundation, but a river will only change its course.