Over de rechtstheorie van de Farizeeën

Een interview met Roberto Mangabeira Unger

Pauline Westerman*

Roberto Mangabeira Unger was de jongste professor ooit die tenure verwierf aan de Harvard Law School. Hij was toen 29 en het jaar was 1976, hetzelfde jaar waarin Duncan Kennedy zijn manifest schreef ter oprichting van de Critical Legal Studies. Unger behoorde tot die groep en we kunnen zonder overdrijving zeggen dat hij nog steeds gezien kan worden als het meest bevlogene en revolutionaire lid. Braziliaan van geboorte, en opgegroeid in een links milieu (zijn grootvader was minister van Buitenlandse zaken, zijn oom was de oprichter van de Braziliaanse socialistische partij en zijn moeder was oprichtster van een links vrouwentijdschrift) pendelt hij tussen het bestaan van een Harvard law professor en dat van een Braziliaans politicus. In die laatste hoedanigheid stelde hij zich – vergeefs – kandidaat bij de presidentsverkiezingen in oktober 2006. In de eerste hoedanigheid kreeg hij 1 februari jongstleden een eredoctoraat van de Katholieke Universiteit Brussel. Over zijn kandidatuur zegt Unger: 'The problem is that most Brazilian men are very charming, and that I am not charming at all.' Dat kan het deftige publiek dat zich ter gelegenheid van de *dies natalis* van de KU Brussel heeft verzameld, bevestigen. 'Europe is asleep!', zo begint Unger, martiaal rondkijkend, zijn speech waarin hij zijn gehoor oproept tot institutionele hervormingen. Even lijkt hier vooral de Braziliaanse redenaar en niet de Amerikaanse academicus aan het woord te zijn.

Wie Ungers website bezoekt, kan zich alleen verbazen over de enorme reikwijdte van zijn belangstelling. Unger publiceerde over China, Mexico en Europa, over architectuur, psychiatrie, over cosmologie en over passie. Maar moeiteloos worden al deze terreinen met elkaar verbonden door één thema: de noodzaak om ons voor te stellen dat het ook ánders had gekund. Dat het pad dat samenlevingen hebben gekozen niet het enige en overmijdelijke pad is maar één uit vele mogelijke. Dat we ons voortdurend bewust moeten

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blijven van alle alternatieven die we niet hebben gerealiseerd maar die wel als reële opties mogelijk blijven. Dat geldt in het persoonlijke leven waarin we moeten proberen zo veel mogelijk aspecten van onze persoonlijkheid te ontplooien, het geldt voor de politiek waarbij we voortdurend onze verbeeldingskracht moeten blijven gebruiken om met nieuwe institutionele vormen te blijven experimenteren en het geldt ook voor de rechtstheorie. Ook het recht had anders kunnen zijn en kan ook anders zijn. Unger betoogde dat al in zijn boek *What should Legal Analysis become,*[1] dat alweer tien jaar geleden verscheen en het vormt opnieuw zijn uitgangspunt bij het nieuwe boek over rechtstheorie dat nu op stapel staat.
Ik spreek Unger na de plechtigheid. Hij lijkt weer teruggekeerd te zijn tot de hoedanigheid van Amerikaanse academicus en vertelt met enthousiasme over de nieuwe collegereeks die hij startte. Hij geeft zijn colleges bij voorkeur over een onderwerp waar hij weinig van weet en samen met iemand anders. Bijvoorbeeld een reeks over 'Human Nature', samen met Steven Pinker. Hij zegt ook zich nooit verwaardigd te hebben tot het aanvragen van een onderzoekssubsidie. Hem was dat ooit wel gevraagd, maar hij had de decaan direct duidelijk gemaakt dat hij daar nooit aan zou beginnen. Als ik hem vertel voor welk publiek het interview is bedoeld, steekt hij meteen van wal over de impasse waarin de rechtstheorie volgens hem nu al decennialang verkeert:

Unger: 'The dominant type of legal analysis still is what I would call "rationalising" or "idealising" legal analysis. Here, law is seen as a purposive social enterprise. By means of rational reconstruction pieces of law are reconstructed as fragments of an intelligible plan of social life. Law is treated here as an expression, although as a flawed expression, of connected sets of policies and principles. It assumes that there is a rhyme of reason underneath, that we can articulate as policies and principles. It assumes that policies and principles are already there in the law, waiting to be made explicit.
In my new book I want to project myself into the mindset of these legal theorists and to start with their preconceptions instead of working out my own system. Because that is my weak point, I always have too much of a system. I have spent a large part of my life writing on all these theories, and systems and speculations. Well, now my attitude is: to hell with these systems. Life is more interesting. So that is what I want. It is better to start from the situation itself and to discover the paradoxes of history than to work from first principles. What strikes me then in that mindset is the sense of being lost,

1 Een goed overzichtsartikel van de inhoud van dit boek is: 'Legal Analysis as Institutional Imagination', in: *The Modern Law Review*, Vol. 59, nr. 1, januari 1996, p. 1-23.

the sense of forming a legal discourse one does not believe in or only half believes in. I have this shocking experience with legal theorists. For some of them really believe in what they say, and they are regarded as more or less ridiculous by the other people. And others don't really believe in what they say, but they are disingenuous.'

PW: What do you mean by that?

Unger: 'Well, you can see it in the form of the typical law review article. Such an article has always the same structure. It always starts by supposing that there is some underlying principle or purpose, then it is acknowledged that some part of the material does not fit in that underlying principle or policy, and then recommendations follow for us to work it pure. It is only natural that they proceed like this. For if they would contend that all fits, there might be reason for suspicion. But if too little fits, you make yourself vulnerable to the suspicion that you are an ideologue instead of a legal scholar. So that is why legal scholars only half believe it. If you criticise them, they profess that they never believed it themselves. It is a form of self-defence by ironic distancing which is inimical to life.'

PW: But isn't it characteristic for any legal form of interpretation to try to interpret the legal system as if it is a coherent whole?

Unger: 'No, that is a mistake. This is a very peculiar thing. It is not a universal characteristic of legal reasoning. It is very distinctive. It is distinct from German pandectism and the legal theory of the 19th century. It is radically different from Roman republican jurisprudence. So the first manoeuvre is to understand its peculiarity and to resist the temptation to identify it with the universal nature of legal reasoning.'

PW: OK, maybe this didn't always take the form of a quest for principles, but some form of consistency was always required.

Unger: 'No. Take the role of analogy. Nowadays, analogy is regarded as a first step towards rational reconstruction. But it should not be seen as a road to the formation of an axiomatic pyramid. It is not as if analogy is crawling in relation to walking. Walking would be thinking in systems, and analogy would be the crawling stage. But analogy is not the infant stage of something else. The best Roman jurists looked down on the speculators and generalizers as inferior! They regarded that as the sacrifice of the distinctive prudential character of jurisprudence to speculative superficiality on the one hand, and to bureaucratic despotism on the other hand.'

PW: Is your position then to be compared to a defense of casuistry, just like Toulmin did?

Unger: 'I am not defending casuistry against generalisation. My only point is that this style of rationalising legal analysis is unique. It is distinct from 19th century deductivism and it is in the service of this kind of social democratic restoration of the mid-twentieth century. In fact, we have to understand that it exacts a very large price. It tells us in effect: we are not going to change the organisation of things so let's make the best of it! Let's put the best face on it, telling these beneficent lies, these noble lies in the hope that this would benefit the people who are most vulnerable.'

PW: But in your book 'What should legal analysis become' you also point out that there is another account of law.

Unger: 'Yes, this rationalising account of the origin of law is the sacred one. But there is another origin as well, a profane one. Here, law is not seen retrospectively as an ordered and purposive whole, but it is seen prospectively as a struggle between conflicting ideologies. Legislation is the expression of this struggle. Law is then a truce; an armistice. Well, of course, the problem is then: how is it possible that this outcome of the struggle will obey a rational scheme? How can these ad hoc compromises in an ongoing war converge with the intelligible plan in the form of guiding principles and policies?
One answer to that is to say that the lawyers should tell the democratic representatives what they really should want [in the light of these reconstructed purposes and principles, p.w.]. That is why this form of legal analysis is almost irresistible to the jurist, it gives them important work to do. They should make these two conflicting genealogies of law converge. And this is a form of usurpation of lawmaking power by legal mandarins. The collective interest is distorted by what Weber called the status group of the jurists. They have a special interest in this kind of legal analysis. This kind of legal analysis gives them the greatest authority.'

PW: What, exactly, is wrong with that? Every profession has such an ideology.

Unger: 'It is not right! It is perverting. I think the reason why this is so successful in the US is that it is characteristic of American culture to believe that they found the formula of a free society and that it needs to be adjusted only occasionally in extreme circumstances. What is tragic is that in many parts of the world this rationalising legal analysis is treated as the wave of the future, that it is the thing that comes after doctrinalism. Because it is easy for them. It protects them. It says: this is not politics, this is not ideology, this

is a niche which we can occupy, in the name of which we can diminish the corporativist influences of special interests without going overboard into some generalised ideological conflict. But these societies in the rest of the world are struggling to form alternatives! In China, India and Brasil there are advanced sectors which are weakly linked to the rest of the economy but which are in close communion with the other advanced sectors in the world; this network of advanced sectors has already become the commanding force in the world economy, but the problem is that the great majority of humanity is excluded form those sectors, and then it is necessary to rethink the institutional forms of democracy and the market economy to establish these advanced practices in the society as a whole. But then this rationalising legal analysis gets in the way! By putting the best face on law, it blocks institutional imagination. So this is no good for them. It is mistaken and undemocratic for the US and Europe, and it is disastrous for the rest of the world.'

PW: But wait a minute. In the book that you wrote thirty years ago (Law in Modern Society) you stressed the importance of the generality and autonomy of law. Are you retreating from that position by saying now that all talk about autonomous law is false ideology? This rationalising or idealising legal discourse can also be seen as an attempt to rescue the autonomy of law, isn't it?

Unger: 'Absolutely! The idea is: we can't base the autonomy of legal discourse anymore on 19th century deductivism, because we don't believe in that. We can't believe any more in the simple 19th century distinction between a distributively neutral law of coordination à la Hayek and politicised distributive law, because we no longer believe in that. So we have to invent something else. We have to invent this idea of impersonal policy and principle. It is a kind of retreat to a more defensible line, in the service of the idea of the autonomy of law. But that is only one aspect. For it is also the autonomy of law in the service of this kind of conservative progressivism, this restorative social democracy, right? We are not going to allow the law to be seen as just a field of battle among powerful interests. It has to serve the public interest, as we, the jurists, understand it. It is true that we have to pay a price, we have to give up institutional experimentation, but there isn't any institutional experimentation, anyway and the 20th century was full of catastrophes with institutional fantasies. So let's make the best of it. And then we have this paradox that we have people like Rawls who combine a theoretical egalitarianism with an extreme institutional conservatism, and this style of institutional legal analysis fits in. So this is the legal thought of the Pharisees, right? It is puristic, idealising, conservative, it is everything that the Redeemer came to destroy.'

PW: Why was Hayek's idea of a neutral coordinative law no longer plausible?

Unger: 'That was rejected because we understand that there is not this distinction between, on the one hand, a set of rules of property and contract that are unquestionable or distributively neutral and another set of rules of public law that are only distributive. In the period from 1850-1950 the jurists discovered that the market can be translated into alternative legal forms, and each of these alternative legal versions of the market has different distributive consequences. This is the insight produced by the history of legal thought of the last 150 years: that a free society can take different legal forms, with different distributive consequences.

For example, take the market economy: we can have a 19th century system of property rights, that gives maximal value to the absoluteness of the command the owner has over the resources that are to his disposal, even at the cost of the limited amount of people who have access to these resources, or we might say that what matters to the markets is the number of economic agents who have access to the protective resources, and the range of ways in which they have access to them, even if in order to extend that range we have to diminish the absoluteness of the control. Which system then is more "the market"? Is it the regime where fewer people have access, and in fewer ways, but where, when they have access, they have a more absolute access, or is it more "the market" where more people have access, and in more ways, but some of them have it in a conditional or temporary way? We cannot answer that question by pure analysis. It is an experimental question.

And the same thing applies with respect to the organisation of democracy. We have Madison's system in which there is the liberal objective of fragmenting power combined with the conservative objective of slowing politics down, to the system of checks and balances. But what if we were able to keep the liberal principle of fragmenting power but to get rid of the conservative principle of slowing politics down? These questions cannot be answered by simple abstractions such as "democracy" or "the market", but they are of fateful importance for the direction for society. What happens in rationalised legal analysis is: we are giving up on these questions. These changes are too difficult or too dangerous. Instead of doing those changes, let's make the best of it. That is why rationalising legal analysis is a kind of poison for which we need to provide the antidote. It is foregoing the instruments of experimentation with the detailed institutions and practices of social life.

Now, speaking of autonomy, it can be defended by turning to this idea of fragmentation of power. Power should be fragmented, there should be many sources of power in a society, there should be public prosecutors who are able to attack the politicians. But we don't need to combine this multiplica-

tion of powers with an intellectual and political construction that is designed to demobilize politics on the pretext of making things better.'

PW: OK, you convinced me now of the ills of rationalising legal discourse, but what is wrong with the other kind of genealogy you pointed out, the account of the origins of law as the provisional end-product of competing interests? It seems to me that nothing is wrong with that as long as we don't try to squeeze it into the genealogy of law as a sacred embodiment of principles. In fact, such a view of law is at the background of Waldron's plea for a rehabilitation of the process of legislation.

Unger: 'Yes, there are people like Waldron developing a theory of legislation and they then sympathize with my position and they quote me, but that, that is only the beginning! It is not the end. The question is: what is it part of? What is the larger project? My interest in this story is the alternatives. I am interested in alternatives, not just practically and politically, but cognitively. We cannot understand anything except in relation to a view of what that thing might become. I think that most of the so-called social sciences are for the most part right-wing Hegelianism. They are a mystification, they do not have a view of transformative possibilities. So I am unwilling to see this debate as the debate on the rights of the legislation. I agree with the Waldron people that the hostility of the idealising jurist to legislation is a sign of their discomfort with democracy. But that is only the beginning of the story.
So I propose two particular projects. One project is to say: let us rethink the whole body of law to see how contemporary societies look completely different once we lift the *onus*, the constraint, of these pseudo-idealizations; then we see that there is a mass of transformative opportunities. In my book, *False Necessity*, in the chapter on the history of institutions, I try to do this. And to show how all looks different when we look at the details, because that is the material we have to work with in recovering the notion of alternatives. So my idea is: we have lost this idea of alternatives in the large sense, in the macro sense: capitalism, socialism, and so forth. They don't mean anything anymore. Now we have to recover it at the micro sense and that is why the discovery of this mass of contradictions and deviations is crucial. Then the second project is: let us use this mass of contradictions and anomalies as a starting point for the reinvention of the practical institutional forms of democracy and the market economy of civil society. Now, I don't know what these legislation people think about that. But I am afraid they are not engaged in that business and that they are at the same level as their opponents. They are Pharisees of a different kind.'