The margins of the law

Text reviewed


One of the most powerful current readings of the law is that developed, as an ‘expansion of doctrine,’ by Roberto Mangabeira Unger. This reading begins with an acceptance of ‘the minimal characteristics of doctrine – the willingness to take the extant authoritative materials as starting points and the claim to normative authority’ (15). It accepts the historical givenness of doctrine, that is to say; but then pushes on from there to the point where doctrine crosses over into ideological conflict. This is the reading, in other words, of a ‘double inscription’: it explores the ‘internal development’ (2) of legal categories (for example, the causal categories embedded in notions such as imputed purpose), but it then tries to open this development out into a recognition and a deepening of the clash between contradictory principles. Legal categories are so closely tied in with the structure of the world that to contest them, or to elaborate them to the point of contradiction, is to challenge the naturalness and the necessity of that structure. Such a method of reading derives its political force from its belief that ‘the focussed disputes of legal doctrine repeatedly threaten to escalate into struggles over the basic imaginative structure of social existence’ (17).

One of the set pieces of Unger’s method is his deconstructive reading, in *The Critical Legal Studies Movement,* of modern contract law. The force of the example lies in the centrality of contract doctrine to classic liberalism: grounded in notions of enduring acts of will based in the autonomy of the private sphere, of mutually defined and freely chosen rights, and of a privately constructed and socially arbitrated consensus, the category of freedom of contract appeals directly to the liberal vision of a social order formed from the concurrence of multiple individual acts of freedom.

Unger’s analysis of this vision begins by positing a double set of contradictions between doctrinal principles and counterprinciples, which are in their turn related to antagonistic background assumptions about the organization of the world. The first set
opposes the freedom to enter into a contract to the counterprinciple that this freedom should not be allowed to subvert the communal aspects of social life. The clearest application of the counterprinciple is in the discouragement of contract in the ‘private’ world of family and friendship.

The rules governing the interpretation of the intent to contract can serve to clarify what is at stake here. In Anglo-American contract law there is a first-level rule stating the legally binding nature of contract, together with the possibility of avoidance of liability under certain explicit conditions. A second-level rule restricts such exclusions of liability as far as possible in the interest of protecting justified reliance on the terms of the contract. A third-level rule, however, limits the scope of the first two levels by suppressing an interpretation of contractual intent in non-commercial contexts, since legal liabilities are not in principle supposed in the social dealings of the private sphere. The third rule, that is, attempts ‘to defend private community against the disruptive intervention of the law and of the regime of rigidly defined rights and duties that the law would bring in its wake’ (63). Consider, for example, the law disfavouring family bargains and encouraging family gifts. Here, Unger contends:

the hostility toward donative transactions suspected of undermining family duties (such as a married man’s gift to his mistress) contrasts with the solicitude shown toward intrafamilial donations (such as a parent’s gift to a child) when there are no competing inheritance or creditor’s rights to protect. Just as classical contract theory depicts the bargain as the beneficial creature of anticommmunal self-interest, it sees the gift as an instrument of either community-preserving generosity or community-destroying circumvention of the law. (63)

At one level this sets up a crude opposition between the world of private community and the Hobbesian world of commercial struggle (the analogy that Unger draws is with the contrasted cities of Belmont and Venice in The Merchant of Venice). At a broader level the opposition is the product of a strict separation between areas of human connection – ‘democracy for the state and citizenship, private community for family and friendship, and an amalgam of contract and impersonal technical hierarchy for the everyday world of work and exchange’ (64). In political terms this vision is crippling in its exclusion of the models of democracy and private community from everyday economic activity.

At the same time it is evident that contract theory has particular problems with the ‘private community’ of the family (for example), because the structure of the classical family combined a dependence
on fluid relations of trust with asymmetrical relations of power which demand that family members ‘accept the legitimacy of gross inequalities in the distribution of trust’ (65). It was precisely as a weapon against such structural asymmetries, however, that the abstract universalism of classical contract theory was developed: ‘It is hostile to personal authority as a source of order; it preaches equality in distrust. The mechanisms of egalitarian, self-interested bargaining and adjudication cannot be made to jibe with the illiberal blend of power and allegiance’ (65). In this split between contract and community, the family comes to be seen ‘as a structure of power, ennobled by sentiment. Both as sentiment and as power, it repudiates the rule of law’ (66).

The second structure of contradiction Unger examines is the relation between the freedom of contract (a freedom to set the terms of the contract on the supposition that both parties possess equal knowledge) and the counterprinciple that unfair bargains should not be enforced. A regime of contract, that is to say, mediates the need to allow parties ‘to bargain on their own initiative and for their own account,’ and so not to cancel out every inequality of power and knowledge, and conversely the need not to allow these inequalities to accumulate ‘to the point of turning contractual relations into the outward form of a power order’ (67). It is the structure of this opposition that gives rise to the paradox Mensch identifies when she writes of the movement by which contractual freedom implies the possibility of its own negation. This is not just the local problem that contracts can be formed with the aim of restricting the freedom of others to enter into contracts (for example, contracts in restraint of trade), but more generally that:

in securing promises contract logic begets property logic, which defeats the premises of freedom thought to underlie contract logic. To recognise expectancy rights ostensibly generated by willing parties and to enforce them even against the will of one of these parties amounts to a generation of property rights over time. Their protection invokes the rhetoric of property doctrine – primarily through the language of secured expectation. The result is objectively protected advantage, with its inherent tendency toward accumulation and hierarchy.1

Both the accumulation and the restriction of inequalities in the process of contract formation involve particular effectively political forms of intervention by the courts, and the question of where to draw the line between them helps constitute (as well as reflects) the structure of the market. They are charged options. Consider two of the forms taken by the counterprinciple of fairness – the law allowing for discharge under changed circumstances or for mistaken
understandings of the terms of the contract, and the law concerning duress. All contracts involve displacement in time and so, by definition, a change in circumstances between formation and performance. The issue for contract law here is whether what it should protect is an expectancy of performance, or the exchange value embodied in this performance – whether it should try to secure expectations against risk, or in a more limited way secure only the conditions explicitly envisaged by the contract. The problem could be evaded if it were assumed that the parties to contracts were in the position of high-risk gamblers and if the law ‘abided relentlessly by the logic that things are worth only the values that parties place on them in particular transactions’ (69). The law remains committed, however, to a minimal standard of equivalence, and this attitude ‘betrays a willingness to imagine how an alternatively organized market would have operated’ (ibid.).

In the same way, the counterprinciple of fairness is written into the structure of the bargaining process itself as a set of protocols designed to guard against coercion or undue influence on any of the parties involved. But the problem with this quest for an ideally neutral process ‘lies in what must be done to reconcile the idealized bargaining picture with the existing institutional forms of the market economy’ (70). Take the law of duress. Where there are gross inequalities of bargaining power, the law allows contracts to be voided. It is possible, however, that a literal application of this principle would destroy the viability of the contract regime altogether in a society structured on fundamental inequalities of economic power. Mensch notes that the solution to this contradiction is the paradox that legal decisionmaking:

has arbitrarily excluded economic pressure from the legal definition of duress. That exclusion concealed the fact that coercion, including legal coercion, lies at the heart of every bargain. Coercion is inherent in each party’s legally protected threat to withhold what is owned. The right to withhold creates the right to force submission to one’s own terms. Since ownership is a function of legal entitlement, every bargain (and, taken collectively, the ‘natural’ market price) is a function of the legal order – including legal decisions about whether and to what extent bargained-for advantages should be protected as rights.2

In the area of labour law the crucial considerations of economic duress are avoided by resort to the fiction of ‘countervailing power’ whereby collective organization and bargaining are thought to equalize the forces of labour and capital. But this raises the problem of the extent to which scrutiny and regulation should pervade relations between labour and management (the extent of substantive
intervention), and it sits uneasily with the doctrine of the ‘retained rights’ of management (which, excluded from the bargaining process, in fact overturn the formal balance of ‘countervailing power’).

These contradictions could only be resolved within the framework of a general reorganization of economic relations, since ‘on its own terms and its own terrain the countervailing-power mechanism cannot achieve enough correction to distinguish contract from power without imposing so much correction that contract falls victim to a higher-level method of resource allocation and income distribution.’ Thus ‘the attempt to defend the heartland of contract theory by dispensing special treatment to the intractable problems of the employment relation turns against itself. It ends up casting a critical light on the very core zone of contract that it had been expected to seal off from further attack’ (73). This is to say that as long as the counterprinciples are unable to modify the institutional frame of economic and political action they can only work selectively and sporadically; they remain anomalies, secondary corrections to a stable and given order. If this order can be envisaged as subject to transformation, however, then something like a Derridean reversal of the primary and derived poles of the opposition takes place: the counterprinciples ‘lose any stable, natural, and contained relation to the principles. They may even serve as the points of departure for a system of law and doctrine that reverses the traditional relationship and reduces the principles to a specialized role’ (75).

The next step in Unger’s analysis is to take a number of instances of exemplary difficulty where the coherence of doctrine seems to break down, and to push the analysis of these instances to the point where the counterprinciples can form the basis for an alternative theory of obligations and rights and thus for a reconstructed contract doctrine. These moments of heightened contradiction are a set of related difficulties in the law of mistake within contract.

The first involves the problem of whether to distinguish between innocent and wrongful revocations of contract in cases where there is a lapse of time between offer and acceptance – for example, when the contract is concluded by correspondence. Since the passage of time changes the contractual conditions (the knowledges, the state of the market, the situations of the parties) classical contract theory looks for rigorous enforcement, and it is wary of making moral distinctions between different cases of revocation. Only under exceptional circumstances will it allow moral criteria to be brought to bear.

The second instance represents a weakening of the normal contract-making procedures that obtained in the first case. Here we
are concerned with a mistake in calculations forming the basis of a contract for which the formalities have been completed but which has not yet matured into reliance; and here again there is a split between a dominant espousal of moral neutrality and an alternative view which would try to discriminate the substantive moral considerations in the case. Unger formulates the issue here in terms of a broadening of the conflict of principle involved in the previous instance:

Those who will not allow the offeror to be discharged adhere to a view of the rules of contract formation that refuses to distinguish the wrongful from the innocent and sees the law of mistake as one more place to confirm the primacy of the principles and the anomalous character of the counterprinciples. On this view, nearly completed formalities and commercial context suffice to trigger the traditional norms of contractual liability. The alternative approach fits the quality of the promisor’s desire for discharge against the quality of the offeree’s reliance. The exchange of promises is not irrelevant to this analysis; it is just not the whole story. (78)

This alternative view thus envisages a quite different role for the counterprinciples than that which holds in mainstream theory.

The third and most complicated case involves the submission of a bid by a general contractor on the basis of a mistaken calculation supplied by a subcontractor. For classical contract theory no contract exists between these two and promissory estoppel cannot therefore be applied. Whereas in the second case ‘a contract or something close to it has come into being, though born under the cloud of an error in the steps just prior to integration’, in this third case ‘there is no acceptance, hence no contract, unless you either adopt the implausible unilateral-contract analysis, according to which use of the bid was itself the acceptance sought, or apply promissory estoppel doctrine and view the estoppel as a mere “substitute for consideration” ’ (79). This case exacerbates the conflict between principle and counterprinciple and makes it clear that in all three cases the conflict is not between alternatives enunciated within a common conceptual framework but between conceptual frameworks themselves.

It is to a clarification and generalization of these frameworks that the third stage of Unger’s analysis now proceeds, with an elaboration of a countervision of the sources of obligations and the nature of rights. Mainstream contract theory sees two sources of obligations: either duties imposed by the state, or perfected acts of will expressed in such forms as the bilateral executory contract. Any other sources of obligation, such as relations of interdepen-
dence, are treated as marginal, an ‘equitable qualification to the basic principles of the law,’ and this entails a theory of rights that ‘sees an entitlement as design[at]ing a zone of discretionary action whose limits are set at the moment of the initial definition of the entitlement’ (ibid.) – which is to say that these limits cannot be negotiated or redefined, since this would mean recognizing the effects of the performance of the contract on other parties as a factor capable of disrupting the terms contractually established. Against this Unger sets a countervision which ‘implies that obligations do arise primarily from relationships of mutual dependence that have been only incompletely shaped by government-imposed duties or explicit and perfected bargains’ (ibid.). According to this view, the boundaries drawn around contractual rights must be contextually drawn and redrawn to take into account the interdependence of the parties and the potential effects upon them or upon third parties of the exercise of these rights. In practice this is a vision either, at its most rigorous, of the necessary transformation of the institutional structure of economic activity (such that a regime of contract would be separated from a power order), or, in its more immediate implications, of reformist activity designed to transform the counterprinciple of fairness from its marginal to a fully central role in the supervision of contract.

A fourth stage of the analysis seeks to extend the countervision to areas that have not constituted instances of exemplary difficulty – fiduciary relations, for example. Then in a final stage Unger’s ‘deviationist doctrine’ seeks to turn back upon itself a description of the normative beliefs that have guided its argument. The two controlling ‘internal’ themes of critique of the stark opposition between community solidarity and contractual self-interest, and of the quest to separate contract from power without crippling it with judicial correction, are understood as standing synecdochally for two traditions of social criticism:

One of these traditions objects to the denial of solidarity and to the absence of the varieties of communal life that could mediate between the isolated individual and the large-scale organizations of the social world. The other tradition emphasizes the continuity of group domination under forms of practice and thought that both conceal and reproduce it. The deviationist doctrinal argument shows how the two traditions can merge into a more comprehensive and satisfactory line of criticism once analysis descends to institutional detail. The practical and theoretical solutions to the problem of overcorrecting and undercorrecting contract converge with the implications of the attempt to soften the antagonism between contract and community. (86–87)
The difficult question here is how far these conceptions are intrinsic to the law, and thus of the extent to which it is legitimate for legal doctrine to intervene, especially in an adjudicative context, to ‘affect established legal understandings and the social practices and institutional arrangements that these understandings reinforce’ (87). Here Unger refuses the distinction between the intrinsic and extrinsic, arguing instead for the interpenetration of doctrinal concepts and prescriptive conceptions of society; and this in turn means that judicial interpretation can never be kept conceptually distinct from practical action to maintain or to modify existing institutions. It is clear to Unger that doctrinal critique is not going to bring about social revolution; but his argument supposes that the immanent structure of law constantly and practically implicates broad and agonistic structures of social understanding.

It should be apparent from this summary that Unger operates at the commanding heights of legal theory, and that the rigorously elegant formalism of his analysis endows its categories with a consistent philosophical dignity. One immediate objection to this is the fact that the possibility of doctrinal complexity is achieved only at the higher levels of the legal system, and only under certain restricted material conditions: to put it crudely, the price of doctrinal complexity is the fees of lawyers and the salaries of judges and academics. At lower levels of the legal system, where the law operates as a routinized administrative apparatus and a more or less direct extension of the police force, the possibility of doctrinal contradiction is negligible. This is to say that the concentration on doctrine risks reinstating a dichotomized relation of theory to practice, inside to outside, which it is precisely the aim of Unger’s ‘deviant activist’ method (as it should be of a legal semiotics) to deconstruct.

Whilst it has a certain force with reference to the areas of concentration of Unger’s analysis, however, this criticism is nevertheless not conclusive. The power of Unger’s critique lies precisely in its elaboration of an ‘immanent’ logic of legal doctrine to the point where it splits asunder to reveal both an overdetermining social logic and the possibility of its political reversal: the countervision of the organization of social life is extracted from within the kernel of the existing order (to use a notorious metaphor). Such a reversal, which builds upon existing structures rather than either opposing to them a purely utopian alternative or seeking a reformist accommodation with them, is not available to a merely cynical understanding of law as domination, which would read an order of power directly off from legal categories. All that can then be understood is the positivity of power: power is conceived as absolutely given, and since there is neither a negativity
inscribed within it nor an outside to power, nothing can threaten its dominion.

Perhaps the more serious criticism of Unger’s work concerns the content of the countervision he develops. The fact that a reading of contract doctrine figures as the centrepiece of his account of a deviationist method is hardly accidental: Unger seeks to break apart the framework of liberalism from within, and it is arguable that because he situates himself in this way he is never adequately able to transcend its presuppositions. The key concept here is that of the market.

There are a number of distinct stages in the presentation of Unger’s vision of the kind of restructuring of the market that would follow from the critique of objectivist theories of law. The first involves a critique of current economic institutions and practices for their exclusion of the principles of community and democracy (which are boxed off into separate spheres). The present form of the market works to consolidate relations of hierarchical dependence and to empower small and self-selecting groups to make the crucial economic decisions; apart from anything else, these forms of entrenched power discourage efficiency and innovation. In a second stage, it is supposed (but never in fact argued) that a democratization of the economic process would require economic decentralization. The juridico-political principle that would enable this is enunciated in a third stage: it is a disaggregation of the consolidated property right into its separate faculties, and their reassignment to different entities, including those proposed in the final stage of the programme. Here Unger suggests an economic mechanism for decentralization – a rotating capital fund which would be made temporarily available to ‘teams of workers and technicians’ (35) under conditions which would limit – for example – the income to be derived from it or the accumulation or distribution of profits. What is crucial in this proposal is not to ‘reduce the generative principle of economic decentralization to the mere assignment of absolute claims to divisible portions of social capital in a context of huge disparities of scale, influence, and advantage’ (35); rather, the decentralization must be part of a formalized process of continual disruption of any consolidated disparity.

There is I think some question as to whether this proposal is, in all its detail, in any sense strictly derived from Unger’s analysis of the logic of law, and in any case the claim to derivation is surely suspect: Unger had earlier described legal objectivism as ‘the belief that the authoritative legal materials – the system of statutes, cases, and accepted legal ideas – embody and sustain a defensible scheme of human association’, displaying ‘an intelligible moral order’ or at least the normative force of practical constraints, such as economic
efficiency (2). Yet this seems to describe precisely the way in which he himself seeks to discover a programme of social and economic reorganization on the basis of the counterprinciples embedded in the very structure of the law. It is as though, having looked too hard into the mirror of legal formalism, Unger had failed to heed his own argument that, rather than being ‘a repository of intelligible purposes, policies, and principles’ (9), the normative background theory that informs and structures the law is no more than a contradictory aggregation of political enactments. This is not necessarily to argue for the impossibility of thinking in terms of juridical, political, ideological and economic systems, but to say that these have no intrinsic logic, and that the order of the law can thus only be understood as a post hoc rationalization on the basis of conflicting or piecemeal economic and political demands which reflect no totalizing logic.

But the more important question has to do, again, with the content of Unger’s proposal. As an argument for the redistribution of credit to social ends it reads like nothing so much as a platform of the Social Credit movement. This is to say that Unger’s economic countervision seems to be clearly placed within a well-established tradition of right-wing libertarianism, a tradition which, far from being universal or class-neutral, reflects quite definite social interests – those of small businessmen and entrepreneurs (including of course, and especially in its Canadian version, small farmers) and of entrepreneurial collectives.

The most concise criticism of this tradition is perhaps a comment that Pashukanis makes about anarchists, when he notes that they reject the external characteristics of bourgeois law but preserve intact ‘its inner essence, the free contract between autonomous producers.’ If Unger seems to be situated within a clearly specifiable ideological position, it is because he conceives the economic in terms of vaguely defined structures of ‘power’ rather than in terms of class structures grounded in a particular configuration of forces and relations of production. In saying this I don’t want to appeal to that model of a necessary and unilinear logic of the social formation that Unger denounces when he writes of ‘the loaded use of concepts such as capitalism or the market economy as if they designated a well-defined social world, structure, or system, all of whose elements presuppose one another and stand or fall together. Such concepts have no secure basis – they may even make no sense – apart from a larger view that presents each of these supposedly integrated social worlds as a stage in a sequence or as an option in a denumerable list of possible societies’ (107). But note that this attack is directed at an antiquated version of Marxism and shows no awareness of the very similar criticisms enunciated in the
last twenty or thirty years from within the Marxist tradition itself. What must be stressed is the priority of considerations of class to any serious analysis of social power. In the absence of this category Unger is unable to envisage a qualitative transformation of capitalist economic relations or to formulate a convincing alternative conception of property. Nor is it possible for him to hold an adequate conception of social agency, since the only agent of transformation implied in his work is an interventionist judiciary (which would, by definition, effect changes only from the top down). In this too Unger’s programme remains a liberal (or ‘superliberal’) (41) vision of the social order; the limits of the law are the limits of his language.

Notes

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