

Roberto Unger and the politics of transformation in an Asian context*

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“It is true that we cannot be visionaries until we become realists. It is also true that to become realists we must make ourselves into visionaries.”***

I Introduction

One of the most exciting movements to have emerged in the field of Anglo-American legal philosophy during the past two decades or so has been the critical legal studies movement.¹ The movement, however, has come under serious attack, not least because its radical critique of existing legal thought sits uneasily with the prevailing dominant school of liberal legal theory — and this is an attack that has generated heat as well as scorching, not only in the pages of legal literature but also (and most unfortunately) in the realm of personal relations amongst faculty members as well.² Some have predicted that the movement will go the way of its alleged³ predecessor, American Realism,⁴ and

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*** *What Should Legal Analysis Become?* (1996) 190 and “Legal analysis as institutional imagination” 1996 *Modern Law Review* 1 23.

¹ For a good general overview, see Kelman *A Guide to Critical Legal Studies* (1987). Reference may also be made to Hutchinson & Monahan “Law, politics and the critical legal scholars: the unfolding drama of American legal thought” 1984 *Stanford Law Review* 199; Tushnet “Critical legal studies: an introduction to its origins and underpinnings” 1986 *Journal of Legal Education* 505; and, by the same author, “Critical legal studies: a political history” 1991 *Yale Law Journal* 1515.

² For a well-known and oft-cited popular account, see the article by Trillin “A reporter at large (Harvard Law School)” *The New Yorker* [26-03-1984] 53. And for a more recent (also popular) account, see Eleanor Kerlow *Poisoned Ivy — How Egos, Ideology, and Power Politics almost Ruined Harvard Law School* (1994).

³ It is unclear what the precise relationship between critical legal studies and American Realism is: both are movements against the prevailing legal situation and both do not possess clearly delineated common agenda as such (cf Tushnet: “[c]ritical legal studies is less an intellectual movement in law (though it is that too) than it is a political location” — (n 1) 1515 (emphasis mine)).

⁴ See generally Horwitz *The Transformation of American Law 1870-1960 — The Crisis of Legal Orthodoxy* (1992); Duxbury “The reinvention of American realism” 1992 *Legal Studies* 137; Purcell *The Crisis of Democratic Theory — Scientific Naturalism and the Problem of Value* (1973), especially chs 5 and 9; and Twining *Karl Llewellyn and the Realist Movement* (1973). And for an excellent recent anthology, see Fisher, Horwitz & Reed (eds) *American Realism* (1993).

fade into theoretical oblivion. The jury is still out on this particular issue, and I would venture to suggest that this will be so for some time to come. Chief, however, amongst the major problems that might spell the ultimate demise of critical legal studies is (as was, in part at least, also the case with American Realism⁵) the lack of a viable alternative. If, therefore, the verdict is returned in its favour, this will (in large part, if not wholly) be due to the efforts of one particular scholar who has embarked upon an ambitious positive project to construct an alternative social theory that will not fall prey to the critique levelled by liberal legal theory. That scholar is Unger of the Harvard Law School, although by the very broad nature of his interests and work, Unger's ideas clearly go beyond the narrower boundaries of the movement itself. Little by way of personal detail is known about Unger who hails from Brazil; variously described as brilliant⁶ and enigmatic,⁷ his work has had both its ardent supporters⁸ as well as acerbic detractors.⁹ Densely constructed and tightly argued, to state that Unger's work is a difficult read is an understatement.¹⁰ His writing style is, in many ways, reflective of what is suggested is the central significance of his work: a claim to uniqueness. For — as we shall see — Unger's legal and social theory attempts to chart a 'third path' between the commonly accepted paths of socialism on the one hand and capitalism on the other. Significant, too, is the fact that Unger attempts to

⁵ See generally the works cited in n4 above.

⁶ "When Roberto Mangabeira Unger was 21, a Brazilian supreme court justice called him the most brilliant young man in Brazil, and the faculty at his law school in Rio de Janeiro unanimously voted to exempt him from his final semester there" — Adler "At the head of the class — America's 5 hottest young law professors" *The American Lawyer*, Oct 1981, 31.

⁷ See *ibid.*

⁸ See eg Anderson: "For a long time intellectuals from the First World have been diagnosing the condition and prescribing the treatment of the Third — still the dominant mode of all writing on the subject. Here something new has occurred: a philosophical mind out of the Third World turning the tables, to become synoptist and seer of the First" — "Roberto Unger and the politics of empowerment" 1989 *The New Left Review* 93 107. A shortened version of this article appeared in the *Times Literary Supplement* [13 to 19–01–1989] 37 (entitled "A dream of change").

⁹ See eg Kronman (including an exchange of letters with Unger), 1976 *Minnesota Law Review* 167 (book review); Holmes *The Anatomy of Antiliberalism* (1993) ch 6 (see also, by the same author, "The professor of smashing" 1987 *The New Republic* 30; but cf Unger in *DE* (n11) 81: "It [his proposed democratic project] is not antiliberal; it realizes liberal hopes by changing liberal forms." He also stresses (*ibid* 83) that "[t]he albatross of dictatorial state socialism has been lifted from the neck of the left. The time for the left to reinvent itself by driving democratic experimentalism forward is now."); and Ewald "Unger's philosophy: a critical legal study" 1988 *Yale Law Journal* 665. The lastmentioned piece is particularly critical, focusing on Unger's earlier work as well and questioning, *inter alia*, its philosophical soundness. The present writer is of the view that Unger's philosophical scholarship is by no means as flawed as Ewald makes it out to be and that, in any event, scholastic disagreement does not necessarily entail an overly personal approach. For more details, see Phang *Toward Critique and Reconstruction. Roberto Unger on Law, Passion and Politics* (1993) 4–5, n 22.

¹⁰ There appears to be near unanimity (at least with respect to the persons I have spoken to) that Unger's work is extremely difficult to comprehend. See eg Younger "No more ugly legal prose" 1986 *ABAJ* 140; Herzog "Rummaging through the emperor's wardrobe" 1988 *Michigan Law Review* 1434 1435; and Pannier "Roberto Unger and the critical legal studies movement: an examination and evaluation" 1987 *Wm Mitchell Law Review* 647 650. But it is suggested that a writer's style is a very personal thing and that it would be most intolerant to level such forceful accusations where a work does not self-evidently flout the basic rules of grammar and syntax.

apply his ideas in the context of the *realpolitik* of his native Brazil.¹¹ However, with the collapse of Eastern European-communism and the sure (and steady) opening up of markets in the People's Republic of China, Unger's task has been made all the more difficult. If, after all, liberal legal theory and its attendant free-market ideology represent the "end of history",¹² all talk of an alternative becomes meaningless. But it is precisely this approach which Unger seeks assiduously to avoid, *viz*, the taking of institutions and attitudes for granted; as given; more than that, he is arguing against the very mechanisms of change themselves which emphasize revolution, for, insofar as Unger is concerned, the social program must be "committed to moderate the contrast between routinized social life and its occasional revolutionary re-creation. It wants something of the quality of the latter to pass to the former".¹³ As routine and revolution blend together, constant revision and transformation is ensured, with no "end of history", a conclusion which he would condemn as "false necessity".¹⁴ The very concept itself is startling: it not only runs directly

¹¹ See Simon "Social theory and political practice: Unger's Brazilian journalism" 1987 *Northwestern University Law Review* 832; Unger *A Alternativa Transformadora — Como Democratizar o Brasil* (1990) (*The Transformative Alternative — How to Democratize Brazil*) and, by the same author, "The 3rd of October 1994 and the future of Brazil's Workers' Party (PT)" 1995 *Constellations* 224 (hereafter cited as *PT*). Unger is, in fact, a member, not of the PT, but the PDT (*Partido Democrático Trabalhista* or The Democratic Workers' Party). See also Unger *Democratic Experimentalism — the Programmatic Path to the Left Now: An Argument and a Manifesto* (unpublished manuscript on file with the author, and hereafter cited as *DE*) 54–55.

¹² See Fukuyama "The end of history?" *The National Interest* Summer 1989, 3. See also his books as follows: *The End of History and the Last Man* (1992) and *Trust — The Social Virtues and the Creation of Prosperity* (1995).

¹³ Unger "The critical legal studies movement" 1983 *Harvard Law Review* 561–583. This very lengthy article was reproduced by Harvard University Press in monographic form in 1986.

¹⁴ The major theses are contained in three books, which comprise a trilogy comprising a lengthy (but highly complex) argument, spanning over one thousand pages, and collectively known as *Politics, a Work in Constructive Social Theory* (1987). The first volume, entitled *Social Theory: Its Situation and Its Task — A Critical Introduction to Politics* sketches out the theoretical premises of the entire project, whilst the second, entitled *False Necessity — Anti-Necessitarian Social Theory in the Service of Radical Democracy*, elaborates (in meticulous detail) the various institutional elements of his project. The third volume, entitled *Plasticity into Power — Comparative-Historical Studies on the Institutional Conditions of Military Success*, consists of three essays that are intended to provide the historical focus on, and illustration of, the more abstract themes and ideas considered in the preceding volumes (in particular, the second). These three volumes will hereafter be cited as *Social Theory*, *False Necessity* and *Plasticity into Power*, respectively; the general work will be simply cited as *Politics*. For an extremely comprehensive consideration of *Politics*, see the excellent symposium in the Summer 1987 issue of the *Northwestern University Law Review* (vol 81, no 4); all the essays (plus a few more, but minus essays by Ball (n 176) and Cornell "Beyond tragedy and complacency" 1987 *Northwestern University Law Review* 693) have now been republished in *Critique and Construction — A Symposium on Roberto Unger's Politics* (Lovin & Perry eds, 1990). All further references, however, will be to the former, save where the essays are only to be found in the latter volume. In his most recent work, Unger has classified such "false necessity" in other ways, eg, as the problem of "institutional fetishism" that is supported by the "convergence thesis": see eg Unger *What Should Legal Analysis Become?* (1996) (hereafter cited as *Legal Analysis*) 6–8 and 8–10, respectively. His proposed remedy is best encapsulated, perhaps, by a phrase that figures prominently in his latest work, *viz* "democratic experimentalism", the present available fragment of which (incidentally) is a highly accessible account of his latest views (*and* includes a *Manifesto*): see generally *DE* (n 11). It should be mentioned that after the present manuscript had been completed, Unger's Chorley Lecture delivered at the London School of Economics was published, which is an excellent summary of the key ideas contained in *Legal Analysis*: see Unger "Legal analysis as institutional imagination" 1996 *Modern Law Review* 1 (but *cf* Christodoulidis

against the prevailing view but also (and perhaps more importantly) is itself almost incapable of description, let alone analysis — the very concept of (as Unger himself terms it) a “structure of no structure”¹⁵ appears, at first blush at least, as a contradiction in terms. Indeed, the Ungerian enterprise must, by its very nature, distinguish itself from all other theories inasmuch as the latter do ultimately come to rest, so to speak; and this is the case (for the latter) even where the emphasis is on a (procedural) “framework” that allows each person to pursue his or her personal conception of the (substantive) good, an understandable “favourite” under the otherwise intractable tenets of liberalism.¹⁶

The present article seeks to advance an understanding of Unger’s work in three particular respects. First, it attempts (in part II) to briefly summarize Unger’s political thought to date. It should, in this regard, be noted that Unger has published (and will publish) more books and articles since his last (and massive) contribution almost a decade ago.¹⁷ Thus, although I will be relying on an earlier work of mine¹⁸ to facilitate this process of summary, references to Unger’s later work will also be made, where relevant. Secondly, various critiques of the various ideas advanced will be undertaken in part III of this article. Thirdly, an attempt (in part IV) is made at the level of concrete application to ascertain whether (on a preliminary analysis) Unger’s legal and social theory can be successfully applied in an Asian context. This particular analysis is preliminary for at least two important reasons. Any application of any theory to a concrete context immediately runs up against the problem of what I have termed “theoretical frameworks” as well as the related issue of the Humean “is-ought” proscription (or what I have termed elsewhere “the problem of normativity”).¹⁹ The other reason has to do with the very particulars of the concrete context itself which, in turn, generate problems in various ways: for one thing, it is difficult to ascertain what the (even key) facts are and, for another, when one attempts to draw on a general context (in this case, “Asia”), the problems are exacerbated by the clear lack of expertise that stems, in part at least, from language, distance,²⁰ as well as scope. In order to minimize (but by no means eradicate) the difficulties arising from the enormous scope of the project, my focus will be on East Asia. However, I will not be considering countries whose main (if not sole) legal regime is premised

“The inertia of institutional imagination: a reply to Roberto Unger” 1996 *Modern Law Review* 377). The breadth and scope of Unger’s work is, in a word, enormous. See also “From public to social space(s) — a faculty discussion” *GSD News* (Winter/Spring 1995), pp 3–14 (where Unger was the moderator) and his recent letter entitled “Overcoming defeatism in the making of social space” *GSD News* (Summer 1995) 34–35 (The *GSD News* is published by the Harvard Graduate School of Design).

¹⁵ See *Social Theory* (n 14) 46. In constitutional terms, Unger utilizes the terminology of “structure-denying structure”: see *False Necessity* (n 14) 572.

¹⁶ See generally Rawls *A Theory of Justice* (1971) and his more recent work, *Political Liberalism* (1993). See also Nozick *Anarchy, State and Utopia* (1974), esp pt III and Finnis *Natural Law and Natural Rights* (1980) 154–156.

¹⁷ *Politics* (n 14).

¹⁸ See Phang (n 9).

¹⁹ See *ibid* 55–65.

²⁰ Distance can, of course, be an advantage, but it is submitted that the external observer is always plagued with both advantages and disadvantages, the relative balance of which will differ from situation to situation.

on Islamic law. Nor will I be considering the Indo-Chinese countries, about which very little (in English at least) has been written. This last reference (to “English”) is itself problematic, and relates back to the factor of language which has also been briefly alluded to above. It has been a stock criticism of studies of this nature that the author concerned ought not to rely on secondary materials, let alone secondary materials translated into English. This is an extremely cogent objection, but it should be noted that this objection, if taken to its logical conclusion, would result in total paralysis, for although it is possible, it is by no means probable that any one specific person could, in the first instance, have a working knowledge of so many languages; and even if he or she did, there would be the other difficulties briefly mentioned above. It is submitted that just as detailed studies are required, so also are attempts like the present article to “bridge” theory and practice, beginning from more modest attempts (like this very essay) and being gradually developed over time into more elaborate as well as nuanced studies. An important point should also be mentioned: a reliance on the works of acknowledged experts would aid in reducing the speculative nature of such an enterprise. Indeed—and on a related note—as more studies of both analysis as well as synthesis take place, this can only further enhance studies such as those attempted in the present piece. Finally, part V briefly concludes this article.

II *Ungerian legal and social theory described*²¹

Methods and attitudes

At the most general level, it may be said that Unger is dealing with three broad areas of institutional transformation: the law, the structure of government, and the economy. However, a conundrum, that concerns each of these areas will be discussed first; it has already been referred to in the preceding part and pertains to the problem of theoretical frameworks and the concomitant problem of normativity. In my earlier work, I dealt with these problems as related to the question of institutional transformation.²² This is certainly true, for the successful reconstruction of the institutional framework must necessarily be accompanied by the proper *attitudinal* approach. More to the point, the *justification* of the institutional project would, in the absence of a successful explication of the Ungerian attitudinal stance, run foul of the Humean proscription of deriving or inferring the prescriptive from the descriptive or, put in a somewhat cruder form, deriving an “ought” from an “is”. But it should be noted that such a proscription is one from *rationality*, and that if it is possible to proffer a justification *outside* the strict sphere of rationality, the proscription would not apply. This is, of course, not at all easy to achieve, since the threat of the never-ending descent into infinite regress or the entry into circularity are the usual results. If, of course, it could be argued that there is some *objective* standard to which recourse could be had, the problem might well be solved. This is where the importance of Unger’s earliest book,

²¹ The concept of “description” is utilized in a loose sense, as it is (of course) very difficult to exclude an element of interpretation: see eg Phang “‘The Concept of Law’ revisited” 1995 *TSAR* 403 406–407.

²² See generally Phang (n 9) 20–29 and 55–65.

Knowledge and Politics,²³ comes into play: Unger argues that liberalism hoists itself on its own petard, for by accepting the inevitability of subjectivity of values (and therefore seeking its avoidance), liberalism nevertheless requires, in the final analysis, an objective standard which, on its own premises, cannot exist. This being the case, and to return to the issue of justification, the problem posed appears intractable. *Knowledge and Politics* also speaks to the second (related) problem of theoretical frameworks, for, quite apart from the problem of normative justification, there is the further problem of how one could formulate an adequate theoretical framework that would aid in explicating if not all, then at least most, of the perceived facts. And Unger needs to face this problem, which does not go away simply because of the proposition (now commonly accepted, I think) that there are no such things as brute facts.²⁴ This is because one requires central organizing principles even for *perceived* facts as well. In *Knowledge and Politics*, Unger would characterize this problem as one manifesting the broader tension between “universals” on the one hand and “particulars” on the other. Unfortunately, however, Unger does not, it is submitted, provide us with an adequate answer there. This problem of theoretical frameworks is tackled by Unger in an even more concrete fashion in *Law in Modern Society*, which was published one year later.²⁵ Indeed, and supporting the argument just made, Unger observes:

“[E]ven the most focused historical statement must refer implicitly to general categories of thought and rely on general conceptions of social order and human action. There is no way to avoid the puzzle of the relationship between the understanding of historical particulars and the reference to general truths.”²⁶

Unfortunately, however, as in *Knowledge and Politics*, Unger is, with respect, unable to furnish us with an approach that would allow us to steer ourselves between the Scylla of theoretical reductionism and the Charybdis of factual chaos.²⁷ The suggested solution was rather vague and acknowledged (then at least) that a satisfactory answer was not yet available.²⁸

All this brings us to his latest work in *Politics*²⁹ as well as a shorter book published a little earlier, *Passion*.³⁰ In both these later works, Unger attempts, in one broad approach, to surmount the twin problems of normativity and theoretical frameworks — and more besides. His approach, unlike his earlier works briefly mentioned above, is boldly clear, the clearest statement of which I have argued is to be found, in fact, in *Passion*.³¹ Put simply, Unger is arguing for a pragmatic³² dynamism as embodied in the *actual practice* of what he terms “context smashing” that simultaneously enables us to mitigate (if not

²³ published in 1975. Reference may also be made to his *Law in Modern Society — Toward a Criticism of Social Theory* (1976).

²⁴ See generally Phang (n 9) 60.

²⁵ See Unger (n 23), especially at chs 1 and 4.

²⁶ *ibid* 244.

²⁷ See n 23.

²⁸ See *ibid* 261.

²⁹ (n 14).

³⁰ See *Passion — An Essay on Personality* (1984) (hereafter *Passion*).

³¹ See Phang (n 9) 57.

³² See Cornell “Toward a modern/postmodern reconstruction of ethics” 1985 *University of Pennsylvania Law Review* 291 348–349. See also generally *Legal Analysis* (n 14) especially 40.

eliminate in large part) the “false necessity”³³ that obtains in the sphere of social relations: a “false necessity” that results in what Unger terms the problems of solidarity and contextuality, respectively. Briefly stated, the problem of solidarity consists in the difficulty of reconciling our need for others (which is necessary in order to establish our individuality and identity) with the opposing need to prevent such interaction from allowing others to harm or even consume us. In more familiar philosophical terms, one can view this dilemma as being manifested in the tension between individual rights on the one hand and (contrary) majoritarian goals on the other. Kennedy has referred to this problem as “the fundamental contradiction”,³⁴ although (in all fairness) it ought to be pointed out that this is, in fact, one of the central dilemmas that Unger attempts to deal with in both *Knowledge and Politics* as well as *Law in Modern Society*.

The second problem that occupies Unger is that of contextuality. Our definition of individuality and identity is not confined only to our relationships with others: relationships that (as we have seen in the preceding paragraph) result in the problem of solidarity. Our individuality and identity are also defined by another set (or sets, rather) of relationships: but, this time, to our *contexts*. The problem, as Unger perceives it, is that we have a tendency to take our contexts as given, as unchangeable and untransformable, and thus indulge, once again, in “false necessity”. “Context smashing”, once again, provides the instrument by which the problem of contextuality can be surmounted.³⁵

It is not possible within the more modest confines of the present article to articulate the details surrounding the practice of “context smashing” itself.³⁶ Unger here offers us what he terms a *modernist* restatement of the *Christian-romantic* image of man: the element of modernism attacking the problem of contextuality and the latter element attacking the problem of solidarity.³⁷ The reader would notice that the elements in this restatement are either contradictory or paradoxical. Unger is, of course, clearly arguing for the latter; in his words, one has “[t]o be ardent and to be gentle”.³⁸ The love engendered by the Christian-romantic image of man prevents the possible nihilism that results from a purely modernist approach and, by the same token, the element of modernism presumably prevents an utterly passive approach that might conceivably be adopted by the Christian-romantic image of man.

Unger’s practice of “context smashing” is, in fact, an extremely ingenious answer to the problems of both normativity and theoretical frameworks.³⁹ In

³³ See n 14.

³⁴ See Kennedy “The structure of Blackstone’s Commentaries” 1979 *Buffalo Law Review* 205 211–213.

³⁵ It is unclear whether the problems of solidarity and contextuality are related. No clear answer on this score appears to have been provided by Unger, although he does hint at a connection at one point towards the end of *Passion*: see (n 30) 246 (cf also *ibid* 147–148). He appears to suggest that the empowerment that results from freeing oneself from the problem of solidarity is but one variety of empowerment that the overcoming of the problem of contextuality generally provides. It is submitted that such an interpretation is not without merit and is also buttressed by Unger’s remark in the selfsame work to the effect that we cannot solve the problem of solidarity without first solving the problem of contextuality: see *ibid* 191.

³⁶ See generally Phang (n 9) 23–25.

³⁷ Both, however, operate as an organic whole: see Unger *Passion* (n 32) 24.

³⁸ *ibid* 269.

³⁹ For a fuller account, see Phang (n 9) 55 *et seq.*

the first place, the problem of normativity (confined, as the reader may recall, to the sphere of rational discourse) is avoided completely by “context smashing” simply because we are not, by actually *engaging* in the process of “context smashing”, *arguing* as such from *fact* to *value*; value, rather, results from the very *practice* as empowered individuals. And it is this very practice that will result in social visions and projects which are the topic of the next section. As Unger puts it in his latest work, “[t]hinking about ideals and interests and thinking about institutions and practices are not two separate moments or activities: each incorporates the other without being reducible to the other”.⁴⁰ The reader would also notice that the dynamism in the ongoing practice of “context smashing” ensures that there is *constant* transformation, thus obviating the deadening quicksand of “false necessity”.

Secondly—and insofar as the problem of theoretical frameworks is concerned—Unger attempts to avoid this problem by the practice of “context smashing” as well: by conflating, as it were, both the prescriptive and the descriptive through actual engagement and conduct, there is no need to distinguish between “universals” on the one hand and “particulars” on the other.⁴¹ However, it should be mentioned that it is not wholly clear what the precise resolution would look like and, in this respect, Unger appears to be suggesting, in effect, that the *problem* of theoretical frameworks as such is a mythical one, simply because we make history as we live out our lives and, in this sense, the “universal” is captured in particular conduct and *vice versa*.

The process of “context smashing” is by no means unproblematic. Indeed, we shall have reason to question it later on in this essay. However, before proceeding to do that, we need, first, to complete our account of Ungerian legal and social theory by turning to the concrete *institutional* aspects as embodied within the law, the organization of government and the economy. Unger here attempts to posit an institutional “structure of no structure”⁴² that not only prevents any idolatry *vis-à-vis* existing formative contexts but also simultaneously contains the seeds of continuous self-revision of the contexts themselves;⁴³ only thus will we be able to free ourselves from the subtle and seductive (yet potent) fetters of “false necessity”.⁴⁴

Legal theory

In point of fact, Unger’s critique of liberal legal theory may be traced to his very first work, *Knowledge and Politics* which, amongst other things, contains a devastating critique of liberalism in general and the liberal legal order in particular.⁴⁵ The latter critique is taken even further in his second book, *Law in Modern Society*, where Unger describes both the creation of what he terms “legal order” as premised on the idea of the Rule of Law and its subsequent

⁴⁰ See *Legal Analysis* (n 14) 5. See also *ibid* 18 129 as well as *DE* (n 11) 62.

⁴¹ and see n 40.

⁴² See n 15.

⁴³ In Unger’s words, the structure would be “a framework that is *permanently* more hospitable to the reconstructive freedom of the people who work within its limits”: see *False Necessity* (n 14) 34 (emphasis mine).

⁴⁴ See n 14. This emancipation Unger also terms “denaturalization”: see *False Necessity* (n 14) 164.

⁴⁵ See n 23.

breakdown. On a more concrete level, however, Unger has, in his later (albeit not latest) work,⁴⁶ launched specific critiques of mainstream legal ideas: not only of legal positivism but also of diverse theories such as Dworkin's account of how law operates⁴⁷ as well as the law and economics school.⁴⁸ An overarching theme of each of the theories critiqued by Unger is a commitment (or recourse) to some form of objective standard. Unger himself describes such recourse as encompassing two broad headings: "formalism" and "objectivism", respectively. "Formalism" is described as "a commitment to, and therefore also a belief in the possibility of, a method of legal justification that can be clearly contrasted to open-ended disputes about the basic terms of social life, disputes that people call ideological, philosophical, or visionary".⁴⁹ "Objectivism" is described 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".⁵⁰ Both "formalism" and "objectivism" are related; as Unger puts it, "formalism presupposes at least a qualified objectivism".⁵¹

Unger's argument is simply that whilst mainstream liberal legal theory attempts to contain the "descent" of law into open-ended ideological disputes by appealing, at bottom, to "a defensible scheme of human association",⁵² it can never wholly stamp out the ideological controversy over the scheme concerned. Indeed, the recourse by lawyers to "formalism" fails to prevent the "descent" at a prior stage simply because there is a clear gap between the legal materials and the ideals they are supposed to embody.⁵³ Discontinuities in the form of what Unger terms "counterprinciples" would therefore exist as a reminder of the inability of mainstream legal theory to achieve its ideals of neutrality and objectivity.⁵⁴

Unger's critique, very briefly set out above, is not unconvincing.⁵⁵ The

⁴⁶ See Unger (n 13).

⁴⁷ See *ibid* 564–574. And, as for Dworkin's account, see Dworkin *Law's Empire* (1986); as well as his earlier works as follows: *Taking Rights Seriously* (1978) and *A Matter of Principle* (1985). And see generally Guest *Ronald Dworkin* (1992).

⁴⁸ See Unger (n 13) 574.

⁴⁹ See *ibid* 564.

⁵⁰ *ibid* 565. See also *False Necessity* (n 14) 271.

⁵¹ *ibid*.

⁵² *ibid*.

⁵³ *ibid* 571–572.

⁵⁴ *ibid*, especially 569. Such "counterprinciples" are illustrated by Unger via his consideration of contract law: *ibid* 616–646. See also *False Necessity* (n 14) 70, 101, 105–106, 204–205 and 555. It should be noted that Unger also speaks of a second method, "the discovery of indeterminacy through generalization": see Unger (n 13) 569; this is illustrated via Unger's consideration of the American constitutional law model of equal protection: *ibid* 602–616. And, for a comparison of both methods, see *ibid* 646–648. For an extremely succinct version of the critique that has just been summarized, see *Social Theory* (n 14) 147–148.

⁵⁵ But see Finnis, "On 'the critical legal studies movement'" 1985 *American Journal of Jurisprudence* 21 (reprinted in *Oxford Essays in Jurisprudence — Third Series* 145–165 (Eekelaar & Bell, eds, 1987)). Finnis's own theory (see Finnis (n 16)) is not, however, itself free from criticisms: see eg MacCormick "Natural law reconsidered" 1981 *Oxford Journal of Legal Studies* 99; Harris "Can you believe in natural law?" 1981 *Modern Law Review* 729; Kerruish "Philosophical retreat: a criticism of John Finnis' theory of natural law" 1985 *University of Western Australia Law Review* 224; and Duncanson "Finnis and the politics of natural law" 1989 *University of Western Australia Law Review* 239. And see generally Phang (n 9) 13–14.

argument, it should be noted, is not with legal rules and principles as *logical* instruments but, rather, with the holistic process of legal reasoning, a process that must (either expressly or impliedly) include the consideration of values. Unless, therefore, it can be argued that values (or at least an ascertainable set thereof) are grounded in objectivity, it is very difficult to justify liberal legal theory. At this juncture, it is important to point (once again) to Unger's first book, *Knowledge and Politics*, which (in this writer's view at least) contains the most comprehensive statement as to why liberalism in general, and liberal legal theory in particular, cannot possibly be justified by recourse to objective standards or values, not (at least) on *their premises*. But the more important question for Unger, I think, is whether he can offer us a *positive alternative*. In this regard, Unger offers us the practice of "deviationist doctrine", which (amongst other things) entails "the willingness to recognize and develop the disharmonies of the law: the conflicts between principles and counterprinciples that can be found in any body of law":⁵⁶ conflicts that simultaneously point to "alternative schemes of human association",⁵⁷ thus freeing us from the "false necessity" imposed by the framework laid down under the auspices of liberal legal theory. This Unger also terms "internal development".⁵⁸ However, in a somewhat cryptic fashion, Unger also points us to another mode of practice, which he terms "the visionary insight into a reordered social world":⁵⁹ a process which (unlike "internal development") is much sharper and (presumably) consists wholly in the process of radical reimagination⁶⁰—although Unger acknowledges that "[n]o clearcut contrast exists between the normal and the visionary modes of argument, only a continuum of escalation".⁶¹ These suggestions are, with respect, a little general and lacking in institutional details.⁶²

There is a little more elaboration, however, in *False Necessity*, where he actually suggests that the (transformed) judiciary "may forge complex interventionist remedies allowing for the destabilization and re-organization of large-scale institutions or major areas of social practice, *even though* such remedies may be *irreconcilable* with the received view about the appropriate institutional role of the judiciary (or of any other branch of government)".⁶³ However, this is only suggested as a *transitional* measure. Were the proposal merely left as at present, it would have been rather radical indeed. Unger's latest views, however, do not really mediate the radical nature of the proposal but, rather, seek to escalate it.⁶⁴ In his latest work, a book which grew out of

⁵⁶ See Unger (n 13) 578.

⁵⁷ *ibid* 579.

⁵⁸ *ibid* 580. Belliotti, however, views "internal development" as correlating to the broader institutional reform and deviationist doctrine as correlating with (narrower) legal reform: see Belliotti "Beyond capitalism and communism: Roberto Unger's superliberal political theory" 1989 *Praxis International* 321 322–323. In point of fact, it is difficult to draw a line between Unger's narrower and more visionary work; they are, in a word, all of a piece.

⁵⁹ See Unger (n 13) 580.

⁶⁰ See generally *ibid*.

⁶¹ *ibid*. Unger does return to these two methods in *Politics*: see Phang (n 9) 40–41.

⁶² See generally Phang (n 9) 15–17.

⁶³ See *False Necessity* (n 14) 551 (emphasis added).

⁶⁴ See *Legal Analysis* (n 14).

the ideas delivered during different series of lectures,⁶⁵ Unger repudiates what he terms as “rationalizing legal analysis” which (presumably) contain all the elements (such as formalism and objectivism) which he rejected in his earlier work, and which has been briefly recounted above.⁶⁶ Of interest in this particular work is Unger’s explicit mention of the various mainstream theories he rejects. One could, of course, have (often quite easily) guessed at the theories Unger was critiquing in his earlier work, but the express stipulation here obviates the need for such guesswork.⁶⁷ More interesting, however, is his suggestion that legal analysis be “recast as legal imagination”.⁶⁸ Judges would no longer be the “chief agents”; in his words:

“Its [the proposed new system’s] primary interlocutor would be the democratic citizenry at large. Its chief ambition would be to inform the conversation in the democracy about the collective present and the alternative collective futures, deepening the sense of reality by broadening the sense of possibility.”⁶⁹

⁶⁵ “Many of the ideas in this book were initially presented as three Storrs Lectures at the Yale Law School, a Rubin Lecture at the Columbia Law School, and a Chorley Lecture at the London School of Economics”: see *ibid* 191. The Chorley Lecture has, in fact, very recently been published: see n 14.

⁶⁶ Unger defines “rationalizing legal analysis” thus (*ibid* 36): “It is a style of legal discourse distinct both from the nineteenth-century rationalism and from the looser and more context-oriented analogical reasoning that continues to dominate, in the United States and elsewhere, much of the practical reasoning of lawyers and judges.” It is suggested that the theory closest to what Unger has in mind is quasi-Dworkinian: “quasi” because Unger’s is a characterization which Dworkin himself would probably reject; and for Dworkin’s works, see n 47. This interpretation is supported by Unger’s elaboration of “rationalizing legal analysis” (*ibid* 36). And “rationalizing legal analysis” is akin to Dworkin’s “chain of law” (which is both forward as well as backward looking) when it is described by Unger (*ibid* 37). Indeed, the main ‘corrupting’ element that makes Unger’s characterization quasi-Dworkinian is his infusion of the element of policy which Dworkin eschews, especially where adjudication is concerned. More importantly, however, Unger correctly points out a major problem with Dworkin’s thesis that has been little noticed or discussed: the grave threat that the argument that existing doctrine is mistaken poses for the Dworkinian interpretive theory of law. Unger observes that “rationalizing legal analysis” “has received its most lavish elaboration in the contemporary United States”, although “its worldwide influence grows steadily”: *ibid* 38. See also *ibid* 2. To be fair, however, Unger does acknowledge the uses of “rationalizing legal analysis” but argues that it does not go far enough: see *ibid* 105–106, and his concept of “superliberalism”: (n 102), which expresses a parallel idea. Unger also talks about “interest group pluralism” which, unlike “rationalizing legal analysis”, does not discern any coherent rational scheme in the law as such, but makes do, as it were, with groundrules that are observed by all the groups concerned: this form of discourse is apparently reserved more for the legislative sphere, whilst “rationalizing legal analysis” is reserved for the adjudicative sphere: see *ibid* 53–54; and both eschew the transformative thought that Unger advocates: see *ibid* 57.

⁶⁷ See *ibid* 73 (Hart and Sacks, whose joint work pioneered the famous legal process school), 119–120 and 122 (the positivists, Hart and Kelsen), 120 (a general reference to historical jurisprudence), 122–123 (a general reference to law and economics), 122 (Marxist theories of law), and (nn 66 and 82) (with regard to Dworkin). And the reference at 60–61 is probably to Fuller and that at 110 could be to Finnis. Though *cf* the more *general* definition of “rationalizing legal analysis”: (n 66). Of interest, too, is Unger’s succinct account of the general development of legal thought in the United States: see *ibid* 41–52.

⁶⁸ Unger in fact asks us “[t]o grasp the potential of legal analysis to become a master tool of institutional imagination in a democratic society”: see *ibid* 26. And in this manner will we thus be able to engage in the “construction of alternative pluralisms”: see *ibid* 29.

⁶⁹ See *ibid* 82. See also *ibid* 94–95, where Unger refers to an “implicit partnership” between the judiciary and the grassroots organizations in civil society (here, in the context of equal protection).

It is, perhaps, unsurprising why Unger adopts such an approach in this, his latest work, and which merits some elaboration; in his view, because judges are constrained in what they can legitimately accomplish, he reiterates that “[w]e must demote the judicial role, assigning it a *specialized, exceptional, and secondary* responsibility”.⁷⁰ Instead, “[t]he civic body as a whole must become the primary interlocutor of legal analysis” and “[t]he first role of the jurist should be to serve as the technical assistant of the *citizen*”.⁷¹ He is of the view that the perennial question of how judges should decide cases deserves no privileged position; he terms it, instead, as “the judicial obsession”,⁷² which stifles legal imagination and the consequent revision of existing social arrangements, thus perpetuating the problem of “false necessity”.⁷³ Unger makes the point that dispute settlement is not identical with mainstream adjudication.⁷⁴ What adjudication does, in his view, is to provide a method by which the settlement of disputes is rationalized and thereby legitimized.⁷⁵ However, as political divisions and alternatives sharpen, “rationalizing legal analysis” loses its legitimacy, and the dictates of democracy imply that power in the judicial sphere should devolve upon the citizens.⁷⁶

The approach to be adopted in an adjudicative setting, according to Unger, should, instead, be as follows:

“The heart of most legal analysis in an adjudicative setting should and must be the context-oriented practice of analogical reasoning in the interpretation of statutes and past judicial decisions. This analogical reasoning must be guided by the attribution of purpose to the interpreted materials, an attribution that can often remain implicit in situations of settled usage but that must be brought into the open whenever meanings and goals are contested. What drives the explication of purposes is that they be contested in fact, in the larger experience of society and culture and in the life situations of the litigants, rather than merely by the advocates in court.”⁷⁷

This radical approach toward adjudication is clearly much broader and looser. In addition, Unger’s preference for analogy is interesting, if nothing else, because analogy has often been associated with low-level mechanical jurisprudence, the favorite target of (amongst others) “rationalizing legal analysis”.⁷⁸ We now obtain, in fact, a more complete picture of legal adjudication: whilst judges still literally sit to hear and decide cases, the *substance* of the materials they have to consider is, in the final analysis, to be found in the realm of the *citizen*. In particular, the “contestable and factional quality”⁷⁹ of the context and (in particular, legal) materials of the dispute should be openly acknowledged. But Unger does admit the fact that the Anglo-American common law system, for example, would experience “special problems” when faced with such a form of discourse.⁸⁰ Yet, Unger insists that:

⁷⁰ *ibid* 106 (emphasis mine).

⁷¹ *ibid* (emphasis mine).

⁷² *ibid* 107.

⁷³ (n 14).

⁷⁴ *Legal Analysis* (n 14) 107.

⁷⁵ *ibid* 109.

⁷⁶ *ibid* 109. See also *ibid* 113.

⁷⁷ *ibid* 114.

⁷⁸ On analogy, see especially *ibid* 61–63.

⁷⁹ *ibid* 114.

⁸⁰ *ibid* 115.

“We should reinterpret the common law in the context of democratic experimentalism as a penumbra of arrangements and assumptions that the democracy has not yet disturbed and may not always need to displace. We strengthen its continuing vitality and authority by bringing to its case-by-case development the assumptions and analogies active in the political making and, the judicial construction, of statutory law. In this way we make it ours rather than expecting it, through its immanent development, ‘to work itself pure’.”⁸¹

The purpose of legal adjudication, Unger argues, is to treat persons as real people and to advance their power to govern themselves.⁸² And judges may, under certain circumstances, “cut through a Gordian knot in the law with their swords of constructive interpretation . . . under the promptings of the ideal of popular self-government.”⁸³ What, then, is the criterion? Unger states thus:

“The basic condition justifying these acts of judicial statecraft is that there be an entrenched impediment to the enjoyment of rights, especially the rights composing the system of popular self-government. To call the obstacle entrenched is to say that it resists challenge and defiance by the ordinarily available devices of political and economic action, and that its victims consequently find themselves unable to escape it by their own efforts.”⁸⁴

And in an apparent *volte-face*, Unger suddenly states that in the absence of a viable alternative at present, judges (who are “willing”) should continue to be the institutional agents:⁸⁵ “Better an ill-suited agent, however, than none at all. Judges may often be the best agents around. But, so Unger argues, the judges will have to be fully aware of their limitations and will thus “have reason to be both sceptical and humble”.⁸⁶

However, it is significant to note that, in addition to other mainstream theories,⁸⁷ Unger also criticizes persons who indulge in what he terms “the radicalization of indeterminacy”, calling it “a dead end”;⁸⁸ he says that we must “recognize that law can be something, and that it matters what it is”⁸⁹ — although it is clear that he does not attribute the same meaning that “rationalizing legal analysis” would to this statement! Unger here appears dissatisfied with the lack of a constructive agenda amongst radical critiques of law,⁹⁰ but the issue (which we will consider in the next part of this article) is whether Unger’s own ideas (as summarized above) provide a better alternative.

Finally, though, we should note the dual strategy that Unger suggests in order to practise “legal analysis as institutional imagination”; these comprise *mapping* and *criticism*, respectively. Mapping is a high-level and inspired version of analogical activity; it “is the exploration of the detailed institutional structure of society, as it is legally defined”.⁹¹ Criticism, on the other hand, is

⁸¹ *ibid* — this last phrase is probably a reference to Dworkin: see *Law’s Empire* (n 47), especially ch 11. See also *Legal Analysis* (n 14) 59–74 and 121.

⁸² See *Legal Analysis* (n 14) 115.

⁸³ *ibid* 118.

⁸⁴ *ibid*.

⁸⁵ *ibid* 118.

⁸⁶ *ibid* 119.

⁸⁷ See eg *ibid* 122–128.

⁸⁸ *ibid* 121.

⁸⁹ *ibid* 122.

⁹⁰ and see Unger’s distinction between “super-theory” (which he endorses) and the pessimistic and nihilistic “ultra-theory” (which he does not): see *Social Theory* (n 14) 165–169.

⁹¹ See *Legal Analysis* (n 14) 130.

“the revised version of what the rationalistic jurists deride as the turning of legal analysis into ideological conflict. Its task is to explore the interplay between the detailed institutional arrangements of society as represented in the law, and the professed ideals or programs these arrangements frustrate and make real”.⁹² The practice of criticism

“explores the disharmonies between the professed social ideals and programmatic commitments of society, as well as the recognized group interests, and the detailed institutional arrangements that not only constrain the realization of those ideals, programs, and interests, but also give them their developed meaning”.⁹³

Both are internally and dialectically related.⁹⁴ “[m]apping provides materials for criticism, and criticism sets the perspective and the agenda for mapping”.⁹⁵ At a later point, he states that “mapping and criticism are indissoluble; they are aspects or moments of the same practice”.⁹⁶ But Unger also proceeds to state that:

“[n]othing in my account of the revised practice of legal analysis defines the extent to which criticism can itself be informed or guided by a more context-independent type of moral and political argument. Rather than addressing that issue now, however, it is enough to recognize how little we need a prior and confident view of it to begin revising the practice of legal analysis in this way and to begin practicing the revision”.⁹⁷

It is suggested, at this preliminary juncture, that Unger’s latest views complement and “flesh out”, as it were, his earlier suggestions centring on deviationist doctrine⁹⁸ and the practice of internal development, and are thus a contribution to our understanding of his views on law and legal theory.

Finally, Unger does provide concrete suggestions in a more particular respect and which (as we shall see) shall play a pivotal role in his broader social theory as well — his system of *rights*. This system is briefly described in earlier work,⁹⁹ and is elaborated upon in much greater detail in *False Necessity*,¹⁰⁰ we can only content ourselves with the briefest of descriptions in the present essay.

A preliminary point may be in order: is not Unger’s utilization of the concept of “rights” inconsistent with his critique of liberal legal theory? Unger’s answer is that he is advocating a “superliberalism”,¹⁰¹ he is, in other words, taking the premises of liberalism, and pushing them beyond their artificially imposed boundaries, thus transforming them in the process.

Unger’s system of rights is fourfold: *market*, *immunity*, *destabilization*, and *solidarity* rights. A main distinction marking these rights from rights as we presently understand them is that they are not premised on what Unger terms the “consolidated property right” which “consists in the allocation of more or less *unrestricted* claims to divisible portions of social capital: unrestricted both

⁹² *ibid.*

⁹³ *ibid* 132.

⁹⁴ *ibid* 130.

⁹⁵ *ibid* 132.

⁹⁶ *ibid* 134.

⁹⁷ *ibid* 132.

⁹⁸ and *cf* *ibid* 125. See also the practice of criticism (n 93).

⁹⁹ See *False Necessity* (n 14) 597–600.

¹⁰⁰ *ibid* 508–539.

¹⁰¹ See Unger (n 13) 602. See also *False Necessity* (n 14) 455–588.

in the chain of temporal succession and in the scope of permitted usage".¹⁰² It is this right, in Unger's view, that stifles economic as well as social plasticity and transformation.

Market rights are "the rights employed by economic exchange in the trading sector of the society".¹⁰³ And such rights must perforce be linked to a reconstruction of the economy, which is described in the last section of this part of the article.

Immunity rights are rights which "protect the individual against oppression by concentrations of public or private power, against exclusion from the important collective decisions that influence his life, and against the extremes of economic and cultural deprivation".¹⁰⁴ Such rights ensure that the individual will be free to participate in the more positive enterprise of transformation.

Destabilization rights "protect the citizen's interest in breaking open the large-scale organizations or the extended areas of social practice that remain closed to the destabilizing effects of ordinary conflict and thereby sustain insulated hierarchies of power and advantage".¹⁰⁵

Solidarity rights "give legal form to social relations of reliance and trust. . . . Solidarity rights form part of a set of social relations enabling people to enact a more defensible version of the communal ideal than any version currently available to them."¹⁰⁶ This particular category of rights is clearly linked to the problem of solidarity considered in the preceding section.

Unger's fourfold classification of rights is not without problems: both general and specific. We shall consider these problems in the next two parts of this article.

Re-organizing the institutions of government

First, Unger argues for "the multiplication of overlapping powers and functions".¹⁰⁷ Instead of adhering to the traditional separation of powers,¹⁰⁸ he argues for a much looser institutional arrangement that would, presumably, facilitate experimentation. Power would be decentralized by a multiplication of the number of branches of government, all of which have overlapping functions and powers;¹⁰⁹ the level of grassroots participation is also increased in the process.¹¹⁰ The problem, however, is that (and taking the concept of "government" in a broad sense as encompassing all the branches traditionally associated with a separation of powers¹¹¹) both the legislature and judiciary would necessarily have to be transformed. Unger, in fact, appears to be in favor of a *separate* institution altogether which would be responsible for any intervention, should the circumstances so require; its members would be selected "by the other powers, the parties of opinion and the universal

¹⁰² See *False Necessity* (n 14) 511 (emphasis mine).

¹⁰³ *ibid* 520.

¹⁰⁴ *ibid* 524.

¹⁰⁵ *ibid* 530.

¹⁰⁶ *ibid* 535–536.

¹⁰⁷ *ibid* 449. See also generally, *ibid* 449–457.

¹⁰⁸ *ie*, the executive, legislature and judiciary.

¹⁰⁹ *False Necessity* (n 14) 449–450.

¹¹⁰ *ibid* 450.

¹¹¹ See (n 109).

electorate".¹¹² Unger's views on the law in general and the judiciary in particular have already been considered in the preceding section and will therefore not be considered here.¹¹³

Unger also suggests alternative reforms to the present system of checks and balances which he views as "banal".¹¹⁴ In this regard, he proposes three principles: first, "the absolute restraint one power may impose upon another"; this principle cannot, of course, be absolute in fact, and can therefore be overcome: but only by "the reciprocal influence the different branches may exercise upon one another's composition".¹¹⁵ Secondly, there must be a principle "of priority among the different branches".¹¹⁶ Thirdly, there must be "the use of the immediate or delayed devolution of constitutional impasses to the general electorate".¹¹⁷ However, because "immediate" devolution might be apt to be abused by persons of bad faith, Unger proposes that such a process should only be utilized where "the contest arises within the decisional center and indicates a failure of popular support for the party program".¹¹⁸ "Delayed" devolution would constitute the normal method of resolution of disputes, and would take the form of a *referendum by the electorate*.¹¹⁹

Reference has already been made (in the preceding paragraph) to the "decisional center", and this is indeed vital to the Ungerian enterprise; it would encompass the roles now traditionally allocated to the judiciary and the legislature,¹²⁰ and would supervise the party in office as well as settle conflicts. Insofar as the *legislative* functions are concerned, the cabinet and a smaller supervisory council would formulate the laws together, and both would be subject to the greater representative body as well as "the other powers in the state".¹²¹

Another element in the reform of the government is the concept of *miniconstitutions* "for limited contexts and aims"¹²² which would be overseen by special bodies.¹²³

Unger also proposes two principles of "decentralization" — "subsidiarity" and "functional specialization". The former "requires that power to set rules and policies be transferred from a lower and closer authority to a higher and more distant one only when the former cannot adequately perform the

¹¹² *False Necessity* (n 14) 453.

¹¹³ See especially the main text accompanying (nn 63–91).

¹¹⁴ *False Necessity* (n 14) 454.

¹¹⁵ *ibid* 456.

¹¹⁶ *ibid*.

¹¹⁷ *ibid*.

¹¹⁸ *ibid* 457.

¹¹⁹ *ibid*. And in his latest work, Unger gives the following illustrative example (*DE* (n 11) 69–70): "First, reform programs enjoy priority over ordinary, episodic legislation: they must be agreed to, rejected, or negotiated quickly. Second, when the branches of government disagree on a reform program, they may agree to plebiscites or referenda. Third, if the branches of government are unable to agree about the realization or the terms of popular consultation, or if the result of the consultation is indecisive, either the parliament or the resident may call anticipated elections, but the elections must be simultaneous for both branches of government. The general principle is rapid resolution of impasse through direct involvement of the general electorate."

¹²⁰ *False Necessity* (n 14) 458.

¹²¹ *ibid* 460.

¹²² *ibid* 461.

¹²³ *ibid* 461–462.

particular responsibility in question".¹²⁴ The latter, "functional specialization", "requires that the same task not be performed by two competing or overlapping authorities".¹²⁵ What, then, about the forms of decentralization themselves; Unger argues that they must be such as are "less likely to immunize privilege against effective challenge".¹²⁶ In this regard, two methods of decentralization are proposed: the first allows for the *opting-out* by a minimum of two people, provided that they are in a position of "relative equality", set up an alternative structure, with such an alternative not having "the effect of casting one of the parties into enduring subjugation".¹²⁷ And Unger proposes that the doctrine of *economic duress* can provide the requisite point of departure for ascertaining the precise content of this particular method. The second method concerns "the qualified devolution of power", and "reallocates power among the levels of the government hierarchy rather than between government and people" — and from higher to lower levels, thus precluding "a local citadel of hierarchy" from being consolidated.¹²⁸

Finally, Unger prescribes the concept of *voluntary association*, comprising organizations that are *outside* the governmental sphere (including union organizations and neighborhood associations); it is, as Unger terms it, "antigovernment" and its purpose is simple and obvious: it "diminishes the risk of despotic perversion".¹²⁹

The re-organization of the economy

As we noted right from the outset, the free-market system is in global ascendancy. Indeed, one might usefully note that the systems of law and government critiqued by Unger are all correlatives of this idea of the free-market. When Unger published *Politics*,¹³⁰ the collapse of East European-Communism had not taken place yet. That one historic event, and others, have firmly entrenched the idea of the free-market in both the psyches as well as agendas of the people (or at least the leaders) of virtually all nations. Has, indeed, the "end of history"¹³¹ come to pass? And, more to the point perhaps, has history trumped Unger's proposals, in particular those pertaining to the re-organization of the economy? It would, at first blush, appear to be the case. However, Unger is not proposing a traditional form of socialist or communist economy; to that extent, therefore, his proposals are not irrevocably tarnished. What, then, is this "third path" that Unger would have us tread? What is so attractive about it that the nations of the world would relinquish the capitalistic road? I now attempt to summarize the basic strands of Unger's proposals.

Unger begins with what would be a startling proposition, one that we have already briefly referred to when discussing his concept of market rights: that

¹²⁴ *ibid* 474.

¹²⁵ *ibid* 475.

¹²⁶ *ibid*.

¹²⁷ *ibid*.

¹²⁸ *ibid* 476.

¹²⁹ *ibid*. And see generally *ibid* 476–480. Unger also describes it as "the attempt to establish a style of restraining social counterweights": see *ibid* 477. See also *Legal Analysis* (n 14) 150–151 152 and *DE* (n 11) 75.

¹³⁰ (n 14).

¹³¹ See (n 12).

what ails any economy is the absolute claim to property, or what he terms the “consolidated property right”; indeed, Unger goes so far as to claim that so long as this right persists, “the program of empowered democracy is doomed from the start”.¹³² Unger’s main aim is to systematically *break up* this right by way of an innovative and ingenious conceptual apparatus that attempts to “marry”, as it were, both capitalism on the one hand and the economic elements of socialist systems on the other.¹³³

The key “player”, so to speak, in the aforementioned conceptual apparatus is the *rotating capital fund*. It is developed as “a perpetual innovation machine”,¹³⁴ the “key idea” of which is “the breakup of control over capital into several tiers of capital takers and capital givers”.¹³⁵ Unger’s elaboration bears quotation *in extenso*:

“The ultimate capital giver is a social capital fund controlled by the decisional center of the empowered democracy: the party in office and the supporting representative assemblies. The ultimate capital takers are teams of workers, technicians and entrepreneurs, who make temporary and conditional claims upon divisible portions of this social capital fund. The central capital fund does not lend money out directly to the primary users. Instead, it allocates resources to a variety of semi-independent investment funds. Each investment fund specializes in a sector of the economy and in a type of investment. The central democratic institutions exercise their ultimate control over the forms and rates of economic accumulation and income distribution by establishing these funds or by closing them out, by assigning them new infusions of capital or by taking capital away from them, by charging them interest (whose payment represents the major source of government finance), and, most importantly, by setting the outer limits of variation in the terms on which the competing investment funds may allocate capital to the ultimate capital takers.”¹³⁶

The investment funds may take funds away from each other, and the funds themselves “set the terms on which financial and technological resources may be obtained”.¹³⁷ The ultimate capital takers/users pay an interest charge to the investment fund which thus recoups on interest paid to the central social fund.¹³⁸

What about the central capital fund itself? It is controlled by the decisional center.¹³⁹

The *intermediate* investment funds level, on the other hand, is also necessary lest “the central democratic entities . . . [be] forever tempted to exercise a roving, ad hoc economic clientalism, and the prospects for extreme decentralization and organizational diversity would greatly diminish”.¹⁴⁰

¹³² *False Necessity* (n 14) 483.

¹³³ “A property regime resulting from such [an Ungerian] sequence of cumulative change is *not* recognizable as either socialism or capitalism because it does not conform to the legal logic of a unified property right held by the individual owner or by the state.”; see *Legal Analysis* (n 14) 23 (emphasis added). See also *DE* (n 11) 80: “The result is neither ‘capitalism’ nor ‘socialism’ but the market economy made more inclusive, more various, and more experimental.” And see, in the context of workers, *Legal Analysis* (n 14) 157–163.

¹³⁴ *False Necessity* (n 14) 491.

¹³⁵ *ibid.*

¹³⁶ *ibid* 491–492.

¹³⁷ *ibid* 492.

¹³⁸ See (n 137). See also *ibid.*

¹³⁹ *ibid* 493–494.

¹⁴⁰ *ibid* 494–495.

The investment funds operate under two basic regimes — a capital auction system and a capital-rationing (or rotation) system, respectively. The former is a competitive regime, with the safeguard being “a blend of screening, guarantees, penalties, limits on the distribution of profits, and provisions for repossession”.¹⁴¹

The second (rotation) system, on the other hand, utilizes more constraints, for example, “the setting of standards about the minimal levels of permissible reinvestment and maximum levels of allowable profit distribution”.¹⁴² In addition, “[t]he capital-rationing fund must be ready to take the initiative in pooling financial and capital resources, in bringing teams of worker-technicians and entrepreneurs together for large-scale, durable enterprises, in redistributing capital from time to time to new teams, and in designing incentives and disincentives”.¹⁴³ As with the bidding system, however, the ultimate capital users in this second system cannot entrench privilege; as Unger puts it, “[o]nce certain limits of personal enrichment and enterprise investment are reached, the additional capital goes back to the original capital fund for reassignment”.¹⁴⁴

In his later work, Unger does not really provide much more detail,¹⁴⁵ save (perhaps) for his statements that resources would be assigned by the intermediate investment funds “to those with the best prospect of assuring over longer or shorter periods the highest rate of return”¹⁴⁶ and (perhaps more importantly) stipulating what the relative rights in the businesses would be:

“The ultimate capital-takers and users . . . would share with the intermediate organizations and with local governments or community associations joint residual rights in the businesses they established.”¹⁴⁷

An important point remains to be noted: Unger does provide for persons who are less able; he stresses, in particular, that every citizen has

“an unconditional right to the satisfaction of his legally defined minimal welfare needs¹⁴⁸ . . . , qualified only by the size of the welfare fund available to government, which is in turn influenced by the price charged for the use of capital and by the decisions made about the basic desired rate of economic growth”.¹⁴⁹

In his latest work, Unger gives a few more details concerning what he terms “a social endowment”:

“[I]ndividuals must also be given a social endowment — a package of rights and resources — securing them against extreme economic insecurity and affording the means with which to open up a path of their own in the world. Some of the contents of this individual endowment account may be spent freely by the individual, whereas others, regarding his early education, his pension

¹⁴¹ *ibid* 496.

¹⁴² *ibid*.

¹⁴³ *ibid*.

¹⁴⁴ *ibid*.

¹⁴⁵ See generally *DE* (n 11) 78–80.

¹⁴⁶ *ibid* 79.

¹⁴⁷ *ibid*.

¹⁴⁸ which come under the rubric of immunity rights, discussed in the main text accompanying (n 105).

¹⁴⁹ See *False Necessity* (n 14) 498.

and unemployment guarantees, or his health protections fall under strict rules or require, for the suspension of these rules, the intervention of social trustees.”¹⁵⁰

On a more general level, Unger’s latest views add more detail and nuance to his suggestions in *Politics*. He reiterates his sharp criticism and rejection of free-market liberalism, which he characterizes variously as the “neoliberal program”¹⁵¹ and “the Washington consensus”,¹⁵² that only seek to entrench existing oligopolic interests.¹⁵³ Unger also criticizes what he terms “psuedoKeynesianism” which is essentially the creation of artificial money, staving off short-term “social pain” at the expense of long-term convulsions that would obviously include high rates of inflation.¹⁵⁴ As to his positive program, in addition to ideas already sketched out in this section, he also has the following suggestions.

First, he advocates raising the level of internal savings and investment by privileging (instead of the usual progressive income tax) a flat tax on consumption instead¹⁵⁵ — although he states that more reliance on direct taxes can be had once inequalities amongst people are diminished,¹⁵⁶ a curious statement if the critique from solidification (considered in the next part) is accepted.

Next, he suggests the forging of a partnership between the central government and the firms which foster experimentalism and transformation.¹⁵⁷ At the same time, he advocates “cooperative competition” that would see the vanguard integrated with the rearguard in the private sector.¹⁵⁸ He does, however, also state that, unlike the vanguard, the rearguard has also to be buttressed by *governmental* activism.¹⁵⁹ “PsuedoKeynesianism” should also be eschewed.¹⁶⁰ Further, Unger is in favor of investment in persons, particularly in the field of education in all its various aspects.¹⁶¹

¹⁵⁰ See *Legal Analysis* (n 14) 139.

¹⁵¹ See *PT* (n 11) 228.

¹⁵² *ibid.* See also generally *Legal Analysis* (n 14) 8–10 23–25 and *DE* (n 11) 4–5.

¹⁵³ *PT* (n 11) 228–229.

¹⁵⁴ *ibid* 235 and *DE* (n 11) 30–31.

¹⁵⁵ In particular, a comprehensive flat-rate value-added tax: see *DE* (n 11) 75–77 and *PT* (n 11) 232–233. See also *Legal Analysis* (n 14) 139, where a universal and direct consumption tax is suggested in the first instance (“This tax falls on the difference between income and savings or investment, allowing for a generous exemption for modest consumption and a steeply progressive rate for the taxable portion of the consumption bill. Such a tax has two consequences favorable . . . First, it turns taxation into the ally, rather than the enemy, of saving and investment. If there is a real problem of underconsumption, it can be addressed directly by a countervailing macroeconomic policy. Second, it applies to what a social democrat should most want to tax: the hierarchy of standards of living and the individual appropriation of social resources.”). And the austere are prevented from accumulating wealth and economic power by “facilities for decentralized access to capital; and the outright taxation of wealth” (*ibid.*). A flat-rate value-added tax may, however, also be utilized as a supplement (*ibid.*); indeed, as we mentioned at the outset of this note, this would be the preferred model in the first instance.

¹⁵⁶ *PT* (n 11) 233.

¹⁵⁷ *PT* (n 11) 227, 233; *Legal Analysis* (n 14) 80; and *DE* (n 11) 7, 36, 77.

¹⁵⁸ *Legal Analysis* (n 14) 80 102 125–126 140 146 150 165; *DE* (n 11) 3, 8, 51, 77; and *PT* (n 11) 233 (“pooling of knowledge and resources among competing firms”).

¹⁵⁹ *PT* (n 11) 234–235.

¹⁶⁰ *ibid* 235.

¹⁶¹ *ibid* 230 237 and *Legal Analysis* (n 14) 140 166.

Method and illustrations

Before proceeding to consider the general difficulties with Unger's proposals, a short note, once again, on the problem of method might not be amiss. I have, in mind, in particular, the final volume of *Politics, viz, Plasticity into Power*,¹⁶² in which Unger provides historical illustrations of the major themes considered and proposed in the preceding two volumes.¹⁶³ In particular, this volume focuses on the causes of both economic and military success (as well as their failures). Needless to say, success is rare and (more importantly) is (as Unger argues) only achieved when an antinecessitarian, transformative approach is adopted. Constraints of space, however, preclude a description of the historical illustrations Unger utilizes. Indeed, so terse and succinct is Unger's own description and analysis that the reader would be better off reading the (relatively slim) volume for himself or herself. I have attempted the briefest of synopses in my earlier work,¹⁶⁴ and will only refer to illustrations in part IV of this article when discussing the possible applicability of Unger's ideas in an Asian context.

[to be continued]

¹⁶² (n 14).

¹⁶³ *viz, Social Theory and False Necessity* (n 14).

¹⁶⁴ See Phang (n 9) 48–50.

Roberto Unger and the politics of transformation in an Asian context*

ANDREW PHANG**

III *A critical analysis of Unger's ideas*

Normativity and theoretical frameworks

As we have seen above, Unger seeks to avoid both the problems of normativity and theoretical frameworks via “context smashing”.¹⁶⁵ This proposal is, however, not without problems, not least because it is clear that Unger cannot stake his justificatory claim for the process of “context smashing” simply by virtue of a *claim* to objective truth.

To very briefly recapitulate, Unger avoids the Humean fact-value objection by synthesizing both the descriptive and the normative via the practice of “context smashing”. Unger here is not seeking to argue from fact to value but, rather, that value results from the practice of empowered individuals; in his words: “At any given time we *are* largely the sum of our fundamental practices. But we are also the permanent possibility of revising them. We can change them.”¹⁶⁶

In sum, we discover as well as affirm value by engaging in the process of transformation via “context smashing”.

But how are we to measure the value that results from the practice of “context smashing”? Unger argues that the manifestations of such value will be found in the resultant social visions and projects which his conception of personality supports.¹⁶⁷ These, presumably, are the various institutional reforms that we briefly described in the preceding part.

The preceding description was based on Unger's book, *Passion*,¹⁶⁸ but his subsequent description in *Politics*¹⁶⁹ is similar, the underlying idea being the combination or synthesis of description and prescription in actual experience so as to avoid the Humean difficulty.¹⁷⁰

How persuasive are Unger's suggestions? His suggested practice of “context smashing” is, insofar as the problem of normativity is concerned, rather vague.

* See 1997 *TSAR* 45–65 for the first and second parts of this article.

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¹⁶⁵ See the main text accompanying n 32–44. And as one writer has persuasively argued, this attitudinal approach is, in fact, crucial to our acceptance (or rejection) of Unger's institutional proposals: see Trubek “Radical theory and programmatic thought” 1989 *The American Journal of Sociology* 447–451 (review essay) (see also a similar passage, slightly elaborated on, in a modified version (entitled “Programmatic thought and the critique of the social disciplines”) in Lovin & Perry (eds) (n 14), 232–240).

¹⁶⁶ *Passion* (n 30) 41 (emphasis in the original text).

¹⁶⁷ *ibid* 48. See also *Legal Analysis* (n 14) 150.

¹⁶⁸ (n 30).

¹⁶⁹ See eg *Social Theory* (n 14) 41–42 and *False Necessity* (n 14), especially 350–355 360–361 395–396 578–579.

¹⁷⁰ See *Social Theory* (n 14) 42.

Amongst other things, its constantly shifting content conflicts with our traditional perception of a “guide” which presupposes a datum amount of stability.

What (more importantly) is the *justification* for the adoption of Unger’s proposal but not the others? Unger’s argument in this particular respect would, I suspect, run something along the following lines: the objective good in his suggested practice cannot be ascertained by mere theoretical discourse; it has to be *actively practised* in order that its value may be realized. Whilst not an unpersuasive argument, it achieves, with respect, an impasse at best. In many ways, it is self-referential and circular; accepting it (and, better still, engaging in it) would require something akin to *faith*, and this, in fact, raises the related issue of religion which, however, can only be very briefly touched upon in the concluding part of this essay. But returning, for the moment at least, to the practice Unger proposes, the reader is left, in effect, with one of two choices: he or she can take Unger’s arguments on faith, engage in the practice of “context smashing”, and thereby have *personal evidence* that such a practice is indeed good; alternatively, he or she can choose to reject Unger’s arguments on the ground that they simply cannot be *theoretically* justified, in which case an impasse would probably ensue. Leaving aside the second alternative, there are remaining problems, nonetheless, with the first: what if someone did in fact engage in the practice of “context smashing”, and *disliked* it? This is a not improbable scenario; after all, is not individual subjectivity and preference assumed even by Ungerian theory? Indeed, as we shall see below, there are many persuasive reasons why engaging in “context smashing” may not be all to the good of many individuals. Here, however, Unger might have recourse to a counter argument that would (unfortunately) not advance our inquiry; he might argue that individuals who do not appreciate the practice of “context smashing” are missing the point: in other words, that something could be objectively good even though it might not in fact be appreciated as such. But, at this juncture, are we not back full circle, as it were?¹⁷¹ The result, again, is an *impasse*. And the problem is exacerbated by the fact that Unger rejects, in fact, the idea of an objective good in the traditional sense, *ie*, in the sense of intelligible essences; if this is so, then issue cannot even be joined in the first instance since Unger would not even entertain the possibility of objective justification, at least in its traditional form.

¹⁷¹ For similar (as well as other) critiques, see Fish “Unger and Milton” 1988 *Duke Law Journal* 975 997 *et seq* (but *cf* Fish’s own account which relies on practice which, it is submitted, is itself a “theory”; and see generally, by the same author, *Is There A Text in This Class?* (1980); “Working on the chain gang: interpretation in law and literature” 1982 *Texas Law Review* 551; “Wrong again” 1983 *Texas Law Review* 299; “Still wrong after all these years” 1987 *Law & Philosophy* 401; “Dennis Martinez and the uses of theory” 1987 *Yale Law Journal* 1773; and a collection of these (and other) essays in *Doing What Comes Naturally — Change, Rhetoric, and the Practice of Theory in Literary and Legal Studies* (1989)). See also Boyle “Modernist social theory: Roberto Unger’s *Passion*” 1985 *Harvard Law Review* 1066, especially 1071–1077; Weinreb “Enduring *Passion*” 1985 *Yale Law Journal* 1825 (though *cf* Weinreb’s own basic approach toward legal formalism: see eg “Legal formalism: on the immanent rationality of law” 1988 *Yale Law Journal* 949, and, by the same author, “The jurisprudence of legal formalism” 1993 *Harvard Journal of Law & Policy* 583); Van Doren “Understanding Unger” 1990 *William Mitchell Law Review* 57, especially 97–98, 100, 105; Chaffin “Passion and the ethic of empowerment” 1985 *Cardozo Law Review* 987 991 (book review); Burns “When the owl of Minerva takes flight at dawn: radical constructivism in social theory” in Lovin and Perry (eds) (n 14) 130–158 at 151; and Belliotti (n 58) 326–327.

The problem, in fact, is that the *very concept* of normativity must *necessarily* imply *an objective good or value* that inheres in the idea enunciated. This would explain why, despite the many trajectories explored in the present discussion, we constantly end up at precisely the same area of difficulty.

Even if we accept Unger's merger of the descriptive and the prescriptive, there are further difficulties. There is, first, every possibility of empirical fact being inaccurately described.¹⁷² More importantly, perhaps, perceptions of the "same" empirical fact may vary amongst different individuals.¹⁷³ Indeed, one commentator goes so far as to argue that Unger "does not provide a single empirical example of a structure denying structure".¹⁷⁴ Unger has, in fact, been criticised for the perceived over-abstract nature of his work.¹⁷⁵ It does not help, either, that Unger concedes that the project of "context smashing" might fail.¹⁷⁶ However, it should be noted that the (just mentioned) argument relating to the fluidity of facts may actually work in favour of Unger's inasmuch as it leads to a plastic interaction between fact on the one hand and theory on the other, on the premise that there is no sharp or even reasonably clear distinction that can be drawn between empirical facts and normative propositions — the way each of us sees the world depending, in the final analysis, on the particular conceptual structure we hold. But, even so, what is primarily avoided is the Humean dilemma, but (unfortunately) it does not dispense with the further inquiry as to the basis of the conception (of "context smashing") itself: not unless one simply accepts the impossibility of objective demonstration and relies simply on the ability to persuade instead.

A little may be said about Unger's concept of "context smashing" in relation to the problem of theoretical frameworks. The principal (and intractable) problem really relates to the ineradicable tension between universals on the one hand and particulars on the other.¹⁷⁷ One main consequence of this tension is the absence of brute facts and the overall complexity of the perceived facts themselves as they intermesh in a myriad of contexts and situations. Superadded to this — and probably an insuperable problem in its own right — is the problem of the subjectivity or relativity of values.¹⁷⁸ Nor ought the problem be trivialized, for example, by setting the theoretical framework at

¹⁷² See Alford "The inscrutable occidental? Implications of Roberto Unger's uses and abuses of the Chinese past" 1986 *Texas Law Review* 915; Smolin "Roberto Unger's theory of personality, law, and society: critique and proposal for a revised methodology" 1986 *Cincinnati Law Review* 423 437 439 447–448; and Herzog (n 10) 1447–1448.

¹⁷³ See eg Anderson (n 8) 98.

¹⁷⁴ See Yack 1988 *Harvard Law Review* 1961 1969 (book review).

¹⁷⁵ See eg Ball "The city of Unger" 1987 *Northwestern University Law Review* 625; Hobson "Psychiatry as scientific humanism: a program inspired by Roberto Unger's *Passion*" 1987 *Northwestern University Law Review* 791 (calling for more empirical evidence and who is, significantly perhaps, a psychiatrist by training); and Fleischmann "The plastic politics of abstraction" 1988 *Contemporary Sociology* 448. On (related) arguments from vagueness, see eg Elshstain 1987 (Jan/Feb) *Society* 89 (book review) and King 1988 *Political Quarterly* 124 (book review).

¹⁷⁶ See eg *Passion* (n 30) 86 and 113–114. Unger is also quite clear that his conception cannot (unlike his institutional proposals proffered in *Politics* (n 14)) attain perfection (see eg *Passion* (n 30) 217 244 263 268). But (as we shall see) Unger also does make concessions in relation to his ideas in *Politics*: see the main text accompanying n 233–234.

¹⁷⁷ See generally the main text accompanying n 23–28.

¹⁷⁸ It bears repeating that Unger gives us a masterly analysis of all the problems just mentioned in *Knowledge and Politics*, his first work: see (n 23).

too high a level of abstraction, rendering it meaningless from the perspective of application.¹⁷⁹ Unger's approach is thus rather attractive, for if value can be automatically engendered from the very practice of "context smashing", there would be no need to have recourse to a theoretical framework in the sense just outlined. But it should be borne in mind that the arguments considered above in relation to the problem of normativity would pose equally difficult problems *vis-à-vis* the issue of theoretical frameworks.

In his latest work, Unger does return to the problem of theoretical frameworks and attempts to locate the golden mean: "The campaign to split the difference between rationalism and historicism can succeed only by radically shifting course in the methods it employs and the outcomes it justifies."¹⁸⁰

Whilst Unger very cogently describes the central dilemma that has its roots (as we have seen) in the ineradicable tension between universals and particulars,¹⁸¹ he does not, with respect, provide any clearer an answer. He seeks to expose the fragile link between ideals and practices and to demonstrate their holistic nature, thus merging the prescriptive with the descriptive via the "experience of churning and recombination" that, it is submitted, results from the practice of "context smashing" already considered above.¹⁸² And he disapproves of "historicism" which defines the descriptive in the here and now as the prescriptive for the future, and thus effects closure on transformative thought.¹⁸³ Unger views the recent efforts by philosophers to strike a balance, in the form (that we have already mentioned) of frameworks (and citing both Rawls¹⁸⁴ and Habermas¹⁸⁵), as unsatisfactory.¹⁸⁶

Whither legal theory?

It is never really clear what the precise relationship is between Unger's legal theory and his social theory. It is suggested, however, that the apparent absence of linkage is entirely consistent with the basic spirit behind Unger's proposals, which are intended to be taken holistically. It is, however, unfortunately true that the law (in particular) is often viewed as abstruse and exclusively within the province of legal scholars, practitioners and judges; law is, amongst other things, technical and is replete with "word-traps" that (without the expertise provided by the aforementioned personnel) could result in loss of life or liberty, or at least relatively huge amounts of wealth. Such an approach is not only consistent with a positivistic approach towards the law; more than that, it is wholly consistent with the underpinnings of liberal doctrine where subjective preference is the order of the day; in this context, law

¹⁷⁹ See also *ibid* 133–134.

¹⁸⁰ See *Legal Analysis* (n 14) 171.

¹⁸¹ See generally *ibid* 170–172.

¹⁸² *ibid* 173.

¹⁸³ See generally *ibid* 174–176.

¹⁸⁴ See the works cited at n 16. See also Burns (n 171) 135–139 144 146.

¹⁸⁵ See eg Habermas I and II, *The Theory of Communicative Action* (trans, McCarthy, 1984–1987).

¹⁸⁶ See *Legal Analysis* (n 14) 177. And see *ibid*: "The central flaw in this approach is its failure to question the authority by which the established organization of the government, the economy and civil society represents the ideal conception of voluntary society": *ie* a problem of philosophical *justification*.

provides one of the neutral frameworks to resolve disputes and generally prevent chaos. The problem, of course (and which we have already seen), is the assumption of (and recourse to) neutral and objective standards, which recourse undermines the very ambitions of liberal doctrine itself. Unger's approach is intended to not only expose this but also to transform legal doctrine in particular and the entire social structure in general.

It is easy to see why liberal doctrine in general and liberal legal theory in particular has had such a powerful hold over the mindset of so very many people, both in the past and in the present. The present writer would hypothesize that a major cause of this virtual obsession with individual rights stems from the profound decline in religious belief coupled with industrialization and modernization: the former encourages an excessive concern with self and immediate family,¹⁸⁷ whilst the latter encourages and reinforces this concern by pointing to what is material and gratifying, and which (in turn) fuels the desire for increased acquisition of material goods and luxuries. I think that Unger is basically correct when he argues that in a liberal society, the line between ideal and actuality is blurred as relationships increase in number but decrease in quality: people are held together merely by an "association of interests" rather than by the deep bonds of solidarity.¹⁸⁸ Indeed, this is the *anomie* most sociologists speak of in the context of increased alienation of the individual in urban society. The upshot of all this, however, is a deep and abiding belief in institutions that can serve as arbiters and (more importantly) protectors in an increasingly hostile world. And the institution of law in general and its process in particular plays a pivotal role in the mediation and resolution of problems in an environment where competition is otherwise the order of the day. Indeed, the ascertainment of what is *legal* is what gives order to the socio-economic as well as political system. This, in a word, is what *legitimacy* is all about — the *perceived* moral justification and consequent authority for the law lies, in other words, in the *perception* of *impartial* adjudication;¹⁸⁹ for, otherwise, the (especially coercive aspects of law) take on an oppressive colour instead. Regardless of whether we speak of procedural or substantive justice, one common denominator prevails — the eschewing of *ad hoc* balancing (which is dependent on the unbounded discretion of the judge), which balancing would clearly result if anomalies or counterprinciples were permitted to run their logical course. I hasten to add that although *ad hoc* balancing may not only be impossible to realistically avoid but may also (on occasion at least) be even desirable, this does not appear to be the general view in so far as *public perception* is concerned. At the expense of repetition, this explains, in large part, why a central preoccupation of scholars has been the search for a neutral framework within which different conceptions of the good (based on individual subjective and substantive preference) may be pursued.¹⁹⁰ Looked at in this

¹⁸⁷ in many ways itself at least a major factor influencing conception of the self as well.

¹⁸⁸ See generally *Law in Modern Society* (n 23) 143–147.

¹⁸⁹ See also Haley *Authority Without Power — Law and the Japanese Paradox* (1991) 6: "Another special attribute of legal norms is their *legitimacy*, in other words, community recognition of the bindingness of the norm and the appropriateness of the sanction for its violation" (emphasis in the original text). It should be noted that at least one writer does consider this particular issue expressly, but does not (with respect) really provide a viable alternative proposal: see generally Belliotti (n 58) 328–331.

¹⁹⁰ See eg the works cited at n 16.

light, Unger's latest proposals which not only go to the process of adjudication but also to the very *personnel* themselves,¹⁹¹ is, it is suggested, apt to exacerbate, rather than mitigate this central problem of legitimacy.¹⁹²

A second (and more subsidiary) point pertains to one of Unger's proposed points of departure, *viz*, the practice of deviationist doctrine and internal development. Can it not be argued that judges *are*, indeed, practising internal development, if nothing else, because they are confronted daily with anomalies in the law, which they necessarily have to utilize as points of departure for the exposition as well as development of the particular branch of the law concerned? Unger's dissatisfaction would probably lie in the fact that such a process would not (for the most part at least) be taken to its logical conclusion which (at the extreme end of the continuum) would result in the counter-principle or exception "swallowing up", as it were, the rule, *ie*, *becoming* the rule itself. But this, it is submitted, takes us back to the problem considered in the preceding paragraph, *ie*, the avoidance of *ad hoc* balancing, so that the question once again centres on whether judges today are justified in refusing to proceed on a process of *ad hoc* balancing and insisting on adherence to "the law" instead.

All said and done, there is probably more *ad hoc* balancing than the popular rubric would have us suppose. But if Unger is indeed correct that the present edifice of legitimacy is built on foundations of sand, is there a future for the law itself? And if there is by way of an Ungerian transformation, what is to be done during the interim period? Would we be able to survive the possible chaos? And if we can by utilizing existing systems of law and legal reasoning, why change what has worked, albeit imperfectly? In point of fact, nobody really believes that the law is even close to being perfectly just, but litigants (for example) only expect (I suspect) a good faith effort on the part of all concerned, in the absence of a better alternative. Unger's argument is simple, but requires a tremendous leap of faith: there may be nothing out there, in which case one would be throwing out the baby together with the bath water; alternatively, there could be a never-ending spiral of transformation, each an improvement on the previous one. I am, however, apt to take a more pessimistic stance. Nothing in history, indeed outside it, has shown that the imperfectibility of human beings and their institutions can be transcended; on the contrary, everything in history, and outside it, has merely confirmed, time and again, the imperfectibility of persons and institutions that is both our blessing and our curse: our blessing because as living beings capable of reason, we can make our own choices, our curse because we often make the wrong ones. The reader will recall that I spoke of the *perception* of people *vis-à-vis* the law; Marxian theory would term such perception mystification. But this latter characterization, with respect, trivializes the inimitable essence of persons, of their capacity (in particular) to think, reason and apply; mass delusion would be a persuasive explanation if only it were not so reductionistic. Indeed, the realm of human consciousness is no less real because unseen; that is the paradox and

¹⁹¹ See *supra* (n 69–86).

¹⁹² Unger appears to acknowledge this practical reality early on in *Legal Analysis* (n 14), where he acknowledges (at 31) that "no society, not even the United States, will allow a vanguard of lawyers and judges to reconstruct its institutions little by little under the transparent disguise of interpreting the law".

strength of the human mind and spirit. So, then, “myth” becomes reality in the minds and hearts of the people and whilst Unger is correct in pointing out that nothing is immutable, some concepts are more deeply etched in the psyche of people, indeed whole civilizations, than others; it is suggested that the concept of law is one of them. I would not advocate an unconditional abandonment of the present system, despite its manifold problems. Indeed, the risks Unger asks us to take far outweigh the possible benefits to be gained, even in a spiritual sense.

Unger’s proposed system of rights is more readily accessible to the ordinary reader.¹⁹³ I have already dealt with a preliminary problem which may be encapsulated in the following question: does the very concept of “rights” itself contradict the premises of Ungerian legal thought? As I have pointed out, Unger is advocating a “superliberalism”¹⁹⁴ which thus takes liberalism as its starting-point for transformation and ultimate metamorphosis. The more significant issue, therefore, is whether Ungerian rights do take on a fundamentally different nature.¹⁹⁵

Unger’s system of rights, whilst systematic, is still rather general. And it is submitted that any attempt to further concretize this system would only result in possible contradictions, both without and within. For example, his system of *market* rights¹⁹⁶ is dependent (as it should be) on the success of his proposals for the re-organization of the economy in general and the concept of the rotating capital fund in particular. As we shall see, however, the concept of the rotating capital fund is itself a fallible instrument of reform. Unger’s idea of *immunity* rights, on the other hand, whilst not so dependent, does not, however, tell us *how* they are to be determined and what their *scope* might be; indeed, *who* is to effect such determinations? To state that this depends on the particular shape and culture of the society concerned is not, to be sure, unreasonable; but it is this very element of relativity that undermines the very concept of immunity rights in all but in most abstract forms: that perennial (and ineradicable) “enemy”, the tension between universals on the one hand and particulars on the other, rears its ugly head yet again. But if societal particulars are inevitably relative, what standards are to guide the reformer? However, it is those very standards that critical legal scholars in general and Unger in particular have accepted and argued cannot exist: relativity becomes a double-edged sword. Indeed, the basic assumption behind the very concept of immunity rights presupposes, in Unger’s own words, a “minimum rigidity”;¹⁹⁷ more than that, Unger accepts a “bright line” demarcation for each immunity right, entailing clearly defined boundaries of individual “space” that cannot be

¹⁹³ See generally the description in the main text accompanying n 102–106.

¹⁹⁴ See (n 101).

¹⁹⁵ See generally the critique by Eidenmuller “Rights, system of rights, and Unger’s system of rights: part 1” 1991 *Law & Philosophy* 1, which, however, is more technical in nature; it shall be assumed, in the discussion that follows, that Unger’s system of rights can somehow survive this more specific critique. Though *cf* the second part of the author’s article which does in fact engage in a more wide-ranging critique that will be touched on in the discussion that follows: see generally Eidenmuller “Unger’s system of rights: part 2” 1991 *Law & Philosophy* 119, especially 126–142.

¹⁹⁶ See (n 103).

¹⁹⁷ See *False Necessity* (n 14) 527.

interfered with.¹⁹⁸ This is a concrete illustration of the need for a standard or guide, the absence of which would result in arbitrary line-drawing; and arbitrariness has always been a calling card for oppression. Indeed, can one argue that there is a further inconsistency between immunity rights on the one hand and destabilization as well as solidarity rights on the other (the latter pair of rights of which Unger argues *cannot* be circumscribed by bright lines)?¹⁹⁹

Similar problems crop up with regard to *destabilization* rights, for (once again) where is one to draw the line? If no lines are contemplated, such rights would, as I shall argue below, actually threaten (rather than protect) individual as well as group freedom.²⁰⁰

The situation is no better (and perhaps worse) insofar as *solidarity* rights are concerned. The problem, briefly described earlier and embodied within the concept of the “fundamental contradiction”,²⁰¹ is an undeniably real one which goes right to the bone, so to speak. But how are they to be successfully implemented; indeed, one might even argue that the very existence of the conceptual tools and process required to eradicate this problem is an impossibility because if they did exist, there would have been no serious problem in the first place. The attempted concretization of such rights would, I suspect, merely reveal the intense intractability of the problem itself, the root cause of which lies (once again, it is submitted) in the realm of the imperfection (and imperfectibility) of human nature.²⁰²

The main problem was recently emphasized by one writer,²⁰³ and it is this: that Unger’s system of rights requires, in the final analysis, line-drawing (which he appears, as we have seen, to concede insofar as immunity rights are concerned) would and not only be anathema to the underlying spirit of the Ungerian enterprise but would also not thereby be sufficiently distinctive from the existing system of rights; on the other hand, the absence of line-drawing would lead to all kinds of conceptual as well as practical problems, as briefly delineated in the preceding paragraphs.

¹⁹⁸ *ibid* 530. But *cf* *Legal Analysis* (n 14) 142, where Unger concedes that the context might require some qualification.

¹⁹⁹ *False Necessity* (n 14) 535 and 538, respectively. See also Eidenmuller “Unger’s system of rights: part 2” (n 195) 125–126.

²⁰⁰ See generally the discussion of “solidification” below. Spitz “Solidarity and disaggregated property rights: Roberto Unger’s recasting of democracy” 1991–92 *Columbia Human Rights Law Review* 43 argues, specifically, that only this category of rights is questionable, but (with respect) his arguments for its modification (into “transformation rights”) do not appear to advance the project of empowerment as a whole — at least insofar as the issue of justification is concerned (not least because they do not really deal with the problem of solidification, discussed in more detail below).

²⁰¹ See (n 34).

²⁰² Refer, once again, to the discussion of ‘solidification’, below.

²⁰³ See generally Halpin “New rights for old?” 1994 *Cambridge Law Journal* 573. His argument to the effect that any uncertainty only relates to the process of establishing the right concerned and not to the definition of the right itself is interesting, but does not really aid us if it is argued that no right can ever be firmly established, at least to the degree argued for by that writer: see *ibid* 586–587 590–591. Indeed — and contrary to that writer’s arguments (see *ibid* 592–593) — Unger would reject any attempt to infuse his system of rights with objective constraints.

Routine, revolution and exhaustion²⁰⁴

As mentioned right at the outset of the present article, one of Unger's main objectives is to efface the contrast between routine on the one hand and revolution on the other. But this is not without problems.

In the first place, there are limits of space and time. And when translated to the individual, these limitations take on an even starker reality: each individual has limits both in the physical as well as the mental senses. No matter how able an individual is, there *will be* limits to the development of his or her abilities.

By making the argument in the preceding paragraph, I am not arbitrarily limiting the endless potential each of us possesses. Unger's approach, if taken to its extreme, is, it is suggested, intuitively unpersuasive — especially if it is related to what actually takes place in reality. Whilst I believe that it is imperative for each individual to attempt to develop his or her abilities to the fullest, I do not subscribe to the proposition that there are no limits on *ultimate* development. I argue, instead, that there *are* limits, so that, whilst we never *fully* realize our potential, we do reach the outer limits, beyond which any further development is extremely incremental and which constitute mere variations on the same theme. Our abilities are ultimately limited, and even the gifts and abilities we possess are constrained by the human limitations alluded to above.

The essential thrust of this second point is not all difficult to grasp; again — as with the first — there is a not insignificant degree of intuitive appeal: indeed, perhaps more so than the first. This second point rests in the idea that routine is the only way in which life can be lived out in a reasonable manner, simply because it provides the necessary stability to enable one to work out as well as implement one's life-plan as well as the short-term projects of the moment.²⁰⁵ That we live in an increasingly complex world is a fact which few would deny: stability in the form of routines becomes, then, not simply a point of departure for long as well as short-term planning, but an imperative of survival itself. Adoption of an Ungerian approach in its fullest form would, many writers argue, only exacerbate the situation.²⁰⁶ Indeed, one writer has cogently argued that Unger's project is only for the fittest and most well-endowed;²⁰⁷ lesser

²⁰⁴ See generally Sunstein "Routine and revolution" 1987 *Northwestern University Law Review* 869.

²⁰⁵ See eg Sunstein (n 204); Galston "False universality: infinite personality and finite existence in Unger's *Politics*" 1987 *Northwestern University Law Review* 751; Holmes (n 9) 172 and 36, respectively; Van Zandt "Commonsense reasoning, social change, and the law" 1987 *Northwestern University Law Review* 894; Wilder 1989 *American Political Science Review* 620 623 (book review); and Shapiro "Constructing Politics" 1989 *Political Theory* 475 481 (review essay).

²⁰⁶ See eg Sunstein (n 204); Van Zandt (n 205); and Hutchinson and Monahan "The 'rights' stuff: Roberto Unger and beyond" 1984 *Texas Law Review* 1477.

²⁰⁷ See Ball (n 175) 641; see also Hutchinson "A poetic champion composes: Unger (not) on ecology and women" 1990 *University of Toronto Law Journal* 271 289 295 (review article) and Yack (n 174) 1974–1976. Indeed, the situation is quite different for the majority: see Dunn "Unger's politics and the appraisal of political possibility" 1987 *Northwestern University Law Review* 732 749 and Galston "False universality: infinite personality and finite existence in Unger's *Politics*" 1987 *Northwestern University Law Review* 751 759; so, also, for (and, perhaps, especially) those who are at least potentially more vulnerable (eg children, and the mentally retarded or unstable): see Holmes (n 9) 169–170 and 35, respectively. But cf Altman *Critical Legal Studies—A Liberal Critique* (1990) 161–162, who implicitly subscribes to an interpretation of Unger's views which the latter would probably state does not go far enough (see *ibid* 162).

mortals would, presumably, be left by the wayside: exhausted²⁰⁸ and in utter despair. This is a compelling observation if Unger's project is embraced in its fullest sense, although I argue in part V below that a qualified and modified acceptance of Unger's thesis would not only be workable but also desirable. Indeed, even Unger is compelled to admit that there must be points during which the individual has to rest and, presumably, reorganize.²⁰⁹ This point, however, (in turn) raises at least two pertinent and closely related queries. First, is there any real difference between Unger's thesis and the existentialism which he assiduously seeks to avoid? To establish a real difference, it is suggested that Unger would have to accept not only a series of points of rest (as he does)²¹⁰ but also (in part at least) a series of stable end-points. But would the latter not be anathema to the general thrust of his programmatic suggestions which allow for a framework only insofar as that framework engenders *perpetual* revision and transformation? Secondly, even as to Unger's envisaged points of rest: how long would they last? If they last too long, they might, albeit unintentionally, aid in contrasting the routine and revolution which Unger seeks to efface. If they do not, the exhaustion and despair already referred to become real possibilities. In his latest work, Unger attempts to answer these objections, however, by observing thus:

"Availability to challenge and revision should not be mistaken for a condition of permanent flux. The point is not that the institutional arrangements constantly be changed — an exercise from which people would soon seek release — but rather that the distance between pursuing interests within a framework and changing bits of the framework as you go along diminishes. Change becomes banal, as the transparency of the institutional context of action, and its openness to tinkering, increase. This is no move from stability to instability; it is a shift in the quality of stability"²¹¹

The crucial point, however, is not so much the constant change in the *institutional* arrangements themselves but, rather, the *constant mental energy* that is required to be expended, which expending would ultimately lead to exhaustion, or to breaks that might then (as sought to be argued above) lead to solidification of sorts. In any event, both mental attitudes and institutional arrangements are (ideally at least) all of a piece. Indeed, some might even go so far as to argue that if Unger is merely arguing for the receptiveness towards (as well as readiness for) innovation, this already takes place in the everyday world in any event.

Returning to the issue of practicality proper, Unger might argue that his proposed program is nevertheless objectively correct, notwithstanding what is happening in fact. This would, however, be a rather odd argument to proffer simply because his program is (in large part) premised on practical action. Notwithstanding this, however, an important point should be made: the desire by a majority of persons for stability and routine, and their consequent disorientation by perpetual transformative activity, does (and, it is submitted,

²⁰⁸ See Hutchinson and Monahan (n206) 1532–1534 and Sunstein (n204) 885. See also Hutchinson (n207) 288.

²⁰⁹ See eg *False Necessity* (n14) 462. This would also be consistent with Unger's argument that reforms should be made piecemeal, albeit constantly: see, eg *Legal Analysis* (n14) 152 169 and *DE* (n11) 60 61 81; but cf the issue as to timeframe in the main text below.

²¹⁰ See *False Necessity* (n14) 462. See also *Legal Analysis* (n14) 163–164 179–180.

²¹¹ See *Legal Analysis* (n14) 316. See also Lovin "Introduction: Roberto Unger's *Politics*" in Lovin and Perry (eds) (n14) 1 9.

will continue to) exist, *regardless* of the truth (or otherwise) of Unger's proposed program. It thus becomes notoriously difficult to persuade people of the truth of such a program when it is rife with such undesirable practical consequences.

Conflict and destruction

No pejorative connotations are apparently contained in the Ungerian project. However, a plain and logical reading of the various works themselves may suggest otherwise, and many writers have pointed to the rather destructive cast of Unger's proposals that advocate conflict and "context smashing".²¹² Indeed, the very nature of Unger's argument contributes to this inference: if transformative thought does not (indeed cannot) contemplate any boundaries, there must be the ever constant danger that an overspill, as it were, will occur, leading to possible (but needless as well as wanton) destruction. The consideration of the conditions of *military* success in *Plasticity into Power*²¹³ supports this construction. In addition, in numerous places in *False Necessity*²¹⁴ (too numerous to be detailed here) Unger's emphasis is on economic and military power. And Unger himself admits, at various points in the selfsame work, that there is the everpresent danger of oppression.

The problem of disincentives and bequests

It might be asked whether Unger's proposed economic arrangements might, in any event, gradually break down because the constraints on the excessive accumulation of wealth which might in fact generate *disincentives* to work and create one of the main causes of economic backwardness in the communist states.²¹⁵ It might be observed that the guaranteed minimum welfare rights are likely to merely enhance the degree and intensity of such disincentives.

A related point relates to bequests — would these be permitted? If not, the disincentives will, once again, be propelled to the fore. If, on the other hand, bequests are allowed, the process of levelling would be retarded. This result may be undesirable for the simple reason that Unger's proposed institutional program can only mitigate the problem of inequality and, as we shall see, Unger himself recognizes the risk of failure.

²¹² See eg Dunn "Doing something" *London Review of Books* (17 Mar 1988), 12; Ball (n 175) 638; Holmes (n 9) 173–174 and 35, 37, respectively; Ewald (n 9) 740–753 755; and Devlin 1986 *Queen's Law Journal* 219 228–229 (book review). Ewald focuses, in fact, on Unger's endorsement of the Chinese cultural revolution which (as he correctly points out) resulted in much needless pain and suffering; on the cultural revolution, more in Part V, *infra*. Interestingly, Holmes points out ((n 9) 169 and 35, respectively) that if Unger's project succeeds, context-smashing would have perforce to cease: "You can shatter the brittle, but not the fluid." For an attempted moderation of Unger's concept of plasticity, see Lessig "Plastics: Unger and Ackerman on transformation" 1989 *Yale Law Journal* 1173.

²¹³ See (n 14).

²¹⁴ See (n 14).

²¹⁵ And see eg Perkins "Completing China's move to the market" 1994 *Journal of Economic Perspectives* 23 29. And cf Eidenmuller "Unger's system of rights: part 2" (n 195) 128–131 (on the insufficient encouragement of research and development) and 131–132 (on the triggering of substantial substitution effects). Reference may also be made to Pannier (n 10) 680 and Belliotti (n 58) 331.

In his latest work, however, Unger does attempt to deal with the issue of inheritance. But his proposal does not center on *individual* inheritance as such but,²¹⁶ rather, on what he terms “*social inheritance*”:

“The individual inherits from society rather than from his family, receiving a minimal social-endowment account. This basic endowment account should vary upward according to two countervailing standards: compensation for certified need and reward for competitively demonstrated capacity.”²¹⁷

Apart, however, from the obvious problems of where to draw the line, it is suggested that this principle of “social inheritance” still does not ameliorate the problem of disincentives. So long as individuals are unable to accumulate wealth for themselves as well as their own family members, the incentive to work, create and innovate will, it is suggested, be stifled.

The politics of solidification

The premises of “solidification” can be traced to two related points: the fact that every institutional structure must ultimately be operated by people and, secondly, the problem of human nature. “Solidification” results, in large part, from the latter: from, in other words, the preoccupation with self-aggrandizement which ultimately “suffocates” the entire enterprise of Ungerian thought and action. This problem is referred to by some writers,²¹⁸ but has not really been emphasized, let alone driven home. One can only speculate at the reasons for this, the foremost amongst which must surely be the fact that it is too obvious. But it is often the most obvious critique that can also prove the most devastating. Since, however, solidification rests on a pessimistic view of human nature, it is possible for Unger to avoid this critique by postulating an entirely different conception of human nature altogether.²¹⁹ But it would, I submit, be extremely difficult (if not impossible) to accomplish such a task. I can, of course, make no claim myself to objective truth, although I would venture to observe that the enormity of Unger’s task stems, in large part, from the fact of enormous disparities in the world, both present and past: of the constant grasping for, and irrepressible urge to maintain, power in its various forms—all of which transcend space, time, and cultures. Without higher guidance, any sustained altruism on an effective scale as well as timeframe appears doomed to failure right from the outset. Indeed, the Enlightenment, by finally destroying the religious base and extolling human reason, has rendered the philosophical quest (in Anglo-American legal philosophy at least) merely a search (in large part) for frameworks, for conceptions of the right that (in turn) channel the multifarious conceptions of

²¹⁶ *Legal Analysis* (n 14) 139; see also *DE* (n 11) 72–73.

²¹⁷ *PT* (n 11) 237. See also *Legal Analysis* (n 14) 14–15 139.

²¹⁸ See eg Sunstein (n 204) 878 886–888 892; Holmes (n 9) 172–175 and 37, respectively; and Dunn (n 212) 13. On a more specifically historical level, see Cleary and Higonnet “Plasticity into power: two crises in the history of France and China” 1987 *Northwestern University Law Review* 664.

²¹⁹ But cf *False Necessity* (n 14) 522 (reference to “greed and ambition”). See also *ibid* 455 and 472; *Social Theory* (n 14) 153; and *Plasticity into Power* (n 14) 11. But cf, in turn, *False Necessity* (n 14) 500, where Unger attempts to argue for “the mutability of human nature” (see also *ibid* 558–559). Whilst acknowledging the literal varieties and possibilities for change in human beings, I am still pessimistic about what I perceive to be a dark, and indeed *immutable*, facet of human nature.

the good.²²⁰ But the term “the good” is itself a misnomer, for given the relativity of values (as exemplified by the different individual conceptions of the good) which mainstream liberalism takes for granted, the underlying premise is a Hobbesian one — the selfish grasping after benefits for oneself and for one’s immediate family. This is, in fact, the basis of the free-market system which (as has already been mentioned) has taken on an even more important role in the wake of the collapse of communism in Eastern Europe and the steady changes being effected in the economy of the People’s Republic of China. Indeed, such a system is supposed to provide the necessary motivation for innovation as well as diligence. It is, however, an equally well-known fact that such a system generates enormous disparities in income and welfare: the bases, as well as manifestations, of domination and subjugation. Implicit within Unger’s project is an antagonism towards such domination and hierarchy; hence the tenor and substance of his proposed program. But, as already mentioned, “solidification” poses insurmountable obstacles.

Taking, for example, Unger’s proposed reorganization of the government, whilst it is true that the present constitutional structures in a great many Western democracies give rise to innumerable opportunities for impasse, Unger’s proposed multiplication of the number of branches of government with overlapping functions and powers, whilst theoretically attractive, does not prevent “mini-kingdoms or fiefdoms” from being established by the persons having charge of such branches: some of whom may utilize their respective statuses as springboards for the projected takeover of the entire system. This argument applies equally to the overseeing of the mini-constitutions Unger advocates. What, then, about Unger’s proposals for a resolution of what is therefore an entirely possible conflict amongst the various branches of government? If, as Unger suggests, there is to be a principle of priority amongst the different branches, how is this to be worked out in practice: in particular, who is to decide? Might the decision-maker herself or himself be biased and prejudiced? One other method of resolution of constitutional impasses Unger suggests is that of either immediate or delayed devolution to the general electorate. But, as Unger himself acknowledges, the use of immediate devolution would probably lead to abuse.²²¹ If, however, delayed devolution were the normal mode of resolving disputes, would there not be the danger of chaos and conflict in the meantime? Further, if constitutional impasses became the norm because they are created (whether naturally or artificially) by persons of bad faith, would not the entire system collapse, not least because the system of devolution itself is rather unwieldy? In addition, Unger also speaks of “referendums” which he appears to use interchangeably with the term “general election”.²²² This mechanism is, it is suggested, no less cumbersome. Whilst Unger would probably argue that such dangers of breakdown are inevitable in any constitutional system, the real issue is this: what makes his proposed system clearly better than existing ones? After all, his proposals cannot avoid (and therefore include) a central co-ordinating body that he terms “the decisional center”. What, then, would happen if solidification set in with respect to this center: a not impossible scenario? It

²²⁰ See generally (n 16).

²²¹ See (n 118).

²²² See *False Necessity* (n 14) 457.

is to be recalled, too, that the present system of courts and legislatures would be different and (as our discussion above has demonstrated) there is no clear indication that abuse could be effectively prevented by the proposed change; if anything, it could be exacerbated. Indeed, Unger himself concedes at a later point in *False Necessity* thus: “No constitutional scheme can guarantee itself, once and for all, against the renaissance of a politics of privilege.”²²³

Finally, other points of detail in relation to the proposed reorganization of government also raise doubts and queries: his provision, for instance, of an opting-out scheme by a minimum of two people in a position of relative equality to set up an alternative structure²²⁴ merely encourages solidification since domination can take place more easily in a smaller (and isolated) group; indeed, who is (and on what criteria is he or she) to judge whether a position of relative equality exists in the first instance? Similar problems arise with regard to his suggestions centering on “voluntary association” comprising organizations outside the governmental sphere. In a word, decentralization is a double-edged sword: it can encourage disentanglement and consequent transformative thought; but it can equally well encourage solidification and a completely contrary result.²²⁵

Consider, next, Unger’s proposed reorganization of the economy—in particular, his key institution of the rotating capital fund. Similar problems to those considered with regard to his proposed reorganization of the government apply. For one thing, the capital fund is controlled by the decisional center. But, we have already seen that this decisional center may be one of the most susceptible victims of solidification. Corruption is a real risk as it is (often) coupled with the lust for power which can be maintained, *inter alia*, by wealthy, illegal elements. And because of the relative complexity of the mechanics of the process, the degree of temptation is further increased.²²⁶ Nor, it should be added, is the danger of corruption confined to the uppermost level: the intermediate investment funds are also manned by persons who are no less susceptible, and the stakes not that much lower; indeed, the risks of detection are probably relatively less the lower down the scale of institutions we go. Possible problems also arise with the capital-auction system. So long as a competitive system not unlike that which exists under present-day capitalism is in place, inequality and consequent entrenchment of privilege is likely to persist and even burgeon. It might be added that even the capital-auction system is susceptible to the evils of bribery and corruption. Unger does speak of safeguards under the investment funds,²²⁷ but these are, with respect, far too general to be of practical assistance. Even the other limb of the investment funds, the capital-rotation system, is open to such abuse: the setting of standards for reinvestment and the pooling of resources all provide opportunities for solidification to rear its ugly head.

On a related note, the very idea of capital rotation implies, indeed entails, that there must be limits to the continuous acquisition of wealth. Unger,

²²³ *ibid* 504 — written, significantly, in the context of the proposed reorganization of the economy, as to which see the discussion below.

²²⁴ Cf Eidenmüller “Unger’s system of rights: part 2” (n 195) 141–142.

²²⁵ *PT* (n 11) 240. Or even rivalry with, say, local governments: see *Legal Analysis* (n 14) 152.

²²⁶ See also Eidenmüller “Unger’s system of rights: part 2” (n 195) 132–133 (on black market funds).

²²⁷ See the main text accompanying n 141–142.

however, is unclear as to how those limits are to be ascertained, and by whom.

As to the safeguards under the proposed economic system of minimum welfare via the effective exercise of immunity rights, we are also faced with the problem of who is to determine the rather vague standards that have themselves to be clarified. And, once again, the danger of solidification looms large on the horizon. A similar argument would, it is suggested, hold for the other rights previously discussed.

It is necessary to consider two further points. First, solidification can arise from both conscious as well as subconscious desires.²²⁸ Often the latter is more dangerous simply because it is more insidious, and there are few things worse than a bad act done in subjective good faith.

The second point has already been considered in the context of the more specifically legal sphere: the issue of legitimacy. Solidification in its various forms cannot engender legitimacy; on the contrary legitimacy will be eroded. And solidification will generate one of at least two possible consequences: either a sense of hopelessness and despair amongst the have-nots and/or an increased participation in solidification — in terms of both numbers of persons and activities — resulting in a weakening of whatever social bonds as exist, ultimately (in the worst scenario) propelling the society concerned into the throes of a Hobbesian war of all against all.

Unger is himself aware of the very real and fatal effect of solidification. This awareness comes through very clearly during the course of *Politics* itself.²²⁹ Perhaps the most telling admission comes right at the end of the massive argument in *False Necessity*.²³⁰ This is, for the present writer at least, an enormous concession that detracts (even unduly) from the argument and spirit of the entire work. But it is also the concession of an honest and forthright scholar who chooses not to paper over the most vulnerable portion of his thesis. In a section (appropriately entitled “The meaning of imperfection” and the final one in *False Necessity* itself), Unger begins most candidly thus:

“To acknowledge both the reasonableness and seriousness of [the] risk is to emphasize the antiperfectionist character of the program. All that can be claimed for the institutional platform of the empowered democracy is that it represents an advance over the available forms of governmental and economic organization.”²³¹

A little further on, Unger concedes thus: “In the absence of broadly based and wholehearted civic engagement, empowered democracy might suddenly turn from the freshest constitution to the most despotic.”²³²

I think that Unger is overly optimistic when he appears to suggest that one should overlook the darker side of human nature, which he seems to suggest appears to be but a slight blemish only. This is where I think the most crucial difference between my views and Unger’s emerges. I do also believe in the nobility of the human spirit; indeed, history has demonstrated this time and again. But I am rather more pessimistic about the *proportionality* of it all; the

²²⁸ Cf Romany 1985 *Revista Juridica de la Universidad de Puerto Rico* 587 605–606.

²²⁹ See eg *Social Theory* (n 14) 211 213–214; *False Necessity* (n 14) 286–287 292 303 308 321 363 394 502 504–505 514; and *Plasticity into Power* (n 14) 19 212. See also the discussion immediately following.

²³⁰ See generally *False Necessity* (n 14) 589–594.

²³¹ *ibid* 589. Cf also his views *ibid* 590.

²³² *ibid*.

darker side far outweighs the noble. There is much in world history that illustrates the problems that are engendered, especially when highly gifted individuals choose to utilize their abilities and powers for their own advancement and (perhaps more importantly) the terrible frequency with which such events occur. This is one of the points that is, in fact, briefly taken up in part IV below. Indeed, after extolling the virtues of transformation, Unger himself is compelled to state that his proposed program constitutes “a calculated risk”; he continues thus:

“There is no assurance that empowered democracy will provide adequate safeguards against the danger that people may withdraw from civic life and through their withdrawal permit a new and more thoroughgoing entrenchment of factional interests. I claim only that the guarantees and benefits of the constitutional plan make it reasonable to run these risks.”²³³

He adds thus:

“Just as the quest for empowerment through plasticity may enable us to live out more fully our context-transcending identity, so, too, it may subject us to a despotism less messy or violent but more thoroughgoing than any yet known.”²³⁴

It is true, however, that this ought not to preclude the attempt to transcend our contexts. And, in his latest work, Unger appears to concede the pessimistic view of human nature proffered here, but nevertheless still attempts to argue in favour of his proposed program:

“It is *not* in the cards that, under *any* reconstructive scheme, we shall see privatistic concerns replaced by *selfless civil devotion*. What we can realistically hope for is that, *under favorable institutional conditions*, the range of our ordinary pursuit of private interests will broaden, and the contrast between realizing interests and challenging structures will diminish.”²³⁵

The problem, however, is that even the most “favorable institutional conditions” are unlikely to last indefinitely before being consumed by the overpowering force of solidification.

My critique hitherto assumes a pessimistic view of human nature. Although I cannot, of course, objectively demonstrate my thesis, I hope to rely upon more than mere personal intuition in my attempt to convince the reader why my characterization of human nature is a more realistic one than Unger’s.²³⁶

The first is a point already implicit in the preceding discussion: that a great

²³³ See *False Necessity* (n 14) 591–592.

²³⁴ *ibid* 592. Indeed, in a recent work, Unger also raises the possible problem of expansionist imposition arising from chosen attachments and strong ideals: see *Legal Analysis* (n 14) 153–154.

²³⁵ See *Legal Analysis* (n 14) 169–170 (emphasis mine).

²³⁶ The undoubted existence of evil in the world does not, of course, prove my case, for it could be argued, for example, that this does not entail the absence (or at least near-absence) of (or the possibility of) altruism (and *cf* the works considered below). However, it is not insignificant to reiterate that evil does exist (and indeed that Utopia might not only be impossible but might not actually be superior: see Smart “Omnipotence, evil and supermen” in Pike (ed) *God and Evil — Readings on the Theological Problem of Evil* (1964) 103–112 (and reprinted from 1961 *Philosophy* (no 137)), and, further, it is highly unpersuasive to argue that the sources of evil have nothing to do with the inherent nature of man (see eg Midgley, *Wickedness — A Philosophical Essay* (1984) ch 1). And *cf* *Legal Analysis* (n 14) 162–163. See further Pannier (n 10) 676–677 and Devlin “On the road to radical reform: a critical review of Unger’s *Politics*” 1990 *Osgoode Hall Law Journal* 641 707 709 712–714 and, by the same author, *supra* (n 212) 228.

many writers²³⁷ at least implicitly adopt this more pessimistic view of human nature as a given. Indeed, the general philosophical search (not wholly convincing in my view) has not been for an ideal theory that will eradicate self-interest but, rather, for a framework that will allow vested interests to be pursued in a civilized fashion.²³⁸

Secondly, even where there has been explicit consideration of the concept of altruism, the conclusions arrived at by various writers have not been in the least encouraging. In the sphere of biology, for example, it has been argued that human beings tend toward actions that will further their own interests.²³⁹ Although the writer concerned has eschewed any form of biological (here, genetic) determinism,²⁴⁰ there is clearly no tangible and convincing theory indicated to the contrary. Indeed, looked at from the perspective of the complex nature of reality and the many corresponding factors operating at any particular point in time, the hope that human beings can transcend the biological nature (inherent according to the present work referred to, in their genes) cannot be dismissed out of hand; but the fact remains that what little evidence there is tends to suggest otherwise. And it appears that the infusion of other factors does not really strengthen the argument in favour of altruism.²⁴¹

In the sphere of philosophy, Thomas Nagel has cogently argued for the possibility of altruism, drawing not (as, for example, Hobbes and Hume did) from a separate motivational basis, but, rather, from a rational objective basis grounded in “the conception of oneself as merely a person among others equally real”.²⁴² Even then, Nagel acknowledges that his conception of altruism need not have the noble connotations often associated with altruism.²⁴³ Further, he acknowledges that his arguments would not be able to counter an extreme skepticism;²⁴⁴ more importantly, perhaps, he acknowledges that, on a practical level, persons often shut their eyes to the rationality of behaving altruistically:

“The word ‘possibility’ occurs in the title of this book for a reason. Even though altruistic motives depend not on love or on any other interpersonal sentiment, but on a presumably universal recognition of the reality of other persons, altruism is not remotely universal, for we continually block the effects of that recognition.”²⁴⁵

²³⁷ such as Hobbes and Rawls, who have already been referred to.

²³⁸ and see (n 16).

²³⁹ See Dawkins *The Selfish Gene* (new ed, 1989).

²⁴⁰ *ibid* 2–3 267–268; see also, by the same author, “Genetic determinism and gene selectionism” in *The Extended Phenotype — The Gene as the Unit of Selection* (1982) ch 2.

²⁴¹ See eg Badcock *The Problem of Altruism — Freudian-Darwinian Solutions* (1986) which, as the title suggests, attempts to integrate insights from both science and psychoanalysis. The result is, significantly perhaps, still a pessimistic one, the author concerned concluding that *reciprocal* altruism is the only viable solution in the longterm. But we have to bear in mind the various *other* types of altruism considered by the author, all of which might gain (and, indeed, some might argue, have already gained) ascendancy — but none of which constitutes altruism in the sense intended here.

²⁴² See *The Possibility of Altruism* (1970) 14. See also *ibid* 83: “Recognition of the other person’s reality, and the possibility of putting yourself in his place, is essential.” And see *ibid* 88 and 100 *et seq*.

²⁴³ *ibid* 16 n 1. See also *ibid* 80: “By altruism I mean not abject self-sacrifice, but merely a willingness to act in consideration of the interests of other persons, without the need of ulterior motives.” See also (n 245).

²⁴⁴ *ibid* 145.

²⁴⁵ *ibid* 145–146 (emphasis mine).

But most important of all are the closing lines in the book which bear quotation in full:

“To say that altruism and morality are possible in virtue of something basic to human nature is not to say that men are basically good. Men are basically complicated; how good they are depends on whether certain conceptions and ways of thinking have achieved dominance, a dominance which is precarious in any case. *The manner in which human beings have conducted themselves so far does not encourage optimism about the moral future of the species.*”²⁴⁶

And it might not be wholly inapposite to point to the fact that Nagel himself has resiled somewhat from the argument from objectivity in his later work.²⁴⁷

We are now in a position to take this article into its second main phase: a consideration of the description and critique of Unger’s proposals in a more concrete context, that of East Asia.

[to be concluded]

²⁴⁶ *ibid* 146 (emphasis mine).

²⁴⁷ See *The View From Nowhere* (1986) 159.

Roberto Unger and the politics of transformation in an Asian context*

ANDREW PHANG**

IV *Unger and East Asia*

Introduction

This is clearly the most difficult part of the essay. One major problem relates to the difficulty in grasping as well as critiquing Unger's ideas which, because of the nature of his project, are frequently on the edge between substantive theory and indescribable experience; this applies to both his institutional "structure of no structure" as embodied within his suggested transformations of law, government and the economy as well as the concomitant practice of "context smashing". I have attempted to both describe and offer a general critique of these ideas which I shall now seek to link to the concrete East Asian context. The second major problem lies in the problem of institutional detail; there is (in English alone) a prodigious amount of literature, particularly with respect to the People's Republic of China (PRC) and Japan, and this does not take into account a literature multiplied several times over in the primary languages themselves. I have briefly touched on this problem at the outset of this article, and so will not reiterate the arguments here, save to state that the adoption of a conservative approach would not be conducive to the advancement of the study of the interaction between theory on the one hand and law and social theory on the other in a cross-cultural context. I have also briefly mentioned that the severity of the problems can, to some extent at least, be mitigated by a reliance on the views of not only generally acknowledged experts but also the significant findings of writers in the field; indeed, a more nuanced pool of resources that is the result of new interpretations as well as findings would result (in turn) in a more nuanced cross-cultural analysis. The third major problem is (in many ways) an ineradicable one, and has to do with the problem of "causation" or, as I have termed it in this essay, the problem of theoretical frameworks. Indeed, the problem of normativity is also necessarily involved, simply because one cannot justify one's critique on a purely logical basis by pointing to possible counterexamples in the (here) East Asian context. The entire process is, in fact, rather untidy, particularly from the perspective of those who desire theoretical symmetry. I would only argue that the complexity of societies, indeed life itself, tells us that such symmetry is rather unrealistic.²⁴⁸

* See 1997 *TSAR* 45–65 and 287–304 for respectively the first two and the third parts of this article.

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²⁴⁸ And see the following observation by a leading legal historian, Gordon "Recent trends in legal historiography" 1976 *Law Library Journal* 462 466: "We used to think that there were two realms: the realm of law and the realm of social context. On closer inspection 'law' seems to dissolve and merge into context; we have been in the swamp all along without knowing it."

This could explain, in part at least, why Unger has abandoned a pure theoretical justification as such, preferring to combine it with a call to practical action. I shall be adopting a similar approach although, unlike Unger, I make no comprehensive claims as such. But by attempting to let Unger's ideas *interact*²⁴⁹ with some of the salient²⁵⁰ features of East Asian societies, it is hoped that the way would be cleared in some small way for further research and analysis in a similar vein in the future. The flavour of such an approach is encapsulated to a certain extent in the following remark by Bailyn, to the effect that we are all faced with “. . . an alternating dipping and soaring motion of the mind as it drops down to scrutinise puzzling, tangled details, then struggles, not always successfully, to rise again to view the landscape whole”.²⁵¹

The abovementioned observations, made in the specific context of historiography, apply equally to the present discourse which, in fact, necessarily includes a study of history as well. The entire process has been a tremendously difficult one indeed but it is hoped that it will be but the beginning of a stimulating (albeit arduous) attempt to establish the linkages in a more convincing fashion in future endeavours.

I shall utilise the various categories of critique in the preceding part of this essay as points of departure for application in the instant part, although there will be some modification of approach where required. I hope, in the process, to be able not only to test the more general critiques in part III above but also to practise the alternation between theory and practice that we have just briefly discussed above.

Normativity and theoretical frameworks in an Asian context — some preliminary observations

It is suggested that Unger's concept of “context smashing”, centring as it does around the modernist re-statement of the Christian-romantic image of man is, in any event, far too alien to East Asian societies which have developed in radically different directions and whose systems (for the most part at least) are too well-established to admit to the “context smashing” Unger advocates. Korea, for example, is a highly-Confucianised society, with its Confucian roots stretching back for approximately six centuries.²⁵² Indeed, the PRC (from where neo-Confucian thought had in fact been transferred to Korea)²⁵³ was the birthplace of Confucian thought which, in the present writer's view, was, is, and probably always will be deeply embedded in the psyche of the Chinese people; and all this despite the variegated (even dissonant) political

²⁴⁹ Cf Phang *The Development of Singapore Law — Historical and Socio-Legal Perspectives* (1990) 1–12.

²⁵⁰ Again, there can be no claim to absoluteness, even on this less absolute level.

²⁵¹ See Bailyn “The challenge of modern historiography” 1982 *American Historical Review* 17.

²⁵² See generally Deuchler *The Confucian Transformation of Korea — A Study of Society and Ideology* (1992). The process of change takes place between the late Koryo period to the mid Choson one, the latter period of which stretches, in fact, from 1392 to 1910, when the Japanese colonized Korea. For detailed histories of Korea, see generally Lee Ki-Baik *A New History of Korea* (trans Wagner — 1984) and Eckert *et al Korea Old and New — A History* (1990); the former work (albeit more detailed) takes the reader only till 1960, whilst the latter (a collaborative work, which also includes a major input by the former author) takes the reader right up to 1990.

²⁵³ See Deuchler (n 252) 14–20.

systems that have existed these past thousands of years, systems that ranged from dynastic rule through republicanism, communism, and (now) an uncertain future where communist thought and capitalism share an uneasy truce. Indeed, the continuous application of coercive force regardless of regime raises the further question as to why (for the majority of the population in each generation) there was little by way of radical response; we find, in fact, the major political shifts occurring only during the present century. In addition, each response did little, in the final analysis, to change the basic structure of governance. Fairbank, for example, poignantly observes, with respect to the communist regime, thus:

“[T]he quest for a new unity of government took form in plainly recognizable continuities from Chinese tradition. . . . The totalitarian claims of Leninism perpetuated the claims of the imperial autocracy. The Neo-Confucian doctrines as absolute truth were substituted by Marxism-Leninism, which was equally all-embracing and absolute. . . . This new communist order was so consonant with the old imperial order that Mao as a successor to emperors was able to hold autocratic power while trying as a revolutionist to bring the masses into participation in politics.”²⁵⁴

Although this is speculative in nature, it is suggested that there must have been an operative factor at work in the consciousness of the Chinese people throughout the centuries that accounts for the tolerance and even perceived legitimacy of the various regimes, and even in the midst of oftentimes oppressive conditions imposed by the latter on the former; it is suggested, in particular, that this factor was Confucian ideology that, although taking many (sometimes even undesirable and manipulative political) forms, emphasises, at bottom, social harmony and cultivates a high degree of deference to governmental action. Indeed, although acknowledging the literal difference between neo-Confucianism on the one hand and communism on the other, Fairbank does also emphasise the linkage between the two. Speaking, for example, of the response by the Chinese Communist Party to a perceived attack on its monopoly of power that resulted in the brutal results in Tienanmen Square in 1989, Fairbank observes thus:

“Here we see the bankruptcy of the heritage left by the Imperial Confucianism of the neo-Confucian establishment. Confucian self-discipline might continue to fashion superior men for the civil service or public life, while inhibiting political theorizing about the source and legitimation of autocracy. The modest pluralism required for a civil society, though readily accessible, was strenuously avoided.”²⁵⁵

It is suggested that whilst the legacy of neo-Confucian thought deeply influenced (as Fairbank pertinently observes in the preceding quotation) the ability (or inability, rather) on the part of the governors to shift toward a more civil society, it equally (and no less deeply) influenced the inability of the governed to respond to excesses by the former. To be sure, there were other factors at work (the inordinate size in terms of both geography as well as population were probably also tremendous obstacles to mass mobilization in the political arena); however, the present writer’s thesis is that there must, perforce, be limits to

²⁵⁴ See Fairbank *China — A New History* (1992) 429–430.

²⁵⁵ *ibid* 425.

“top-down” manipulation by the government, regardless of political hue, and that these limits lie in the responses by the general populace themselves. The “peaceful revolution” in the Philippines in 1986 is one significant illustration and even though (as was the case with South Africa) oppression might drag on for an extremely lengthy period of time, there is light at the end of the political tunnel, as recent events have demonstrated. Indeed, the whole concept of legitimacy of political systems in general and laws in particular lies in a dual-analysis of both the governors and governed alike. Much of the time insufficient emphasis is given to the latter perspective but, as alluded to in the preceding part, the assumption that people on the whole can be blatantly or even subtly manipulated by the powers that be is a rather unrealistic one to make. This has, indeed, been recognised even by neo-Marxists.²⁵⁶ So, and to return to the present strand of discussion, there must be something more than mere window dressing with regard to the influence of Confucian tradition on the general Chinese populace. It could be — and has in fact consistently been — argued, nevertheless, that the Chinese people would be in a far superior position if they could throw off the fetters of Confucian tradition. This is a point that I hope to take up again later, but it suffices for the moment to state that if my argument is tenable, it would be extremely difficult on both theoretical and (especially) practical levels to convince the people themselves to embrace, instead, the concept of “context smashing”.

Japan poses an even more difficult challenge to the idea of “context smashing”. Although Confucian tradition and thought have played a not insignificant role in the development of Japanese culture, one can quite cogently argue that Japanese culture is, in many ways, an unique one. This is due, of course, in no small part to the high degree of isolation that allowed such an unique and homogeneous culture to emerge.²⁵⁷ A number of uniquely Japanese characteristics resulted within this framework, as it were, of isolation, the foremost (perhaps) being the emphasis on consensus in general and the group in particular²⁵⁸ — a consensus that did not, incidentally, scotch individual conceptions of identity and aspiration.²⁵⁹ Looked at in this light, it seems a risk without realistic reward (whether material or spiritual) to indulge in “context smashing” which, in its extreme form, would destroy rather than develop consensus. Indeed, if Reischauer and Jansen’s analysis is correct,²⁶⁰ the Japanese would appear to have found at least their “golden mean” between the dictates of society on the one hand and the desires of the individual on the other. This is not to state that the Japanese are simply blessed with a natural and impeccable social harmony; however, there is a clear and strong cultural tendency toward negotiation and compromise.²⁶¹ Reischauer and Jansen, indeed, argue that the psyche of the Japanese people generally is one that, whilst recognizing

²⁵⁶ See eg Thompson *Whigs and Hunters — The Origins of the Black Act* (1975) 258–269.

²⁵⁷ See Reischauer and Jansen *The Japanese Today — Change and Continuity* (enlarged ed, 1995) ch 3.

²⁵⁸ *ibid* ch 13. And on, inter alia, the cohesiveness that results in the workplace, see *ibid* ch 33. But cf *Legal Analysis* (n 14) 245–246 (arguing that the Japanese life-employment system is only “a relatively recent invention” that resulted from several generations of industrial conflict).

²⁵⁹ Reischauer and Jansen (n 257) chs 14 and 16.

²⁶⁰ See generally (n 257–259).

²⁶¹ See eg Reischauer and Jansen (n 257) 139.

the distinction between universals and particulars, nevertheless does not (unlike in the West) endeavor to make universals and particulars of a piece; although these are differences in degree rather than kind, the authors nevertheless observe that “there undoubtedly remains a deep underlying difference from the West in the greater emphasis on particularistic relations and relativistic judgments.”²⁶² Is this necessarily undesirable insofar as it tends to unnecessarily downplay the role of universalistic values? To be sure, there are disadvantages in the adoption of such an approach, but this is inevitable *regardless* of the particular system adopted. More to the point, the Japanese approach toward universals and particulars is the result of an unique interplay of a variety of specific factors which is probably not easily replicated (if at all) by other societies. For example, it has been argued that child-rearing techniques have much to do with the orientation towards the group and the relative moderation with which Japanese view other (especially contrary) views.²⁶³ As already mentioned, there are, of course, disadvantages; for example, Reischauer and Jansen observe thus:

“One result of an ethical system oriented more to specific relationships than to abstract principles is that in an unfamiliar situation it gives less than clear guidance. When confronted by something new, a Japanese is more likely to feel unsure of himself than a person who is smugly confident of the universality of his own principles.”²⁶⁴

It is true, too, that although Japanese society emphasises hierarchy, much of it is symbolic; further, class divisions as such are minimal, and there is equity within hierarchy since opportunities are guided, in the main, by seniority rather than meritocracy, and thus do not promote the kind of inefficient and inimical friction that is seen so often in other free-market societies.²⁶⁵ Nor, as was already briefly mentioned, does individual identity become subsumed within the broader society: there are numerous ways in which the Japanese retain a strong sense of individual identity.²⁶⁶

In summary, it is submitted that Japan is one very significant illustration that constitutes a reason against the adoption of “context smashing” and, indeed, it is at least arguable that the Japanese have found their own unique way of coping with the problem of solidarity, without becoming wholly subservient cogs in the societal machine.

To be fair to Unger, he is not unaware of the unique nature of Japanese society, which he views as having (in the Tokugawa period) avoided what he terms the uninspiring “cycles of reversion to natural economy”.²⁶⁷ At the expense of drastic oversimplification, Unger observes that at each significant juncture, conditions were such as to empower the respective peasants in their struggle against the landlords (the ruling elites), there being (simultaneously) either no central government intervention in the latter’s favour or government intervention that operated in the former’s favour. The central government was, in fact, relatively independent of the clutches of the ruling elites.²⁶⁸ However,

²⁶² *ibid* 141.

²⁶³ *ibid* 142–146.

²⁶⁴ *ibid* 147.

²⁶⁵ See generally *ibid* ch 15.

²⁶⁶ See generally *ibid* ch 16.

²⁶⁷ See generally *Plasticity into Power* (n 14) ch 1. *Contra* Anderson (n 8) 98.

²⁶⁸ See generally *Plasticity into Power* (n 14) 42–50.

he has very little by way of commendation insofar as the Japanese villages or *muras* are concerned, viewing them as having stifled innovation.²⁶⁹ Yet, it should be noted, Haley views the village system as an indispensable part of, as well as model for, the social control that exists apart from the law.²⁷⁰

In contrast, Unger observes that in imperial China, the extra-governmental oligarchies as well as the government's dependence on the former combined to overrun the reformist impulse. The later Chinese empire, however, under the influence of the Mongol conquerors did (Unger argues) aid in effecting a partial escape from the dreaded cycle of reversion. However, a preoccupation with security, stability and harmony, and a consequent failure to follow through with the various transformative developments allowed the cycle (unfortunately) to close again.²⁷¹

Again, Unger's survey of the Japanese and Chinese experiences in the context of the conditions necessary for military success is interesting.²⁷² Once again, the difference in the degree of success turned on the relative presence or absence of opportunities for innovation and transformation. What is of particular interest in this survey is Unger's reflection on the problems of what is, in effect, solidification, particularly with regard to China, where opportunities were (he argues) present from time to time.²⁷³ This is also, in fact, the general thesis of Cleary and Higonnet, who, however, arrive at a contrary conclusion based on similar factual data.²⁷⁴ In their survey of, *inter alia*, the plasticity of the later Ming period and the corresponding solidification during the Ching period that followed it, the authors conclude that the hold of context is more real (particularly in the lives of the general populace), and the promise of plasticity much less, than Unger would have us believe; whilst not eschewing the spirit behind Unger's project, they are of the view that any transformative move must be more deliberate and calculated than mere "context smashing" would allow.

It is suggested that despite Unger's views, the fact remains (as we have already seen) that Japan is by no means an Ungerian society; the village system that Unger criticises epitomises, in fact, the norm rather than the exception in Japanese society generally. And yet, not only was Japan able (as Unger points out) to disentrench itself during the Tokugawa period, it was able to achieve success (and arguably to a far more impressive extent) during the last half of this century. Indeed, in his latest work, Unger expresses admiration for modern-day Japan: a significant concession in the light of the arguments just made; he observes thus:

"Success at national development requires practical experimentalism, and practical experimentalism demands ceaseless recombination. The most successful countries are those like Japan that have proved to be the most assiduous imitators and recombiners. For generations now they have roamed the world pillaging and mixing institutions, practices, and ideas."²⁷⁵

²⁶⁹ *ibid* 49.

²⁷⁰ See Haley (n 189) especially 58–60, 170–76.

²⁷¹ See generally *Plasticity into Power* (n 14) 50–61.

²⁷² See generally *ibid* 192–206.

²⁷³ *ibid* 205.

²⁷⁴ See (n 218).

²⁷⁵ See *DE* (n 11) 40–41.

On a broader level, it might be mentioned that “context smashing” might lead to political and, consequently, economic instability. This point also overlaps with the problem of conflict and destruction discussed in the preceding part. This is a possible societal effect; insofar as the individual is concerned, there is the everpresent danger of exhaustion: a point also discussed in the prior part of this essay. Such dangers are, it is suggested, particularly acute in stable and homogenous societies such as Japan, as has been just briefly discussed above. Obviously, in countries with not only less homogenous societies (of which Singapore and Malaysia would be good examples), and *a fortiori* in societies which are still struggling for economic viability and future flourishing, the idea of “context smashing” may represent a very alien (even dangerous) concept; such an obstacle is more psychological than material but is no less an obstacle because of that.

The differing roles and perceptions of law

To state that the roles and perceptions of law will differ from society to society is to state the self-evident. Indeed, even within societies, one finds a variety of contested approaches towards the concept of law, a primary example of which is to be found in the United States of America.²⁷⁶ This difficulty is, however, exacerbated in the context of other societies, as we shall see. Indeed, the primary thesis advanced in this section is that the different East Asian legal systems each have different ways of coping with the law and, in this respect, Unger’s proposals centering around the concept of “deviationist doctrine” and his proposed system of rights may be inapposite to these other contexts. We will survey each of these proposals in the East Asian context in turn.

In the PRC, for example, we have seen how dominant Confucian tradition has been in the mores of Chinese society. But, for the most part, there has been an inevitable mix of both law and Confucian values, best exemplified, perhaps, in the rubric of neo-Confucianism. The present legal system, whilst undoubtedly influenced by strands of Confucian thought, does appear to stand at a crossroads of sorts. The gradual opening up of the Chinese economy since the late 1970s has resulted in an attempt to modernise the Chinese legal system, bringing it into sync with world markets, amongst other things. But many theoretical as well as practical problems remain, which problems would, it is suggested, militate against the practice of internal development that Unger suggests.

Despite the attempt to modernise its legal system, it is suggested that the Chinese Communist Party, whilst more liberal than before, still (at bottom) places the factor of control over power over all else; this is one possible (even main) reason for its show of armed force at Tienanmen Square in 1989. And, as one writer perceptively points out, it is this overwhelming concern with power and control that results in so much uncertainty insofar as the fate of Hong Kong is concerned after 1997. A logical view would hold that Hong Kong ought to be allowed to maintain the status quo even after 1997, for it would

²⁷⁶ See generally Belliotti *Justifying Law — The Debate over Foundations, Goals and Methods* (1992) and Minda *Postmodern Legal Movements — Law and Jurisprudence at Century’s End* (1995).

be the quintessential example of (and contributor towards) the free-market prosperity that the PRC hopes to emulate; yet, as the writer just mentioned points out:

“Although the Basic Law²⁷⁷ is highly pragmatic, the Chinese have an old-fashioned view of sovereignty, reminiscent of Hobbes or Austin: supreme, unlimited, illimitable. The long, and, according to the Chinese, illegal,²⁷⁸ occupation of Hong Kong by the British makes China particularly sensitive to questions of sovereignty.”²⁷⁹

It is suggested that the best that one can state at this particular point in time is that the PRC government is moving only tentatively toward legal reforms and that it is a fragile movement that could be shattered on a moment's notice, world opinion notwithstanding. A skeptic, on the other hand, would state that no change (in substance at least) is likely to be forthcoming for some time to come. An optimist would not, it is ventured to suggest, have a much better prognosis, for even a good faith attempt at adopting Western concepts of the rule of law would necessarily involve the PRC government in an inevitable “legal schizophrenia”. In a much earlier work, in fact, Unger described Chinese society as one that was “pulled between the trials of its present and the image of its future”.²⁸⁰ Although Unger was talking then (in 1976) of Chinese society still very much steeped in the ideology of Marxism, it is submitted that his observation applies, perhaps *a fortiori*, now. It would take a tremendous amount of effort as well as time for the PRC government to reorientate itself toward the ideal of the rule of law, a process that (as we have seen) is a journey fraught with the constant threat of collapse and relapse;²⁸¹ we are here talking not merely of change, but, rather, of a sea-change so that the transition will (as we have just mentioned) be fraught with the clash of conflicting ideas and values.

Looked at in this light, it is suggested that there is no place, at the present time at least, for the practice of deviationist doctrine as suggested by Unger. Indeed, there is a tremendous shortage of trained legal personnel to begin with, and the PRC is only now embarking on the task of building up its legal infrastructure.²⁸² On the contrary, any attempt to foster the developments of counterprinciples and anomalies in the existing law would, it is suggested, cause widespread chaos. In this regard, we should also bear in mind the *size* of the PRC itself — a point to which we shall be returning below. In addition, the continuing tensions between the PRC and Taiwan (the Republic of China) also discourage the kind of experimentation suggested by Unger.²⁸³

²⁷⁷ This is to serve as the constitution for Hong Kong after the changeover in 1997.

²⁷⁸ See also generally Wesley-Smith *Unequal Treaty 1898–1997: China, Great Britain and Hong Kong's New Territories* (1980).

²⁷⁹ See Ghai “The past and future of Hong Kong's constitution” 1991 *China Quarterly* 794 811 (no 128).

²⁸⁰ See *Law in Modern Society* (n 23) 233.

²⁸¹ And see Alford “Double-edged swords cut both ways: law and legitimacy in the People's Republic of China” 122 *Daedalus* 45 (Spring 1993 no 2) (reprinted in Tu (ed) *China in Transformation* (1993) 45–69).

²⁸² And see generally Alford “Tasselled loafers for barefoot lawyers: transformation and tension in the world of Chinese legal workers” 1995 *China Quarterly* 22 (no 141).

²⁸³ And this would apply, of course, both ways: see eg Vogel *The Four Little Dragons — The Spread of Industrialization in East Asia* (1991) 17.

The same basic points may be made with respect to Korea which, despite having a legal heritage that has its modern roots in the civil law tradition (principally as derived from Japan and Germany),²⁸⁴ is nevertheless still very much a Confucian society,²⁸⁵ but one which is simultaneously capitalistic; Korean society is, in other words, still in a state of transition. In addition, it should be noted that much of its legal tradition was not (for the most part at least) borrowed voluntarily.²⁸⁶ Coupled with strong political rule (both colonial initially and, later, “domestic”) that has only recently been liberalised,²⁸⁷ it is not difficult to see that a concern not only with political stability (and consequent economic growth) but also with the impact of the law on the people itself become of the first importance. Indeed, a recent unpublished study²⁸⁸ suggests, amongst other things, that whilst there has been a heightened sense in terms of political participation and the concept of rights, this has not been accompanied by a compliance with law and order; there also appear to be doubts with regard to prosecutors as well as the judicial system which is probably due not only to the influence of Confucian tradition but also (in part at least) to the perception of an alien system of imposed law²⁸⁹ as well as dissatisfaction with perceived corruption,²⁹⁰ of which the last mentioned topic has figured generally in the discussion above and will be mentioned again below. Finally — and not unlike the situation with respect to the PRC and Taiwan — the continuing tensions between South and North Korea also contribute to a situation where any form of experimentation would come under close scrutiny and would be unlikely to pass muster;²⁹¹ this is an external

²⁸⁴ See Sang Hyun Song *Introduction to the Law and Legal System of Korea* (1983) 14. And for an overview of the details of the South Korean legal system, see Ministry of court administration, supreme court, Republic of Korea *Judicial System of Korea* (1988).

²⁸⁵ See eg Deuchler (n 252) and Kalton *Korean Ideas and Values* (Philip Jaisohn Memorial Paper No 7) (1979) in Song (n 284) 22–37. But this is not to state that law did not play a significant role: see eg Shaw “Social and intellectual aspects of traditional Korean law, 1392–1910” in Chun, Shaw and Choi (eds) *Traditional Korean Legal Attitudes* (1980) 15–48. See also Byoung-ho Park “Traditional Korean society and law” 1974 *Seoul Law Journal* 107, reproduced in Song (n 284) 151: “. . . it is an undeniable, historical fact that the introduction of the Confucian, jurisprudential culture of China exerted a great influence on the development of our traditional law and society and it is a matter of common sense that a discussion of the developmental characteristics of the laws and society of traditional Korea is impossible without a discussion of Chinese culture.” However, the author also points out that the process was one of interaction; he observes, for example, *ibid* 154, thus: “. . . though the Yi Dynasty tried to realize Confucian ideology in all fields — political, economic, social, and cultural — the relationship of tension between the indigenous laws based on the traditional social order and the Confucian ideology established Korea’s social order during the 500 years of that dynasty”.

²⁸⁶ See eg Pyong-choon Hahm “Korea’s initial encounter with the Western law: 1866–1910 AD” 1969 *Korean Observer* 80 (no 2), reproduced in Song (n 284) 171–185, especially 184–185. See also generally Baker “The role of legal reforms in the Japanese annexation and rule of Korea, 1905–1919” in McCann, Middleton and Shultz (eds) *Studies on Korea in Transition* (1979) 17–42.

²⁸⁷ See generally Eckert *et al* (n 252) chs 18–20.

²⁸⁸ Korea Legislation Research Institute *A Survey on the Korean People’s Attitude Towards Law* (trans Sang-Hyun Song) (1993) (on file at the East Asian Legal Studies Program, Harvard Law School, as part of the author’s course materials on Korean law).

²⁸⁹ See n 287.

²⁹⁰ And see Byoung-Seog Park “Political corruption in South Korea: concentrating on the dynamics of party politics” 1995 *Asian Perspective* 163.

²⁹¹ See eg Vogel (n 283) 46 64–65. And see Kalton (n 285) 33 on governmental constraints on criticism by the highly educated.

aspect that cannot be gainsaid. It is of course possible that with increased industrialisation and modernisation, so-called Western ideas of the rule of law will gradually take root in Korean society generally and its legal system in particular. But it is suggested that this is unlikely to be possible in the foreseeable future. Thus, even the threshold requirements for an Ungerian transformation in legal theory appear to be absent.

By far, however, Japan (once again) provides an excellent example of a country and legal system that are not susceptible to an application of Ungerian ideas. In his perceptive book, Haley gives a convincing account of how law (in his own words) “serves as a means for legitimating norms while it remains relatively ineffective as an instrument of coercive control”;²⁹² in his view, “[s]ubstantive legal norms . . . operate as principles . . . that both shape and reflect consensus”, but “[w]ithout effective formal enforcement, they can only partially bind or command” — “[t]hey do not fully control or determine conduct but they do influence and restrain”.²⁹³ His account of this paradox is broadly consistent with the views of others such as Reischauer and Jansen, and which have as a principal point of focus the consensus-based nature of Japanese society.²⁹⁴ Under such a system, it would not be very useful to propose a radical change in the way law and legal doctrine have hitherto been conceived, simply because the effective implementation of the law lies in the larger extra-legal context. Could it be argued that the development of deviationist doctrine would result in an enhanced legitimation of legal norms? It is suggested that whilst possible, this is highly unlikely since the main content of social cohesion really lies in the extra-legal arena — although it should, as Haley has pointed out, be noted that the net result is to weaken state control but increase the methods of private social control.²⁹⁵

A more general issue that warrants our attention has to do with the type and extent of popular political legitimacy. If such legitimacy is premised either solely or mainly in terms of economic well-being, then the demand for legal innovation that inevitably leads to risk (as all attempted innovations necessarily do) would be wholly unattractive to the East Asian people, especially citizens of countries where the standard of living is already relatively high. More importantly — and this is a related point — Unger’s latest views do,²⁹⁶ in fact, make the possible risks even more undesirable. And this would be the case even in (paradoxically, even particularly in) countries such as Singapore and Hong Kong which have not, as yet, developed a strong homogenous culture. Indeed, one might argue that in multi-ethnic, multi-racial and multi-cultural societies such as Singapore and Malaysia, the very development of a strong homogenous culture is itself problematic. This (at least perceived) fragility in social relations renders it even more unlikely that Unger’s more radical concepts would be found acceptable to the governments concerned.

²⁹² See Haley (n 189) 199.

²⁹³ *ibid.*

²⁹⁴ And see the main text accompanying n 260–263.

²⁹⁵ See Haley (n 189) 199–200. But the individual is not thereby necessarily “engulfed” by society: see the main text accompanying n 260. Cf also Upham *Law and Social Change in Postwar Japan* (1987). And for a far more sceptical account, see Van Wolferen *The Enigma of Japanese Power — People and Politics in a Stateless Nation* (1989).

²⁹⁶ See especially the main text accompanying n 65–99.

It remains now to briefly consider the possible application of Unger's system of *rights* in an East Asian context. The most obvious (and therefore immediate) reason for a negative response would lie in the thesis that rights do exist in an East Asian context but (unlike the concept of rights as traditionally espoused in the West) are different to the extent that they are bounded by specifically cultural considerations. So, for example, the concept of "rights" as originally formulated under Korean law was quite different from the concept as it is referred to today. It has, for example, been pointed out that "[i]n the Yi Dynasty²⁹⁷ there was no concept of 'rights' in the sense of today's legal concepts", although "the enjoyment of exclusive interests by certain persons was guaranteed by various concrete legal provisions".²⁹⁸ Such rights as existed must, in other words, be viewed in the context of a Confucian culture in which the individual was, by definition, not wholly supreme, though (at the same time) not entirely subservient to society either. But with the advent of modernisation and industrialisation, there are indications that things may be changing. In the survey referred to above,²⁹⁹ for example, it was found that the educated, the affluent, the liberal and members of the younger generation possessed a stronger consciousness of rights.

The "intermediate approach", briefly alluded to at the end of the preceding paragraph, is not without its attraction, but is, it is suggested, rather unsatisfactory, because it expresses no definite view as such, the intermediacy here being viewed as but one step toward a definite viewpoint.

As modernisation and industrialisation proceed apace in East Asia, it is not at all easy to keep the so-called Western technology and expertise separate from the cultural and social values that tend to accompany the former. In any event, the world is a much smaller place now, given the relatively quick means of transportation and (perhaps more importantly) the ease with which information can be communicated across continents. It is in this context that some have argued that the free-market system cannot work without democracy. This attempted linkage between economic development and political democracy is, however, not one that can be substantiated beyond the shadow of a doubt.³⁰⁰ Indeed, it may be argued that even the link between democracy and rights may not always be clear,³⁰¹ although both concepts have been used interchangeably. At this point, unfortunately, discussion usually degenerates into the taking of one of two sides.³⁰²

²⁹⁷ or Choson Dynasty, which lasted from 1392 to 1910.

²⁹⁸ See Park (n 285) 163.

²⁹⁹ (n 288).

³⁰⁰ See Ghai *Human Rights and Governance: The Asia Debate* (The Asia Foundation's Center for Asian Pacific Affairs, Occasional Paper No 4, November 1994) 18.

³⁰¹ *ibid* 18–19.

³⁰² For interesting (albeit contrasting) views, see eg Lee Kuan Yew "The East Asian way" 9 *New Perspectives Quarterly* 4 (Winter 1992 no 1); Francis Fukuyama "Asia's soft-authoritarian alternative" 9 *New Perspectives Quarterly* 60 (Spring 1992 no 2); Fareed Zakaria "Culture is destiny — a conversation with Lee Kuan Yew" 73 *Foreign Affairs* 109 (Mar/Apr 1994, no 2); Kim Dae Jung "Is culture destiny? The myth of Asia's anti-democratic values: a response to Lee Kuan Yew" 73 *Foreign Affairs* 189 (Nov/Dec 1994 no 6); and Eric Jones "Asia's fate — a response to the Singapore school" *The National Interest* Spring 1994 18–28. A more general piece examining all the major arguments (albeit not without the author's own opinions) is Ghai (n 300).

The first, already briefly alluded to, is that there is a set of universal rights that are applicable to all societies. The other, also briefly referred to in the course of discussion above, is that rights are culturally-bound and determined by the state concerned without interference from outsiders. The former argue that the latter view is often utilised as a cover for abuses of human rights, whilst the latter counter with the argument of cultural imperialism as well as the argument that economic development must precede the establishment of rights.³⁰³ On a strictly theoretical level, both sides of the argument contain their respective strengths and weaknesses. On the one hand, the argument for universality, emanating as it does from the West, may be viewed, on the contrary, as an equally culturally specific concept attempted to be foisted in an imperialistic fashion on other (especially Third World) countries. In addition, the argument to the effect that it is perverse to worry about rights in a context of severe deprivation is not unpersuasive. On the other hand, however, if no basic core of rights can exist prior to economic development, this also creates possible problems: would, so the argument would run, people actually prefer more material hardship provided certain basic rights were ensured and, secondly, at what level would economic development be deemed to be sufficient so as to give primacy to the grant of rights? But, so the counter-argument would go, how is a “basic” right ascertainable in the first place? However, the (at least implicit) reliance by these persons (who give primacy to the argument for culture) on Confucian values at least implicitly argues for *those* values as being a basic criterion. Unfortunately, it is not entirely clear what “Confucianism” means. It is clear, however, what “Confucianism” as originally propounded by Confucius himself does *not* mean: it does not mean (as some sceptics tend to think) the degradation of the individual; on the contrary, Confucius himself displayed the utmost respect for his pupils,³⁰⁴ and, indeed, recognised the indefatigable fact of the uniqueness of the individual, for he observed: “You may be able to carry off from a whole army its commander-in-chief, but you cannot deprive the humblest individual of his will.”³⁰⁵

What appears clear, however, is that, whilst individual rights and freedom are (as we have seen) by no means non-existent, the emphasis is, in the final analysis, on that of duty.³⁰⁶ But, again, this emphasis — insofar as it is effected by the state — subjects the state itself to the constraints of legitimacy. As Confucius himself observed: “If a ruler himself is upright, all will go well without orders. But if he himself is not upright, even though he gives orders they will not be obeyed.”³⁰⁷

Perhaps even more interesting are his observations on the law itself:

“Lead the people by laws and regulate them by penalties, and the people will try to keep out of jail, but will have no sense of shame. Lead the people by virtue and restrain them by the rules of decorum, and the people will have a sense of shame, and moreover will become good.”³⁰⁸

³⁰³ See eg Kishore Mahbubani “The West and the rest” Summer *The National Interest* 1992, 3–12.

³⁰⁴ See the *Analects* XI:25, reproduced in I *Sources of Chinese Tradition* (compiled by De Bary, Chan and Watson, 1960; hereafter cited as *Sources*) 20–21; this compilation, despite its relative age, is still an excellent collection of materials.

³⁰⁵ *Analects* IX:25, *ibid* 31.

³⁰⁶ And see Tu Wei-ming *Confucian Ethics Today — The Singapore Challenge* (1984) 63.

³⁰⁷ *Analects* XIII:6 in *Sources* (n 304) 32.

³⁰⁸ *Analects* II:3, *ibid*.

An overriding and threshold requirement, however, was (perhaps quite commonsensically) a minimum level of subsistence, which (translated into modern terms) would be a viable economy: a point that did not escape the attention of both Confucius³⁰⁹ and Mencius.³¹⁰ This would explain the stress laid (especially at the present) on the imperative of economic development.³¹¹ But, quite apart from this and following from our discussion thus far, an important point should be noted: Confucianism, at least in its original form, was not one that emphasised society to the exclusion (or even near-exclusion, for that matter) of the individual; indeed, in its “purest” (*ie*, classical) form, because of the *interactive* relationship between the ruler and the people as well as the people amongst themselves, there would be few, if any, contradictions between the individual on the one hand and society on the other. In practice, however, this would not be the case and, as I shall now seek to briefly elaborate, this inability to find the illusive “middle” is one that is not peculiar to Confucianism but afflicts any philosophical tradition or theory, East or West.

But before we leave the argument from Confucianism, at least three more points might be usefully mentioned, which points actually exacerbate (rather than ameliorate) the inevitable conceptual conundrum mentioned in the preceding paragraph. The first is a point already alluded to in the briefest of fashions previously: that Confucianism has taken on a variety of forms, including (as we have already mentioned) neo-Confucianism. More importantly, particularly in the present day, one should distinguish between two contrasting aspects of Confucianism, one of which might well lead to abuse by the government of the day.³¹²

The second point is this: that Confucian doctrine and tradition is often contrasted with the legalist school,³¹³ the former focusing on the development of moral virtues in the context of social harmony and the latter focusing on developing the positive laws of the state.³¹⁴ This contrast, taken up, in fact, by Unger himself in *Law in Modern Society*,³¹⁵ can often be taken too literally.³¹⁶ The fact of the matter, of course, is that law can never be wholly irrelevant to society,³¹⁷ as the Confucianists themselves acknowledge; and, by the same token, any society which seeks to utilise the law as its sole instrument for enforcing its policies will soon find itself in a crisis of legitimacy, resulting in its overthrow once limits set in the perception of the population at large have been unconscionably exceeded. And all this is linked, amongst other things, to the form of Confucianism adopted.³¹⁸

³⁰⁹ See eg *Analects* XII:7 and XIII:9, *ibid* 33.

³¹⁰ See *The Book of Mencius* I A:7, *ibid* 94.

³¹¹ See n 304.

³¹² See Tu (n 306) 90. See also Fukuyama “Confucianism and democracy” 1995 *Journal of Democracy* 20.

³¹³ On the Legalist School, see eg *Sources* (n 304) ch VI and Schwartz *The World of Thought in Ancient China* ch 8 (1985). And for a succinct general account of Chinese law that still has valuable resonances today (particularly with regard to law in ancient China), see Schwartz “On attitudes toward law in China” in *Government under Law and the Individual* (1957) 27–39.

³¹⁴ See also Tu (n 306) 56. See further *ibid* 82–83 147 150–153 203.

³¹⁵ See generally (n 23) 86–109.

³¹⁶ This appears to be the nub of Alford's critique of Unger (*ibid*): see generally Alford (n 172).

³¹⁷ See generally Alford (n 172).

³¹⁸ And see n 313.

Thirdly — and perhaps most importantly — Unger does give us some (albeit relatively brief) views on Confucianism (though not neo-Confucianism).³¹⁹ Although he praises the manner in which Confucianism tackles the problem of solidarity, he expresses dissatisfaction (as might be expected) with the resultant constraints on the kind of transformative thought he advocates. His views in this regard bear extensive quotation:

“Confucianism fails to recognize the many-sided productive, emotional, and cognitive empowerment that may result when established or emergent privilege faces ever-renewed challenge, when the contrast between routine moves within the social order and revolutionary conflicts about it loses its force, and when the tyranny of collective categories of gender, class, or nationality over individual circumstance is overthrown. As a view of self hood the weak point of the classical Confucianist doctrine is its naive and impoverished conception of subjectivity and personal encounter. To the canon of social roles and conventions there corresponds, according to this doctrine, an ordering of the emotions. And the combination of the collective and psychological orders sets the terms on which society can cohere and prosper and individuals can be secure and happy, each in his separate station.”³²⁰

And — in Unger’s view — Confucianism gives rise to precisely the problems of “false necessity” he is so dead against. As I have sought to demonstrate, however, there are not only general problems with Unger’s own proposal of “context smashing” but also that Unger’s views do not really account for the widely differing circumstances existing in East Asian nations. Indeed, Ezra Vogel views a modified form of Confucianism (what he terms “industrial neo-Confucianism”) as being partly (though not wholly), responsible for the industrial success of the East Asian dragons.³²¹

Unger’s views on Confucianism do not, however, contain even a small grain of truth, for as was hypothesised in the preceding section, the embeddedness of the Confucian tradition in the PRC at least has led to a resistance to change and alternatives both on the part of the governors and the governed alike — probably on a conscious level in the former situation but probably on an internalised, subconscious level in the latter. But in addition to the multi-causal origins of most phenomena, one ought, as just argued in the preceding

³¹⁹ See generally *Passion* (n 30) 65–69.

³²⁰ *ibid* 67–68; see also *ibid* 68.

³²¹ See Vogel (n 283) 92–102, where the author classifies such a category of Confucianism as comprising the following: a meritocratic elite; the entrance examination system; the importance of the group; and self-cultivation. However, he is at pains to point out that the Confucian tradition alone could not be the main or sole explanation, if nothing else because many countries have achieved industrial transformation without Confucianism, that it used to be thought that the Confucian tradition in fact retarded economic progress, and the inability of the source of Confucian tradition (the PRC) to achieve material prosperity (see *ibid* 83–84); further, he points to a variety of other factors that contributed toward economic growth, what he terms “situational factors”, which include US aid, the destruction of the old order, the sense of political and economic urgency, the eager and plentiful labor force, and the Japanese model (see *ibid* 85–91). Also interesting is his reference (*ibid* 102–103) to yet other factors such as consumerism, a firm commitment to increase exports, as well as continued economic momentum arising from present success. He does, however, point to other major trends that would shift the impetus in the years to come, such as the end of the era of cheap labor, the accumulation of sizable financial assets and possible income inequality, the growth of financial and other services which entail relatively greater risks, and a more vocal public voice (see *ibid* 103–108).

paragraph, also bear in mind the different conceptions of Confucianism, not all of which are necessarily inimical to the reconception of alternative pathways.

To return to the general issue, there is, it is submitted, no clear answer that enables us to effect satisfactory closure on the general debate, not least because the debate here reflects, once again, that ineradicable tension between universals on the one hand and particulars on the other. Indeed, the philosophical analogue (in Western theory) is embodied in that perennial tension between individual rights and (contrary) majoritarian goals. In other words, this general difficulty is one that manifests itself not just in the debate between (or between the people of) different nations but also within individual nations themselves. It is suggested that there is no rational answer or way to split the difference, as it were. Every attempt to locate a golden mean inevitably tips one into one end of the continuum or the other.³²² For example, despite (as we have seen) the efforts on the part of Confucian doctrine to find a balance between individual rights and freedom on the one hand and duties to others on the other hand, the final resting-point would, it is suggested, tend invariably to be in the direction of the latter.³²³ This is, at the risk of repetition, the case not merely because of specific cultural factors but also (and more importantly) because of this broader philosophical conundrum between universals on the one hand and particulars on the other. Indeed, the overarching problem of subjectivity or relativity of values is the final nail in the theoretical coffin. What we are in effect left with, in the final analysis, are mere arguments that may either persuade or not persuade, but on a purely pragmatic level since no proof of objective values underlying one's arguments exist; although both sides to the debate would invariably claim that their respective views are undergirded by objective values, these would be (at best) mere assertions rather than convincing theoretical arguments.

How do the arguments and views in the preceding paragraphs impact on Unger's *own* suggested system of rights? It might be useful to mention at the outset that Unger's system must tend toward the side of universality, since his rights would, presumably, be applicable regardless of the society concerned. Indeed, his advocacy of "superliberalism"³²⁴ suggests an affinity with the so-called Western conception of rights,³²⁵ even though we have noted that, in its ambitions at least, Unger's proposed system of rights is intended to be different from rights as traditionally understood — principally, to facilitate transformation.³²⁶ Indeed, Unger seems to go further when he states that "the belief in an immutable foundation for human rights" is an "illusion".³²⁷ In accordance with the transformative nature of his ideas, he is of the opinion that "[n]o

³²² See eg the attempt in the following work: Peerenboom "What's wrong with Chinese rights? Towards a theory of rights with Chinese characteristics" 1993 *Harvard Human Rights Journal* 29. The attempt to find a balance is commendable but does not (in the present writer's view) convince in the final analysis; see, especially, the author's proposals *ibid* 53–57.

³²³ *Cf ibid*. See also Tu (n 306) 63–64. For a recent general attempt at "balancing", see Emerson "Singapore and the 'Asian values' debate" 1995 *Journal of Democracy* 95. However, there is no satisfactory conceptual solution, consistent with the proposition tendered in the main text immediately following.

³²⁴ See n 101.

³²⁵ Here again, the query is raised as to whether what purports to be universal is in fact only another particular conception.

³²⁶ See *Legal Analysis* (n 14) 167.

³²⁷ *ibid* 168.

matter what secular or sacred basis we claim for the rights we profess to support, we cannot avoid conflict over their content".³²⁸ Such an approach does not, in fact, appear too far away from the argument proffered here to the effect that there is no clear answer in the light of perpetually contestable issues. If, however, Unger's system of rights retains even the most tenuous of links with liberalism, it immediately comes into direct conflict with the position generally taken in East Asia with respect to rights. As I have sought to argue, there are equally cogent arguments that may be used on each side of the debate, with no clear resolution in sight simply because there is an ineradicable tension between universals and particulars that results in a conundrum that can never be cleanly resolved on a purely conceptual basis. But, quite apart from (and in addition to) the more general problems with regard to Unger's proposed system of rights considered in the preceding part of this article, this absence of a satisfactory answer poses even greater problems for the acceptance of this system in an East Asian context.

It bears repeating at this juncture that the cogency of Unger's concept of market rights is heavily dependent on his proposed reorganisation of the economy, which we will be considering at a later point in this essay.

Insofar as immunity rights are concerned, this would clearly be tied to the discussion on basic rights, in particular, human rights. As we have already seen, however, there are no easy answers in this extremely controversial area. Nor are there clear solutions insofar as destabilisation rights are concerned. Indeed, the general argument for political stability would, I suspect, be given even more emphasis in answer to the latter category. Could it (nevertheless) be argued that, on a very broad level, immunity rights, at least, already exist in most countries, including the East Asian ones, the only remaining issue being the types of rights and their respective scope? But it is precisely at this point that agreement usually stops and controversy begins, not least because there is no objective set of criteria as such that would clearly demonstrate that one party is correct and the other wrong.

Finally, Unger's category of solidarity rights is also problematic. Given, for example, Confucianist tradition or the special integration that is found in Japan, can it not be argued that such solidarity rights are, at best, superfluous? Unger would probably argue that whilst conflict may in fact be mediated under such systems, this would be undesirable since it would stifle individual freedom as well as innovation; it would be, in effect, like the "closed circle" he mentions in *Law in Modern Society*.³²⁹ But, even if this be true, is it not the least of all evils? May it not be the only practical recourse in the light of the fact that it is (as has been argued) conceptually impossible to blend individuality with universality, at least on a concrete plane — without lapsing into the one or the other, thus defeating the entire exercise itself? Further, the infusion of "context smashing" also creates difficulties, which difficulties have already been briefly mentioned in the preceding section.

Let us now turn to a consideration of Unger's proposed reorganisation of the government and the economy in the context of East Asia. I treat both these

³²⁸ *ibid.*

³²⁹ See generally n 23 238–242.

proposals together for one main reason: the problem of solidification which is not only a central one but also one common to both categories. Indeed, the discussion that follows will, I hope, illustrate in some small way the proposition that solidification is a very real danger and an even greater obstacle to the Ungerian enterprise than could merely be imagined in the abstract.

Reorganisation of the government and economy — redundancy, risk and solidification

I will not re-traverse the various possible critiques of Unger's proposed reorganisation of both the government and the economy set out in part III of this essay — save where they are particularly relevant to the application attempted in this section.

The chief critique that may be usefully illustrated here is (as the reader might have surmised) that pertaining to solidification. The countries of East Asia have had a chequered history; there have been many opportunities for the kind of experimentative transformation Unger desires: a fact that Unger and others would, I am sure, agree with.³³⁰ Yet, the result has been, for the most part, a lapse back to the status quo, or worse.³³¹ This has in particular been the situation with respect to China. Yet Japan has done exceedingly well from a relative point of view, despite having a cultural and social system that is (in many ways) opposed to the Ungerian ideal. I have already argued that Unger's views to the contrary (*ie*, that Japan had a system very similar to what he proposes) do not reflect the Japanese reality. Similar problems are posed by the East Asian dragons or tigers (as they are now popularly known),³³² but on a less intense scale for at least one reason: despite their rapid growth, there have been expressed doubts whether at least some of the countries have actually increased in productivity, notwithstanding their clear growth in terms of gross national product; or, to put it another way, the overall growth is due for the most part to inputs of capital and labour, rather than to a genuine growth from total factor productivity which (in turn) implies rather less innovative mores that could lead to economic deceleration in the longer term.³³³ This, in fact, raises another rather significant issue that we should consider first: what is the relationship between transformative thought and the actualisation of goals, even if such goals are, in the nature of the Ungerian enterprise, transitory? The general tenor of Unger's (especially later³³⁴) work suggests that economic development is a major indicator of the success of transformative thought; if

³³⁰ See generally the main text accompanying n 266–274.

³³¹ See generally *ibid*.

³³² *viz*, South Korea, Taiwan, Singapore and Hong Kong. See generally Vogel (n 283).

³³³ For an accessible account, see Krugman "The myth of Asia's miracle" *Foreign Affairs* 62 (Nov/Dec 1994, no 6). For more technical analyses, see Jong-Il Kim and Lawrence Lau "The sources of growth of the East Asian newly industrialised countries" 1994 *Journal of the Japanese and International Economies* 235; Young "A tale of two cities: factor accumulation and technical change in Hong Kong and Singapore" 1992 *NBER Macroeconomics Annual* 13; and by the same author, "Lessons from the East Asian NICs: a contrarian view" 1994 *Eur Econ Rev* 964 as well as *The Tyranny of Numbers — Confronting the Statistical Realities of the East Asian Growth Experience* (NBER Working Paper No 4680, March 1994). (The NBER is the National Bureau of Economic Research, a private research organisation based in the US.)

³³⁴ See the works cited at n 11 and 14. But *cf* the discussion immediately following.

so, then despite the reservations expressed with respect to the possible questionmark as to total factor productivity in at least some of the East Asian tigers,³³⁵ they would nevertheless be taken to have achieved a high degree of success on the Ungerian scale. But, surely, the transformative approach advocated by Unger ought to include innovation. If so, how are economic success and technological (as well as other) innovation related? Is the former merely a prerequisite of the latter, with our judgments proceeding accordingly? What, then, about Unger's proposed system of rights? How does *it* relate to both economic success and innovation? Is it, in fact, a prerequisite of both these last-mentioned items? Unger is, with respect, not entirely clear on the matter. He perceives, for example, the East Asian tigers as an example "usable for the developing countries of the contemporary world", but only provided there is a "[d]emocratizing [of] the partnership between firms and governments".³³⁶ But, even here, he views this condition as a necessary but not a sufficient one; he envisages a certain measure of "hardness"³³⁷ in order that "the partnership between business and the government" can be worked out and yet argues, at the same time, that such "hardness" cannot take "the form of authoritarianism".³³⁸ Here, therefore, the stress is on the aspect of rights, but as viewed in an economic context. But we are left with no clear idea as to the relationship amongst economic success, innovation and rights, save that they are somehow probably part of a holistic and integrated programme.³³⁹ Indeed, support for this interpretation can be found on a close reading of Unger's views, where he emphasises an integrated programme that entails both material *and* spiritual well-being, as represented by economic progress and individual freedom.³⁴⁰ As a related point, it has been argued that the economic rise of the East Asian economies was due to a combination of sound fundamental policies³⁴¹ and selective governmental policy interventions.³⁴² Indeed, although the efficacy of the latter was perceived as controversial, this has not been the view of some other writers.³⁴³ It is thus at least arguable that at least some of the East Asian

³³⁵ See n 332.

³³⁶ See Unger *DE* (n 11) 9. See also *ibid* 8: "The institutional form and the economic content of the partnership must be made more decentralized and experimentalist . . .".

³³⁷ According to Unger, a "hard state" is "a state able to formulate and to implement policy with a substantial measure of independence from the interests of entrepreneurial elites": see *ibid* 6. See also Wade (n 343) 337.

³³⁸ *DE* (n 11) 6 9 13. See also *Legal Analysis* (n 14) 125: Unger states that the present system "may nevertheless prove insufficient and damaging when industrial evolution calls for higher levels of flexibility, knowledge, and workteam self-direction".

³³⁹ See also *Legal Analysis* (n 14) 7: "The most successful countries, in economic development as well as national self-assertion, have often been the most insistent pillagers of practices and arrangements from all over the world." *Cf* also n 275. See further *ibid* 164 181 and *DE* (n 11) 81.

³⁴⁰ "The quality of personal experience and personal encounter are the ultimate prizes in politics. If they do not change, nothing important has really happened despite all the drama and bustle at the commanding heights of political life": see *DE* (n 11) 44. See also *False Necessity* (n 14) 518.

³⁴¹ Including high levels of domestic savings, investment in education and flexibility to limit price distortions, amongst other things.

³⁴² Principally, export-push strategies. See generally *The East Asian Miracle: Economic Growth and Public Policy* (The World Bank, 1993). Reference may also be made to the views of Vogel (n 332), and briefly summarised at n 372.

³⁴³ See eg Wade *Governing the Market — Economic Theory and the Role of Government in East Asian Industrialization* (1990).

economies may have discovered a model of economic development that is a modified form of the capitalist free-market model, although (as we have seen) Unger objects to what he perceives as the excessively authoritarian stance taken by governments toward business. He speaks, instead, of the concept of “co-operative competition”³⁴⁴—as amongst the private firms themselves. It is suggested that such an approach is unlikely to yield substantive results simply because it is highly improbable that firms that are at the vanguard of technology would aid those who are at the rearguard, an approach totally in sync with the idea of a competitive free-market. Indeed, as I have already mentioned, the idea of the competitive free-market is so attractive simply because it accords with the general desires of both individuals and groups. It could, of course, be argued that persons are inherently good, a point apparently assumed by Confucius but made clear by Mencius.³⁴⁵ I have already proffered arguments at some length in part III above as to why the reality probably lies on the contrary end of the spectrum, thus explaining the inherent desirability of the free-market, as just mentioned.

It will be recalled that Unger also speaks of partnership between the government and the private firms in order to facilitate transformation and innovation.³⁴⁶ However, it is suggested that the problem of self-interest discussed in the preceding paragraph would apply, *a fortiori*, to the situation here, where it is quite likely that, with the fullness of time, one would try to gain ascendancy over the other. It is true, however (and as Unger himself argues³⁴⁷) that governmental action can (and is in fact necessary to) ensure that the learning and expertise of the vanguard is pushed into the rearguard in a large and meaningful fashion. But is this not an admission that the “co-operative competition” must be viewed in the more traditional sense (*ie*, as directed and coordinated by the government), rather than be left to the private firms themselves, as suggested in the preceding paragraph. Indeed Unger does clarify that it is the government that would help both small and medium-sized firms to establish regimes of “co-operative competition”.³⁴⁸ And there is the further problem (as Unger himself points out)³⁴⁹ of the perennial tension between co-operation on the one hand and innovation on the other: each needs, and yet threatens, the other. There is always the risk of government action stifling private innovation; conversely, there is also the risk of private innovation being effected, but with no interests in co-operation and consequent sharing of the fruits of such innovation. Further, even if “co-operative competition” is achieved via governmental activism, this may only benefit competition with external firms; there is, however, the everpresent risk of solidification within the domestic market itself, where government-directed specialisation reduces competition within a particular industry and results in cartels being formed. Unger does, however, suggest that an intermediate system of capital funds

³⁴⁴ See generally (n 158), as well as Unger and Cui “China in the Russian mirror” *The New Left Rev*, no 208 (Nov/Dec 1994) 78.

³⁴⁵ See *The Book of Mencius* VI A: 2 (n 304) 88–89.

³⁴⁶ See the main text accompanying n 158.

³⁴⁷ See the main text accompanying n 160.

³⁴⁸ See *Legal Analysis* (n 14) 140.

³⁴⁹ *ibid* 102–103 184.

(considered above)³⁵⁰ would prevent collusion insofar as the partnership between the *government* and private firms is concerned.³⁵¹

But if the East Asian experience is a model in itself, would not Unger's proposals be somewhat redundant? This would especially be the case if economic success *per se* were sufficient as an indicator of minimal success in the Ungerian enterprise. We should not, at this juncture, forget the Japanese experience which has already been referred to at several points in the instant part. Unger would probably argue that the Japanese experience is too specific and even unique, and would therefore be (unlike his proposals) of minimum (if any) general applicability. This is by no means an unpersuasive argument, but it would raise yet another difficulty that Weber never resolved satisfactorily in an analogous problematic context: would Japan, like England, constitute the exception rather than the rule to Unger's general thesis? But if so, would the exception be so significant as to cast doubts on the general thesis itself? And would it not be at least possible to argue that within the Japanese (indeed, any) experience lie the possible seeds of general application: an approach that is not entirely out of sync with Unger's.³⁵² If, for example, a consensus-based economy premised on a homogeneity of views is one of the main struts of the Japanese economic success story, why would it not be possible for other developing or underdeveloped countries to attempt to emulate this model, albeit within whatever specific constraints are imposed by the particular context concerned?

However, even assuming that the difficulty of ascertaining what would be included, as such, as part of the Ungerian enterprise could be solved, what about the dangers of solidification itself? As already mentioned, East Asian countries have involved themselves in experimentation from time to time. Indeed, in the PRC we find in fairly recent history at least three major experiments, all of which have either resulted in or at least exhibited the tendency toward solidification. I have in mind, in particular, the "Great Leap Forward" of 1958 to 1960,³⁵³ the "Cultural Revolution" of 1966 to 1976,³⁵⁴ and the ongoing attempt to transform the (principally) Chinese economy since 1978.³⁵⁵ The first two ended in utter failure, the second exacting a particularly heavy toll not only in terms of the economy but also (and more importantly in the present writer's view) in human lives—both then and now. The third attempt, the outcome of which is yet to be known, was dealt a severe blow at Tiananmen Square in June 1989. All this would appear to suggest that experimentation often leads to undesirable (even tragic) results rather than continuous economic growth and innovation. Yet, Unger continues to argue for his program in the context of the current and future development of the PRC. He views it as the best alternative to socialism on the one hand and capitalism on the other. Indeed, in *False Necessity*, he views the "Cultural Revolution" as a failed attempt at transformation that never got past the

³⁵⁰ See the main text accompanying n 140.

³⁵¹ See *DE* (n 11) 77–78.

³⁵² See eg n 275.

³⁵³ See Fairbank (n 254) ch 19.

³⁵⁴ See *ibid* ch 20.

³⁵⁵ See *ibid* ch 21 (for an account till 1988) as well as the *epilogue*.

threshold, with no alternatives being even put to the test.³⁵⁶ More recently, he cites the success of the Town and Village Enterprises (TVEs) as support for his views.³⁵⁷ Strangely, though, the TVEs are a good illustration of decentralisation and the resultant opportunity for experimentation. But they do not represent, from an economic perspective at least, the type of system he has in mind, one that has as its focus the rotating capital fund.³⁵⁸ Indeed, the lack of centralised co-ordination militates against the whole idea of a rotating capital fund which, whilst allowing for innovation and experimentation along the lines briefly described in part II of this article, must also maintain some system as well as level of co-ordination and control. Curiously, the theme of decentralisation in the Ungerian enterprise is, in fact, to be found more in the reorganisation of *government*, as opposed to the economy. Yet, it is precisely the theme of *decentralisation* that some writers are holding to be the key toward both short as well as long-term economic success in the PRC. In an interesting paper, for example, Qian and Xu argue that the main reason for the PRC's economic growth and the corresponding weakness of such growth in Eastern Europe and the then Soviet Union is due to what they have termed the "multi-layer-multi-regional form of organisation" practised in the PRC which contrasts with the functional and specialisation principles of economic organisation to be found in the latter.³⁵⁹ The major theme in the economic practice of the PRC is that of a gradual decentralisation of the non-state sector along regional lines, thus ensuring not only that regions were not interdependent but also (and more importantly) that economic units within each region were able to conduct their own small-scale experiments without the risk of extreme adverse consequences in the event that the experiments were misconceived.³⁶⁰ In addition, such an economic configuration was less prone to external shocks whilst providing an incentive to all concerned to be committed to the projects concerned; local initiatives could abound without the fetters imposed by the central government. However, the authors also frankly acknowledge one major disadvantage of the system which centres on the loss of efficiency in the

³⁵⁶ See generally *False Necessity* (n 14) 241–246 568–569. This reference, in fact, provoked a strong reaction from eg Ewald (n 9) 741–753. It is, however, suggested that Unger is not advocating senseless violence in the cause of transformative action. Indeed, the catalyst for such action is often perceived as a practical necessity only in situations of great oppression; one does not, I think, do Unger justice by equating transformative action with a "rose garden"; indeed, in adopting such an approach, one may in fact be confusing the process with the (desired, even idealised) result.

³⁵⁷ See generally Unger and Cui (n 344) as well as Weitzman and Xu "Chinese township-village enterprises as vaguely defined cooperatives" 1994 *Journal of Comparative Economics* 121 (and cf the assumption of a high degree of informal conflict resolution within the group itself). See also Chun Chang and Yijiang Wang "The nature of the township-village enterprise" 1994 *Journal of Comparative Economics* 434; the authors do, however, argue that the TVEs will probably become less desirable as the PRC moves toward a market economy: see *ibid* 450. Reference may also be made to Naughton "Chinese institutional innovation and privatization from below" 1994 *American Economic Association Papers and Proceedings* 266.

³⁵⁸ Though there is provision for mandatory retention of after-tax profits, much of which is apparently reinvested: see Weitzman and Xu (n 357) 133 and Chang and Wang (n 357) 439.

³⁵⁹ See Qian and Xu "Organizational basis for economic transition" in Gan and Cui (eds) *China's Reform: Towards Institutional Innovation* (1996). I am grateful to Cui for kindly furnishing me with a copy of the draft manuscript.

³⁶⁰ See also Perkins (n 215) 37.

utilisation of economies of scale.³⁶¹ However, an interesting piece which offers quite a bit of food for thought appears to support the argument for decentralisation just proffered. In that essay, it is argued that the attempt by Mao Zedong to find a way between the planned economy and the market economy during the cultural revolution failed because it eschewed both: Mao was suspicious of central planning as being contrary to communist ideals but was also anathema to any element of the market in decentralisation for the equally obvious reason of total inconsistency with the very same ideals.³⁶² Mao eventually left it all to “decentralised self-reliance”,³⁶³ which proved to be disastrous. However, the thesis presently considered would solve the basic problem by infusing the decentralised economic units with the market and both the authors do, interestingly, point out that Mao had in fact laid the groundwork for decentralisation during the cultural revolution itself! Further support from this illustration for Unger’s thesis derives from the fact that, unlike the “Great Leap Forward” and the “cultural revolution”, the development here was gradual.³⁶⁴ But it is submitted that whilst gradualness is an important factor, it is not the only one (indeed, one might query the gradualness of the Ungerian project since routine and revolution are supposed to be blended together³⁶⁵). But even accepting for the time being the cogency of gradualness and (more significantly perhaps) the emphasis on decentralisation in economic reorganisation, one could, it is suggested, ask (quite legitimately) the question whether excessive decentralisation would really be to the good in the long term. If the central government were to lose all semblance of control over the various economic enterprises (a not implausible result if decentralisation were carried to its extreme³⁶⁶), chaos might result; worse still, in the midst of the general chaos, we would be likely to see regional governments filling the vacuum, thus paving the way for rigid control all over again and/or corruption.³⁶⁷ Further, although decentralisation encourages competition amongst the various regions, it is entirely possible that there will be frequent skewing in the overall economy as local enterprises scramble for profits in “hot” industries; although there would be ultimate correction, there could be much unnecessary pain and discomfort in the interim period. Finally, although it is clear that the overall economic growth has been consistently on the rise, there is no concrete evidence that there has been equitable distribution of wealth and in a free-market system, one would indeed not expect it to be the case. The case for some minimal co-ordination by the central government is again raised, although I would venture to suggest that there is every economic reason for the local governments to use every device possible to bypass the central authorities. And the enormous size of the PRC merely serves to encourage such diversions.

³⁶¹ See also *ibid* 43.

³⁶² See Riskin “Neither plan nor market: Mao’s political economy” in Joseph, Wong and Zweig (eds) *New Perspectives on the Cultural Revolution* (1991) ch 6.

³⁶³ *ibid* 141–144.

³⁶⁴ See n 209. And see Perkins (n 215) 23: “Mao Zedong was the believer in ‘big bangs’.” But *cf* Unger’s own view of the “cultural revolution” at n 410.

³⁶⁵ And see the comment following immediately after the main text to n 244.

³⁶⁶ *Cf* Perkins (n 215) 44. But *cf* Chang and Wang (n 357) 435–439.

³⁶⁷ And see Hao and Johnston “Reform at the crossroads: an analysis of Chinese corruption” 1995 *Asian Perspective* 117, especially 123–125 and Johnston and Hao “China’s surge of corruption” 1995 *Journal of Democracy* 80–84.

But the burden of Unger's argument insofar as the reorganisation of the economy is concerned is (the reader may recall) centred on the rotating capital fund. It is not my argument that the concept of the rotating capital fund necessarily precludes decentralisation; indeed, at least some decentralisation is probably implicit within the application of the concept itself. However, it is suggested that the fund equally entails co-ordination by a central body, which Unger terms the "decisional center", which co-ordination would (as already alluded to above) be undermined by extreme (or even moderate) decentralisation.

As to the decisional center itself, it has already been suggested in the preceding part that there is a great potential for corruption — although there may be potential for even greater corruption by local authorities in a situation of decentralisation. My point is simply this: that *regardless* of the system adopted, the risks of solidification are always going to be greater than the expectation that continuous transformative thought will accrue.

I have also dealt with the problems centring on disincentives and bequests in the preceding part of this article. The situation is a "Catch 22" one; if people were not allowed to accumulate wealth in an absolute way,³⁶⁸ they would almost surely lack the motivation to innovate or even contribute in as vigorous a manner as they are capable of; solidification would also ensue, but in an indirect fashion. The essence of Unger's proposed reorganisation of the economy, however, allows no place whatsoever for the idea of the "consolidated property right".

Turning now from the reorganisation of the economy to the reorganisation of the government, it will be seen that the dangers of solidification are no fewer. Indeed, the problems that arose with regard to some of the examples already mentioned in relation to economic development were due, in no small part, to the solidification that had already occurred in the political realm, and the reader is referred to the discussion above.

Before concluding the discussion of solidification in the context of East Asia, however, I would like to venture a tentative view: that *economic* transformation and success, at least, become more of a reality where there is a strong proscription of *corruption*. This appears to be supported by the strong correlation between a tough political stand on corruption and economic success to be found in many of the East Asian countries.³⁶⁹ To be sure, there are many other factors at work, some of which have been briefly referred to earlier. But it is suggested that a government perceived to be unacceptably corrupt would trigger adverse consequences *vis-à-vis* other major factors, such as political legitimacy and consequent stability, thus impacting on the economy as well; indeed, it is further suggested that even where legitimacy derives in

³⁶⁸ as contrasted with Unger's concept of the "disaggregated property right" which would accompany his proposed reorganization of the economy.

³⁶⁹ See eg Vogel (n 283) 33–34 (with regard to Taiwan). Reference may also be made to Hao and Johnston (n 367); Johnston and Hao (n 367); and Park (n 290). See also generally Phang (n 249) 238–243 and Phang "Convergence and divergence — a preliminary comparative analysis of the Singapore and Hong Kong legal systems" 1993 *Hong Kong Law Journal* 1 15–16 18–20 as well as the literature cited in both references.

large part from the maintenance and/or enhancement of economic well-being,³⁷⁰ such legitimacy can in fact nevertheless be rapidly eroded where corruption is perceived by the public at large to be rampant, especially amongst state officials. Indeed, by its very nature, the presence or absence of corruption would (as the discussion just demonstrates) impact on political transformation as well, although, in this regard, it is acknowledged (once again) that other factors will also be of no mean importance, such as the availability of an effective system of free voting, which was briefly discussed above.

V Conclusion

The necessity of maintaining a continuous attitude of spirit and change is observed more in the theory than in its practice. Ironically, this is particularly true during times of ostensible success, where the guard is dropped, laurels are rested upon, and old methods are idolised and even deified in the name of progress. In a world that has undergone tumultuous changes in less than a decade, the rights-based free-market system has not only become the dominant ideology, but has in fact almost invariably been perceived to be the only one. If it were a system that ensured even substantial material equality, there might, indeed, be no cause to question it. But the fact of (at least) inequality is very much in evidence in such a system. So, too, are people left in a continuous quandary *vis-à-vis* their definition (and pursuit) of individual identity and affirmation on the one hand and the oftentimes fragile (even hostile) relations to others: a dilemma heightened by the effects of modernisation and industrialisation. Faced with these difficulties, it is suggested that radically different alternatives such as Unger's ought to be taken seriously. Indeed, not to do so constitutes the unkindest cut of all: for it is precisely because of the "false necessity" which Unger perceives is fettering many of us, that he offers us his "structure of no structure" that is kept in constant motion by the practice of "context smashing". The size of his undertaking is evident in the works which we have described and analysed during the course of this essay.

I have ventured to observe elsewhere³⁷¹ that even though one might not find Unger's arguments persuasive in the final analysis, his signal contribution must surely be the *spirit* that lies behind his work, which spirit must not be underestimated³⁷² — not least because, despite the apparently obvious point that things ought to be perceived as capable of being better, the fact of the matter is this: that apart from a few remarkable individuals, most labour under the illusion that they are powerless to work a greater good in society at large, not

³⁷⁰ And see generally Vogel (n 283) 40 51 88.

³⁷¹ See Phang n 9 77.

³⁷² But *cf* Unger who argues that spirit is insufficient without actual institutional change: see *DE* (n 11) 24. It is not, in fact, suggested that an effective spirit should not be accompanied by effective action, but, rather, that effective action would not produce effective results, *ie*, a transformation in the institutions that Unger desires, not least because of the problem of solidification that we have already discussed at some length above.

realizing that that “greater good” lies not in a final decisive victory as such but, rather, a continuous and committed effort to try to alter what we sincerely feel requires change.³⁷³

But what about the content of Unger’s proposals themselves? I have sought to argue that they are susceptible to both general as well as specific critiques, the latter illustrating the former by focusing on an uniquely testable terrain, that of East Asia. All these critiques centre, it is suggested, around one major problem — the imperfection and imperfectibility of human nature and knowledge. It is this imperfection and imperfectibility that result in the inability to find objective standards and values that would enable us to sever the Gordian knot of life itself, of which law, politics, economics and human relations are but aspects of a more central dilemma. More importantly, perhaps, it is this imperfection and imperfectibility that prevent the ingenious solution proffered by Unger himself: that we can at least ensure a substantive looseness and freedom by way of institutions and attitudes that would (by their very nature) enable us to keep ourselves from solidifying into layers of hierarchy and domination. Ironically, perhaps, the solidification of life results from the solidification that is the curse of the human condition. Indeed, I would venture to suggest that every insightful move forwards (particularly in the theoretical realm) leads to a paradox — of increased insight accompanied by an increased sense of despair and unfreedom. To state that Unger’s ideas are destined to meet the same fate as all theories is, therefore, not to trivialise the efforts of this fine scholar and thinker. But the solution probably lies in a realm that Unger emphasised in his very first work,³⁷⁴ but which he appears to have abandoned in his later work³⁷⁵ — the suprarational realm belonging to a Being that transcends space, time and the amazing smallness of even the greatest of human intellects and ideas. This opens up, in effect, a completely new field of inquiry, an inquiry that will never (by its nature) be brought to (at least final and decisive) fruition. Admittedly, this view may, on the terms of the *secular*, be just another conception that competes for adherents within the sea of subjectivity. That may be so, but it would be dangerous to neglect this avenue of inquiry, if nothing else because the *real* alternative is to resign oneself to the frustration of relativism or even the blackhole of nihilism. Unger’s ideas may, by their very nature and spirit, be the closest we have yet come to a rationalistic escape from the dark fate of relativism and nihilism; but because they still fall agonizingly short, the Ungerian enterprise may, ironically, be the one that pushes us beyond the secular and into the transcendent.

³⁷³ As Unger himself recently put it, elaborating on his suggestion that the two main parties of the left in Brazil unite and weed out those who would play partisan politics for their own selfish interests (see *PT* (n 11) 240): “Impossible? Of course it is impossible. It is, however, necessary. When the necessary is impossible, the path to pursue is the best approximation that circumstance, backed by strong will, may allow.”

³⁷⁴ See *Knowledge and Politics* (n 23) 294–295. See also Unger’s reply to Kronman’s book review: 1976 *Minnesota Law Review* 167 200–201 203–204.

³⁷⁵ Cf Powell “The gospel according to Roberto: a theological polemic” 1988 *Duke Law Journal* 1013 (see also 1989 *Modern Theology* 97); Wilder (n 205) 621; Holmes (n 9) 158; and Burns (n 171) 146–147 149 151–155 156–157. Cf also *Legal Analysis* (n 14) 186–190 which, however, whilst attempting a generalizing parable about the Jews and their law, turns out by its effective focus on *agape* to at least indirectly support Christianity. Although Unger likens people to the Jews, it is suggested that there is no secular argument that would aid in the attainment of true *agape*, although Christianity provides it through the transforming power of the Holy Spirit.

SAMEVATTING

ROBERTO UNGER EN TRANSFORMASIE IN ASIË

Die fokus van hierdie artikel is die werk van die *Critical Legal Studies* denker, Roberto Unger. Die artikel bestaan uit vyf dele, waarvan die eerste en laaste dele onderskeidelik die inleiding en gevolgtrekking beslaan.

In deel II word Unger se politieke denke tot op hede saamgevat; deel III bestaan uit 'n kritiese analise van Unger se idees; en in deel IV word ondersoek tot welke mate Unger se regs- en sosiale teorieë toepassing kan vind in die konteks van Oos-Asië. Aan die hand van hierdie analise word die gevolgtrekking gemaak dat aandag geskenk moet word aan radikale alternatiewe tot die vryemarkstelsel, soos dié wat deur Unger gepropageer word. Selfs indien Unger se argumente nie in die finale analise oortuigend is, word dit aangebied in 'n gees van aktiewe meewerking tot transformasie en lewer dit as sodanig 'n bydrae tot die nastrewing van groter ideale.