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CRITICAL (PERSONAL) JUNCTURES: HIGH-LEVEL THEORY
ON THE BOOKS VERSUS DESIRABLE AND FEASIBLE POLICY
OPTIONS ON THE GROUND

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The author, as a law and economics scholar in this article, drawing on personal experience, especially in Papua New Guinea in the early 1980s, in contrast to his exposure to theoretical principles of economics as a Fellow in Law and Economics at the University of Chicago a few years earlier, confronts the chasm between theory on the books and policy and institutional challenges on the ground in most developing countries, especially the poorest and most traditional (as was the case of Papua New Guinea in the early 1980s and still today). He attempts to draw some lessons from this and other experiences for contemporary trade and development policy, especially for insiders and outsiders and for lawyers in particular.

TABLE OF CONTENTS

- I. THE FIRST CHAPTER: HIGH-LEVEL ECONOMIC THEORY ON THE BOOKS
- II. THE SECOND CHAPTER: DESIRABLE AND FEASIBLE POLICY OPTIONS ON THE GROUND FOR DEVELOPING COUNTRIES
- III. BRIDGING THE TWO CHAPTERS IN THE EVOLUTION OF DEVELOPMENT THINKING
 - A. LESSON 1: THERE IS NO UNIVERSAL THEORY OF DEVELOPMENT.
 - B. LESSON 2: EFFICIENCY IS TOO NARROW A CONCEPTION OF DEVELOPMENT.
 - C. LESSON 3: THE LIMITS OF UTOPIAN CONCEPTIONS OF DEVELOPMENT.
 - D. LESSON 4: INSIDERS VERSUS OUTSIDERS.
 - E. LESSON 5: THE ROLE OF LAWYERS IN THE DEVELOPMENT ENTERPRISE.
 - F. LESSON 6: CHALLENGES AT HOME.

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I. THE FIRST CHAPTER: HIGH-LEVEL ECONOMIC THEORY ON THE BOOKS

In retirement now for almost 6 years after a 60-year academic career, 50 of which were spent at the University of Toronto Faculty of Law, one is inclined to reflect on major turning or inflection points in one's intellectual and scholarly orientations, and substantive foci.

In my case, I grew up in a small farming community in New Zealand, was educated initially in country primary and secondary schools, and was one of the first members of this community to attend university, in my case by enrolling in a law degree at the University of Canterbury. This was then a first degree, and in my case the faculty consisted of one full-time member at the outset (the Dean), and when I completed the degree four years later at age 21 (the latter two years as a part-time articling student), there were three full-time members, with most of the courses taught by practitioner adjuncts, with very few choices of courses.

Following graduation, and by virtue of the good offices of my Dean, I secured a lowly tutorship at the University of Adelaide in South Australia in 1963 while undertaking an LLM by thesis on anti-tax avoidance policy. This led to a full academic appointment at the Adelaide law school, and as an element of my academic commitments, participation in a three-person government-appointed task force to review consumer credit laws and propose reforms. In the course of this assignment, I had occasion to read primarily US scholarship on parallel debates on similar reforms in the US. This experience made me acutely aware of my deficiencies in economics in recommending reforms to major consumer (or other) markets.

On moving to the McGill law school in the late 1960s and in the early years of my appointment at the University of Toronto beginning in 1972, I became involved in a protracted process of competition law/antitrust law reform in Canada, partly in my role as a senior elected officer with the Consumers Association of Canada, but again reinforcing to me the inadequacies in my grasp of basic economic principles.

In recognition of these deficiencies, I and a close colleague and friend enrolled in a four-week intensive summer course, Economics for Law Professors, taught by Harold Demsetz and Armen Alchian, at the University of Rochester in 1974, organised by Professor Henry Manne. This led, in my case, to a Fellowship in Law and Economics at the University of Chicago in 1976, where I turned myself into a student again and audited courses by Richard Posner, Ronald Coase, and Gary Becker and an industrial organisation workshop chaired by George Stigler with occasional participation by Milton Friedman (the last four Nobel Laureates), reflecting a general ideological orientation that markets mostly work and that governments mostly don't. This was a transformative intellectual experience for me

and largely redressed the serious deficiencies in my earlier education (for which experience I will always be enormously grateful).

Following my Chicago experience, I returned to the University of Toronto and, along with younger former students and then colleagues, founded the law and economics program that flourishes to this day (along with other interdisciplinary initiatives launched at about the same time in Legal Theory/Philosophy and Health Law and Policy). The programme in its founding years enlisted economists from the Economics Department and Business School on cross-appointments, along with a stream of short-term visitors, who often co-taught courses with us and sometimes co-authored papers. Three of my collaborators subsequently became Deans of the Faculty, and two went on to become university presidents. Another two former students and then close colleagues went on to become Deans at other law schools, and another former student and then close colleague became a senior Cabinet Minister in the current Canadian government.

At the University of Rochester programme and subsequently as a Fellow in Law and Economics at the University of Chicago, I began to appreciate that the basic theoretical principles of economics (especially microeconomics) were not so difficult to grasp for a committed novice: elasticities of demand and supply and determinants thereof; rational actor models of human behaviour in response to economic incentives and disincentives; stylised models of monopoly and perfect competition; oligopoly, monopolistic competition, and collusion; barriers to entry; and the theory of the firm, transaction costs, and externalities (the last three much influenced by Coase's path-breaking scholarship). I also learnt from my exposure to public choice theory and collateral reading why political 'markets' often fail to maximise the efficient allocation of resources or social welfare more generally as a result of the excessive influence of concentrated interests over diffuse interests, marginal voters in marginal electorates over infra-marginal voters, informed versus uninformed voters, and short-termism by political decision-makers typically operating within four- or five-year electoral mandates. Subsequently, I went on to apply many of these insights from theoretical economic principles to competition law,¹ contract law,² the legal domain of accidents,³ less obviously family law,⁴ etc., and insights from public

¹ MICHAEL TREBILCOCK, *THE COMMON LAW OF RESTRAINT OF TRADE* (1986); MICHAEL TREBILCOCK ET AL., *THE LAW AND ECONOMICS OF CANADIAN COMPETITION POLICY* (2002).

² MICHAEL TREBILCOCK, *THE LIMITS OF FREEDOM OF CONTRACT* (1993).

³ DON DEWEES ET AL., *EXPLORING THE DOMAIN OF ACCIDENT LAW: TAKING THE FACTS SERIOUSLY* (1996).

⁴ Brian Brix, *The Role of Private Ordering in Family Law*, 41 *UNIV. TORONTO L. J.* 5 (1991); Michael Trebilcock & Steven Elliott, *The Scope and Limits of Legal Paternalism: Altruism and Coercion in Family Financial Arrangements*, in *THE THEORY OF CONTRACT LAW* (Peter Benson

choice theory to a wide range of Canadian and other public policy contexts⁵ and served on several commissions of inquiry or government task forces in various capacities.⁶

This body of experience constitutes the first chapter (or intellectual cataclysm) in my scholarly evolution. I now turn to the second chapter (or intellectual cataclysm): my nearly year-long experience as Acting Research Director of the Institute of National Affairs (INA) in Papua New Guinea (PNG) in 1982 after a short visit with an economist colleague in 1981, initially principally focused on reforms to informal communal land ownership regimes but extending subsequently to the role of the private sector in the economic development of PNG and public enterprises in PNG (while supervising other studies on trade policy, localisation of public sector personnel, extension services to agricultural smallholders, etc.). Both chapters, entailing very different but radical immersion experiences within a mere six years of each other, have profoundly shaped my intellectual outlook and scholarly agenda over the balance of my career.

II. THE SECOND CHAPTER: DESIRABLE AND FEASIBLE POLICY OPTIONS ON THE GROUND FOR DEVELOPING COUNTRIES

In moving to Port Moresby, PNG, with my wife and two young boys in January of 1982, from the middle of a Canadian winter to the middle of a South Pacific tropical summer, one is first struck by radical differences in climate and geography — the heat, humidity, rugged mountainous and jungle terrains, along with large coastal shorelines and offshore islands. Also, one is quickly struck by the very traditional modes of dress and living of most of the local inhabitants (at that time, a population of about 3 million). Mankind is thought to have lived there for fifty thousand years. PNG was administered as a colony of Australia beginning in 1906 and became a fully independent country in 1975. The country did not produce its first university graduate until 1965, and at the time of my visit, only slightly more than 60% of children received any formal primary school education. At that time, most of the population was involved in informal subsistence agriculture or smallholder food production. It was then one of the poorest countries and one of the most traditional societies in the world, comprising some 700 tribes speaking almost as many mutually unintelligible languages, where some of the world's most distinguished anthropologists, including Margaret Mead and Bronislaw Malinowski, undertook

ed., 2001); Michael Trebilcock, *Marriage as a Signal*, in *THE RISE AND FALL OF FREEDOM OF CONTRACT* (F.H. Buckley ed., 1999).

⁵ Michael Trebilcock et al., *The Choice of Governing Instrument*, INT'L. REV. L. ECON. (1981).

⁶ MICHAEL TREBILCOCK, *PUBLIC INQUIRIES: A SCHOLAR'S ENGAGEMENTS WITH THE POLICY-MAKING PROCESS* (2022).

some of their most path-breaking research. Nothing could stand in sharper contrast to the hallowed halls of the University of Chicago.

In my first week there, at a meeting of INA officials and the Prime Minister, Sir Julius Chan, and some of his cabinet, which I attended, he appointed a task force comprising me and three others — a PNG grandee, a young Papua New Guinean lawyer in private practice and a long-serving expatriate land administrator — to address the increasingly acute conflicts over land rights. About 97% of the land was then held in informal communal property rights without formal or recorded title, with a prohibition on alienation except to the government. An increasing percentage of land was being utilised in commercial agriculture rather than purely subsistence agriculture, which was destabilising this traditional system. This was reflected in frequent tribal conflicts between adjoining land-owning groups (often violent) and extravagant compensation claims, sometimes forcibly enforced by occupation, that often severely compromised major infrastructure projects such as ports and airports.

We worked diligently and productively on our report to the government for several months. We were cautious and incremental in our proposals, favouring sporadic formal registration of title (an option for land-owning groups) but not systematic registration of title to all land in PNG (after two failed attempts by the Australian colonial administration to attempt this task, which prompted more conflicts than it resolved), limited forms of direct alienability, e.g., leases and joint ventures, and clearer definition of membership in land-owning groups and clearer decision rules within such groups to mitigate transaction costs. These recommendations were partly influenced by consultations with anthropologists, who underscored to us the kinship conception of property rights that had prevailed for thousands of years and that raised major challenges to rational-actor conceptions of self-interested individual behaviour. On receipt of our recommendations, the Minister of Lands stated that he would be introducing legislation in Parliament to implement all of its recommendations. Shortly afterwards, he was fired for corruption in demanding bribes to approve leases of government-owned land. I have never been able to ascertain the fate of our proposals, which is not an uncommon experience in PNG due to the rapid turnover of personnel in government and related agencies.⁷

At the same time, I undertook two other studies: one on the role of the private sector in the economic development of PNG, and another on the role of public enterprises (state-owned enterprises) in PNG. In the first study, I ran a mail-out survey to all firms in PNG employing 20 or more workers, which attracted a high response rate. One question I asked was for respondents to rate as favourable or unfavourable about 20 aspects of government policy (much like the later World Bank “Doing

⁷ Michael Trebilcock, *Communal Property Rights: The Papua New Guinea Experience*, 34 UNIV. OF TORONTO L. J. 377 (1984).

Business” Reports). To my surprise, the aspect that attracted the most unfavourable responses was ‘law and order’, both in rural and urban areas, with many examples provided. I supplemented the survey with in-person interviews of representative respondents in their offices, homes, or plantations, including a multi-day drive from Lae on the north coast up the Highland Highway to Mount Hagen in the Northern Highlands, stopping along the way for pre-arranged interviews to provide context to my survey results, interviews that I found vastly illuminating — again, a world away from the classrooms at the University of Chicago. I found the interviews particularly illuminating in underscoring the challenges of developing an effective national government in the face of extreme tribal fragmentation — a shackled leviathan rather than an absent or paper leviathan in the typology that Acemoglu and Robinson have made famous in their book, *The Narrow Corridor*,⁸ discussed further in Part III of these comments.

However, there were some promising initiatives in the agricultural sector, for example, small-holder constellations of palm oil producers distributed around a central processing facility. These examples underscore the broader need for developing countries with major agricultural sectors to move beyond exporting raw agricultural products to higher value-added processes in the production chain (and contesting in trade negotiations, escalating tariffs that developed countries have often imposed on finished or processed agricultural products to protect their own later-stage industries).

In my second study of State-Owned Enterprises (SOE) in PNG, I documented the 29 SOEs owned or controlled by the national government and followed up with on-site interviews with senior management of most of them. Another 19 had been created by provincial governments. More than half of the full complement were unprofitable in my assessment and reflected in general murky mandates and accountability mechanisms with the government. At the same time, the small expatriate Marxist-dominated department of economics at the University of Papua New Guinea strongly promoted an even greater role of government in the economy (as to which I was deeply sceptical, reflecting what vestiges I had left of my University of Chicago immersion).

My scepticism was also in part based on regular accounts in the Port Moresby daily newspaper of parents in tears when their six-year-olds were turned away from the local public school because it was full; families camped out overnight in the hospital parking lot waiting for emergency treatment; the State-owned airline reporting continuing losses of about \$1 million a year without producing audited financial accounts in seven years; regular power outages; and an ineffective police force. In

⁸ DARON ACEMOGLU & JAMES ROBINSON, *THE NARROW CORRIDOR: STATES, SOCIETIES, AND THE FATE OF LIBERTY* (2019) [hereinafter Acemoglu & Robinson].

my view as an outsider, but also shared by many local and expatriate interviewees, state-protected artificial monopolies should be opened to competition (e.g., airlines, coastal shipping); chronic money losers should be wound up unless serving an essential public purpose (e.g., electricity generation); and others consolidated, anticipating elements of the Washington Consensus, discussed in Part III of these comments.

During my visit, a national election was held, resulting in about 20 regional or tribal parties represented in Parliament (more in recent elections), leading to unstable governing coalitions and short-term policy *ad hoc*-ery. Senior positions in the bureaucracy were often held by an ever-changing cast of expatriates on three-year contracts, and policy advisors were often World Bank officials on periodic two- or three-week missions to the capital or visiting ‘firemen’ (like me). At the same time, residents of the island of Bougainville staged an ongoing secessionist movement over the sharing of revenues from a copper mine on the island, and another gold and copper mining venture, OK Tedi, was getting underway in the Western Province that resulted several years later in an environmental disaster when mine tailings contaminated surrounding river systems and was eventually taken over by the national government as another SOE.

In terms of institutions, PNG at the time of my visit in the early 80s was at the tail end of the ‘Big Push’, a government-led development mantra that prevailed in the first few post-war decades (discussed in Part III of these comments) and led to a proliferation of government entities (almost 50 SOEs and 19 provincial governments, weakly coordinated and with often unclear mandates and divisions of responsibilities) in a country then with a population of a mere 3 million. The result was many formal emanations of government as opposed to effective functional governance.

In my view, an effective national government might usefully designate a major office in all or most provinces with an ear to the local ground to provide constant feedback to the national government on the impact of its policies on the ground (Problem-Driven Iterative Adaptation or PDIA), as discussed in Part III of these comments. and avoid the worst dysfunctions of ‘seeing like a state’ from a distant capital city, as compellingly described by James C. Scott in his widely acclaimed book of the same title.⁹ The fragmentation of political authority generated by the proliferation of regional or tribal parties and resultant political instability would seem to justify a constitutional rule, such as requiring a minimum floor of the national vote (e.g., 5%) to qualify for national representation, but this would require broad public discussion and perhaps a national referendum (unlike the post-independence constitution, drawn up principally by outsiders, mostly Canadian constitutional lawyers, as Canada

⁹ JAMES C. SCOTT, *SEEING LIKE A STATE* (1998).

was going through its own cathartic constitutional reform process at roughly the same time).

Two vignettes close this brief survey of my experience on the ground in one of the poorest countries in the world. They led me to devote much of the rest of my academic career to teaching or co-teaching an upper-year seminar on Law, Institutions and Development at the University of Toronto, Harvard Law, NYU Law School, the University of Pennsylvania Law School and the National University of Singapore and writing extensively in the field, typically with a colleague, Mariana Prado, originally from Brazil via the Yale doctoral programme.¹⁰

The first is an iconic photo, then in wide circulation in Port Moresby, of two Papua New Guinean supply bearers carrying a severely wounded Australian soldier under each armpit from the Kokoda trail through the Stanley Mountains, which marked the end of the Japanese advance through the South Pacific during World War II, and captioned ‘Fuzzy Wuzzy Angels’, reflecting many of the racist and other strands of colonial history that the rest of the world bequeathed to PNG on its independence. The Bomana War Cemetery outside Port Moresby is a moving testament to the soldiers lost during the war. 3,800 bodies are buried there (699 unidentified). The tragic losses of so many young lives (and more on the other side of the conflict), culminating in the dropping of atomic bombs on Hiroshima and Nagasaki, underscored, at least for me, the madness of war as opposed to various forms of international co-operation, including international trade and investment (another policy preoccupation of mine since my Chicago interlude and involving endless and currently highly contentious debates over free trade-fair trade fault lines in which developing countries are often implicated).¹¹

The other vignette is my recollection of picking up my youngest son, then aged 6 years, from the international school on palm-fringed Ella Beach in Port Moresby on our last day in PNG. He said goodbye to a little Papua New Guinean boy in his class that he had befriended, did high fives, and said: “Goodbye, Peter. Thank you for being my friend. I will see you on my next sabbatical.” We never did return, reflecting the passing parade of external advisors that mostly leave no lasting or constructive footprints but left me and my family with a kaleidoscope of memories that will last a lifetime, including some of the warmest and most generous people we have ever met.

¹⁰ See MARIANA PRADO & MICHAEL TREBILCOCK, *ADVANCED INTRODUCTION TO LAW AND DEVELOPMENT* (Edward Elgar 2d ed., 2021) [hereinafter Prado & Trebilcock]; MARIANA PRADO & MICHAEL TREBILCOCK, *INSTITUTIONAL BYPASSES* (2019).

¹¹ See MICHAEL TREBILCOCK & JOEL TRACHTMAN, *ADVANCED INTRODUCTION TO INTERNATIONAL TRADE LAW* (3d ed., 2025); MICHAEL TREBILCOCK, *NAVIGATING THE FREE TRADE-FAIR TRADE FAULT-LINES* (2021) [hereinafter Trebilcock & Trachtman].

III. BRIDGING THE TWO CHAPTERS IN THE EVOLUTION OF DEVELOPMENT THINKING

While my Papua New Guinean experience is my most sustained exposure to the challenges facing many developing countries, I am not so naive as to suppose that this experience generalises to all developing countries from the least to the most developed (however defined). I have taught short courses in either law, institutions and development, or International Trade Law and Policy in Singapore, the University of Hong Kong, and the Tsinghua University in Beijing and helped run advisory courses for government officials in Thailand, Vietnam, and Malaysia, with shorter interludes in Brazil, Argentina, Venezuela, Peru, Mexico, and South Africa, and differences stand out more than similarities. I have also taught intensive courses in these areas at Harvard Law School, Yale Law School, New York University Law School, University of Pennsylvania Law School, University of Virginia Law School, and Johns Hopkins University to students from many parts of the world. This leads me to a final set of reflections on the evolution of development thinking in the post-World War II years.¹²

For the first several decades after the war, development thinking in official and academic circles was dominated by ‘big push’, government-led development strategies premised on a form of capital fundamentalism, calling for major transformations through domestic or foreign aid or investment. The goal was to move most developing countries, in the process of decolonisation, from a predominant emphasis on subsistence agriculture to urban-based basic manufacturing, complemented in most cases by dispensations for infant-industry protection or import substitution industrialisation. In the light of mixed to poor outcomes from these policies in many countries, the standard policy prescriptions were then stood on their head in the 1980s and 1990s by the so-called Washington Consensus and reflected in the election of the Thatcher and Reagan Administrations in the UK and the US. Government was now seen as not the solution but the problem; hence, the prescriptions were privatisation, deregulation, trade liberalisation and fiscal restraint, given the debt crisis in many developing countries (e.g., the Asian financial crisis, the Mexican peso crisis, the Argentinian financial crisis, etc.). In turn, these neoliberal policies in many cases produced disappointing results.

A. Lesson 1: There is no universal theory of development.

A grudging recognition amongst official aid agencies and academics, especially economists, has emerged that there are no universal prescriptions for economic and

¹² See Prado & Trebilcock, *supra* note 10; MARK KOYAMA & JARED RUBIN, HOW THE WORLD BECAME RICH (2022).

social development, but each country's challenges and opportunities reflect particularities of history, geography, culture, religion, demographics, natural resources, and institutions, and path dependence often precludes sweeping policy and institutional reforms. This view argues instead for 'Searchers' rather than 'Planners',¹³ PDIA,¹⁴ randomised control trials targeting the efficacy of specific interventions in specific contexts,¹⁵ and institutional bypasses designed to test public reactions to alternative public service delivery systems,¹⁶ building on more general arguments for incrementalism or trial-and-error policy-making articulated in a famous article (in a US context) by Charles Lindblom, an economist at the time at Yale University, in 1979.¹⁷ Even so-called developed countries vary enormously in their institutional arrangements (political, bureaucratic, and legal) and substantive economic and social policies, reflecting a similar set of background factors and defying sweeping generalisations.

While the emergence of the so-call New Institutional Economics over the past several decades has yielded important insights on the importance of political, bureaucratic and legal institutions in shaping a country's development options, pioneered initially by Nobel Laureate Douglas North in his book *Institutions, Institutional Change and Economic Performance*¹⁸ and refined by later scholars such as Daron Acemoglu and James Robinson (both recent Nobel Laureates) in their books *Why Nations Fail*¹⁹ and *The Narrow Corridor*,²⁰ even North acknowledged in a later book that "we know a lot about politics, but not how to fix them,"²¹ given path dependence and the serendipity of critical junctures (e.g. civil or external wars, the emergence of a (hopefully well-intentioned) charismatic leader) that may put a country on a different development path. Even the rightly acclaimed book by Acemoglu and Robinson, *The Narrow Corridor*, which convincingly makes the case, based on historical evidence, that shackled leviathans reflecting a productive equipoise between government and society are superior to despotic leviathans or absent or paper leviathans, is thin on actionable advice on how to move from one

¹³ WILLIAM EASTERLY, *THE WHITE MAN'S BURDEN* (2006); WILLIAM EASTERLY, *THE TYRANNY OF EXPERTS* (2013); DANI RODRIK, *ONE ECONOMICS, MANY RECIPES* (2007).

¹⁴ MATT ANDREWS, *THE LIMITS OF INSTITUTIONAL REFORM IN DEVELOPMENT* (2013); MATT ANDREWS ET AL., *BUILDING STATE CAPACITY* (2017).

¹⁵ ABHIJIT BANERJEE & ESTHER DUFLO, *POOR ECONOMICS* (2011); *GOOD ECONOMICS FOR HARD TIMES* (2019).

¹⁶ Prado & Trebilcock, *supra* note 10.

¹⁷ Charles Lindblom, *The Science of Muddling Through*, 19 PUB. ADMIN. REV. 79 (1959); *see also* Charles Lindblom, *Still Muddling, Not Yet Through*, 6 PUB. ADMIN. REV. 517 (1979).

¹⁸ DOUGLASS NORTH, *INSTITUTIONS, INSTITUTIONAL CHANGE AND ECONOMIC PERFORMANCE* (1990).

¹⁹ DARON ACEMOGLU & JAMES ROBINSON, *WHY NATIONS FAIL* (2012).

²⁰ Acemoglu & Robinson, *supra* note 8.

²¹ DOUGLASS NORTH, *UNDERSTANDING THE PROCESS OF ECONOMIC CHANGE* (2005).

to the other, in large part because their historical case studies turn on very context-specific particularities that defy easy generalisation. Similarly, the earlier classic by Nobel Laureate Amartya Sen, *Development As Freedom*,²² proposing a multi-pronged set of means and ends (beyond economic growth for its own sake) for enabling most citizens of a developing country to live lives they have reason to value (a social democratic conception of development), is thin on how to operationalise these objectives in countries lacking many of these prerequisites. Indeed, with the recent rise of populist movements in many developed and developing countries (not least the US), democratic and rule of law norms are increasingly in retreat, driven in part by the corrosive effects of the social media on these norms, with the politicisation of law enforcement agencies, the courts, and electoral management bodies. Even China, despite its violation of many of the norms of the narrow corridor, reflecting a very different culture and history from many western nations, with its mostly 10% growth rates over the past three decades or more, can claim to have lifted 800 million of its citizens out of poverty. Thus, context is crucial in advancing desirable and feasible reform options.²³

B. Lesson 2: Efficiency is too Narrow a Conception of Development.

Several of the above authors have importantly advanced a crucial objective of moving beyond a narrow conception of economic efficiency or economic growth to a richer set of development objectives.

On a narrow conception of efficiency, any policy can be justified if it moves resources from lower to higher and more productive uses. On this conception, even slavery can be justified by moving natives in West Africa engaged in 'primitive' forms of subsistence living to work on commercial plantations in the southern states of the US or the Caribbean, where total global output would increase. Similarly, rather than engaging in academic scribbling on our retirement farm that few people may read and fewer be persuaded by, perhaps my labour could, on efficiency grounds, be moved to higher and better uses by conscripting me to clear clogged sewage drains in nearby urban centres, but that is not my choice.

²² AMARTYA SEN, *DEVELOPMENT AS FREEDOM* (1999); *see also* AMARTYA SEN, *THE IDEA OF JUSTICE* (2011).

²³ *See* KEYU JIN, *THE NEW CHINA PLAYBOOK: BEYOND SOCIALISM AND CAPITALISM* (2023); KEVIN DAVIS & MARIANA PARGENDLER, *LEGAL HETERODOXY IN THE GLOBAL SOUTH* (2025); *see also* JOEL MOKYR, *A CULTURE OF GROWTH: THE ORIGINS OF THE MODERN ECONOMY* (2017).

While proponents of efficiency, like Milton Friedman in his famous books, *Capitalism and Freedom*,²⁴ and *Free to Choose*,²⁵ place individual freedom at the centre of their conception of efficiency, theirs is a conception of negative or libertarian freedom (freedom from state-imposed constraints) and not positive freedom that requires an active role for the state in ensuring that freedom of choice to live lives that people have reason to value (in Sen's terms) is equitably and broadly distributed (as Timothy Snyder argues persuasively in his recent book,²⁶ drawing on the classic distinction developed by Isaiah Berlin between "freedom from" and "freedom to"). On a narrow conception of efficiency, some of the most abhorrent features of colonial policies (including those of the British Empire) were justified as a central feature of the mythology of the imperial civilising mission, whatever forms of coercion were necessarily entailed.²⁷

In turn, banalities offered by pre-eminent US political economist, the late Mancur Olson, in a review of why some countries are rich and others poor: "The best thing a society can do to increase its prosperity is to wise up",²⁸ or the venerable Economist magazine in a survey of Africa in 2000: "Africa's people need to regain their self-confidence"²⁹ are both unhelpful and patronising. Similarly, highly charged rhetorical, even vitriolic, debates by proponents (e.g., Jeffrey Sachs) and opponents of vastly increased foreign aid (e.g., William Easterly) are not helpful in devising desirable and feasible institutional and policy reforms on the ground for particular developing countries.³⁰

However, we are then left with 'searchers' rather than 'planners',³¹ PDIA, surgical randomised control trials, or institutional bypasses: whatever works on the ground.

C. Lesson 3: *The Limits of Utopian Conceptions of Development.*

Here theory unavoidably resurfaces: what should countries be working at (or searching for)? Should they devote most of their fiscal, human, or institutional resources to infrastructure, education, health care, tax policy, foreign investment policy, or trade policy (or a bit of everything)? This is where high-level or abstract

²⁴ MILTON FRIEDMAN, *CAPITALISM AND FREEDOM* (1962).

²⁵ MILTON FRIEDMAN & ROSE FRIEDMAN, *FREE TO CHOOSE: A PERSONAL STATEMENT* (1980).

²⁶ TIMOTHY SNYDER, *ON FREEDOM* (2025).

²⁷ Michael Trebilcock, *In the Throes and Thrall of Empires*, YALE J. OF REGUL. (forthcoming).

²⁸ Mancur Olson, *Big Bills Left on the Sidewalk: Why Some Nations are Rich and Others Poor*, 10 J. ECON. PERSP. 3 (1996).

²⁹ *The Heart of the Matter*, THE ECONOMIST (May 13, 2000) <https://www.economist.com/special/2000/05/11/the-heart-of-the-matter>.

³⁰ Prado & Trebilcock, *supra* note 10, at 241.

³¹ Amartya Sen, *The Man Without a Plan: Can Foreign Aid Work?*, 85 FOREIGN AFF. 171 (2006).

normative theory is unavoidable. Given that all developing countries will have limited resources to devote to policy change and implementation (and many of their citizens will be resistant to massive convulsive change in their lives, where not all will realistically be winners),³² some sense of priorities is required. In this respect, I find an all-encompassing array of objectives, such as those adopted by the UN General Assembly in 2015 in the form of 17 Sustainable Development Goals (all of which I think I agree with in the abstract), largely unhelpful (or, as H.W. Arndt put it, “[e]verybody’s idea of utopia”).³³ Maybe countries in Acemoglu and Robinson’s Narrow Corridor could realistically aspire to all of them (although I seriously doubt it), but it is certainly not true of many developing countries relatively early in their economic and social development trajectory. However, once normative objectives have been determined, efficiency considerations should influence the choice of instrument to vindicate them, i.e., minimise the costs of realising the objectives given transaction costs and the costs of poorly chosen policy instruments.

D. Lesson 4: Insiders versus Outsiders.

Recognition of the constraints on policy-making and implementation carries with it an implication for the role of outsiders versus insiders in the policy and institutional reform process. An old Polish definition of a pessimist is ‘an optimist with inside information’ (which outsiders typically lack, particularly in setting policy priorities). Outsiders may have useful comparative information on what policies have worked or not in countries sharing many of the particularities of the country in focus, once priorities have been determined. But this is far removed from the (albeit antithetical) universalistic development policies propagated for most of the post-war decades by official aid agencies and many academics. This does not entail leaving all developing countries to “write their own history”, as H.W. Arndt put it,³⁴ but being appropriately modest as to what role outsiders can usefully play in the development enterprise.

By way of concretising this point, some two decades or so ago I was invited by the World Bank to join a mission of two of its officials for a three-week visit to Bangladesh to undertake an assessment of the efficacy of its public institutions. I was initially flattered, but on reflection I realised that I knew next to nothing about Bangladesh and its history (beyond the Wikipedia entry) and I would need an extensive briefing before joining the mission. Upon arrival, who would I interview — just senior government officials (political and bureaucratic) and/or senior members of opposition parties and/or representatives of civil society groups (and

³² MICHAEL TREBILCOCK, *DEALING WITH LOSERS: THE POLITICAL ECONOMY OF POLICY TRANSITIONS* (2014).

³³ H.W. ARNDT, *ECONOMIC DEVELOPMENT: THE HISTORY OF AN IDEA* (1989).

³⁴ *Id.*

which)? Would I confine my interviews to the capital city or extend my interview network to officials and representatives of civil society groups in smaller centres and the rural countryside? What questions would I ask them? How would I divide up responsibilities with the other two members of the mission on the ground, and how easy would it be to collaborate with them (neither of whom I knew) in writing up a subsequent report (upon which World Bank financing was likely to be partly dependent)? Despite the initial flattery, I declined the invitation. It seemed analogous to the World Bank inviting three respected public figures from Bangladesh to undertake a three-week mission to Canada (or the US) to assess the efficacy of its public institutions, which would strike most Canadians (and even more Americans) as preposterous. One response might be that we are relatively rich and they are relatively poor, so we must know something that they do not know. A response, in turn, might be that their relative poverty is primarily a result of colonisation, where most of the population was restricted to 'hewers of wood and drawers of water', and the last thing they need is another dose of patronising imperialism.

E. Lesson 5: The Role of Lawyers in the Development Enterprise.

As to what role lawyers, insiders or outsiders, may play in the development enterprise, one virtue that they have as a discipline is that they are often closer to the ground in their skill sets and orientation as problem solvers than members of cognate disciplines in drafting constitutions, constitutional amendments, referenda, legislation and regulations and as judges in interpreting and applying the law while avoiding the opposite problem of law-making by anecdote rather than a systematic factual basis. Black-letter, green-eyeshade types of lawyers are not an appropriate exemplar, but rather lawyers with a broad interdisciplinary orientation who are open to taking wisdom from wherever they find it. Ideally, they should also be open to continuous feedback from folk on the ground (Problem-Driven Iterative Adaptation) as to whether the objectives of the law-making initiatives in which they have been involved are actually achieving their objectives without unforeseen negative consequences. In this respect, law as a first degree (which is still the case in many countries around the world) is a disability (which I was fortunately mostly able to overcome), but most are not so fortunate. Legal education should not only be in the University but of the university in a broad multidisciplinary orientation (as for other development disciplines).³⁵

For both insider and outsider lawyers aspiring to play a constructive role in the development exercise, a prior or coterminous degree in a cognate discipline (e.g., economics, philosophy, history, sociology, political science, or anthropology) is invaluable, and postgraduate studies domestically or internationally in an appropriate interdisciplinary environment are an added virtue.

³⁵ PAUL COLLIER, *LEFT BEHIND: A NEW ECONOMICS FOR NEGLECTED PLACES* (2004).

With these conditions in place, lawyers are well-placed to play an essential role in the development enterprise, helping bridge the gap between high theory and the challenges of policy making and implementation on the ground. In 2003, I was enormously privileged (as a Canadian and ex-New Zealander) to be elected President of the American Law and Economics Association, more than two decades after the two chapters I have recounted here, providing at least modest support for the value of wrestling with the antinomies between high theory in the books and the desirability and feasibility of policy reforms on the ground, particularly in so-called developing countries.³⁶

F. *Lesson 6: Challenges at Home.*

Looking back, I now appreciate how these skills are also relevant in a developed domestic country context. In my brief interlude at McGill (1969-1972), I experienced firsthand the Front de Liberation du Quebec (FLQ) crisis, the proclamation of the War Measures Act, the McGill Francais March, and a growing secessionist movement, reflecting a widely held view amongst many Quebecois that they had been repressed by British colonisation (leading to major constitutional reforms in Canada), and a dawning recognition on both my part and the Canadian public of similar and justified views amongst our indigenous peoples that they had suffered severe injustices during the colonisation process and thereafter. Thus, the crude and arbitrary bifurcation of the world into developed and developing countries obscures some important commonalities which lawyers (with hopefully broad interdisciplinary perspectives) are often called on to address, including currently embattled democratic and rule of law norms in many countries, developed and developing (including prominently the US, where the second Trump Administration governs principally by executive decree, defying basic democratic and rule of law principles). Similarly, these skills are crucially relevant in negotiating international treaties (or having clients directly affected by such negotiations) on subjects as diverse as trade and investment policy, foreign aid, tax policy, intellectual property, human rights, labour standards, immigration policy, and the environment, although again the Trump Administration's repudiation of rules-based multilateralism in its various manifestations poses special challenges. By virtue of a blizzard of executive decrees, the Trump Administration has repudiated the multilateral trade regime, initially enshrined in the GATT and now the World Trade Organisation, of which the US, through various administrations, was its principal architect. This regime

³⁶ MICHAEL TREBILCOCK & RONALD DANIELS, *RULE OF LAW REFORM AND DEVELOPMENT: CHARTING THE FRAGILE PATH OF PROGRESS* (2008); Kevin Davis & Michael Trebilcock, *The Relationship Between Law and Development: Optimists versus Sceptics*, 56 AM. J. COMP. L. 895 (2008); Michael Trebilcock, *Between Universalism and Relativism: Reflections on the Evolution of Law and Development Studies*, 66 UNIV. TORONTO L. J. 330 (2016).

provided greater scope for developing countries to foster domestic industries through tariff protection (and move beyond ‘hewers of wood and drawers of water’, which was often the legacy of colonialism) and exhorted developed countries to grant non-reciprocal tariff concessions to developing countries on products of export potential to them.

The quasi-judicial dispute resolution regime, of which the US was the principal architect, has now largely been repudiated by successive recent US administrations, largely leaving small developing countries at the mercy of larger economies, which the dispute resolution regime sought to equalise. Promiscuous invocation of national security exceptions has, in many cases, no plausible justification. The withdrawal of most forms of foreign aid by the Trump Administration and withdrawal from the Paris Agreement on Climate Change and the World Health Organisation have left small developing countries even more exposed.³⁷

In short, there is no shortage of challenges for lawyers with the disposition and skill sets required to constructively address them, especially in the current fractious geopolitical environment, which puts small developing countries in special jeopardy.

³⁷ Trebilcock & Trachtman, *supra* note 11.