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# Trebilcock's Heresy

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## Trebilcock's heresy†

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*Michael Trebilcock is passionately committed to improving the lives of the poor. As part of this project, he has written extensively on the effort to bolster the rule of law in developing countries and to improve the legal institutions found in these countries. Through an analysis of his recent book on this subject, Rule of Law Reform and Development (written with Ron Daniels), this essay examines Trebilcock's method and philosophic orientation and shows how his moral sensibilities have led him to depart from the classic tenets of law and economics and to open new vistas for this branch of legal analysis.*

*Keywords:* development/rule of law/markets/law and economics/empiricism

The year 2008 was a terrible one for the market, both as an idea and as a concrete institution. First there was the global financial crisis, which not only caused great suffering but also cast doubt on the self-regulatory capacity of the market. Then came the publication of Michael Trebilcock and Ron Daniels' book *Rule of Law Reform and Development*,<sup>1</sup> which, given the occasion and given Ron's success in scaling the heights and acquiring that immunity from criticism known as the presidential prerogative, I will attribute entirely to Michael.

As a theoretical construct, the market makes free and open exchange the primary ordering mechanism of society. It presupposes that people are driven by the rational pursuit of self-interest under conditions of scarcity. It also relativizes all values by reducing them to preferences and declaring that all preferences are equally worthy of satisfaction. Under these assumptions, the social function of the market becomes one of maximizing the satisfaction of preferences in a purely quantitative sense – to increase the size of the pie – which, according to the theory of comparative advantage, will be the inevitable result of trade among free agents.

Exchange requires that property rights be clearly defined and protected and, furthermore, that contracts be enforced. Those who exalt the market turn to the state to perform these functions and allow the

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1 Michael J. Trebilcock & Ronald J. Daniels, *Rule of Law Reform: Charting the Fragile Path of Progress* (Cheltenham, UK: Edward Elgar, 2008) [Trebilcock & Daniels, *Rule of Law*].

state to intervene in those situations, presumably few in number, in which the benefits and costs of an activity are not adequately reflected in private bargains. In this way, the state is acknowledged, but only grudgingly. Competition among economic actors, not the state, is supposed to be the prime regulatory mechanism of aggressive pursuit of self-interest.

Beginning in the 1970s, market ideology achieved greater and greater ascendancy, and reached its apotheosis during the political era marked by the presidency of Ronald Reagan and the premiership of Margaret Thatcher. The market then became the model of domestic policy in the United States and the United Kingdom and, even more significantly for our purposes, guided the World Bank and the International Monetary Fund in their development programs under the banner of the Washington consensus.

As a result, loans to developing countries were conditioned upon their willingness to institute a series of reforms or structural adjustments that were dictated by market principles: privatization, deregulation, balanced budgets, and free trade. These reforms were supposed to spur economic growth, which was understood in purely quantitative terms and typically measured by per-capita GDP. The premises underlying the market were deemed to be universal truths, and thus no concessions were made for local conditions, culture, or history. The Washington consensus constituted a universal prescription for all debtor nations.

Disenchantment with the Washington consensus began long before Michael wrote his book. One strand of criticism emphasized the importance of institutions for development. This school of thought is best represented by the work of Douglass North<sup>2</sup> and the 1999 manifesto of the World Bank that ‘governance matters.’<sup>3</sup> Michael’s subject is not institutions in general but, rather, legal institutions, and it is rooted in the increasing emphasis on the rule of law in development circles during the 1990s, perhaps occasioned by the collapse of the Soviet empire and the prominent role American lawyers played in the transition process.<sup>4</sup> The bulk of the book deals with the institutional apparatus of the law – courts, police, prosecutors, prisons, tax administration (which is treated as a stand-in for all administrative agencies), legal aid, law schools, and bar associations.

In some societies, law schools operate independently of the state, and Michael endorses this arrangement.<sup>5</sup> Bar associations also sometimes

2 Douglass North, *Institutions, Institutional Change, and Economic Performance* (Cambridge: Cambridge University Press, 1990).

3 Daniel Kaufmann, Aart Kraay, & Pablo Zoido-Lobotón, *Governance Matters*, WPS2196 (Washington, DC: World Bank, 1999).

4 Thomas Carothers, ‘The Rule of Law Revival’ (1998) 77 *Foreign Aff.* 95.

5 Trebilcock & Daniels, *Rule of Law*, supra note 1 at 287.

operate independently of the state, although here Michael's proposed reform moves in the opposite direction: he urges the establishment of a single, unitary bar association in which membership by all lawyers is mandatory.<sup>6</sup>

Aside from these two instances, the institutions that Michael wishes to reform constitute the apparatus of the state, and although he makes many proposals to change the way they operate, he does not propose to confine them to the protection of property rights or the enforcement of contracts. Michael is extraordinarily nimble in his use of the traditional tools of law and economics, and he undoubtedly could, if pressed, justify each of the state interventions he accepts as a strategy needed to correct for market failure. Even so, the result, taken as a whole, would be striking. Gone is the minimalist state envisioned by the market ideology and required by the Washington consensus.

The goal or aim of Michael's reform package is also distinctive and sets him apart from those who defend the market and, for that matter, from the new institutional economists, who stress the importance of institutions but only for the purpose of promoting growth understood in classical terms – increasing the size of the pie. Michael refuses to relativize all values and, in keeping with the pioneering work of Amartya Sen,<sup>7</sup> introduces a non-material and egalitarian dimension to his conception of the ends of development. For Michael, the aim of development is not to increase per-capita GDP but, rather, to enlarge the opportunities for self-realization of all citizens.<sup>8</sup> Material resources are important for self-realization, but so are civil and political rights and freedom in general. Michael promotes adherence to the rule of law not as a way of enhancing economic growth but, rather, as a means of creating a more humane and decent society.

This can be seen most clearly when Michael is pressed to give an account of what he means by the rule of law. Michael is the master of the middle ground, and in defining the rule of law he tries to avoid two familiar extremes – the view that maintains that the rule of law requires the establishment of a just society (law as justice) and, alternatively, the view that sees the rule of law as merely requiring transparent and predictable enforcement of positive law (law as rules). In an effort to locate this middle ground, Michael offers what he calls a procedural conception of the rule of law. Offhand, it would seem that such a conception of the rule of law veers toward the positivist extreme, and so is consonant with market principles, but in fact Michael defines the procedural conception of the rule of law in such a way as

6 Ibid. at 330.

7 Amartya Sen, *Development as Freedom* (New York: Knopf, 1999).

8 Trebilcock & Daniels, *Rule of Law*, supra note 1 at 27.

to introduce – all to his credit – a robust set of moral considerations. He calls these moral considerations ‘normative benchmarks,’ which he says are to be justified by ‘the contribution they make to human development’ and ‘correlate with a minimal constellation of civil and political rights, and a basic arrangement of economic facilities related to the protection of property and constitutional rights.’<sup>9</sup>

The full import of Michael’s procedural conception of the rule of law becomes apparent when we examine his concrete proposals for reforming legal institutions. Some of these reforms are aimed at furthering familiar process values – transparency, predictability, stability, and enforceability. These values fit comfortably within the parameters of what ordinarily might be considered a procedural conception of the rule of law and, I imagine, would be fully endorsed by those who are dedicated to market principles and have no grander ambition for the state than the protection of property rights and the enforcement of contracts. Yet these process values play only a secondary role in the design or construction of Michael’s reform package. The primary emphasis in the book is on two other sets of values, what he calls institutional and legitimacy values, and these are harder to reconcile with market principles or, for that matter, with what might properly be called a procedural conception of the rule of law.

The institutional values to which Michael refers are independence and accountability. As Michael recognizes, in the case of some legal institutions it is difficult to imagine the relevance of these values. Do we want prisons to be independent, and, if so, independent from what? The state? Politics? Even where independence and accountability appear to be relevant institutional virtues, as they do, for example, for the judiciary, we can readily see that, in contrast to growth, they cannot be simply maximized. The achievement of independence will necessarily come at the expense of accountability, and vice versa.

Accordingly, Michael says, it is always necessary to find the right balance of independence and accountability.<sup>10</sup> However, to identify the right balance of independence and accountability, these would-be reformers must postulate another set of values, distinctly moral ones. Some of these moral values, such as the requirement of fair trials or due process, may be procedural in nature, but Michael does not confine himself to such moral values. He also sometimes invokes substantive moral values, such as those implicated in the protection of civil and political rights, to identify the proper balance of independence and accountability.

9 Ibid. at 25.

10 Ibid. at 30.

Admittedly, as the master of the middle ground, Michael is reluctant to endorse an understanding of the rule-of-law ideal that requires nothing less than achieving a just society. At the theoretical level, he endorses only 'a minimal constellation of civil and political rights,' but he offers nothing other than the jurisprudence of Goldilocks – this is too much, this is too little, this is just right – to prevent a slide to what he regards as an extreme: the maximum constellation of civil and political rights, or, even more, the protection of social and economic rights.

My inclination is not to criticize the introduction of moral values into the rule-of-law reform program but, rather, to underscore their tension with what may ordinarily be understood as a procedural conception of the rule of law and, even more importantly, with market principles. The moral values Michael introduces are alien to the world supposed by market theory, where all values are reduced to preferences that have an equal claim to be satisfied. Moreover, these values have no necessary or even probabilistic relationship to growth understood in purely quantitative terms. Some, such as the avoidance of corruption, may further economic growth, but others, such as the protection of civil and political rights, may push in the opposite direction, or may be pursued without regard for growth.

In fact, Michael does not seem concerned about those situations in which the pursuit of moral values may impede economic growth; or, at least, he endorses arrangements that may cause one to wonder whether they are conducive to economic growth. For example, he speaks warmly of the reforms instituted in Costa Rica in 1989, when a new chamber – Sala IV – was added to an already powerful and well-endowed Supreme Court.<sup>11</sup> Sala IV was charged with the mission of protecting fundamental rights under both the national constitution and international law, and it discharged this responsibility aggressively. Michael describes this development approvingly, suggesting that the country had found the right balance of independence and accountability and thus furthered the rule of law; yet he reaches this conclusion without any concern, as far as I can tell, for its impact on economic growth. He does not pause to consider whether the spiralling caseload of Sala IV should be seen as an indication that the 1989 reform may have in fact impeded growth.

Michael's introduction of legitimacy values to define the goals he hopes to achieve by his rule-of-law reforms also puts him at war with market principles, maybe even more emphatically. According to Michael, legitimacy requires that legal institutions gain the active support of the populace – citizens must regard them as deserving their obedience and respect.<sup>12</sup> Of course, the action needed to engender

11 *Ibid.* at 74–5.

12 *Ibid.* at 33, n. 98.

such respect varies from society to society and depends to a large extent on the prevailing beliefs or values of that society.

Sometimes these beliefs may align with or even require economic growth. One such example is Michael's description of the 1992 police reforms in El Salvador, where the populace's desire to weed out corruption coincided with market principles.<sup>13</sup> Yet it is equally plausible to assume that in many cases, especially when these beliefs are rooted in religious traditions or theories of human rights, the adjustments needed for legitimacy may retard or even conflict with economic growth. Programs to improve prison conditions, warmly endorsed by Michael,<sup>14</sup> might be such an example. Educating prisoners might be a productive investment that will have a big pay-off on their release, but other reforms, such as measures to reduce overcrowding and the barbaric practices associated with overcrowding, may have no discernible connection to growth, and yet they may be endorsed by the populace and thus required in order to maintain the legitimacy of the prison system.

Not only does the pursuit of legitimacy and institutional values introduce moral considerations into Michael's reform package that are extraneous and sometimes antithetical to market principles, and that cannot in all fairness be embraced within a procedural conception of the rule of law, but the pursuit of these values requires Michael to distance himself from such theorists as Milton Friedman, who invoke the authority of science in their defence of the market.<sup>15</sup> According to Friedman and others who follow his tradition,<sup>16</sup> the scientific character of economics, and of market theory in particular, arises from its capacity to generate predictions about the world that can be empirically supported or tested in some way.

In the development context, those who invoke the authority of science maintain that if the economies of developing countries are reformed to comport with market principles – deregulation, privatization, free trade, balanced budgets, and so on – then these economies will grow (to some indeterminate degree). On this account, growth is assumed to be the desired end, and the power of the market, seen as an instrument for achieving that end, will be demonstrated by the result it produces. Although the universality of the prescriptions of the Washington consensus has been startling to many, and has been criticized on that ground

13 Ibid. at 121.

14 Ibid. at 199.

15 See, e.g., Milton Friedman, 'The Methodology of Positive Economics' in Milton Friedman, *Essays in Positive Economics* (Chicago: University of Chicago Press, 1953) 3.

16 See, e.g., Richard A. Posner, *Economic Analysis of Law*, 7th ed. (New York: Aspen, 2007). See also Gerrit De Geest, 'The Debate on the Scientific Status of Law and Economics' (1996) 40 *Europ.Econ.Rev.* 999.

(how can it be that “one size fits all”?), such universality accords with the avowed scientific character of the model of human behaviour that is assumed by the market and that gave rise to the consensus. All scientific theories are universal.

Michael is a lawyer-economist of the very first order. Chicago was once his training ground, and though he has an empirical bent, he does not invoke the authority of science or offer any universal prescriptions. Nor could he. Although he rightly insists that legal institutions must be seen by the populace as legitimate, the policies needed to achieve legitimacy depend vitally on the peculiar history of a society and the prevailing beliefs and traditions of its citizens. Similarly, the pursuit of what Michael calls ‘institutional values’ will be heavily context dependent. The right balance of accountability and independence will vary from society to society and from institution to institution.

Even more fundamentally, the inclusion of a robust set of moral values in the goals or aims of Michael’s rule-of-law reform program is inconsistent not only with Michael’s own description of his approach as procedurally based but also with the scientific claims of economics, and of market principles in particular. For example, in the pursuit of institutional values, Michael argues that legal institutions should be reformed to reflect more properly the appropriate balance of independence and accountability that will, at the very same moment, enhance growth and further civil and political rights. But only moral reflection, not the methods of science, can tell us what should be the proper mix among these goals (growth vs. civil and political rights) or how much one goal should be sacrificed in order to further the other. Moreover, Michael’s central prescription for the pursuit of institutional values – find the right balance of independence and accountability – describes a wise judgement, not a course of conduct that is observable and that could be deemed responsible for producing discernible or measurable consequences. In fact, the wisdom of that judgement will depend in large part on an assessment of the goodness of the consequences that the judgement will produce.

None of this is to deny the merits of Michael’s proposed reforms of legal institutions; in fact, many – maybe most, maybe all – seem extremely appealing. Rather, it is to identify the very special brand of law and economics that Michael practises, indeed pioneered, and that is known the world over. For him, the market – exchange – is not an ideology but, rather, a pragmatic instrument for achieving limited ends, one that might, if used with care, be harnessed to serve the deeply humane values that are the proper subject of moral reflection and that are at the core of his being.