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**Deconstructing Trebilcock’s Development Discourse: Uncovering the
Limits of the Economic Analysis of Law**

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*He is of a time, of a country; he has a family, a city, a
fatherland, a religious and political faith; and all these
factors and many others merge and combine in a thousand
ways.²*

Introduction

Prof. Trebilcock’s work in the area of law and developing countries allows us to analyze the role of economic analysis in development work. Trebilcock clearly identifies a specific role for economic analysis, and he is careful to set limits to this analysis. In his view, economic analysis should be limited to analyzing how legal rules can be structured

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² Emile Durkheim, “Course in Sociology: Opening Lecture” (1888) in Mark Traugott (ed.), *On Institutional Analysis* (Chicago: University of Chicago Press, 1978) at 49-50.

in order to create the incentives for economic growth. However, economic analysis cannot help us to answer broader policy questions in the area of development. For instance, it cannot help policy makers decide how to balance economic growth with other development goals, since such policy questions involve political, social and cultural norms that are not amenable to economic analysis. These decisions fall outside the realm of economic analysis, because they involve political choices about how to equitably distribute income and how to balance the value of existing institutions that do not maximize economic growth against the value of institutions that may do so.

However, in addition to setting the proper limits on the economic analysis of law, Prof. Trebilcock’s work uncovers some conundrums about these limits – conundrums of which Trebilcock is well aware, and which he explores indirectly in much of his work on law and development. In this paper, I will discuss some of the questions about the limits of economic analysis that are raised by Trebilcock’s development work. This discussion will have wider implications for the field of economic analysis of law and development, as some of the issues relating to the limits of economic analysis arise in the work of many law and economics scholars, especially those applying the new institutional economics (“NIE”) to legal problems. These conundrums arise from the theoretical foundation of economic analysis – i.e., the justification economists give for why economics accurately portrays certain empirically observable phenomena, and their explanations of the limits of this kind of economic analysis.

The two “lenses”: Philosophical and Sociological Perspectives on the New

Institutional Economics

As a wide-ranging examination of the limits of economic analysis would be impossible, I focus primarily on the new institutional economics. There are two reasons for this focus: First, Trebilcock frequently employs NIE in his development work; and second, NIE provides a theoretical justification for the boundaries that Prof. Trebilcock sets to his economic analysis. As we will see, Trebilcock limits economic analysis to designing institutions that will create the incentives for economic growth, and he does not venture into questions of distributional justice or other normative political issues. These limits are justified by NIE on the basis of a sociological explanation about different levels of institutions. It posits that certain institutions, called “embedded”³ institutions (religious, cultural, etc.), are impervious to change except in the very long term. Economic analysis, which aims at affecting incentive structures in the shorter term, must eschew policy suggestions that require changes to embedded normative structures in

³ The term “embedded” was first used by Karl Polanyi in *Trade and Market in the Early Empires* (Blencoe, Ill.: The Free Press, 1957), where Polanyi explains that in traditional societies, the economy was “embedded” in other social institutions of the religion, society and politics. However, this view has been questioned by economic sociologists who note that in capital societies, one can also observe that the economy is embedded in society, although in a different way (see, for instance, Leopold Pospisil, *Kapauka Papuan Economy* (New Haven: Yale University Publications in Anthropology, 1963) no. 67.

favour of focusing on more changeable legal norms and the even more variable bureaucratic norms by means of which laws are applied in particular situations. As these norms are not “embedded”, they are more liable to change in the short run.

The conundrums arise when one probes the theoretical foundations of the NIE. This paper uses two lenses to demonstrate that these foundations are unsound: a philosophical and a sociological. From a philosophical point of view, the social theory underlying the new institutional economics overlooks how the philosophical justification of legal norms depends on embedded norms. As a result, if NIE focuses on reforming legal and bureaucratic institutions without considering the link between these institutions and embedded norms, the legal reforms that its proponents recommend may fail due to a lack of fit between these reforms and the normative systems that exist in a developing countries. Indeed, problem of “fit” between proposals for rule of law reform and pre-existing institutions in developing countries has been flagged as a problem in practice, despite Douglass North’s emphasis on the importance of such a fit.⁴ From a sociological

⁴ Many development economists discuss the role of culture in economic development. For instance, Jeffrey Sachs identifies “cultural barriers” as one of the hurdles that developing countries must overcome to kick start economic growth (Jeffrey Sachs, *the End of Poverty: Economic Possibilities for Our Time* (New York: Penguin, 2005) at 60-61. For Douglass C. North’s comments on the role of “fit”, see North, “The New Institutional Economics and Third World Development,” in John Harriss (ed.), *New Institutional Economics and Third World Development* (New York: Routledge, 1997).

perspective, NIE reifies embedded norms, thus overlooking the dynamic interaction between these norms and the norms at other institutional levels. The result of this is that economic approaches to development overly limit the range of possible institutional changes of which developing countries are capable, because on the one hand, it sees the law as independent of embedded norms, and on the other, it overlooks the concrete and dynamic systems of human interaction in which legal rules are actually embedded. I will focus primarily on the sociological arguments because these are, like economics, based in empirical observation. While I find the philosophical arguments equally compelling, they can easily be rejected by positivists and others who reject the view that legal norms need to be justified on the basis of moral and political norms current in the public sphere.

While this paper does critique the theoretical foundations of the economic analysis of law, it does so by demonstrating how Prof. Trebilcock’s work implicitly recognizes the theoretical weaknesses of the economic analysis of law and at the same time tries to preserve its viability in the face of these weaknesses. Because of its implicit engagement with the theoretical foundations of the economic analysis of law, Prof. Trebilcock’s work on law and developing countries provides a rich field for the study of law and economics in action.

North notes that “It is essential to change both the institutions and the belief systems for successful reform since it is the mental models of the actors that will shape choices” (at 25).

The Limits of Economic Analysis – Trebilcock’s Study of Communal Property

Rights in Papua New Guinea

In one of his first papers on development, “Communal Property Rights: The Papua New Guinean Experience,”⁵ Prof. Trebilcock explains the role of economics in his analysis. The paper results from a study Trebilcock and a colleague conducted of the communal property rights system in Papua New Guinea.⁶ The goal of the study was to recommend reforms of this system to permit more economically productive use of land while retaining some features of the traditional system that had existed in the country and on which the residents placed social value. At the end of the paper, Prof. Trebilcock explains the role of economics in his analysis. He writes that economics helps the investigator to understand “the interaction between legal rules and economic incentives,”⁷ thereby permitting the economist to help Papua New Guineans choose an appropriate property system. Different configurations of the property system could create incentives for behaviours that are desirable or undesirable, and economics helps the policy-maker predict which reforms lead to desirable outcomes and which do not.

⁵ (1984) 34 U. Toronto L.J. 377.

⁶ Michael J. Trebilcock and Jack L. Knetsch, *Land Policy and Economic Development in Papua New Guinea* (Institute of National Affairs, Port Moresby, Papua New Guinea, 1981).

⁷ *Ibid.* at 420.

For instance, Trebilcock evaluated the costs and benefits of the traditional Papua New Guinean communal property system. He explains that the restrictions on alienating land to private parties meant that land was not being used in an economically efficient way, because these restrictions prevented future returns from being easily capitalized into the present value of land. Historically, this problem was lessened by the insecurity of property rights, which made land transfers possible in some cases. But modern legislation in Papua New Guinea expressly forbade the types of transfers that had occurred under the traditional system, thus undermining the broader economic goals of the Papua New Guineans.⁸ We see here the role that economic analysis plays – it does not prescribe particular goals such as economic growth, but if a country sets the goal of economic growth, economic analysis permits the law-and-economics-lawyer to analyze the incentive systems that exist in the communal property system of Papua New Guinea and to identify the incentives that limit the potential for growth.

The role of economics in this early paper is clear – it provides options: If Papua New Guinea residents decide that they value economic growth and development over the traditional system of property rights, which has had an important role in their society, then economics provides the answer about how to design the desired system. However, there are limits to economic analysis. For instance, the normative questions of whether to undertake reform and the desired rate of reform should be left to local policy-makers:

⁸ Ibid. at 407

How the process of change should be managed, specifically in the present context with respect to land reform, is obviously a major threshold question for Papua New Guinean policy-makers and can only be resolved in the context of a much broader conceptualization of, and social consensus regarding, a strategy of economic and social development.⁹

Although economic analysis does not help Papua New Guineans make decisions about the appropriate way to distribute resources, once they have made distributional decisions, it can help them to create incentives to ensure that the desired distribution is reached. Trebilcock thus restricts the use of economic analysis to understanding how to create wealth given limited resources, recognizing that it should not be allowed to determine normative issues about the fair distribution of this wealth. Economic analysis offers, as Trebilcock suggests in “An Introduction to Law and Economics,”¹⁰ “only a fragmentary grasp on the total wisdom required to shape a more congenial world. . . .”¹¹

While Trebilcock’s approach here seems commonsensical, it has not always been shared by all law and economics scholars; other economists intent on applying economic analysis to law are more prescriptive about the proper goals of a well-functioning modern legal system. For instance, Richard Posner and others in the Chicago School, basing their

⁹ *Supra* note 5 at 391.

¹⁰ Michael J. Trebilcock, “An Introduction to Law and Economics,” (1997) 23 *Monash University Law Review* 123 at 135 and 157-158.

¹¹ *Ibid.* at 158.

work in part on that of Ronald Coase and other economists in the 1950s and 1960s, see the goal of economic analysis of law as the creation of a legal system that maximizes economic efficiency.¹² This norm – economic efficiency – informs the proposals for legal reform that Posner and others recommend, with the result that a program for reform focuses on creation of private property rights and the law of contracts, which are viewed by adherents to this approach as essential for the creation of economic growth. For instance, Posner, in an article development and rule of law, adopts these Coasian insights, stating the following prescription for developing countries:

So my message is a modest, and perhaps a harsh, one. Legal reform is an important part of the modernization process of poor countries, but the focus of such reform should be on creating substantive and procedurally efficient rules of contract and property rather than on creating a first-class judiciary or an extensive system of civil liberties.¹³

Here, Posner is clearly inspired by Coase, who stated that “a private-enterprise system cannot function properly unless property rights are created in resources, and, when this is

¹² Richard A. Posner, *Economic analysis of law* (New York : Aspen Publishers, 2003).

For an attribution of a similar perspective to NIE, see Malcolm Rutherford, “Institutional Economics: Then and Now” (2001) 15:3 *Journal of Economic Perspectives* 173 at 187 and Mark Granovetter and Richard Swedberg, *The Sociology of Economic Life*, 2nd ed. (Boulder: Westview Press, 2001) at 15.

¹³ Richard A. Posner “Creating a Legal Framework for Economic Development” (1998)

13 *World Bank Research Observer* 1 at 9.

done, someone wishing to use a resource has to pay the owner to obtain it. Chaos disappears; and so does the government except that a legal system to define property rights and to arbitrate disputes is, of course, necessary.”¹⁴

Trebilcock departs from the normative approach of the Chicago school by recognizing the contestability of the normative trade-off to be made in adopting a system of private property rights. For instance, in the case of Papua New Guinea, such a system can only be instituted by abandoning a communal property system on which social value is placed by its citizens. In other words, Trebilcock recognizes normative questions about social goals and the appropriate distribution of resources are prior to economic analysis.

My initial assessment of the limits Prof. Trebilcock places on the economic analysis of law paints a modest role for economic analysis that arises out of a liberal tolerance for different normative frameworks. However, as we will see, this framework may not be so devoid of normative content as it might at first seem. In the next section, I explore how Trebilcock’s economic analysis shares with the NIE a hidden normative framework, to which I now turn.

¹⁴ Ronald Coase, “The Federal Communications Commission” (1959) 2:2 J. Law Econ. 1 at 12.

The Social Theory Underlying Economic Analys – Trebilcock’s Auseinandersetzung with Institutional Economics

After his initial foray into law and development work with his research on Papua New Guinea, Prof. Trebilcock did not write extensively in the area of law and development until the early part of the new millennium. When he returned to the field, it was from a new perspective, namely the new institutional economics. NIE has its roots in the work of Coase in the 1950s and 1960s,¹⁵ but according to Oliver Williamson,¹⁶ its importance was definitively announced by R.C.O. Matthews in his address to the Royal Economic Society in 1986, where he defined the new institutional economics as based on the view that institutions – i.e., the rules that exist in formal legal rules and informal

¹⁵ Although it also goes back to Coase’s earlier articles such as “The Nature of the Firm” (1937) 4:6 *Economica* 386. The founding of the New Institutional Economics is generally attributed to Douglass North and Oliver W. Williamson. The term “new institutional economics” was coined by Williamson in *Markets and Hierarchies. Analysis and Antitrust Implications* (New York: The Free Press, 1975). For this attribution, see Rudolf Richter, “The New Institutional Economics: Its Start, its Meaning, its Prospects” (2005) 6 *European Business Organization Law Review* 161 at 163-164.

¹⁶ Oliver E. Williamson, "The New Institutional Economics: Taking Stock, Looking Ahead" (2000) 38:3 *Journal of Economic Literature* 595 at 595.

social norms that structure economic exchange¹⁷ – affect economic outcomes, and that these institutions are amenable to economic analysis.¹⁸

That this is the case is not self-evident. NIE has been variously criticized¹⁹ as simply being a repackaging of neo-classical economics,²⁰ as inaccurately capturing the process of institutional change by proposing that institutions can be consciously changed by legislators,²¹ and as favouring individualism over collectivism.²² Moreover, there was

¹⁷ Douglass C. North, “The New Institutional Economics and Third World Development,” in John Harriss (ed.), *New Institutional Economics and Third World Development* (New York: Routledge, 1997) at 23.

¹⁸ R.C.O. Matthews, “The Economics of Institutions and the Sources of Economic Growth” (1986) 96:4 *Econ. J.* 903 at 903 and Oliver E. Williamson, “The New Institutional Economics: Taking Stock, Looking Ahead” (2000) 38 *Journal of Economic Literature* 595 at 595.

¹⁹ For a summary of some of these criticisms, see Richter, *supra* note 15 at 179 to 182.

²⁰ Richard Posner, “The New Institutional Economics Meets Law and Economics” (1993) 149 *Journal of Institutional and Theoretical Economics* 73.

²¹ M. Aoki, *Toward a Comparative Institutional Analysis* (Cambridge, MA: MIT Press, 2001).

the possibility that the NIE would be open to the same critiques as the “old” institutional economics, which, after its rise to prominence in the 1920s and 1930s, gradually saw its subject matter relegated to sociology as Keynesian analysis and neo-classical economics rose to prominence.²³ However, despite these obstacles, institutional approaches have once more risen to prominence in economics.

To develop a greater understanding of the possible contribution of the NIE to law and development work, one must look at the theoretical presuppositions of the approach. As Malcolm Rutherford points out, the theory of the NIE, like the “old” institutional approach, rests on a psychological and social theory.²⁴ This theoretical underpinning is most obvious in Williamson’s work. Oliver Williamson divides institutions into four levels:

- 1.) **level of social embeddedness level:** it includes informal institutions, customs, traditions, and religious norms – these norms change very slowly (on the scale of hundreds to thousands of years) and are the domain of social theory rather than economic analysis;

²² B. Fine and D. Milonakis, “From Principle of Pricing to Pricing of Principle: Rationality and Irrationality in the Economic History of Douglass North” (2003) 45 *Comparative Studies in Society and History* 120.

²³ On the decline of the old institutional economics, see Rutherford, *supra* note 12 at 183.

²⁴ *Ibid.* at 186.

- 2.) **level of institutional environment:** this level includes formal institutions such as legal and bureaucratic rules – they change over a decade or more and are the domain of the economics of property rights and positive political theory;
- 3.) **level of governance:** these are the rules in accordance with which the “game is played” – it involves aligning the structures of governance with transactions – these norms can change over a period as short as a year to ten years, and it is the domain of transaction cost economics; and
- 4.) **level of resource allocation and empowerment:** this is the level of the firm, and it deals with changes to prices and quantities – it is constantly changing, and is the domain of neoclassical economics/agency theory.²⁵

According to Williamson, NIE deals primarily with levels two and three by analyzing the legal and bureaucratic rules that structure economic exchanges and the actors who apply these rules to specific transactions.²⁶

Although this sociological categorization of institutions is not explicit in Prof. Trebilcock’s work, it is implicit in it, for instance, in his decision to focus on both formal (legal and bureaucratic) norms and governance (the application of norms to transactions), leaving normative choices that involve embedded norms to political and moral discourse. Indeed, the division between unchangeable embedded norms and the other levels of more flexible norms is evident in Trebilcock’s development work generally. For instance, in his work on Papua New Guinea, there is never any discussion about the possibility of

²⁵ Williamson, *supra* note 18 at 596-597.

²⁶ *Ibid.* at 608.

changing or adapting socially embedded norms – Trebilcock assumes that Papua New Guineans’ preference for communal property rights will remain unchanged.

A similar view underlies Trebilcock’s paper, with Kevin Davis, on the role of ethnically dominant commercial elites in developing economies. Amy L. Chua, in a well-known article,²⁷ had suggested that the dominance of these elites had to be overcome through affirmative actions programs that would place members of the non-economically-dominant ethnic majority in controlling positions within a country’s firms. One of Trebilcock and Davis’ reasons for rejecting this approach is that differences in levels of entrepreneurship among various ethnic groups may be hard to alter.²⁸ They thus rely on the logic of Williamson that embedded norms are not liable to change – at least, not in the short run. As a result, they suggest that countries with ethnically dominant minorities should be allowed to continue their economic dominance and that the government should provide good redistribution programs (i.e., a welfare state) to compensate those less well-off.²⁹ Interestingly, they couch their proposal as a critique of

²⁷ Amy L. Chua, “The Paradox of Free Market Democracy: Rethinking Development Policy” (2000) 41 Harvard International Law Journal 287.

²⁸ Kevin Davis, Michael J. Trebilcock and Bradley Heys, “Ethnically Homogeneous Commercial Elites in Developing Countries” (2001) 32 Law & Pol’y Int’l Bus. 331 at 352

²⁹ Davis, Trebilcock and Heys, *supra* note 28 at 360-361.

the new institutional economic view that informal contracting and ethnic dominance of the economy are the result of poor legal institutions.³⁰ However, I would suggest that overall, their reasoning is entirely consistent with the stratification of institutional levels to which Williamson points.

Other examples of the functioning of these various levels abound in Prof. Trebilcock’s analysis. For instance, in his work on formal and informal contract norms in East Asia, he and Jing Leng conclude that informal institutions are effective for countries at low levels of development in which contracts are relatively simple and relatively short-lived.³¹ They are also suitable for ethnically homogeneous societies such as Japan, or countries such as China, which can depend on the large Chinese diaspora for foreign direct investment.³² It is implicit in this analysis that the communalist societies that favour informal contract norms over formal, legal norms are not likely to change their first-level embedded norms. As a result, Trebilcock and Leng conclude that it may be desirable to incorporate “efficient indigenous institutions of contract enforcement into contemporary legal regimes, rendering formal and informal enforcement institutions

³⁰ Ibid., at 360.

³¹ Michael Trebilcock and Jing Leng, “The Role of Formal Contract Law and Enforcement in Economic Development” (2006) 92 Va. L. Rev. 1517 at 1519.

³² Ibid. at 1575 and 1579.

complements rather than substitutes, and making the law more acceptable to the general population, thereby facilitating its implementation on the ground.”³³

A final example is in his recent book with Ronald J. Daniels, *Rule of Law Reform and Development*.³⁴ Profs. Trebilcock and Daniels include a long discussion at the beginning of their book on whether to adopt a “thick” or “thin” concept of the rule of law – they finally settle on a “thinner” conception. The concern of the authors seems to be to find a concept of the rule of law – a highly disputed norm – that is relatively value free, or to put it another way, a concept that is compatible with many different political and social systems. This discussion is clearly informed, perhaps unconsciously, by the presumption to which Williamson points, namely, that embedded political and social norms are not amenable to change but legal and bureaucratic norms are. As a result, economic analysis properly focuses on the latter and not the former, and in turn, a

³³ Ibid. at 1579. See also Avinash K. Dixit, *Lawlessness and Economics: Alternative Modes of Governance* (Gorman Lectures in Economics, University College London). (Princeton, NJ: Princeton University Press, 2004 at 4.

³⁴ Michael J. Trebilcock and Ronald J. Daniels, *Rule of Law Reform and Development: Charting the Fragile Path of Progress* (Cheltenham, UK: Edward Elgar, 2008).

“thinner”, less normative conception of the rule of law is more desirable when proposing policy changes to developing countries.³⁵

Questioning the theoretical foundations of NIE and its application to law

At the theoretical level, the economic analysis of law and development also raises questions. First, there is the empirical question of whether law and economics is correct to presume different levels of institutions that change at different rates, and moreover, if it is correct to assume that changes can occur at the various levels independently of changes at other levels. In other words, is it correct to say that legal norms can change without changes to the embedded norms? Practically speaking won’t the adoption of Trebilcock’s suggested legal reforms in Papua New Guinea introduce elements of an individualistic property rights system that will gradually undermine the highly valued communal system? Interestingly, despite the apparent pragmatism of Trebilcock’s

³⁵ One might question whether Trebilcock’s most recent work constitutes a rejection of the NIE, since he and Daniels are critical of it. Indeed, Trebilcock and Daniels are critical of the North’s narrow view of the types of legal institutions that matter to development (North focused on contract and property rights). However, despite this criticism, the authors regard NIE as supporting the approach in their book, since it “underscores the social coordinative function of institutions, including legal ones, flowing from their ability to create and manage expectations and the conditions of predictability.” The new institutional economics is thus part of the theoretical background behind Trebilcock and Daniels’ work.

approach, he uses little empirical data to back up his claim that the formalization of communal property rights is the institution that is hampering the productive use of land in Papua New Guinea. Instead, he relies on observations made in developed countries, in which it has been observed that restrictions on private sale of land results in less economically productive use of that land.³⁶

Still at the theoretical level, one can easily question whether the sociological theory on which NIE is based is sound. Is Williamson correct to view the various institutional levels as immiscible? Are embedded norms really static in the short run, such that institutional economists are justified in ignoring them in their analyses? Isn’t the theory basically a theory of cultural determinism? Moreover, in addition to problems with its sociological foundations, there is the question of whether its assumptions about human psychology are warranted. Law and economics presumes that while embedded norms are hard to change, economic behaviour can be changed if a rational system of economic incentives is created.³⁷ However, sociologists such as Max Weber have brought this assumption into question. In *Economy and Society*, for instance, he points out that the

³⁶ He relies, for instance, on Demsetz, “Toward a Theory of Property Rights” (1967) 57 Am. Econ. Rev. 347 and Hardin, “The Tragedy of the Commons” (1968) Science 1243.

³⁷ Posner points out that economic analysis assumes that “people are rational in their social interactions” (Richard A. Posner, “The Law and Economics Movement: From Bentham to Becker,” in Posner, *Frontiers of Legal Theory* (Cambridge, MA: Harvard University Press, 2001) at 35.

acceptability of an institutional arrangement is determined in part by social norms. Economic activity, then, is just as liable to be directed by emotional responses to policy changes that are based on the fear of disapproval that accompanies the breaching of a social norm.³⁸

Leaving theory for methodology, economic approaches to law and development employ a methodology that does not sufficiently account for the web of concrete social interactions in which individuals exist. Economic analysis presumes that rational choice is the proper lens through which to view a development problem. For instance, Prof. Trebilcock’s analysis of the property rights in Papua New Guinea presumes that the traditional communal property rights system is the result of rational individual choices within unchangeable institutional structures. Moreover, the success of his suggested policy reform are based on the assumption that the Papua New Guineans are motivated by their rational self-interest to adopt a set of legal rules that achieves their goal of increasing economic growth. However, these conclusions may be unwarranted without investigation of the concrete motivations of the inhabitants – there is no consideration of the view of Papua New Guineans as to why they desire change. Perhaps the motivation is political, or perhaps the change is desired to enhance a particular set of traditional

³⁸ Max Weber, *Economy and Society: An Outline of Interpretive Sociology* (Berkeley: University of California Press, 1978), chapter 2. See also Richard Swedberg and Mark Granovetter, *The Sociology of Economic Life*, 2nd ed. (Boulder: Westview Press, 2001) at 10.

values.³⁹ Historical analysis is necessary in order to uncover the web of political and social forces that have created a set of institutions, and this historical analysis can then inform future policy choices by presenting choices that reflect the social forces at work.⁴⁰

Finally, Prof. Trebilcock’s work raises the question of whether we have a sufficiently good understanding of the link between institutions and economic growth to be credible advisors to developing countries. Douglass North, in his Nobel Prize lecture, pointed out that one of the weaknesses of new institutional economics is that we still know very little about how to create a set of institutional norms that will make market

³⁹ Richard Swedberg and Mark Granovetter point out how NIE fails to consider social data in understanding the structure of social institutions (*Ibid.* at 15).

⁴⁰ On the importance of a historical study of institutions to understand the organic way in which they have emerged, see Peter Berger and Thomas Luckmann, *The Social Construction of Reality: A Treatise in the Sociology of Knowledge* (New York: Anchor Books, 1966). Berger and Luckmann demonstrate that social institutions develop organically – initially there are a variety of options existing in a relatively fluid state. But then these options “harden” so that a particular institutional arrangement emerges that is difficult to dislodge. See also concepts of path dependency such as those developed by Paul A. David, “Understanding the Economics of QWERTY: The necessity of History,” in William N. Parker (ed.) *Economic History and the Modern Economist* (Oxford: Basil Blackwell, 1986) and W. Brian Arthur, “Competing Technologies, Increasing Returns, and Lock-In by Historical Events” (1989) 99 *Economic Journal* 116.

economies, and thereby economic growth, possible.⁴¹ Thus the law and economics approach does not provide any guidance on how to make the trade-offs that a developing country must make, and it essentially presumes that most of the trade-offs cannot be made if they involve deeply embedded norms.

Having identified some of the difficulties with economic analysis that arise for development work, I will expand on two critiques of the theoretical underpinnings of the NIE that informs Prof. Trebilcock’s work.

Philosophical objections to the stratification of norms

For philosophical objections to the distinction between levels of norms on the basis of how long they last, one could begin with Martin Heidegger, who wrote convincingly, if obscurely in the opinions of some, on the dangers of hypostatizing dynamic systems. The basis of this objection was that hypostatization leads to a division between the person or object being studied and the complex context in which it exists. The most famous example of this in Heidegger’s work is description of a hammer. From the traditional view that divides subject and object, one usually defines the hammer by its physical appearance and potential uses. However, Heidegger prefers a phenomenological description of the hammer, which places it in its context of use, namely, the carpenter’s

⁴¹ Douglass North, “Economic Performance through Time” (1994) 84:3 Amer. Econ. Rev. 359. See also Williamson, *supra* note 18 at 609.

workshop.⁴² Likewise, in his later work, he was critical of both physical and social sciences for the dehumanizing effect they have on the way we view the world, which, in his view, is the direct result of decontextualizing. For instance, it is only by conceptually isolating a young person from his family, friends, and social milieu generally that we can treat him as a soldier – a resource for fighting a war. Were we not to abstract from this context – were we to regard humans as embedded in a multiplicity of systems that lend him value – we could not send him off to war.

Japanese philosophers, inspired by both Asian traditions of Confucianism and Buddhism as well as by Western phenomenology, similarly identified the dehumanizing effect that is both necessary and regrettable about decontextualized interactions. For instance, Watsuji Tetsuro, in his famous book *Ethics*,⁴³ explains how it is necessary to dehumanize a person – separate her from associations of family and friends – in order to perform a medical operation on her. Were this not the case, a surgeon would not be able

⁴² Martin Heidegger, *Sein und Zeit* (Tübingen: Max Niemeyer, 1927) at 69 and 83.

⁴³ Watsuji Tetsurō, Watsuji Tetsurō’s *Rinrigaku: Ethics in Japan*, trans. Yamamoto Seisaku and Robert E. Carter (Albany, NY: SUNY Press, 1996), 60. Trans. of *Rinrigaku* (Tokyo: Iwanami Shoten, 1937, 1942, 1949). Reprinted in Watsuji Tetsurō *Zenshū* (The Complete Works of Watsuji Tetsurō), Vols. 10 & 11 (Tokyo: Iwanami Shoten, 1962), Vol. 10 at 63.

to see her as *merely* a body that can be cut and subjected to the physical trauma of an operation.⁴⁴

The sociology underlying the NIE is liable to a similar phenomenological critique – by dividing and reifying the levels of institutions, it overlooks the context of use in which various norms exist. For instance, embedded institutions are not simply defined by their invariability, organizational associations (with religion, custom, etc.) and so on. Rather, they exist precisely to help people make difficult normative decisions in everyday life, including decisions about legal and bureaucratic norms (Williamson’s level 2), the application of these norms (Williamson’s level 3) and even the meaning of these norms in very specific contexts (Williamson’s level 4). The use of norms to contextualize decisions is acknowledged by such differing views as utilitarianism and natural law theory. Many of proponents of utilitarianism see social norms and values as the manifestation of the utilitarian calculus performed over the course of human history, which preserves utility-maximizing norms and rejects others.⁴⁵ In other words, “embedded” norms are the norms that have been proven to maximize human happiness

⁴⁴ For a more complete discussion of this example, see Graham Mayeda, *Time, Space and Ethics in the Philosophy of Martin Heidegger, Watsuji Tetsuro and Kuki Shuzo* (New York: Routledge, 2006).

⁴⁵ This is the view held by rule utilitarians. For an example, see D.H. Hodgson, *Consequences of Utilitarianism* (Oxford: Clarendon Press, 1967). For a critique, see Peter Singer, “Is Act Utilitarianism Self-Defeating?” (1972) 81 *Philosophical Review* 94.

overall. For many natural law theorists, embedded norms serve to justify and legitimize norms at lower levels such as legal and bureaucratic norms.⁴⁶

But even if proponents of the NIE were to admit that an understanding of embedded norms is necessary for understanding lower normative levels, Heidegger and Watsuji help us to understand how the reverse is also true: we understand embedded norms best by the context in which they are employed at lower levels. For example, to understand the emergence and meaning of embedded norms, one needs to have a complete understanding of the legal context and even of lower levels of institutions, since these represent the implementation of higher order norms, i.e., the way in which norms are implemented. In other words, we obtain very little information about an imbedded norm such as a gender-based hierarchy unless we understand the day-to-day decisions in which this hierarchy is expressed. For instance, to understand sexism in North American society, we need to understand how it the institution of sex is used by individuals making decisions at the micro level about who will care for children, who will take on part-time vs. full-time work within a family unit, etc.

Among contemporary political philosophers, we can find many who see an important relationship between social, cultural, political and legal norms – i.e., a relationship between various institutional levels. For Ronald Dworkin, the law is necessarily engaged with political and moral norms. This is evident in his theory of

⁴⁶ For instance, see Immanuel Kant, who sees legal norms as creating the conditions for the realization of human freedom, the basis of Kant’s moral theory.

adjudication according to which judges, when making decisions in cases not obviously covered by the legal rules, must turn to the political principles that are current in the public forum in order to render a just decision. For instance, let us assume that a judge, in reviewing precedent, finds that the cases can be explained by two incompatible principles of law. How does she decide between the two? According to Dworkin, she must determine which of these principles is compatible with the norms that have historically been used in the public forum to justify legal rights and entitlements. Or in Dworkin’s words: “we must ask which of our two putative interpretations provides a better justification of the decisions [contained in precedent] from the point of view of political morality?”⁴⁷

In a similar move, though with different intent, Jürgen Habermas explains the process of political decision-making. This process, far from being purely rational, as suggested by Williamson’s division of legal and bureaucratic norms (level 2) from embedded norms (level 1), engages the store of reasons in a society that it considers legitimate. In other words, legal and political rules, to be acceptable in society, must be able to be justified on the basis, not just of strategic reasoning (i.e., reasoning based on rewards and sanctions), but of norms that are accepted by members of a political community, and that are marshaled into a decision through a fair process. As Habermas

⁴⁷ Ronald Dworkin, “Law’s Ambitions for Itself,” (1985) 71 *Virginia Law Review* 173-187 at 181. See also Ronald Dworkin, *Taking Rights Seriously* (Cambridge, MA: Harvard University Press, 1978) at 87.

suggests, “[l]aws need to be inter-subjectively recognized by citizens; they have to be legitimated as right and proper. This leaves culture with the task of supplying reasons why an existing political order deserves to be recognized.”⁴⁸ In other words, legal rules, to be acceptable to a society, must draw on a store of norms, some of which Williamson would classify as “embedded” norms.

The need for a sociology of economic life

Theoretical objections to the presuppositions of NIE arise not only in philosophy, but also in sociology. Sociologists have long studied the degree to which human behaviour is determined by individual rational choice and the degree to which it is determined by norms adopted by individuals through a non-rational process of socialization. While the first is generally thought to portray an atomistic notion of the individual in relation to society, the latter is instead considered to promote a non-atomistic view, in which society as a whole, rather than the individual, plays a greater role in determining human behaviour. However, as Mark Granovetter has pointed out, both views are actually based on an individualistic, atomized view. In the first case, the individual determines what will maximize her utility, while in the latter, it is society. But in both cases, what individuals prefer is isolated from their *immediate* social context:

[D]espite the apparent contrast between under- and oversocialized views, we should note an irony of great

⁴⁸ Jürgen Habermas, *The Theory of Communicative Action*, vol. II, trans. Thomas McCarthy (Boston: Beacon Press, 1987) at 188.

theoretical importance: both have in common a conception of action and decision carried out by atomized actors. In the undersocialized account, atomization results from narrow utilitarian pursuit of self-interest; in the oversocialized one, from the fact that behavioral patterns have been internalized and ongoing social relations thus have only peripheral effects on behavior. That the internalized rules of behavior are social in origin does not differentiate this argument decisively from a utilitarian one, in which the source of utility functions is left open, leaving room for behavior guided entirely by consensually determined norms and values—as in the oversocialized view. Under- and oversocialized resolutions of the problem of order thus merge in their atomization of actors from *immediate* social context.⁴⁹

According to both the rational choice and socialization models, an individual’s choices are influenced by internalized factors, rather than by the ongoing process of interacting with others in society.

This sociological insight about the importance of the context of ongoing social interaction for understanding human behaviour is overlooked by the stratification of institutional levels proposed by Williamson. From the sociological point of view, NIE fails to appreciate that “culture is not a once-for-all influence but an ongoing process, continuously constructed and reconstructed during interaction. It not only shapes its members but also is shaped by them, in part for their own strategic reasons.”⁵⁰ As Granovetter goes on to point out, what economists, including the new institutional

⁴⁹ Mark Granovetter, “Economic Action and Social Structure: The Problem of Embeddedness” (1985) 91:3 *American Journal of Sociology* 481 at 485.

⁵⁰ *Ibid.* at 486.

economists, lack is an appreciation for the fact that human action is “embedded in concrete, ongoing systems of social relations.”⁵¹

I suggest that the sociologists’ critique applies to Williamson’s identification of different levels of institutions. By making embedded norms virtually unchangeable, they determine the decisions of individuals in a monolithic way that does not appreciate that actors are embedded, not in a set of unchanging institutions, but in a social process of interacting with others. This interaction shapes individuals, but it also shapes others.

As an illustration of the nefarious consequences of overlooking ongoing relations as occurs in economic analysis, Granovetter uses the economic analysis of contract law, demonstrating the importance of the concrete social context that NIE overlooks. According to Granovetter, the economic analysis of institutions to enforce contracts can best be understood as rational means of preventing inefficient behaviour, which, in the case of contracts, is a failure to abide by them. These institutions ensure that contracts entered into with strangers will be observed even in the absence of a personal trust relationship.⁵² However, in Granovetter’s view, the institutions of contract do not substitute for trust. Rather, it is the “concrete personal relations and the obligations inherent in them [that] discourage malfeasance, quite apart from institutional

⁵¹ Ibid. at 487.

⁵² Ibid. at 489.

arrangements.”⁵³ According to Granovetter, what is missing from the economic explanation is an account of the actual concrete relations of individuals that form the context of a transaction. This context includes past dealings (or the absence of them) – a person is more likely to “trust” another in a contract if she or her associates have had past dealings with him.⁵⁴

The sociologists’ critique of the new institutional economics is relevant to Trebilcock’s development work in the following way. Taking Prof. Trebilcock’s first article in the area of law and development – the study of property rights in Papua New Guinea – one sees the assumptions of the new institutional economics at work.⁵⁵ As I have pointed out, the article suggests that a set of legal institutions can be created, namely, property rights, that are rational and able to create incentives for individuals to overcome the limitations that communal property rights place on creating economic growth. The communal property rights system is implicitly considered as a form of

⁵³ Ibid.

⁵⁴ Ibid. at 491.

⁵⁵ Indeed, they are explicit in Trebilcock’s conclusion that “. . . the Papua New Guinean experience instructively highlights the critical relationship in every society between the legal system which defines, enforces, and governs the transferability of property rights, and the rate and patterns of economic development that will be induced by the choice of property rights regime” (“Communal Property Rights,” *supra* note 5 at 420).

irrationality as it is based on socially embedded (i.e., unchangeable) norms of social status and political power rather than on economic efficiency. However, what this view overlooks is that the communal property rights system may be perfectly rational when viewed within the social context in which it exists. It is therefore not irrational to desire to maintain social status and power and also to increase wealth by stimulating economic growth at the same time.

The sociological critique applies equally to Trebilcock’s more recent work, though in a more subtle way. Trebilcock and Daniels seek to restrict their conception of the rule of law ostensibly in order to promote a less prescriptive method for promoting economic growth through legal reform. But implicit in this is that the social and political norms that form part of the “thick” conception of the rule of law that they reject are embedded norms – norms that are not easily changed. This attitude treats these norms as acting on individuals in a monolithic way that they cannot escape, rather than acknowledging that social and political norms are in a constant process of being evaluated and re-evaluated through the concrete interactions between individuals. Trebilcock and Daniels thus implicitly consider these “embedded norms,” in Williamson’s terminology, as a system of norms separate from real social interaction, and hence not amenable to change.

The difficulty with the reification of various levels of social norms is that it ends in an apparent trade-off between existing first-level embedded norms and new norms that the development professional seeks to introduce. For instance, in the case of Papua New Guinea, Trebilcock sees the inhabitants as faced with a trade-off between making

economically productive use of land and maintaining the existing system of power and social status that is attached to traditional systems of land ownership. Prof. Trebilcock leaves this trade-off to local inhabitants to make, but by conceptualizing it as a trade-off, he leaves little room for Papua New Guineans to be creative about how to solve their dilemma.

Economists who take a more normative approach such as Amartya Sen also fall into the same trap. In *Development as Freedom*, Sen makes it explicit that societies have hard choices to make about whether to maintain tradition or choose economic growth. Moreover, he is emphatic that the two are ultimately incompatible:

There is an inescapable valuational problem involved in deciding what to choose if and when it turns out that some parts of tradition cannot be maintained along with economic or social changes that may be needed for other reasons. It is a choice that the people involved have to face and assess. The choice is neither closed (as many development apologists seem to suggest), nor is it one for the elite “guardians” of tradition to settle “as many development skeptics seem to presume). If a traditional way of life has to be sacrificed to escape grinding poverty or minuscule longevity (as many traditional societies have had for thousands of years), then it is the people directly involved who must have the opportunity to participate in deciding what should be chosen.⁵⁶

The weakness of the work of development scholars such as Trebilcock and Sen resides, I think, in the way development is problematized in economic discourse. A lack of economic growth or the inability to use land to create this growth (as in the case of

⁵⁶ Amartya Sen, *Development As Freedom* (New York: Anchor, 1999) at 33.

Papua New Guinea) are seen as “problems” that need to be overcome. NIE sees institutional reform as a “solution” to this problem, and it uses the rules of efficiency and principles of rational choice to solve the problem. However, the problem as viewed by economists standing outside the institutions of a particular country may be different from the problem viewed from within. Thus, what economists have constructed as a problem of inefficient institutions that do not effectively promote economic growth may, from inside the institutions, actually be a political problem about the redistribution of income or differences in political interests. As Polanyi points out, economic analysis is only effective if what one is analyzing is a series of acts motivated by a situation of scarcity.⁵⁷ However, the motivation for action may be political or social, in which case economic fails to describe the motivations for institutional change. Sociologists, who conduct research in specific populations to uncover the concrete social forces that are creating institutional behaviour, are well-placed to uncover whether economic, political, cultural or social forces are at issue where economic methodology sees only a rational economic problem to solve.

For instance, in Marie-France Garcia’s article “The Social Construction of a Perfect Market,” she exposes what appears to be a rational solution to an economic problem as being motivated, not by a desire to increase economic efficiency, but as a way

⁵⁷ Karl Polanyi, “The Economy as Instituted Process,” in Polanyi (ed.), *Trade and Market in the Early Empires* (Glencoe, Ill.: Free Press, 1957) reprinted in Granovetter and Swedberg, *supra* note 12 at 34.

to institutionalize the balance of interests between competing groups.⁵⁸ García studies the emergence of an electronic system for selling strawberries in Fontaines-en-Sologne, France. The system obviated the need for sellers and buyers to interact by means of traditional commercial networks, which required producers/sellers to accept a price from an intermediary in the absence of clear information about the price at which the strawberries would be sold to consumers. Instead, the new system allowed buyers and sellers to see prices projected on an electronic display board and make purchasing and pricing decisions based on the supply and demand. Garcia analyzes the emergence of this system in order to test whether it is the result of the “invisible hand” that orders markets into forms that maximize economic efficiency. However, she concludes that the creation of this economically efficient market was not due to economic rationality alone, but also to the concrete involvement of a limited number of players:

Le fonctionnement «parfait» du marché n’est dû ni à des mécanismes, ni à une «main invisible» restaurée par l’application des principes du «laisser-faire, laisser-passer» mais au travail de quelques individus ayant intérêt à le faire et à l’acceptation des limites du jeu imposées par tous les autres participants qui y ont aussi trouvé leur compte. Ce marché doit être perçu davantage comme un champ de luttes que comme le produit de lois mécaniques et nécessaires inscrites dans la nature du monde social, quoique défigurées parfois par les «facteurs sociaux». Si la création du marché au cadran a bouleversé le champ des différents réseaux de commercialisation, les principes de distinction sociale et a institué de nouvelles identités

⁵⁸ “La construction sociale d’un marché parfait: Le marché au Cadran de Fontaine-en-Sologne” (1985) 65 *Actes de la Recherche en Sciences Sociales* 1.

légitimes, il n’en reste pas moins que, produit par et fonctionnant pour un groupe restreint composé d’agents dotés de caractéristiques et d’intérêts particuliers, ce marché est inséré dans l’ensemble du champ des réseaux de commercialisation avec lequel il est dans un rapport de dépendance, et que l’équilibre de ce champ peut être remis en question à tout moment, selon les rapports de force entre producteurs, expéditeurs, coopérative et l’action des pouvoirs publics.⁵⁹

Thus Garçia demonstrates that a sociological account of concrete interactions are equally important for understanding how institutional change comes about.

Of course, proponents of the NIE are aware of these critiques. Richter sees a response to Granovetter in Williamson’s work – for Williamson, analysis of embedded institutions and their emergence is the proper domain of sociology, and economists are justified in taking these institutions as given, because they change so slowly:

An identification and explication of the mechanisms through which informal institutions arise and are maintained would especially help to understand the slow change in Level 1 institutions. I conjecture in this connection that many of these informal institutions have mainly spontaneous origins—which is to say that deliberative choice of a calculative kind is minimally implicated. Given these evolutionary origins, they are “adopted” and thereafter display a great deal of inertia—some because they are functional (as with conventions); others take on symbolic value with a coterie of true believers; many are pervasively linked with complementary institutions (formal and informal), etc. Be that as it may,

⁵⁹ Ibid. at 13.

the resulting institutions have a lasting grip on the way a society conducts itself.⁶⁰

However, this response does not meet my concern. First, I challenge whether it is correct to see embedded norms as “embedded” at all, i.e., as changing only in the long run.

Second, I challenge the view that these levels can be separated out from other levels of norms. Instead, I prefer the sociologists’ view of embeddedness, which sees institutions as embedded in a concrete field of human interactions. In my view, Williamson and other proponents of economic analysis do not properly explain why this form of embeddedness should not be taken into account.

What the sociological critique of NIE points to is the need for greater study of the concrete interactions between people as the starting point for law and development reform. It is only through concrete discussions between individuals in a developing country that creative solutions that account for economic, sociological, political and cultural forces can emerge. A clear example of the sort of creative solutions to development problems that emerge from such debate is evident in China, which has found its own balance between economic growth, social stability and civil, political and human rights in its concept of a “socialist” rule of law.⁶¹ This is a clear example of

⁶⁰ Williamson, “The New Institutional Economics,” *supra* note 16 at 597.

⁶¹ See Art. 5 of the Chinese constitution. For a discussion of the rule of law in China, see Randall Peerenboom, “Ruling the Country in Accordance with Law: Reflections on the Rule and Role of Law in Contemporary China” (1999) 11:3 Cultural Dynamics 315.

development decisions emerging from the unique context of evolving Chinese modernity, which has been determined by the concrete historical facticity of modern Chinese society.

Depoliticized politics

Having canvassed both the philosophical and sociological objections to the theoretical underpinnings of the NIE and the application of economic analysis to law, I would like to end with a political critique. In my view, one of the dangers of economic analysis of law is that it hides a hierarchy of political values by maintaining that it is largely apolitical – i.e., economic approaches maintain that economic analysis is merely a tool for manipulating preferences in order to achieve the distribution of income and the level of income that members of a community have chosen through a political process. The gesture of depoliticization is present in Trebilcock’s development work as it is in that of other economists. By “depoliticize”, I mean that they restrict economic analysis to institutions that are liable to change in the short run, and they avoid analyzing embedded norms that play a role in building the fundamental identity of a nation. This is precisely what Prof. Trebilcock does in his development work: he seeks solutions to development issues that do not involve engagement with first-order social and political norms. Instead, he is always at pains to point out that the normative changes that a developing country must make are to be made within the existing framework of social and political conceptions of the good (e.g., the Papua New Guineans’ preference for communal property rights or the East Asian preference for communalism), and he seeks to limit his economic analysis to uncovering how to use incentives to create economic growth while maintaining these invariant political and social norms. In development circles, the

shortcoming of this approach is that law and economic analysis offers no guidance as to how to trade off the social benefits of religion or a communal property rights system against the benefits of economic growth are not addressed by the law and economics approach – i.e., it does little to help developing countries make the hard decisions.

Moreover, the economic approach may not be as value-neutral as it appears:⁶² it promotes certain political values, which it cloaks in its discourse of depoliticization. For instance, economic approaches implicitly place value on economic growth as the primary good. How is this the case? Because according to law and economics, the theory of wealth creation precedes the theory of wealth distribution. Prof. Trebilcock points this out when he says:

[T]heorists committed only to concepts of distributive justice, who proceed in their analysis by inviting us to assume a given stock of wealth, or a given increase in the stock of wealth, and then asking what a just distribution of that wealth might entail, are largely engaging in idle chatter as long as the wealth creation function is simply assumed. Creating wealth is a necessary pre-condition to distributing it.⁶³

This view on the proper ordering of wealth generating and wealth distribution policies clearly prioritizes economic growth over redistribution. This conclusion seems to be at

⁶² Law and economics scholars often maintain the value-neutrality of economic analysis. According to Posner, economic analysis of law “offers a neutral standpoint on politically controversial legal topics” in “The Law and Economics Movement,” *supra* note 37 at 36.

⁶³ Trebilcock, “Introduction to Law and Economics,” *supra* note 10 at 158.

odds with Trebilcock’s conclusion in his paper on Papua New Guinea. There, he stated that were real distributive issues for Papua New Guineans to deal with, since a society that utilizes a communal property system places greater value on economic security and egalitarian distribution of income, while a private property system places greater value on economic growth, which often results in unequal distribution of wealth.⁶⁴ These distributional issues are “threshold questions”⁶⁵ for Papua New Guinean policy-makers to resolve, presumably before they decide to implement Trebilcock’s proposed reforms. This conclusion seems to reverse the order he suggests in the block quote above, namely, that wealth generation is a precondition to decisions about distribution.

Reorienting economic analysis

Prof. Trebilcock’s work in the area of law and development allows us to both appreciate the role of economic analysis in legal reform and see its limits. Indeed, Trebilcock is relatively unique among law and economics scholars in not emphasizing prescriptive norms in his work, instead setting out clear boundaries for economic analysis of law. As we have seen, in his early work on Papua New Guinea, he indicated that economic analysis is a tool to help developing countries achieve their policy goals – it does not itself set these goals. This appreciation of the limits of economic analysis continues in *Rule of Law Reform and Development*, in which he and Daniels go to great

⁶⁴ Trebilcock, “Communal Property Rights,” *supra* note 5 at 389.

⁶⁵ *Ibid.* at 391.

lengths to define a “thinner” conception of the rule of law that will be compatible with as wide a variety of political and social systems as possible while still promoting economic growth. By setting such limits, we see that Trebilcock’s work is animated by Amartya Sen’s view that economic analysis must be used with appropriate humility, because wealth – and by extension, economic growth – are not goods in themselves, but merely means for achieving what we have reason to desire.⁶⁶

In setting the proper limits of economic analysis, Prof. Trebilcock’s work in the area of law and development provides a tremendous opportunity to refine law and economics, and in particular, refine the application of the new institutional economics to development. As we have seen, his work demonstrates that more needs to be done to understand the interaction of norms at different levels such as embedded norms, organizational norms, and application norms. Also, delving into the theoretical presuppositions of the new institutional economics has demonstrated that more emphasis needs to be placed on sociological analysis of the concrete human relations interactions of the community for which legal reform is being proposed. It is not sufficient to presume that cultural, religious traditional and customary norms are an unchanging framework that must be taken into account in law and development reform. Instead, they interact with legal and bureaucratic norms on an ongoing basis, and they form a dynamic system with them. The economic analysis of law will benefit from sociological analysis of developing

⁶⁶ Sen, *supra* note 56 at 13-15. Sen notes that “[t]he usefulness of wealth lies in the things that it allows us to do—the substantive freedoms it helps us to achieve” (ibid. at 14).

countries and of particular communities within them, since these sociological analyses can complement the economic analysis of the incentive structures created by legal institutions by exposing parallel political, cultural and sociological incentive structures. As Emile Durkheim noted, every person “. . . is of a time, of a country; he has a family, a city, a fatherland, a religious and political faith; and all these factors and many others merge and combine in a thousand ways.”⁶⁷ It is important to take into account the concrete facticity of human existence in tailoring rule of law reforms to the specific situations facing communities in developing countries.

⁶⁷ *Supra* note 2.