Roberto Mangabeira Unger, *Law in Modern Society*

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This is an important book in two respects: it is an admonition from the community of legal scholars to the community of those social theorists not identified with legal tradition (as suggested by Unger's subtitle "Toward a Criticism of Social Theory"); and it exhibits certain problems of the articulation of their two fields. For both reasons it should be particularly salient to the readers of this journal. My review might therefore carry some such subtitle as "toward a criticism of legal-historical scholarship." The book is important because it contains one of the sharpest and clearest statements of the problem of what the author calls the place of a legal system in a total and complex society. Yet I must conclude that Unger's view of the articulation of legal scholarship with social theory is unacceptable. I use this word deliberately, in order to pose the issue sharply. This is not a "bad" book in the ordinary sense of being intellectually sloppy or anything like that. The features that make it unacceptable to me are clear precisely by virtue of its high intellectual standards.

I am very much in agreement with Unger's use of and stress upon the concept of a legal system. He is also quite correct to emphasize the rarity and precariousness of a fully articulated legal system. Indeed, one of his more impressive characteristics is sensitivity to comparative problems and attention to the status of law in societies that are not modern, or not western. Although I am not a historian of law, I think Unger is right that the most fully developed legal systems reached maturity in what he calls the "liberal" society of early modern Western Europe, broadly understood as the seventeenth century. At the same time, I am inclined

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This is my second appraisal of Dr. Unger's views. The first, written only a short time ago, was part of an article for a special issue of *Sociological Inquiry*, devoted to the sociology of law, which will appear early in 1978. For that article I chose the theme "Law as an Intellectual Stepchild," and illustrated it with four important contemporary intellectual trends that tend to distort the role of law in society as I have come to see it. I used Unger's book to discuss what I labelled "legal absolutism," which I felt tended to isolate law from its social context in a special analytical sense.

I wrote the article for *Sociological Inquiry* first, because the deadline was earlier, but my use of Unger in that article was influenced by my prior commitment to write this review. The two statements clearly overlap, but I hope that the present can be considered somewhat more mature.

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to think that he underplays the achievement of ancient Rome which, if it fell short of a developed legal system, nevertheless constitutes, both in law and social structure, one of the few essential components of the background of modern western society.

Unger also seems to be on solid ground when he asserts that the two primary conditions for the emergence of a legal system are a pluralism of group structures and interests, and an institutionalized conception of natural law as a normative order that transcends conflicting group interests. The second of these conditions is satisfied by a substantially continuous tradition with roots in the ancient world, including the influence of the Stoic conception of natural law upon Roman law. In early modern Western Europe Unger's other prerequisite, group pluralism, consisted of the interplay among the interests of the monarchy (including the governmental apparatus which was then developing along bureaucratic lines), the aristocracy, and the "bourgeois" groups (in their original sense of corporate communities of urban citizens). Naturally, there was not yet either an organized "working class" or a socialist movement.

To all this and a good deal more it seems to me that Unger has made important contributions clarifying many historical and comparative issues. But I have two difficulties with his technical conceptualization of the relationship between the legal system and the structure and processes of the society in which it develops. First, he distinguishes "bureaucratic" law—prescriptions, prohibitions, and permissions imposed by the rulers on the ruled—from the legal system that may succeed it by means of four essential criteria: law must be positive, public, general, and autonomous. I understand positive law as an explicit (and in this sense "formal") written statement of a rule or other norm which does not rely on oral tradition. This distinction from usage or custom, both of which often have normative elements, seems to me correct and essential. The criterion of generality, which I term universality, seems equally essential. To have legal status a prescription, prohibition, or permission must be more than an ad hoc, particular right or obligation, for instance, that "John Doe," a named homeowner, may object to and prevent unspecified "intruders" from entering his premises at their discretion and making free with the contents. If "John Doe" has "legal" rights against this kind of arbitrary intervention by outsiders in his sphere, the rule that gives him those rights must apply not only to him but also to a generally defined class of proprietors or lessees vis-à-vis classes of actual or potential "intruders."

The criterion of autonomy is somewhat subtler, but equally essential. Among the variety of ways in which a legal system may

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be interdependent with other aspects of the society and culture of which it is a part, three are immediately obvious. First, because a differentiated legal system has "regulatory" functions in relation to other group and individual interests, it must be able to cope with "pressures" exerted by those interests. Autonomy in this context has to mean that "legal authorities," however defined, cannot be totally dependent "creatures" of the interests they are expected to regulate. Second, the legal system must be "secular"—authentically part of the social system and not fused with something distinct from it, such as a religious system. In a number of historically important cases this has not been so, such as Hindu, Jewish, or Muslim law.

The third social system with which the legal system is interdependent is the state. The problem of autonomy, in this context, is related to Unger's fourth criterion for a legal system, that it be "public," by which he means that it must be part of the "state" (or of government, in the more common American usage). It is here that I differ most significantly from Unger, and I believe that this difference is salient because his position, though common, diverges conspicuously from that of Max Weber, who explicitly defined law as a set of rules governing action in *any* collective system, whether public or private, provided that it met certain other criteria, most notably the existence of a staff specialized in the implementation of the set of rules.[1]

Applying this criterion, Unger concludes that government and the legal system have not become structurally differentiated from each other. This was more nearly the case in the seventeenth century than it came to be thereafter, especially in the United States following the adoption of the Constitution and the period of strong leadership by the Supreme Court under Chief Justice Marshall. Connections between law and government naturally remain. Even in the United States what Unger calls the "public" sector of the larger legal system is one of the three "branches" of government under the doctrine of the separation of powers. Furthermore, the judicial system remains dependent upon the executive for the enforcement function which Weber stressed so strongly, and its personnel at the Federal level are entirely appointed, not elected.

1. Unger's use of Max Weber's work, given his obvious familiarity with it, seems to me somewhat curious. In his discussion of method, which is clearly very important to him, he has a number of references to Weber's discussion and use of ideal types. But among the "classical" social theorists, Weber was unusual in his concern with law: he had originally been trained as a lawyer and wrote a major monograph on the sociology of law. Despite this, Unger's book does not contain a *single* reference to Weber's writings on law, although it refers to other parts of his work seven times. I simply fail to understand this striking selectivity.

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The differentiation of the legal system from government also permits considerable continuity between the public and private sectors of the legal system. Weber revealed an important aspect of this continuity when he analyzed bureaucracy as a model of social organization that had been developed in government but later extended to the private sphere, principally the corporate business firm. Weber also offered important insights into the nature of the legal order in urban communities, where it constituted an intermediate form between the private law of business corporations and "the law of the state" in the full sense.

Later in the book Unger offers a different classification, this time of the functionally significant components of a legal system. Among the three elements—formal, procedural, and substantive—he emphasizes the formal to an extreme degree: "There is an issue that overpowers and encompasses all others in the history of the modern Western rule of law. It is the problem of formality in law. To understand this problem is to perceive *at a single glance* the relationship among the different attributes of the legal order . . ." (p. 203; emphasis added). Unger defines formalistic legal reasoning as a situation in which "the mere invocation of rules and the deduction of conclusions from them is believed sufficient for every authorititative legal choice" (p. 194). Formalism is so important to Unger that it wholly subordinates the other two components. Substantive considerations are significant primarily because they threaten to encroach upon formalism.[2] The modern welfare state is a primary source of the erosion of formalism, and thereby of the rule of law more generally. The third component, the procedural, is apparently simply "caught in the middle" of the conflict between formal and substantive, and as a result almost disappears from view.

What emerges seems to me to be a distorted perception of modern legal systems, especially those belonging to Anglo-American common law. Perhaps the main reason I am critical of Unger is that I do not share his—perhaps fashionable—pessimism about the drastic erosion of the rule of law, which is one of his principal themes.

Let me attempt to state an alternative view. Unger makes a considerable number of references to the institution of *adjudication* but does not include it in his categorical list, nor even among the entries in his index. He seems to take it for granted as one of

2. This tension, again, was strongly highlighted by Max Weber, especially in his distinction between "formal" and "substantive" rationality in law, which occupies a central role in his theory. This makes it all the more strange that Unger does not cite Weber in this regard.

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the legal "facts of life." But to me adjudication is a primary indication of the developing autonomy of the legal system. To use an American example, the adjudication of cases is very different from executive decision-making and the process of legislation. Both courts of law, and in a different way legislative bodies, have become involved in problems of proper procedure; this has been less true of executive agencies. Thus one of the main legal objections to monarchs was that they promulgated "arbitrary" decisions which were not arrived at by proper procedures.

A principal source of the significance of courts of law is that they are a quasi-governmental system with a special relationship to the private sector of society. A very large proportion of court cases involve private units, individual or corporate, often on *both* sides of an adversary proceeding. Furthermore, although Unger does not stress this point, a legal profession arose in the West, out of the Roman jurisconsults, with a strong anchorage *outside* the structure of government. To be sure, an attorney is formally an "officer of the court." But though governmental agencies "admit him to the bar," he is neither appointed nor paid by government, nor are his relations with private clients supervised by government. Furthermore, lawyers are trained in university law schools which are surely not in any simple sense "organs of the state." The legal profession in modern societies is not part of "the state," but it *is* part of "the legal system."

These are some of the grounds on which I, who am not a legal expert, venture to agree with Weber (one legal expert) against Unger (another) that law as a social phenomenon should not be restricted to its interpenetration with "the state." But our differences go further than this, for I disagree with his characterization of the legal system as *part of the structure of modern societies.* After all, what Unger calls a "legal system" is at the same time a social system, in the technical sociological sense. The contribution of legal scholars is essential to an adequate understanding of such social phenomena. But one might nevertheless adapt an old saying and assert that law is too important to be left to lawyers, which is not to say that they should not have their "day in court." It seems to me that Unger signally fails to live up the implications of his subtitle, "Toward a Criticism of Social Theory." His is both an important and a good book, but it does not give the reader a competent and comprehensive appraisal of the issues which contemporary legal and "social" theory need to confront in their mutual pursuit of an understanding of legal systems.

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