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Part I: Conceptual perspectives

Reading the story of law and embeddedness through a community lens: a Polanyi-meets-Cotterrell economic sociology of law?

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Abstract

In this article I propose that the role of law in Karl Polanyi's concept of the "always embedded economy"¹ can be enriched by the application of the "lens of community"² developed by Roger Cotterrell.³ I begin with Polanyi's suggestion that economic action and interaction are always "embedded" in wider social life. Reading through the lens of community, we can be more specific: any actor is at once engaged, to different degrees (from fleeting to stable), in multiple types (whether focusing on instrumental, traditional, affective and/or belief-based action) of social life. I then explore a second, implicit, cornerstone of Polanyi's argument: that analytical and normative approaches to economy may become disembedded from wider social life. Reading through the lens of community we can again be more specific: in the transformation to a market society, the analytical and normative approaches that are central to economic actions and interactions are confused with, and privileged over, those that are central to non-economic actions and interactions. This confusion and privileging can have what we might call a performative effect on action and interaction. Finally, I explore Polanyi's story of law as a facilitator both of disembedding movements and of re-embedding counter-movements. The application of a law-and-community lens suggests some additional details of that storyline and that there are additional plotlines to be pursued. The practical potential of this Polanyi-meets-Cotterrell economic sociology of law is briefly illustrated with references to two twenty-first-century cautionary tales: the World Bank's investment climate programme and the 2008 financial crisis.

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1 F Block, "Karl Polanyi and the writing of *The Great Transformation*" (2003) 32 *Theory and Society* 275.

2 A Perry-Kessariss, *Global Business, Local Law: The Indian legal system as a communal resource in foreign investment relations* (Aldershot: Ashgate 2008).

3 R B M Cotterrell, *Law's Community: Legal theory in sociological perspective* (Oxford: Clarendon 1996); "Seeking similarity, appreciating difference: comparative law and communities" in A Harding and E Öricü (eds), *Comparative Law in the 21st Century* (London: Kluwer Law International 2002); "Community as a legal concept? Some uses of a law-and-community approach in legal theory" 2 *No[Foundations] Journal of Extreme Legal Positivism* 15; and *Law, Culture and Society: Legal ideas in the mirror of social theory* (Aldershot: Ashgate 2006).

Introduction

The Great Transformation is among the most-ripped of academic works. The theme of embeddedness that weaves through the book, albeit often unnamed,⁴ has been a rich source of inspiration for sociologists, political scientists and heterodox economists, and, more recently, legal scholars.⁵ Karl Polanyi's key contention with respect to embeddedness is that, during the transformative period of the Industrial Revolution, "market liberals wanted to embed society in the autonomous economy, but their project *could not* succeed" for two reasons: economies are always in fact embedded in society, and "market economies are dependent upon the state to manage the supply and demand for the fictitious commodities" of land, labour and money.⁶

One reason why the "concept of the always embedded economy"⁷ has such broad appeal is that it has implications across four social levels: the "micro" level of individual actors and their *actions*; the "meso" level of *interactions* between actors; the "macro" level at which those interactions aggregate into the institutions of social regimes; and the meta-level of *rationalities* – "the basic principles" which underlie and direct social regimes.⁸ Put in these terms, Polanyi's own analysis of embeddedness can be said to have focused on how our meta-level thinking and our macro-level policies in respect of economy were first disembedded from wider social life in the course of the Industrial Revolution and then re-embedded in wider social life through regulatory counter-movements.

The naturalisation of once-radical theories often involves awkward estrangements, so it is perhaps unsurprising that some putative "Polanyians" have stretched the fabric of his conceptual framework and muted the colour of his moral outrage. Polanyi laid his normative cards flat out on the table, as the following passage demonstrates:

[N]othing saved the common people of England from the impact of the Industrial Revolution. A blind faith in spontaneous progress had taken hold of people's minds, and with the fanaticism of sectarians the most enlightened pressed forward for boundless and unregulated change in society. The effects on the lives of people were awful beyond description. Indeed, human society would have been annihilated but for protective counter-moves which blunted the action of this self-destructive mechanism.⁹

By contrast, the economic sociologists for whom his work is a touchstone have often refused to make "normative conclusions about the subject-matter at issue".¹⁰ For example, Richard Swedberg based his case for an economic sociology of law in part on the need to

4 Fred Block has argued that: "Polanyi glimpsed the idea of the always embedded market economy, but he was not able to give that idea a name or develop it theoretically because it represented too great a divergence from his initial theoretical starting point." Block, "Karl Polanyi", n. 1 above, p. 277. However, Gareth Dale has pointed out that, although Polanyi uses the term embeddedness only a few times in *The Great Transformation*, references to it "crop up repeatedly in his published books and articles from the post-war period, and even more frequently in his unpublished notes and manuscripts". G Dale, "Lineages of embeddedness: on the antecedents and successors of a Polanyian concept" (2011) 70 *American Journal of Economics and Sociology* 307, p. 320.

5 See C Joerges and J Falke (eds), Karl Polanyi, *Globalisation and the Potential of Law in Transnational Markets* (Oxford: Hart Publishing 2011).

6 Block, "Karl Polanyi", n. 1 above, p. 279 (original emphasis).

7 Ibid.

8 S Frerichs, "Re-embedding neo-liberal constitutionalism: a Polanyian case for the economic sociology of law" in Joerges and Falke, *Karl Polanyi*, n. 5 above, p. 68.

9 K Polanyi, *The Great Transformation: The political and economic origins of our time* (Boston: Beacon Press 2001 [1944]), p. 79.

10 Frerichs, "Re-embedding neo-liberal constitutionalism", n. 8 above, pp. 68, 69. See also Dale, "Lineages of embeddedness", n. 4 above, pp. 325–9.

provide a neutral alternative to the “explicitly normative” economic approach to law.¹¹ Sabine Frerichs has responded with a call for an economic sociology of law that is truer to the letter and the spirit of *The Great Transformation* – “Polanyi-inspired” economic sociology of law, through which his deft analytical touch and forceful normative spirit could be coherently extended from the meta level of rationalities down to the micro level of action. In this article I propose that such an exploration of the role of law in the “always embedded economy” can be enriched by the application of the lens of community¹² developed by Roger Cotterrell.¹³

I begin with Polanyi’s suggestion that economic action and interaction are always “embedded” in wider social life. Reading through the lens of community, we can be more specific: any actor is at once engaged, to different degrees (from fleeting to stable), in multiple types (whether focusing on instrumental, traditional, affective and/or belief-based action) of social life. I then explore a second, implicit, cornerstone of Polanyi’s argument: that analytical and normative approaches to economy may become *disembedded* from wider social life. Reading through the lens of community we can again be more specific: in the transformation to a market society, the analytical and normative approaches that are central to economic actions and interactions (including economic networks of community) are confused with, and privileged over, the analytical and normative approaches that are central to other actions and interactions (including non-economic networks of community). This confusion and privileging can have what we might call a performative effect at the levels of action and interaction. Finally, I explore Polanyi’s story of law as a feature of the always-embedded economy, and as a facilitator both of disembedding movements and of re-embedding counter-movements. The community lens adds detail to that story, and suggests additional plotlines to be pursued. The practical potential of this Polanyi-meets-Cotterrell economic sociology of law is briefly illustrated with references to two twenty-first-century cautionary tales: the World Bank’s investment climate programme and the 2008 financial crisis. In light of its presence in a special issue devoted to Polanyi, this piece assumes a degree of familiarity with his work.¹⁴

Embedded economic action and interaction

Economic action and interaction are always embedded in wider social life. Polanyi made this point tangentially when he implied that what we choose to call “labour”, a key “element of industry”,¹⁵ is in fact comprised of people engaged in just one of the many forms of social relations that are the stuff of their everyday lives. This observation is enriched in two ways by the application of a community lens.

First, we see that economy is always embedded because all actors are engaged in diverse types of social action. Cotterrell’s community approach is grounded in Max Weber’s categorisation of four ideal types of social action (traditional, instrumental, belief-based and affective) of which economic action and interaction are just one (instrumental) sub-type. So

11 R Swedberg, “The case for an economic sociology of law” (2003) 32 *Theory and Society* 1, pp. 1–2. This description would be met with discomfort, even indignation, by many economists, since economics is typically presented as a neutral technology untainted by politics. Of course, that is a fantasy that authors such as Jonathan Aldred have dispensed with in detail: J Aldred, *The Skeptical Economist: Revealing the ethics inside economics* (London: Earthscan 2009).

12 Perry-Kessaris, *Global Business, Local Law*, n. 2 above.

13 Cotterrell, *Law’s Community*, “Seeking similarity” and “Community as a legal concept?”, all n. 3 above.

14 In addition to reading *The Great Transformation* itself, a varied introduction to Polanyi’s work can be gained from reading G Krippner et al., “Polanyi symposium: a conversation on embeddedness” (2004) 2 *Socio-Economic Review* 109; Block, “Karl Polanyi”, n. 1 above; and Dale, “Lineages of embeddedness”, n. 4 above.

15 Polanyi, *The Great Transformation*, n. 9 above, pp. 75–6.

we are reminded that any actor is at once embedded, or engaged in, multiple *types* of social action – instrumental activities such as commerce, affective interactions between friends and family, traditional interactions founded across the generations, and interactions grounded in belief.

Second, the notion of “community” allows us to distinguish, in a way that is meaningful in the context of a globalising world, between different *degrees* of embeddedness. Each type of social life can occur in patterns ranging from superficially embedded individual actions, to fleeting interactions between strangers, to relatively stable, deeply embedded, networks of community – whether confined to single neighbourhoods or stretching across the globe. “Networks of community” are primarily a unit of analysis – a way of highlighting those social interactions that “have some stability and moral meaning” whenever, wherever and however they take place. Our attention is drawn not “to distinct social groups” but “to the degree of development of certain aspects of social relationships”¹⁶ – specifically: stable interactions and a sense of belonging. Relations of community can potentially exist wherever interactions (objectively) exist that are relatively “stable and sustained”. When these interactions are accompanied by (subjective) feelings of “attachment or belonging to others or to something beyond the individual”, then they can be regarded as relations of community.¹⁷ This sense of belonging is grounded in a mutually reinforcing combination of, on the one hand, trust and, on the other hand, shared values and interests. Because trust is vital to *all* types of stable, productive social interactions it serves as a reference point for an integrated analysis across multiple types of social action and relations, economic and non-economic.

Mention of the term “community” tends to generate a number of frequently asked questions. Here I will limit myself to answering two, and strictly from the perspective of Cotterrell’s approach. First, no, the application of a community lens is not intended to privilege relations of community over the individual, but a sense of community is valuable in that “social life in any stable and rewarding sense is impossible without it”.¹⁸ Second, yes, relations of community, like all relations, involve power, and can be brutal and unpleasant. So, there is nothing inherently warm and fuzzy about networks of community.¹⁹

Disembedded economic rationalities and regimes

The preceding section established that *any actor, including their actions and interactions, is simultaneously embedded, to different degrees, in multiple types of social life*. We now move to consider embeddedness at the macro/meta levels of rationalities and regime. To the extent “that they are moral, scientific or cultural constructions”, economies are also “always embedded” in wider society at the meta and macro levels.²⁰ In that sense it is as inaccurate to speak of “economy *and* society” as it is to speak of “law *and* society” – neither law nor economy can exist without society. If economic life is always embedded in all levels of social life, how, why and when does Polanyi’s *disembeddedness* occur? Sabine Frerichs does much to unravel

16 Cotterrell, *Law, Culture and Society*, n. 3 above, p. 73.

17 Ibid. p. 70.

18 Ibid. pp. 162–3.

19 See, for example, *ibid.* p. 68.

20 Frerichs, “Re-embedding Neo-liberal Constitutionalism”, n. 8 above, p. 70.

this conundrum when she explains that embeddedness can also be thought of in terms of the relative “ranking” of “different principles of social organisation”.²¹

I will continue my habit of speaking of these “principles of social organisation” as, on the one hand, the “analytical approaches” by which we organise social life into concepts and relationships; and, on the other hand, the “normative approaches” by which we organise the values and interests at the core of social life.²² For those who might wish to place them in the context of the social levels identified at the outset, we can say that these approaches form the intersection between the meta and the macro levels: analytical approaches are manifestations of rationalities, normative approaches are implemented in the form of regimes. Analytical embeddedness:²³

is, first of all, about how Economy and Society are defined and counterposed, while normative embeddedness is about the institutional relations that interconnect and integrate these (conceptually separated) entities . . . [B]oth can, and, indeed, do, change over time, and it is precisely this which is then perceived as a state of crisis.²⁴

So, Polanyi’s disembeddedness is associated with the dominance of rationalities and regimes that rank liberal, economic above other approaches. An analytically disembedded approach is one that thinks of *society as economy*; which uses liberal economic concepts and relationships to think not only about economic and other instrumental actions, but also about affective, belief-based and traditional actions. A normatively disembedded approach is one that both puts *economy before society* and *takes economy for society*. It produces regimes which privilege economic values and interests, usually claiming this to be for the good of all types of social action, including other instrumental action, and also affective, belief-based and traditional actions. Rephrased in these terms, Polanyi’s outrage was directed to the fact that during the Industrial Revolution approaches to thinking (analytical) and deciding (normative) about social, including economic, action were allowed and encouraged to float free from their proper bed in the broader social sciences. A narrower, liberal–economic approach dominated thinking and practice, even while real social, including economic, action and interaction had remained embedded in the complex diversity of wider social life.

The phenomenon of “economics imperialism” that preceded, facilitated and still serves to consolidate the transformation to a market society is well-documented. For example, Ben

21 Frerichs, “Re-embedding Neo-liberal Constitutionalism”, n. 8 above, p. 78. Kurtuluş Gemici made a superficially similar, but fundamentally different, distinction when he described Polanyi as setting two functions for disembeddedness: disembeddedness as a “methodological principle” and as a “historical variable”. Gemici agreed with Granovetter’s observations made elsewhere that only the methodological version of embeddedness is of any use, and that use is limited because it “falls short of providing a theoretical alternative to mainstream economics”. Both of these propositions deserve critical attention. First, that embeddedness does not offer an alternative to mainstream economics is true. But that need not – and, we can surmise, would not for Polanyi – necessarily be perceived as a failing. The aspirations of mainstream economic theory are surely much grander – in flamboyant scope and in intrusive detail – than were Polanyi’s. He was not seeking to predict, explain and measure all aspects of social life as instrumental actions, as do mainstream economists, but rather to understand the impacts of market-oriented regimes on human life. Second, the notion of embeddedness as “historical variable” is, in fact, also useful – at least for those interested in an economic sociology of law. However, that utility is better realised when we specify that this “historical variable” relates to the extent to which, at any given time, the dominant normative approach is more or less market-oriented, that is, more or less disembedded from wider social life, producing regimes which privilege, to a greater or lesser extent, economic values and interests. K Gemici, “Karl Polanyi and the antinomies of embeddedness” (2008) 6 *Socio-Economic Review* 5, pp. 22–26.

22 See A Perry-Kessaris, “Prepare your indicators: economics imperialism on the shores of law and development” (forthcoming 2011) *International Journal of Law in Context*.

23 Frerichs uses the term “conceptual embeddedness” for what I am calling “analytical embeddedness”.

24 Frerichs, “Re-embedding neo-liberal constitutionalism”, n. 8 above, p. 70.

Fine and Dimitris Milonakis have tracked the evolution of economics as a system of thought from inseparable playfellow of other social sciences at the time of Adam Smith's *The Wealth of Nations* in 1776, to its current position as the hollowed out – narrow, asocial, disembedded – coloniser of those social sciences.²⁵ Each aspect of social life in which economics is successfully naturalised risks becoming analytically and normatively disembedded from wider social life.

Economists are not alone in extending the application of their analytical frameworks to the point of unreality – “analysing one . . . aspect of social relations abstracted from its broader social context . . . taking that part for the whole” and “applying analyses based on such abstractions to all aspects of human activity and social life”.²⁶ While an empire-building economist “starts from the view that [the] primary concern is the analysis of exchange or ‘markets’, and elevates this into a theory of human history and society based on individual choice”; an empire-building lawyer “views state law as a system of fixed and determinable rules, and assumes that they are instruments which directly and immediately govern all social behaviour”.²⁷ Elsewhere, new economic sociology pioneer Mark Granovetter has noted the tendency of some sociologists to tell “over socialised” tales.²⁸ But nothing matches the imperial success of economics.

Economics derives much of its drive from the three assumptions “used relentlessly and unflinchingly” that form its analytical “heart”: that individuals always seek to “maximise” their utility, profit and so on; that markets “with varying degrees of efficiency coordinate the actions of different participants – individuals, firms, even nations – so that their behaviour becomes mutually consistent”; and that actors (individuals, firms, states and so on) have stable preferences.²⁹ Although the “boundaries of these assumptions” have been “challenged” by new developments in economic theory, “they remain the preconditions of all remotely mainstream economic analysis – always present, sometimes suspended, sometimes extended”.³⁰ It is this willingness and ability of economics to stick, “relentlessly and unflinchingly”, to its story – however incredible – that makes it so broadly appealing. “Often the truth is that economists don’t know” but “[t]his kind of modesty is not what many of us want to hear. We yearn for comfort and security of definite answers.”³¹

But what are the effects of this analytical and normative disembeddedness, and how might the community lens help to sharpen our vision of them? The dominance of economics is not just irritating for those who would tell other stories in the languages of other disciplines. It threatens their very survival because, as E F Schumacher observed, economics is analytically incapable of accommodating non-economic values and interests. At best it relegates them to a non-speaking cameo role; at worst, it writes them out of the story entirely. One problem is that money has long been the go-to *numéraire* – measure of value – for economists, because of a genuine confidence that everything of value has a price and money is the most efficient signal of those prices. Current efforts to develop

25 B Fine and D Milonakis, *From Economics Imperialism to Freakonomics* (London: Routledge 2009).

26 Campbell and Picciotto make this observation in the terminology of “formalism” as distinct from realism; D Campbell and S Picciotto, “Exploring the interaction between law and economics: the limits of formalism” (1998) 18 *Legal Studies* 251.

27 *Ibid.*

28 Krippner et al., “Polanyi Symposium”, n. 14 above, p. 110.

29 G Becker, *The Economic Approach to Human Behaviour* (Chicago: University of Chicago Press 1976), p. 5.

30 Perry-Kessaris, “Prepare your indicators”, n. 22 above.

31 Aldred, *The Skeptical Economist*, n. 11 above, p. 8.

“happiness” indices and measures of “well-being” may yet enable us to see inside the black box of value, but it is early days.³² It remains the case that:

something is uneconomic when it fails to earn an adequate profit in terms of money. The method of economics does not, and cannot, produce any other meaning . . . Society, or a group or an individual within society, may decide to hang on to an activity or asset for non-economic reasons – social, aesthetic, moral, or political – but this does in no way alter its uneconomic character.³³

So, anyone who tells the story of social life (analytically) through an economic lens will necessarily focus (normatively) on economic values and interests.

The judgment of economics, in other words, is an extremely *fragmentary* judgment; out of the large number of aspects which in real life have to be seen and judged together before a decision can be taken, economics supplies only one – whether a thing yields a money profit *to those who undertake it* or not.³⁴

In the language of community, the “fragmentary” judgment of economics is worrying because it is an economic (type) and individualistic (pattern) story in which the speaking roles are given to those engaged in economic interactions, and the script is composed entirely of monologues. So it blinds us to the reality that all actors are engaged in multiple, diverse and complex patterns of social action and interaction.

Further concern is raised by the fact that analytical and normative approaches have what we might call a performative dimension. The analytical and normative disembedding of the Industrial Revolution was in part caused and effected by the introduction of the “fictitious commodities” of land, labour and money – fictions that were suggested by economic theory. When such fictions leak “outside of academia, they turn into powerful social constructions that are equipped with scientific authority”. Economic theory simultaneously “produces” and “performs” the very economic reality that it is supposed to describe.³⁵ The “descriptions” that we use to “organise” markets for labour, land and money are “fictitious”, but land, labour and money “are being actually bought and sold on the market; their demand and supply are real magnitudes”.³⁶ By treating society “as if” it were a market, so we create market society. Indeed “market society has ultimately to be understood as an artefact of modern (neo-) liberal economics”.³⁷ Some commentators have made this point by drawing on Michel Foucault’s observations on power and discourse. For example, Arturo Escobar refers to the market economy as “a way of organising our perception of the world and our actions in it” – not only a “system” of “production” that places us in “social relations of production”, and a system “of power” that places us “in relations of power”, but also a “system of signification” which places us in “linguistic and discursive relations”.³⁸ We think economics, do economics and feel economic.³⁹

An obvious example of the performative potential of the economic approach came in the form of the sub-prime mortgage crisis that triggered the 2008 global financial crisis.

32 See J Bronsteen, C Buccafusco and J Masur, “Welfare as happiness” (2010) 98 *Georgetown Law Journal* 1583.

33 E F Schumacher, *Small is Beautiful: A study of economics as if people mattered* (London: Vintage Press 1993 [1973]), p. 28.

34 *Ibid.* (original emphasis).

35 Frerichs, “Re-embedding neo-liberal constitutionalism”, n. 8 above, p. 78.

36 Polanyi, *The Great Transformation*, n. 9 above, p. 76.

37 Frerichs, “Re-embedding neo-liberal constitutionalism”, n. 8 above, p. 78.

38 A Escobar, *Encountering Development: The making and unmaking of the Third World* (Princeton, NJ: Princeton UP 1995), p. 142.

39 The implications for counter-movement have drawn out by David Schneiderman, for example, in his presentation at the 2010 Law and Society Association annual meeting in Chicago.

“Buyers” and “sellers” of financial products were encouraged to follow (their perceptions of) a heady combination of their own preferences for risk, and the quality and prices of products on offer. On Main Street and on the High Street, deals were done between commission-hungry mortgage brokers and aspiring homeowners with no income and no assets. On Wall Street and in the City, those mortgages were sold on to investors desperate for somewhere to park their cash with benefits. A regulatory gloss was provided by financial authorities and private sector credit-rating agencies, which intervened with the half-hearted, narrow and shallow self-consciousness of interlopers.⁴⁰ Everyone was on the same market-oriented page, even if not everyone was qualified to understand what was written on it.⁴¹

There is always the chance that economists, their marionettes and their collaborators will spontaneously come to, drop their scripts and exit stage left – a possibility that was hinted at when the scales of disembodiedness fell from the neoliberal eyes of former chairman of the United States Federal Reserve, Alan Greenspan. The following exchange between Greenspan and Representative Henry Waxman during the 2008 hearings at the United States Congress on the financial crisis has been identified as especially enlightening:⁴²

Rep. Henry Waxman: “I do have an ideology. My judgment is that free, competitive markets are by far the unrivalled way to organise economies. We’ve tried regulation. None meaningfully worked.” That was your quote. You had the authority to prevent irresponsible lending practices that led to the subprime mortgage crisis. You were advised to do so by many others. And now our whole economy is paying its price. Do you feel that your ideology pushed you to make decisions that you wish you had not made?

Alan Greenspan: Well, remember that what an ideology is, is a conceptual framework with the way people deal with reality. Everyone has one. You have to – to exist, you need an ideology. The question is whether it is accurate or not. And what I’m saying to you is, yes, I found a flaw. I don’t know how significant or permanent it is, but I’ve been very distressed by that fact.

Rep. Henry Waxman: You found a flaw in the reality . . .

Alan Greenspan: Flaw in the model that I perceived is the critical functioning structure that defines how the world works, so to speak.

Rep. Henry Waxman: In other words, you found that your view of the world, your ideology, was not right, it was not working?

Alan Greenspan: . . . No, that’s precisely the reason I was shocked, because I had been going for 40 years or more with very considerable evidence that it was working exceptionally well.

As Raj Patel explains, the “flaw” to which Greenspan referred was neither the “minor problem of shoddy data” scuppering a good model, to which many post-crisis commentators have pointed; nor “the bigger Black Swan problem” of the weak financial models failing to take account of low frequency–high impact events, to which Nassim

40 A jargon-free and comprehensive account of the financial crisis and its fall-out is provided in two podcasts (both with full transcripts) from the National Public Radio production company This American Life entitled “The Giant Pool of Money” and “The Watchmen”. Countless issues arising from the crisis have been covered in the same style by another National Public Radio production company, Planet Money.

41 R Dyal Chand, “What would de Soto say about the subprime meltdown?” in D B Barros (ed.), *Hernando de Soto in a Market Economy* (Aldershot: Ashgate 2010); and *Exporting the Ownership Society: A case study on the economic impact of property rights*, Northeastern University School of Law, March 2007, Research Paper No 15-2007, available at SSRN: <http://ssrn.com/abstract=968689> (last accessed 24 January 2011).

42 R Patel, *The Value of Nothing* (London: Portobello Books 2011), p. 6.

Taleb^{42a} presciently drew our attention in 2007. The “flaw” in Greenspan’s model was utterly “fundamental”: it was based on a “warped . . . view about how the world was organised, about the sociology of the market”.⁴³ Greenspan’s “warped view” came from looking at society through the analytical and normative lens of mainstream economics.

So, although we have not, in fact, been produced solely for sale, we can come to *behave* as if, even believe that we were – mistaking the play for reality, the script and costumes for our own. Because “markets leave their mark”,⁴⁴ we come increasingly to “know the price of everything and the value of nothing” – as author Raj Patel, UNISON’s head of local government in Wales and Friends of the Earth have all recently paraphrased Oscar Wilde.⁴⁵ We may thus become less willing and/or able to perpetrate Polanyi’s counter-movements. Wherever the balance lies between, on the one hand, the redemptive capacities of the likes of Greenspan and, on the other hand, the susceptibility of all humans to market disciplines, law offers hope for those who would counter-move. However, as the next section explains, the news is not all good. For law is an extension of social life, and thus is itself subject to the disembedding forces of economics and the perils of human frailty.

Law in action and interaction

What can a community lens reveal about the role of *law* in always embedded action and interaction? The law-and-community re-telling of the embeddedness story begins with a simple restatement of the micro–meso level social-embeddedness theme in a legal context: any actor, including their actions and interactions *and their associated law*, is simultaneously embedded, to different degrees, in multiple types of social life *and their associated law*.⁴⁶ Law, like economy, is a part of social life.

What is of interest to socio-legal enquiry is ‘how a certain side or part of the social *takes the form of law*’ – or, indeed, does not take the form of law; or only partially takes the form of law; or appears to but does not, in fact, take the form of law.⁴⁷

Law, whether generated by state or non-state actors, is used, abused and avoided at every level of social life.

A community lens highlights a distinction between two of law’s many faces:⁴⁸ one which is directed towards supporting the ad hoc actions and interactions of individuals; and another which is directed towards supporting those relatively stable and trusting interactions that are “networks of community”. Law supports individuals by facilitating their efforts to

42a N Taleb, *The Black Swan: The impact of the highly improbable* (London: Random House 2007).

43 Patel, *The Value of Nothing*, n. 42 above, p. 6.

44 M Sandel, “Markets and Morals”, Reith Lectures 2009: A New Citizenship, BBC Radio 4, 9 June 2009, www.bbc.co.uk/programmes/b000kt7sh (last accessed 1 September 2011).

45 See www.unison.org.uk/cymruwales/pages_view.asp?did=11422 and www.foe.co.uk/blog/price_everything_31241.html (last accessed 1 September 2011). An anonymous reviewer rightly pointed out that: “The quotation is from Lord Darlington in Act III of ‘Lady Windermere’s Fan’. Cecil Graham’s retort is ‘And a sentimentalist, my dear Darlington, is a man who sees an absurd value in everything, and doesn’t know the market price of any single thing’. Wilde’s position is, at best, more complicated than this selective quotation would suggest.” However, the abbreviated version gets across that part of the meaning of the original quotation that is necessary for the present purpose.

46 Cotterrell, “Community as a legal concept?”, n. 3 above, pp. 19–20.

47 Perry-Kessaris, *Global Business, Local Law*, n. 2 above, p.18, quoting Cotterrell, “Community as a legal concept?”, n. 3 above, pp. 19–20 (original emphasis).

48 Law is, of course, multi-faceted and goes beyond the individual and the communal. For a start, law can be used by the state to direct or enable the individual to do things that they might not choose to do, and that may or may not make them happier, healthier and otherwise better off. Thanks to Martin Krygier for this point.

protect and promote their values and interests. This is the face of law of which contemporary, mainstream, individualistic, market-oriented economics is primarily enamoured. There is no doubt that these are real and legitimate roles for law, but “[l]aw’s aspiration is towards something more than . . . the society of morally unconnected, rights-possessing individuals that liberal philosophy tends to presuppose”.⁴⁹ Law can also act as a communal resource in support of networks of community engaged in all types of social action (instrumental, including economic, traditional, affective and belief-based).

Law supports community, by *expressing* the trust that binds actors together in stable, productive relations. Contracts, constitutions and articles of association are all good examples. Law supports community by securing spaces for the *coordination* of the diverse values and interests of multiple networks of community, thereby ensuring that those diverse stable, productive trusting relations persist and flourish. “An emphasis on community does not imply an absence of conflict.” It actually “highlights key foci of legal contradiction and controversy”.⁵⁰ Law supports community, by encouraging widespread *participation* in social life within and between networks of community. It does this generally by protecting the security and autonomy of individuals, and specifically by creating and maintaining gateways through which participation can occur. In so doing it supports mutual interpersonal trust, which both consolidates existing community-like relations and opens the door to the development of new community-like relations. Public interest litigation, environmental impact assessments and public hearings are all good examples of legal mechanisms which facilitate participation and coordination.⁵¹

It is primarily in law’s capacity to act as a communal resource that the hope of those who would counter-move resides. The values and interests that underpin actions and interactions (individualistic or communal) in one type of social action or interactions (instrumental, affective, belief, or traditional) may be in direct conflict with the values and interests underpinning other actions and interactions. Such conflicts are the beating heart and meaningful soul of embeddedness, and they can be made more productive, or less destructive, when law acts as communal resource.

Law in regime and rationality

Polanyi’s vision of law is as a facilitator and collaborator of social transformation. When he proposed that nineteenth-century society was “transformed” in a “double movement”, he implied a triple role for law: embedded, disembedding, re-embedding. First, law played an innocent, embedded role when it facilitated the “*extension* of the market organisation in respect to genuine commodities” such as milk, oil and cotton. On the other hand, law played a grubby role as collaborator during the disembedding movement in which the fictitious commodities were created: the “as-if” commodities of labour, land and money were necessarily legal, as well as economic, fictions.⁵²

[A]ny *measures or policies* that would inhibit the formation of [land, labour or money] markets would *ipso facto* endanger the self-regulation of the system. The commodity fiction, therefore, supplies a vital organising principle in regard to the whole of society affecting almost all its institutions in the most varied way, namely, the principle according to which no arrangement of behaviour *should be*

49 Cotterrell, *Law’s Community*, n. 3 above, p. 18.

50 Cotterrell, “Community as a legal concept?”, n. 3 above, p. 23.

51 See Perry-Kessaris, *Global Business, Local Law*, n. 2 above.

52 As was pointed out by Sabine Frerichs in her presentation “A Polanyian take on the globalised ‘as if’ economy” during the 2010 workshop around which this special issue is based.

allowed to exist that might prevent the actual functions of the market mechanism on the lines of the commodity fiction.⁵³

At the same time, law played a third, heroic role, this time in the counter-movement to re-embed economy: the “*restriction*” of market organisation “in respect to fictitious [commodities]”.⁵⁴ Economists pretend that the economy is an autonomous “self-regulating” set of relationships. Lawyers collaborate by dressing humans and nature as “fictitious commodities”, Labour and Land, and present them as having been produced for the sole purpose of being sold. But off-stage lurks reality, in which the action and interaction remain embedded in society, and society always “protect[s] itself against the perils inherent in a self-regulating market system”.⁵⁵ As “markets spread” deeper and wider, so a “network of measures and policies was integrated into powerful institutions designed to *check* the action of the market relative to labour, land and money”, and a “deep-seated movement sprang into being to *resist* the pernicious effects of a market-controlled economy”.⁵⁶ Law’s capacity to act as a communal resource can be read directly into Polanyi’s account: it expressed the acceptable extensions of markets in respect of genuine commodities within economic networks of community; and maintained spaces for the co-ordination of inter-network values and interests in which the counter-moving restricting, checking and resisting of markets duly took place.

What Polanyi did not directly address was the transformation – the disembedding – of law itself. As we have seen, law is “always embedded” in social action and interaction. Equally, regimes and rationalities have legal dimensions, so law is implicated when regimes and rationalities become disembedded and re-embedded in the wider social sphere – as different analytical and normative approaches ascend and descend the “ranking” of “principles of social organisation”.

A critical Polanyian perspective has thus, first, to de-construct the Hayekian way of embedding even the law (and its inherent normativity) in economic rationalities, and, secondly, to reconstruct law as a social institution which also reflects the rationalities and values of other social spheres.⁵⁷

This is a task to which a community lens is ideally suited, for it enables us to both “seek similarity”, to pay attention to the common threads that run through all social, including economic, relations; and to “appreciate difference” in the often conflicting values, interests and legal needs that are central to each of these relations.⁵⁸ A community lens suggests that the legal embeddedness storyline can be extended at the meta level of rationalities in at least two ways, both of which I have explored elsewhere, albeit in slightly different guises, so I will limit myself to a few edited highlights.

First, the thread of analytical and normative disembeddedness can be extended to the legal context: approaches to social life *and their associated law* may come to float free from

53 Polanyi, *The Great Transformation*, n. 9 above, p. 76 (emphasis added).

54 Ibid. p. 79 (emphasis added).

55 Ibid. p. 80.

56 Ibid. pp. 79–80 (emphasis added).

57 Frerichs, “Re-embedding neo-liberal constitutionalism”, n. 8 above, p. 81. Such efforts can be found, for example, among feminist theorists who query the very existence of homo-economicus (e.g. M A Fineman and T Dougherty, *Feminism Confronts Homo Economicus: Gender, law, and society* (Ithica: Cornell UP 2005)) and lawyers and economic historians who have revealed the normative core of economics (Aldred, *The Skeptical Economist*, n. 11 above), and charted with concern the spread of an exceptionally asocial and ahistorical form of economics into all aspects of social life (Fine and Milonaki, *From Economics Imperialism*, n. 25 above, including its mathematising, marketising, numericising effects on law (Perry-Kessaris, “Prepare your indicators”, n. 22 above).

58 Cotterrell, “Seeking similarity, appreciating difference”, n. 3 above, p. 49.

their proper bed in the wider social sciences. Here, I am thinking of ever-more commonplace economic approaches (analytical and normative) to law. Analytically, economic concepts and relationships are used to describe law both as a (fictitious) commodity in its own right, and as a facilitator and regulator of markets for other (fictitious and real) commodities. A very real example of this is to be found in the World Bank's current predilection for treating national legal systems "as if" they are an input into a larger fictitious commodity known as an "investment climate", with which states are presented as touting for the attentions of foreign investors. The "commodity" of the national legal system is doubly significant in investment climate discourse because it also facilitates and regulates markets for other fictitious commodities such as labour and environmental resources, as well as real commodities. The normative dimension of the rise of the economic approach to law is that economic values and interests are used to judge the merits or desirability of various legal phenomena. A market-oriented approach to law, economy and society sees only economic values and interests, and it insists that those values and interests are valuable, and ought to be interesting, to individuals and networks that are focused on non-economic types of social life. Turning once more to the World Bank, in its investment climate discourse a "good" legal system is one that is efficient, which means quick and cheap. So the bank measures the speed and cost of legal systems and ranks them accordingly in a league table.⁵⁹

Second, we can extend the thread of performativity to the legal context by asking: have we come to know the price of law but lost touch with its value? Here, I am thinking of the commodification of legal systems in the context of investment climate discourse. By treating legal systems "as if" they are merely an input into a larger commodity known as "investment climate", so we can create that reality. For example, states battle to move up the World Bank's economically defined league table, if necessary, sacrificing the legal needs of other types of social life (non-economic instrumental, traditional, belief and affective social). A detailed case study of the impact of investment climate discourse in Indian foreign investor-government-civil society relations showed not only that investment climate discourse was diverting attention from the interests and values that underpin non-economic relations; it was actively undermining the ability of law to support those non-economic relations,⁶⁰ and any counter-movements that those relations might have produced. The effects of such a loss can be, as Polanyi pointed out, catastrophic. Without the protection offered by the regulatory counter-movement, "Nature would be reduced to its elements, neighbourhoods and landscapes defiled, rivers polluted . . . the power to produce food and raw materials destroyed."⁶¹

Conclusion

Law, economy and society have starred in countless tales of derring-do. It is not uncommon, but it is pointless, to reword a perfectly good story without revealing anything in the process. So, what is gained from the effort of translating the socio-economic legal tangle first into the language of Polanyi's embeddedness, and then into that of Cotterrell's community?

One of the most important benefits of thinking in Polanyian terms is a sense of historical context and perspective – an essential counterpoint to the prevailing tendency to privilege "being in the moment" and to scavenge ceaselessly for record-breakers. *The Great*

59 Perry-Kessaris, "Prepare your indicators", n. 22 above. See the Business Planet website for an instant insight into the power of this project: <http://rru.worldbank.org/businessplanet> (last accessed 1 September 2011).

60 Perry-Kessaris, *Global Business, Local Law*, n. 2 above.

61 Polanyi, *The Great Transformation*, n. 9, p. 76.

Transformation is a story written by an economic historian, in the mid-twentieth century, about the eighteenth and nineteenth centuries, as compared to the fifteenth century and beyond. It puts us in our place and helps us to get over ourselves.

Another benefit of speaking Polanyian is that it enables us to build on the gains of those who have gone before us and diverts us from reinventing analytical wheels. The “concept of an always embedded economy” has already been shown to be an effective transformer of rationalities because it makes it “very hard to gloss over or hide the state’s fundamental role in shaping actually existing economies”; because it reveals that there are “no inherent obstacles to restructuring market societies along more democratic and egalitarian lines”; and because it reminds us that “economic actors have to be constructed” – that is, “to learn how to behave in market situations” and in the context of the very different “complexes of ideas” that prevail across what are *varied* market societies.⁶² But those transformative messages have less often been translated to the level of regimes, that is, in “public policy – particularly as reflected in the Washington consensus doctrines concerning how the developing world and the economies in transition should make *their* great transformations”.⁶³ So, important untapped authors, tellers and audiences of the story of embeddedness remain.

The already profoundly significant story of *The Great Transformation* is enriched by the application of the lens of community. It allows us to think clearly about the facts that economic action and interaction are always embedded in the sense that any actor is at once engaged, to different degrees (from fleeting to stable), in multiple types (whether focusing on instrumental, traditional, affective and/or belief-based action) of social life; and that economy may become disembedded from wider social life in the sense that the analytical and normative approaches that are central to economic actions and interactions may be confused with, and privileged over, those that are central to non-economic actions and interactions. It also allows us to specify the role of law within and between all these patterns and types of social life, as a facilitator of both disembedding movements and re-embedding counter-movements, and as itself subject to disembedding.

Most importantly, because the law-and-community approach pays particular attention to the presence and absence of interpersonal trust, it has a distinctly human orientation. So we are reminded that the capacity of law, individual or communal, state or non-state, is always subject to the talents, ingenuity, whims and frailties of its human (ab)users and avoiders, whether state or non-state actors, movers or counter-movers.⁶⁴ We are also provided with a common vocabulary for tales of hope and of desperation, which can then be told and retold in the same circles, checking extremism of all forms, casting naivety and cynicism to the cutting-room floor in equal measure. All of this is possible through a community lens because it is set to a delicate frequency: “seeking similarity, appreciating difference”.⁶⁵

62 Block, “Karl Polanyi”, n. 1 above, pp. 25–6 (emphasis added).

63 J Stiglitz, ‘Introduction’ in Polanyi, *The Great Transformation*, n. 9 above, p. xiii.

64 Perry-Kessaris, *Global Business, Local Law*, n. 2 above. Thanks to Prabha Kotiswaran for reminding me of this.

65 Cotterrell, “Seeking similarity, appreciating difference”, n. 3 above.

