Articles

Law and Uncertainty: A Comment on Karl-Heinz Ladeur

By Gerald E. Frug[*]

In his insightful article, *From Universalistic Law to the Law of Uncertainty*, Karl-Heinz Ladeur addresses a hotly debated issue within the American critical legal studies movement. What would be the effect on our understanding of the nature of law, he asks, if we really accepted the post-modernist claim that neither social reality nor our conception of the self has a fixed or determinate meaning? In the United States, the issue Professor Ladeur discusses is usually presented as an argument about the role of post-structuralism or deconstruction in a critical legal analysis. Do these ways of interpreting law, it is asked, go too far in asserting the openness of the legal system and thereby erode the political impact of critical legal theory?

Of course, most of those associated with the critical legal studies movement – indeed, many traditional American law professors – accept the premises of post-modernism to some extent. Indeed, American legal scholars often claim that while legal thinkers in the United States once thought that law had a clear and ascertainable meaning that could be established through the exercise of reason or through the acceptance of universally accepted norms, the American legal realists of the 1920's and 1930's demonstrated once and for all that a unitary basis for legal decisionmaking was a pipe-dream. As a result, according to this conventional and oft-repeated history, lawyers in the United States since the 1930's have accepted the existence of uncertainty and conflict over both the meaning of legal rules and the meaning of governing norms. Admittedly, some conventional legal theorists have sought to down-play the extent of this uncertainty, and critical legal scholars have had to reassert the legal realist message of indeterminacy against these attempts to re-establish constraints on legal outcomes. But, so the conventional story goes, all critical legal theorists – and a large number of traditional legal theorists as well – now accept the premise that legal decisionmaking cannot be based on universalistic principles but can only be understood against a background of social and philosophical uncertainty.

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Professor Ladeur's article is devoted to analysis of the ways in which this kind of general acceptance of the notion of openness and ambiguity in the legal system differs from a post-modernist theory of law. He bases his analysis on an examination of the modern history of German legal thought, a history that appears to parallel the conventional history of American legal thought that I have just sketched. He begins, as I began, with what Americans tend to call "legal formalism" (he calls it "universalistic law"), a conception of law that guarantees regularity and calculability in legal decision-making by grounding legal results on a process of deduction from legal rules. Universalistic law, Professor Ladeur argues, structures the legal system in a manner similar to Kant's attempt to found morality on a universalistic system of formality. Both of these efforts seek to separate the enunciation of norms from the day-to-day activity of social life, and both embrace a theory of interpretation that renders rule application unproblematic. More importantly, both ensure control of the world by human reason in the same way: by incorporating into their definition of human beings a universal conception of the subject – a universal conception of the "man within". The deductive process of rule application is thought to be predictable and certain, then, because human reason is thought to be universal. In fact, Professor Ladeur argues, this universalistic conception of the subject is not simply the premise of these theories; it is, in a circular fashion, also their desired goal.

According to Professor Ladeur, the "laboratory of Weimar" in Germany, like the legal realists in America, criticized deduction as a form of legal reasoning and replaced universalistic law's reliance on the deductive method with a reliance on State decisionmaking about how much (and when) to intervene into political and economic activity. But while the Weimar legal theorists abandoned the universalistic conception of law, they, like the legal realists, nevertheless continued to embrace a theory of the subject similar to the one advanced by universalistic legal theory. Indeed, Professor Ladeur argues, even the left-wing critique of law has traditionally been based on a universalistic conception of the subject. Left-wing critics have sought to defend individual freedom by safeguarding "the satisfaction of substantial life-interests" from organized power, but their notion of individual freedom has remained as dependent on a unitary notion of the self as was the process of deductive reason. The Marxist concept of a free association of equal individuals is but one example of this left-wing version of a universalistic subject, one that envisions self-fulfillment in terms of overcoming the tension between the demands of reason and the realities of social life. Another example, Professor Ladeur says, can be found in the work of an important present-day German critic of law, U. K. Preuß. Preuß seeks to protect the needs of the life-world from domination by organized interests in a number of different ways (by balancing the roles of groups and organizations, by a critique of legal ideology, by protecting civil disobedience), but in defending all of them he appeals to a universalistic conception of individual identity or individual conscience. In Preuß' work as in Marx's, Professor Ladeur suggests, "the ambition to ground the domination of a subject of history over the world of objects lives on".

In the concluding sections of his article, Professor Ladeur argues that left-wing legal theorists should accept the post-modernist critique of the universalistic subject as well as the Weimar (and legal realist) critique of universalistic law. Only in this way, he says, can law become properly attuned to the existence of uncertainty. Law cannot "be regulated from a center" because, like language, it is self-reflective; legal decisions transform the context in which they are made. If this were adequately recognized,

> "the subject would no longer stand opposed to the world of objects, but the recognition of his self-referential character, of his ability to form models of himself whose reading must constantly refer back again to his own results, would be the constitution of a circular-closed model of models, whose evolution would be kept in permanent motion through the paradoxical inter-twining of normative model and of de facto 'application'".

Acceptance of such a de-centered conception of the subject would make clear that both self-realization and the balancing of individual and State interests are utopian legal goals. The "self' to be realized or the "individual" interest to be balanced is uncertain because "subjectivity … constantly constitute[s] and de-constitute[s] itself anew". A properly "a-centric" legal system – a legal system truly oriented toward uncertainty – must, Professor Ladeur argues, replace the effort to define and protect a universal subject with an effort to transcend its own certainties; it must develop an ability to deal with conflict and to be open to alternatives. This kind of flexibility, he says, does "not ... give rise to a structureless openness to everything". The "historical conditions of possibility" remain points of departure. But moving from universalistic law to the law of uncertainty allows us to focus our efforts on creating alternative forms of self-organization. "The main point" of an a-centric conception of law, Professor Ladeur concludes, lies in its effort "to re-join to the historical dynamic of the de- and re-structuring of multiple fields of meaning"; an a-centric legal theory enables us to challenge the reinforcement of dominant values through the constant interplay of "interrupters". An a-centric legal system, in short, allows us to rethink dominant values by questioning the universalistic conception of the self on which they are based.

When they read a critique of the subject such as that advanced by Professor Ladeur, many of those who are part of the American critical legal studies movement tend to respond skeptically. Why, they ask, should we adopt the kind of legal theory being called for? Why should people on the left accept a legal theory that embraces a de-centered conception of the self? Traditionally, three different answers have been given to these skeptical questions, but none of them is very satisfactory. Some people respond by saying that the world actually is as uncertain as Professor Ladeur says it is; we should accept a legal theory that embraces the notion of the de-centered self because it is true. The difficulty with this response is that its appeal to the notion of "truth" invokes the very kind of universalistic concept that Professor Ladeur's defense of uncertainty rejects. One cannot embrace the law of uncertainty on the grounds that uncertainty certainly exists; if social life or even the

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concept of the self cannot be grounded on something solid like truth, neither can the law of uncertainty. Theorists like Professor Ladeur would be the first to recognize this point; they emphasize above all the self-referential character of the arguments they make.

A second answer to skeptics is often framed in the language of strategy. Given the hegemonic power of the status quo, some people say, the left ought to concentrate on destabilizing the felt necessity not only of current versions of social life but also of current versions of the self. Embracing the critique of the self is, in other words, the proper strategic course to follow in late capitalist society. This response, however, also adopts a stance that is inconsistent with an acceptance of uncertainty. Instrumental analyses assume that the effects of a particular course of action can be known; they are based on a stabilized conception of the world rather than on a law of uncertainty. Recognition of the self-reflective nature of any activity tends to undermine confidence in the ability to make such predictions. One who embraces the law of uncertainty is likely to recognize the paradoxical, ironic nature of action: the actions people take regularly undermine the very goals they are designed to achieve. Critics' defense of a de-centered self thus could reinforce the hegemonic power of the status quo rather than delegitimate it.

A third response to skeptics is framed in terms of the importance of incorporating into legal theory the advances made elsewhere in modern social theory. Legal theory, it is said, is at a cross-roads: we legal theorists have to decide whether we should accept the notion of the de-centered self that has been widely articulated in other disciplines or whether we should continue to rely on the old-fashioned universalistic subject that has characterized legal theory for generations. Whether we like it or not, it is suggested, we have to accept one theory of the self or the other. The difficulty with this response, however, is that the world cannot be understood in terms of a choice between competing positions of this kind, with some people defending a continued reliance on a conception of a universal subject (a "pro-subject" party) and others proposing instead to "problematize" the notion of the self (a "de-centered subject" party). Neither position standing alone is tenable, as Professor Ladeur's article itself illustrates. Professor Ladeur wrote his article in order to further the acceptance within legal circles of a de-centered conception of the self. But his article is itself written in a tone of self-assertion – its persuasive power depends in large part on a notion of self that his argument attempts to denounce. This simultaneous affirmation and denial of the self is not simply an error in Professor Ladeur's text, one that he might be able to correct. On the contrary, it exemplifies the post-modernist sense of self. The de-centering of the self, like the death of the author, can only be proclaimed by authors who assert themselves into the discourse. Conversely, as Professor Ladeur so effectively argues, attempts to insist on a fully present, fully-centered self are historically contingent and socially created. Indeed, the invention over time of more and more articulations of a universal self has undermined the effort to find one; as possible universal selves multiply, the argument for a universal self deconstructs.

Professor Ladeur's article thus cannot be defended on the grounds that it simply presents the truth, that it provides left legal theory with its strategically best course of action, or that it takes a stand, as one must, on the critical choice about the nature of the subject in legal theory. Instead, his article should be understood as a demonstration of the position for which he is arguing. Professor Ladeur illustrates, with intelligence and insight, post-modernist legal theory. His article contributes to his goal of multiplying the crowd of characters that populate modern legal theory by adding to the voices of the economists, the social scientists, the Habermasians, and the Luhmannians, a post-modernist voice. To be sure, not everyone will be attracted by his way of presenting the post-modernist position; others will prefer alternative formulations, even some contained in this volume (by, say, Gunter Frankenberg or David Kennedy). Professor Ladeur's contribution is, after all, in the language of high theory. But in his own way he has attempted to do himself what he insists legal theory ought to do: he "has made visible the narrative plurality which is reflected (even though with limited effect) in the hermeneutically-inspired present methodology"; he has adopted a "method of operating with uncertainty which is geared to self-transformation and reflexivity"; he has adopted "a paradoxical model" that "does not itself elevate is own relativism to a meta-discourse"; he has recognized his own "self-referential character, ... his ability to form models of himself whose reading must constantly refer back again to his own results, . . (and has constituted) a circular-closed model of models, whose evolution would be kept in permanent motion through the paradoxical inter-twining of normative model and of de facto 'application'".

Seeing Professor Ladeur's article in this way – seeing it as a performance of his own ideas – is not likely to satisfy the skeptic who wants to know why we should adopt such a post-modernist theory of law. A performance tends to generate a variety of reactions; performances do not answer the question of their own value. But Professor Ladeur cannot answer the skeptic's question in its own terms ("why post-modernism"?) because the question remains grounded in the search for a kind of certainty that Professor Ladeur denies exists; the skeptic seeks a basis for deciding which form of left legal theory is best. "Critical legal scholars in Germany", Professor Ladeur wrote me recently, "have always looked for an alternative way of recreating the identity of the rational project of the classical law, that bourgeois society seemed to have left behind, on a higher level of a rational global project of society". American legal scholars tend to look for the same thing. Professor Ladeur's article constitutes a rejection of such a project.

This rejection, however, does not require abandoning the attempt to think critically about our future society or our future selves. It suggests instead that we ought to accept the existence of uncertainty and, as a result, accept the fact that the process of deciding the future of legal theory is paradoxical and self-reflective. The future of legal theory will be decided (as has the past of legal theory) by a historical process in which a variety of alternatives are articulated but only some attract the interest of others. Post-modernism's future will depend not on its having a definitive reason why it is the best of all possible legal theories but on its advocates' ability to do legal work that nurtures a sense of self –

and the kind of society – that others not only recognize but seek to foster. This is what it means to say that post-modernist legal work, like other legal work, is self-reflective: it describes a conception of the self and simultaneously seeks to create it. Professor Ladeur's article (like all legal theory) is best understood, then, as an attempt to form attitudes and induce action in its readers; the value of his article – and, if it has any, the value of this Comment as well – lies in its ability to present legal post-modernism in a way that induces other critical legal scholars to pursue its insights. As I have argued elsewhere, "making and responding to legal, moral, and political arguments are ways in which we decide what kind of subject, what kind of society of subjects, we should foster. This continual effort to interpret and reinterpret ourselves and our society is the experience of creativity and growth; this is the way we create the kind of world we want to live in, the kind of world that will shape who we are".[1]

[1] J. Frug, *Argument as Character*, 40 STAN. L. REV. 869, 878-9 (1988)

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