
Dialogue Concerning Legal Un-certainty and Other Prodigies

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This is a slightly modified version of a dialogue we read on 8 September 2018 at the Graduate Institute, Geneva, in lieu of staging a traditional presentation of the lengthy paper we had filed with the organizers of the workshop on ‘Knowledge Production and International Law’. Mindful of Professor J.H.H. Weiler’s advice in his Editorial, ‘On My Way Out – Advice to Young Scholars I: Presenting in an International (and National) Conference’, 26 *EJIL* (2015) 313, at 315, we tried to turn a liability – multiple speakers are even more prone to exceed allotted timeslots – into an asset; we changed the format completely, so that instead of having before us a 27-page sheaf, upon which the panel chair would have cast a dismayed glance (*ibid.*, at 314), we found ourselves nervously clutching a 6-page script on the unlikely stage of amphitheatre Jacques Freymond. But our strategy proved effective as far as time-keeping was concerned: we were allotted 20 minutes; we did it in less than 19. By casting the paper into a different genre we found ourselves changing the argumentative strategy to such an extent that a largely autonomous text grew out of what we had planned as a simple expedient. The workshop organizers kindly permitted us to publish it separately. We make our intellectual debts explicit in a bibliographic endnote.

- Do you see any certainty in the law, my friend?
- I wouldn’t know. I presume it depends on how you define ‘Certainty’.
- Consider this definition. There is legal certainty when full knowledge of the law makes it possible to predict the outcome of its application in any given case.
- You set too high a standard, my friend: ever met a lawyer who experienced such a blissful state of mind? Lawyers are often sceptical types. Few of them would accept your definition as embodying a *plausible* ideal.
- That’s right, but may I propose that we distinguish individual attitudes – disenchantment, cynicism, you name it – from the objective features of the social

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practice in which lawyers partake? Legal certainty remains part of the language game we call ‘Law’, no matter what individual lawyers think about it. It really is key. A legal match couldn’t even start on the declared assumption that anything goes, that there’s no objective legal meaning, or no stable distinction between right and wrong.

- I see. But what about those legal rules and standards that somewhat reflect or even countenance uncertainty?
- Like?
- Beyond-reasonable-doubt. That standard assumes that even beyond reasonable doubt there might still be some doubt lingering in the decision-maker’s mind. That’s uncertainty.
- That’s sophistry!
- I beg your pardon?
- Your example goes as far as it gets. The legal mind is of course aware of chaos and uncertainty in the world. Rules and standards like the one you mention betray that awareness; but they also show that the law is there precisely to domesticate uncertainty. Consider your own example: a judge may entertain doubts about the guilt of the accused, but once the accused is found guilty, there can be no doubt that guilt is beyond reasonable doubt. Law creates certainty against the backdrop of an uncertain world.
- To sum up: lawyers don’t really believe that the law is certain and yet, paradoxically, they play a game to which certainty is key.
- *That*, at least, is certain; but *how* can it be? Let me think.
- Eureka! It could be all about the distinction between knowing-that and knowing-how ...
- Oh, that post-war analytical relic. I’m not sure I see what you’re getting at.
- The distinction dissolves the paradox. Suppose that our lawyer is uncertain about what the law is. ‘Is *that* the law?’, she would be asking to herself. She wouldn’t know for certain and yet she wouldn’t feel entrapped in her not-knowing-*that*, because she happens to know *how*: she knows how to play the game, how to play with certainty!
- You don’t mean she knows how to cheat, do you?
- Of course not. Let me try to express this in a more philosophical way. In the knowing-that mode certainty is a property of legal knowledge. In the knowing-how mode certainty is a basic rule of the game of law. Lawyers play *by* certainty: they invoke it all the time, either to defend their claims or to undercut those of others. And, yes, they also play *with* certainty.
- Now I see what you mean. Conjuring certainty is indeed a topos of lawyerly rhetoric.
- Exactly. You’re not good at the game if you don’t enlist it in your argument.
- And let’s not forget that Critical Legal Studies definitively showed us that all that is a sham.
- Did they?
- Certainly. They showed that the law in the Western liberal tradition is radically indeterminate, and necessarily so, by its own deep structure.

- This is a claim made in the knowing-*that* mode, isn't it?
- I guess so. Legal indeterminacy is an embarrassing fact that critical legal thinking exposed.
- Is it? By approaching things that way you may just be reinstating 'a metaphysics of presence', as *From Apology to Utopia* softly warned.
- Softly?
- In a footnote. That said, I think we could safely *assume* that legal indeterminacy is a fact – a retrievable deep structure, if you will – as long as we realize, once we're back to the surface, that legal practice *never* puts that fact on display. And since we're committed to understanding what legal practice is about, we should perhaps just switch off the knowing-*that* mode, stick to the knowing-*how* mode, and see where it leads us.
- Got on my knowing-*how* spectacles!
- You see? Watched through those lenses, the indeterminacy thesis may look like the focus of an ascetic discipline whose purpose would be to preserve the emancipatory potential enshrined in the thesis itself.
- Or like a situationist brickbat aimed at rescuing lawyers and everybody else from intellectual torpor.
- I like to see it that way! But let's go back to legal practice now, shall we? I see a big problem there.
- What sort?
- A mismatch between the dogma of legal certainty and the setting in which the lawyer's knowing-*how* is deployed in its most dramatic form.
- You mean the courtroom.
- Yes. Solemn ceremonials, baroque rituals, extraordinary garbs ... all these things seem no less indispensable to the practice than staging the game of legal certainty.
- This is indeed bizarre, if you think about it.
- More than this. We bump into a second paradox here. Legal practice seeks to legitimize itself through a distinct kind of rational discourse, of which the notion of legal certainty is an essential component. These ratiocinations, however, are embedded in a sort of religious ritual and that doesn't look very rational, does it?
- No, it doesn't. And we know this very well. It happens before our own eyes. And yet, it's as if the law's apparent rationality makes us forget about it. Well, no, in a sense we just don't see it, like Poe's purloined letter.
- And there's more lying in plain sight besides the strange rituals we're used to. The Irrational protrudes from the legal texts, too.
- Show me where.
- Let me put it this way. If talk of legal certainty must be taken seriously, why should the law require that judges be persons of high moral standing? Judges are supposed to competently operate inferences, aren't they? If so, why does the law demand that they be high-minded and not just reliable? And why the hell should they take an oath?

- Objection!
- Please, proceed.
- On closer inspection those moral requirements look compatible with a *bouche-de-la-loi* understanding of judicial office. Let's not forget that legal knowledge is expert knowledge. The Enlightenment's conception of legal certainty as instrumental to individual freedom, which couldn't materialize without democratizing legal knowledge, has been a lost cause. And since lay people cannot check by themselves whether expert knowledge is deployed competently, the expert – the judge – is enjoined to promise that she's going to ascertain and apply the law honestly. Call it ethics of expertise. It makes a lot of sense.
- I concede that. But there are other things in the legal materials that just don't compute. Think of the ceremonial of the International Court of Justice. Time stands still as the crowd faces the empty bench, till the usher announces the Court ...
- *La Cour!*
- Then the crowd stands up as the judges enter the courtroom in procession, wearing black vestments. Every single gesture serves to conjure up the sacred and to seal it off from ordinary life. As in a religious service, sessions are opened and closed by ritual formulas. The session is closed, *ite, missa est!*
- And deliberations are secret, as in a Conclave.
- Exactly. Secrecy would be pointless if decisions were logically inferred from pre-existing rules. It's as if the game of legal certainty couldn't be played transparently. Stripping it of its religious accoutrement wouldn't reveal what the players are really up to. It'd be, rather, a recipe for misunderstanding. Magic is part of the practice; it resists rationalization, sometimes in mischievous ways, as in the case of the 'solemn declaration' that some international acts adopt as a secular substitute for the oath.
- You just conceded that taking an oath isn't aberrant from the standpoint of an ethics of expertise.
- I didn't change my mind. Only, in that specific case the devil really is in the detail. As a secularized version of the oath, the declaration must be 'solemn'; it can't be just a declaration. Why? My guess is that magic rituality chases legal certainty like a shadow. It is its dangerous supplement, if you will. And that brings us to Derrida.
- Derrida?
- Yes. My sense is that legal certainty is not as unproblematic as a Moorean concept, a concept that, as Wittgenstein explained in *On Certainty*, appears to function empirically – there *really* is certainty! – but it is actually a rule of the game: it works deontically. There's *also* something spectral to it: 'It happens, like a spectre, in that which does not happen.'
- Oh, Derrida's hauntology, quite difficult to catch ...
- What I want to suggest isn't too complicated. Legal certainty is an impossible injunction. It's being out of reach explains the judge's compunction, you know, their black robes. The spectre of un-certainty is as unsettling as it's unyielding. And that's fine!

- Judges mourn ... and that's a good thing?
- Yes, it is. As Derrida wrote in *Force de loi*, 'a decision that didn't go through the ordeal of the undecidable would not be a free decision, it would only be the programmable application of a calculable process. It might be legal, it would not be just.' Derrida makes an ethical case for legal *uncertainty*: the law must be *uncertain* in order to be just. This is what an ethics of responsibility requires: if legal outcomes were always predetermined, officials would never take responsibility for their choices. Without the mediation of individual conscience and practical wisdom, the Rule of Law risks morphing into an Orwellian nightmare.
- May I sum up the argument thus far?
- Please.
- While modernity tried to overcome premodern legal traditions, in the name of a fully rationalized conception of politics and law, it was actually so unsuccessful that premodern ineffability survives in it, not as buried conceptual contradictions, but in actual practice and in the legal texts themselves. One would of course be tempted to talk about decorative premodern elements sticking out from the modern legal edifice, like scattered gargoyles. But I think that we've turned the tables here. The rhetoric of legal certainty is a modern addition to the vast premodern edifice of adjudication, and a relatively superficial one at that, which doesn't mean unimportant but just 'thin', so much so that a case for legal uncertainty not only can be made on ethical grounds; it actually coheres with so many aspects of current legal practice! We should resist the idea that these are just quaint ornaments.
- Hear, hear! The rituals that shroud the discharge of the magistrate's duties clearly suggest that her role remained momentous and tragic despite the rise of the ideal of legal certainty. Even Montesquieu's famous depiction of the judge as the law's mouthpiece came down to us as a *trompe l'œil*.
- That sounds outrageous!
- The popular notion according to which Montesquieu espoused the idea of the judge as *organe machinale de la loi* is almost certainly the upshot of a post-revolutionary overwriting. What absolutists attributed to the King ...
- *Rex esset lex loquens*, the King is a speaking law.
- Exactly. The *lex loquens* quality Montesquieu bestowed upon the judge, but since he was a subject of Louis XV, he did it with caution and in a way that has misled almost everybody ever since.
- One may indeed wonder why these inscrutable *bouches de la loi*, these *êtres inanimés*, as they're also called, should be there at all, silent and imposing, if they were meant to be just cogs whizzing in the belly of a bureaucratic apparatus. The way Montesquieu puts them on stage makes them appear rather like oracles.
- Oh! With the proverbial *machine à syllogismes* turning oracular we've really come full circle!
- Indeed. But all this might be fading away, you know.
- Is it?

- I should perhaps say overlaid by a new geological stratum coming to the surface through processes that are only weakly linked to the juridical. While liberal modernity in some fundamental respects continues the philosophical tradition that experiences justice as inseparable from legal *uncertainty*, neoliberalism neatly breaks with it. ‘If the law cannot bring about certainty’, a neoliberal motto could go, ‘let’s keep uncertainty and do away with the law’.
- Back to premodern times, when all around us looks so hypermodern?
- The law isn’t perhaps modern enough, while uncertainty is. Uncertainty is intoxicating! The subjects neoliberal normativity seeks to forge revel in uncertainty, take it as an opportunity, build up resilience to face misfortune, enlist risk-calculating algorithms to navigate it ... compare that uncertainty with the one the judge must face: it requires of her gravity and atonement. When the judge buttons up the black robe, it consigns her to the torments of the incalculable.
- But neoliberal subjects too have to cope with their limited rationality, don’t they?
- Of course they have to, but the judge would be of no help here. Justices are too enigmatic and distant to contribute significantly to the government of conducts. For that you’d rather rely on the informal and inconspicuous authority of casually dressed experts, people who know how to *nudge* individuals and institutions, including states, onto the right path. Nudgers are scientists, well versed in the latest discoveries of behaviourism. They possess true knowledge!
- I guess it’d be preposterous to hold them up to the highest moral standards, as the law does with the judges to compensate for – I was tempted to say ‘exorcise’ – its own uncertainty.
- Certainly. And all this throws up a completely different kind of normativity, which in different manners and degrees is colonizing international law and institutions. Think of the massive cluster of legal antimatter that the Sustainable Development Goals are, and the Millennium Development Goals were ...
- Legal antimatter?
- Yes. In the 1970s you got obligations *erga omnes*, common heritages of mankind and the Charter of Economic Rights and Duties of States. The MDGs engulfed that landscape in their waves of goals, strategies, targets and indicators, all of which overflowed from a formal act, formally enacted by an international organization. The Sendai Framework for Disaster Risk Reduction, to take another example, is called ‘an agreement’ in some quarters, it also features numbered articles, but it does not read like a treaty. Obligations are replaced by ‘global targets’, ‘priorities for action’ and ‘expected outcomes’.
- Some call it soft law.
- No, it’s not that, I don’t know how soft it is, but certainly it’s not law. It’s not that it’s not binding. These documents lack law’s semantic structure. They bring with them the flavour of motivational literature.

- Anne-Marie Slaughter would agree. Did you hear what she said apropos the Paris Agreement on Climate Change?
- I should ...
- There you go: 'It's not law', and that contributes to making of it 'a model for effective governance in the twenty-first century'.
- You may loathe the Paris Agreement, but she's absolutely right!
- Right about what?
- About the fact that it's not law. But even where the law is unmistakably there, neoliberal normativity works to hollow it out, as in the case of investment law and arbitration. In that elusive form of governance, what appears as liberal striving towards legal certainty, through continuous doctrinal refinements, is overshadowed by confusingly flexible standards and procedures – think of parallel proceedings! – which create and maintain a risky environment around capital-importing states. States' behaviour is not regulated in the traditional sense of the term. States are disciplined through hardship, in their own interest, you know, so that they benefit from growing capital inflows or avert capital flight. What this kind of law actually does is more about the production of uncertainty than about dispelling it.
- Do you believe that international law, more than other regions of the law-sphere, is exposed to that kind of overlaying? Is it less capable of offering resistance to neoliberal normativity?
- It's hard to tell. It seems as if all this emanates from what we're still bound to call 'international law', and then percolates down through domestic legal systems. The SDGs, and the MDGs before them, came to us under an international law trademark but domestic politics and administration, as well as 'civil society', are discreetly assimilating their logic. One could also surmise that resistance to neoliberal normativity's expansionist drive is weaker where political and economic stakes are higher, as in the field of investment law. But let's come back to this as we polish our draft paper, shall we?
- By all means, my friend, if that is your wish.

Bibliographical Note

'Law creates uncertainty against the backdrop of an uncertain world' is inspired by N. Luhmann, *Law as a Social System* (2004), at 292.

The knowing-that/known-how distinction was famously discussed by Ryle, 'Knowing How and Knowing That', 46 *Proceedings of the Aristotelian Society* (1945–46) 1.

A. Bianchi, 'On Certainty', *EJIL:Talk!*, 5 February 2012, available at <https://www.ejiltalk.org/on-certainty/>, nicely illustrates 'playing with certainty'.

The footnote we refer to: M. Koskeniemi, *From Apology to Utopia: The Structure of International Legal Argument. Reissue with a New Epilogue* (2005), at 10, note 8.

Koskeniemi, 'Constitutionalism as Mindset: Reflections on Kantian Themes about International Law and Globalization', 8 *Theoretical Inquires in Law* (2007) 9, at 16,

note 24 ('For those who have not yet had their determinacy crisis, a good place to prepare for it might be ...') and Beckett, 'Faith and Resignation: a Journey Through International Law' in M. Stone, I. rua Wall and C. Douzinas (eds), *New Critical Legal Thinking: Law and the Political* (2012) 145 ('initiation into the critical legal project can be (and was for me) a slow and painful process') suggested the idea of adhesion to the indeterminacy thesis as ascetic practice.

Mark Tushnet's characterization of the thesis as a sort of provocation ('an attack [...] on popular culture') is reported in Kress, 'Legal Indeterminacy', 77 *California Law Review* (1989) 283, at 284 (note 6).

On the normative nature of Moorean concepts see A. Hamilton, *Wittgenstein and On Certainty* (2014), at 6.

The ethical case for legal uncertainty is made in Derrida, 'Force de loi: le fondement mystique de l'autorité', 11 *Cardozo Law Review* (1990) 920, at 963.

'It happens, like a spectre, in that which does not happen' is picked up from J. Derrida, *Specters of Marx: The State of the Debt, the Work of Mourning and the New International* (1994), at 34.

On judicial symbols and rituals we relied on A. Garapon, *Bien juger* (2001).

D. Luban, *Legal Modernism* (1994), at 373, discusses rule of law tipping over into Orwellian nightmare.

We borrowed the reading of Montesquieu's *bouche-de-la-loi* formula from Schönfeld, 'Rex, Lex et Judex: Montesquieu and *la bouche de la loi* revisited', 4 *European Constitutional Law Review* (2008) 274.

On neoliberalism and non-judicial normativity: M. Foucault, *Naissance de la Biopolitique: Cours au Collège de France, 1978–1979* (2004); M. De Carolis, *Il rovescio della libertà: tramonto del neoliberalismo e disagio della civiltà* (2017).

The geological metaphor is taken from Weiler, 'The Geology of International Law: Governance, Democracy and Legitimacy', 64 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (2005) 547.

On behavioural economics and nudge: R.H. Thaler and C.R. Sunstein, *Nudge: Improving Decisions about Wealth, Health and Happiness* (2012); M. Bozzo-Rey and A. Brunon-Ernst (eds), *Nudges et normativités: genealogies, concepts et applications* (2018).

The quote on the Paris Agreement on Climate Change is taken from Slaughter, 'The Paris Approach to Global Governance', *Project Syndicate*, 28 December 2015, available at <http://www.project-syndicate.org/commentary/paris-agreement-model-for-global-governance-by-anne-marie-slaughter-2015-12>.

Schneiderman, 'The Paranoid Style of Investment Lawyers and Arbitrators: Investment Law Norm Entrepreneurs and Their Critics', in C.L. Lim (ed.), *Alternative Visions of the International Law on Foreign Investment: Essays in Honour of Muthucumaraswamy Sornarajah* (2016) 131–155, at 136, explains how investment law may produce uncertainty. 'What this kind of law actually does is more about the production of uncertainty than about dispelling it' is a reworking of a sentence we read in the draft paper authored by our co-panellist Andrew Lang.

The dialogue's closing lines echo those of Plato's *Protagoras*.