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Trebilcock's Heresy

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2008 was a bad year for the market both as an idea and a concrete institution. First there was the global financial crisis, which not only inflicted great suffering on many people, but also cast great doubt on the self-regulatory capacity of the market. Then came the publication of Michael Trebilcock's and Ron Daniels's book Rule of Law Reform and Development, which, given the occasion and the tenor of some of my remarks, 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. The market turns to the state to perform these functions and allows the state to intervene in those situations, presumably few in number, where 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 the market.

Beginning in the 1970s, market ideology achieved greater and greater ascendency 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 England and even more significantly for our purposes, guided the World Bank in its development programs. Loans to developing countries were conditioned upon their willingness to institute a series of reforms or structural adjustments, collectively referred to as the Washington consensus, that were dictated by market principles: privatization, deregulation, balance 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. Due to the theoretical premises informing the market and its scientific aspirations, no concessions were made for local conditions, culture, or history. The Washington consensus constituted a universal prescription for all 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 body of thought is best represented by the work of Douglass North (Institutions, Institutional Change and Economic Performance, 1992) and the 1999 manifesto of the World Bank that “Governance Matters.” Michael’s subject is not institutions in general but rather legal institutions and is rooted in the increasing emphasis in development circles during the 1990s, perhaps occasioned by the collapse of the Soviet Union and its empire, on the rule of law. 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. Bar associations also sometimes 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. Aside from these two instances, the institutions that Michael wishes to reform are all part of the state and although he makes many proposals to change the way they operate, he does not propose to limit their scope or confine them to the protection of property rights or the enforcement of contracts. Michael is an extraordinarily nimble policy analyst, and undoubtedly could, if pressed, justify each of the state interventions he accepts or proposes 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 advocates of the market.

The goal or aim of Michael's reform package also sets him apart from those who exalt the market and, for that matter, from the new institutional economists, who stress the importance of institutions but only for purpose of promoting growth understood in classical terms – increasing the size of the pie. Michael refuses to reduce all values to preferences and, in keeping with the discordant tradition associated with the work of Amartya Sen (Development as Freedom, 1999), 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. Material resources are important for self-realization but so are political liberties 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 for creating a more humane and decent society.

What is the rule of law? Michael is the master of the middle ground and in trying to give concrete content to this ideal 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) or, alternatively, the view that sees the rule of law as only requiring transparent and predictable enforcement of positive law (law as rules). He argues for what he calls a procedural conception of the rule of law and in accordance with that conception proposes that all legal institutions be reformed to embody more fully three distinct sets of values: process values, institutional values, and legitimacy values. On examination, however, it appears that there is nothing especially procedural about his conception of the rule of law, which, in the end, operates as a means for introducing substantive moral considerations into his reform program.

Arguably, this is not true of what he includes as process values – transparency, predictability, stability, and enforceability. These values are fully endorsed by those who defend the market and have no grander ambition for the state than the protection of property rights and the enforcement of contracts. Yet Michael makes little use of these process values in designing his reform package. The primary emphasis in the book is placed on the other two sets of values, what he calls institutional and legitimacy values, and they are harder to reconcile with market principles.

The institutional values to which he refers are independence and accountability. 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 is the case with 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. In the context of reforming such institutions, the challenge, Michael says, is always to find the right balance of independence and accountability.

Michael is correct in defining the challenge facing reformers in this way, but to identify the right balance of independence and accountability, these would-be reformers must postulate another set of values, substantive or moral ones. These substantive values are alien to a world where all values are reduced to preferences that have an equal claim to be satisfied and they have no necessary relationship to growth understood in purely quantitative terms. Some of these values like the avoidance of corruption may further economic growth, but others, like the protection of human rights and the furtherance of political liberty, may push in the opposite direction or be pursued without regard for growth.

In this vein, Michael 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. Sala IV was charged with the mission of protecting fundamental rights and freedoms under both the national constitution and international law, and it aggressively discharged this responsibility. 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, but he reaches this conclusion without any concern, as far as I can tell, for its impact on economic growth. In fact, the spiraling caseload of Sala IV that he also notes might suggest that the 1989 reform 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 the market, 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. Of course, the action needed to engender such respect varies from society to society and to a large extent depends on the prevailing beliefs or values of that society. Sometimes these beliefs may align with or 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. Yet it is equally plausible to assume that in many cases, especially when these beliefs are rooted in religious traditions or reflect political goals such as democracy or the protection of human rights, these beliefs may retard or even be in conflict with economic growth. Programs to improve prison conditions, warmly endorsed by Michael, might be an example of such a phenomenon. In such instances, the need for legitimacy may call for action that interferes with growth.

Not only does the reference to legitimacy and institutional values introduce substantive moral considerations into Michael's reform package that are extraneous and sometimes antithetical to market principles, and thus cannot in all fairness be theorized as resting upon a procedural conception of the rule of law, but such a reference requires Michael to abandon the scientific aspirations often associated with economics and commonly invoked by those, such as Milton Friedman and Richard Posner, who exalt the market. According to them, the scientific character of economics and 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 claim that if the economies of developing countries are reformed to comport with market principles – deregulation, privatization, free trade, balance budgets, etc. – then these economies will grow (to some indeterminate degree). In this account, growth is assumed to be the desired end and the validity 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 have been criticized on that ground ("one size fits all"), we can now see that such universality accords with the allegedly scientific character of the market principles that underlie the consensus. All scientific theories are universal.

Michael is a lawyer-economist of the very first order but contrary to the spiritual fathers of the Chicago School (once his mentors), he does not pretend to offer a scientific theory. Nor could he. He has no universal prescriptions to offer. Under his account, legitimacy must always be considered when instituting legal reforms, but there are no universal rules on how legitimacy might be achieved. Every now and then, universal values, such as democracy or respect for human dignity, make an appearance and act as guides, but the policies needed to achieve these values and to gain legitimacy vitally depend on the peculiar history of the society and the prevailing beliefs and traditions of its citizens. Similarly, the pursuit of what Michael calls institutional values will be heavily context-dependent. Finding the right balance of accountability and independence, as required by the pursuit of institutional values in rule of law reform, will vary from society to society and from institution to institution.

Even more fundamentally, the inclusion of substantive moral values into the goals or aims of Michael's rule of law reform program is inconsistent with the scientific claims of economics. This can be seen most clearly when, 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 and further that such a balance will enhance growth, human rights, and political liberties. Such a demand is riddled with substantive moral claims and thus defies the methods of science claimed for economics. Only moral reflection can tell us what should be the proper mix among these three goals (growth, human rights, and political liberty) or how much one goal should be sacrificed in order to further another one. Moreover, the central prescription – find the right balance of independence and accountability – describes a wise judgment, 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 judgment will depend in large part on an assessment of the goodness of the consequences that the judgment will produce.

None of this is to deny the merits of Michael's proposed reforms of legal institutions, in fact many seem extremely appealing. Rather it is to identify the very special brand of law-and-economics that Michael practices 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 and that might, if used with care, be harnessed to serve the deeply humane and liberal values that are to be defined by moral reflection and that are at the core of his being.