Revue québécoise de droit international
Quebec Journal of International Law
Revista quebequense de derecho internacional

MICHAEL J. TREBILCOCK AND RONALD J. DANIELS, *RULE OF LAW REFORM AND DEVELOPMENT: CHARTING THE FRAGILE PATH OF PROGRESS*, CHELTENHAM, EDWARD ELGAR, 2008

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Volume 23, numéro 2, 2010

URI : https://id.erudit.org/iderudit/1068405ar
DOI : https://doi.org/10.7202/1068405ar

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Éditeur(s)

Société québécoise de droit international

ISSN

0828-9999 (imprimé)
2561-6994 (numérique)

Découvrir la revue

Citer ce compte rendu

Kosař, D. (2010). Compte rendu de [MICHAEL J. TREBILCOCK AND RONALD J. DANIELS, *RULE OF LAW REFORM AND DEVELOPMENT: CHARTING THE FRAGILE PATH OF PROGRESS*, CHELTENHAM, EDWARD ELGAR, 2008]. *Revue québécoise de droit international / Quebec Journal of International Law / Revista quebequense de derecho internacional*, *23*(2), 249–255. https://doi.org/10.7202/1068405ar

MICHAEL J. TREBILCOCK AND RONALD J. DANIELS, *RULE OF LAW REFORM AND DEVELOPMENT: CHARTING THE FRAGILE PATH OF PROGRESS*, CHELTENHAM, EDWARD ELGAR, 2008.

David Kosař[*]

The "rule of law" has become a mantra of these days. Virtually every political leader subscribes to this concept. Even Vladimir Putin, Chinese leadership and authoritarian rulers do not object to the rule of law. However, a widespread support of the rule of law comes with a price. This notion has become so elusive that it verges on the meaningless. As one scholar quoted by Trebilcock and Daniels puts it: "The rule of law means whatever one wants it to mean. It is an empty vessel that everyone can fill up with their own vision."[1]

Hence, Michael Trebilcock and Ronald Daniels face an uphill struggle if they want to save this term from its promiscuous use. The widening gap between "rule of law scholars", who focus on principles and end goals of the rule of law, and "rule of law practitioners", who rather concentrate on institutions to be reformed, has recently exacerbated the problem of defining the contours of the rule of law.[2] Trebilcock and Daniels rightly emphasize this gap and, albeit they ultimately side with "rule of law practitioners", their book is particularly valuable for its effort to provide a thorough theoretical underpinning of practitioners' views on the rule of law. The contribution of Trebilcock and Daniels to the rule of law reform scholarship is also timely, as various international actors, despite multiplying their financial support to rule of law reforms, are loosing their illusions about the benefits of such reforms. Therefore, these institutions desperately need reappraisal of their current strategies and suggestions on how to move forward.

The structure of the book under review is as follows. The first part[3] (Chapter 1) discusses the notion of the rule of law in the context of development, defines the authors' own "procedural definition of the rule of law"[4] and identifies three impediments to rule of law reform. The second part (Chapters 2 to 9) applies the abovementioned "procedural definition of the rule of law" to various institutions, i.e.

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[1] Michael J. Trebilcock & Ronald J. Daniels, *Rule of Law Reform and Development: Charting the Fragile Path of Progress* (Northampton: Edward Elgar, 2008) at 13 [Trebilcock & Daniels].

[2] See Rachel Kleinfeld, "Competing Definitions of the Rule of Law" in Thomas Carothers, ed., *Promoting the Rule of Law: In Search of Knowledge* (Washington D.C.: Carnegie Endowment for International Peace, 2006) 31.

[3] I divide Trebilcock & Daniels into three parts for didactic purposes. This division is not present in the original manuscript.

[4] Trebilcock & Daniels, *supra* note 1 at 14.

the judiciary, police, prosecution, correctional institutions, tax administration, access to justice, legal education and professional regulation. Each chapter in the second part of the book follows the same pattern. The authors first set out normative benchmarks for the institution in question, then collect reform experiences related to this institution and, based on these experiences, they conclude each chapter with a short discussion on the impediments to reform in the given institution. The third part analyses the empirical evidence discussed in the second part of the book and suggests several mechanisms for the international community "to help encourage the success of the rule of law reform initiatives"[5] in three stylized political formations scenarios.

The structure of this book review follows a different path. It will first focus on the "procedural definition of the rule of law" advocated by Trebilcock and Daniels and explore the problems inherent to such a definition. Subsequently, it will address the authors' methodology in the second part of the book. Finally, this review will identify three general characteristics that permeate the whole book.

In the first part of their book, Trebilcock and Daniels discuss at length both "thick" and "thin" conceptions of the rule of law and ultimately opt for a "thinner" conception of the rule of law, which is "a nomenclature intended to demarcate [their] model from both alternative extremes of 'thick' and 'thin'".[6] According to them, "a 'thinner' model should see the rule of law as both a set of ideals and an institutional framework", and thus their model "comprise[s] elements of both […] 'formal' and 'substantive' theories of the rule of law".[7] Trebilcock and Daniels refer to their "thinner" conception of the rule of law as to the "procedural definition of the rule of law". According to them, the "procedural definition of the rule of law" consists of three clusters of values: (1) process values (transparency, predictability, enforceability and stability[8]); (2) institutional values (independence and accountability); and (3) legitimacy values.

However, a deeper look at the principles of the rule of law covered by their definition and at the application of these principles in the second part of their book in particular reveals that Trebilcock and Daniels, in fact, do not advocate merely for a *procedural* concept of the rule of law. From a theoretical point of view, the inclusion of the principle of legitimacy among the rule of law principles seems to be the most problematic. The authors' definition of legitimacy values is very vague and it allows them to incorporate various *substantive* values such as human rights within the "procedural definition of the rule of law". Several chapters in the second part of book confirm this view. For instance, in chapter 5 dealing with correctional institutions the authors refer to the following four facets of prison management: concern for overcrowding, health and medical services, the treatment of prisoners by prison staff and monitoring mechanisms.[9] Such recourse to human rights standards is generally

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5 Trebilcock & Daniels, *supra* note 1 at 341.

6 *Ibid.* at 23.

7 *Ibid*.

8 Surprisingly, the authors nowhere explain why they do not include values such as generality, prospectivity, congruence, clarity, coherence and feasibility on their list of rule-of-law principles.

9 See also the discussion of Chapter 5 dealing with correctional institutions below.

considered a typical feature of *substantive* conceptions of the rule of law. This is not in itself a deficiency. However, "going more substantive" has several side effects. One of them is that Trebilcock and Daniels' "*procedural* definition of the rule of law" becomes to some[10] extent subject to the same critique as any substantive conception of the rule of law.

Another problem arises when Trebilcock and Daniels apply the rule of law values that fall within the ambit of their definition to individual legal institutions. All of the abovementioned values, that is both process values, institutional values and legitimacy values, can be applied to legal institutions. However, in the second part of the book, Trebilcock and Daniels scrutinize legal institutions only *vis-à-vis* institutional (independence, accountability) and legitimacy values, and not *vis-à-vis* formal rule of law principles (transparency, predictability, enforceability and stability). This approach is neither explained nor justified by the authors. Furthermore, due to this omission the authors avoid an inherent problem of all rule of law reforms: that any rule of law reform involves a change of laws and legal institutions and, therefore, *any* rule of law reform *inevitably* collides with at least one of formal rule of law principle accepted by Trebilcock and Daniels, namely the principle of stability.[11] This collision is a recurrent theme in constitutional adjudication in developing and transitional countries that shows that a careful balance between the formal rule of law principles and more substantive principles such as legitimacy or human rights lies in the heart of any rule of law reform. Adopting a particular concept of the rule of law may even tip the balance in favour or against a given institution.[12] Hence, a reader wants authors to say more on this vexing issue.

As to individual principles of the rule of law advocated by Trebilcock and Daniels, this review will focus on what they define as institutional values and legitimacy values since their four process values are generally accepted rule of law principles and a lot has been written on the latter. First of all, the authors' emphasis on the *general* nature of principle of independence instead of a typical overemphasis on *judicial* independence is refreshing and laudable. In a similar vein, Trebilcock and Daniels rightly apply the principle of accountability not only to governmental and (quasi-)independent institutions, but also to the judiciary. In fact, their discussion of judicial accountability in Chapter 2 is extremely useful for all judges in developing

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[10] One may claim that their definition encompasses formal values (transparency, predictability, enforceability and stability), procedural values (independence and accountability), and substantive values (legitimacy). Here, this review draws inspiration from categorization in Jeremy Waldron, "The Rule of Law and the Importance of Procedure" in *NOMOS-American Society of Political and Legal Philosophy: Getting the Rule of Law* (New York: New York University Press, 2011) at 54 (forthcoming).

[11] In fact, rule of law reforms may be in tension with other formal rule of law principles (such as principle of prospectivity or principle of coherence) as well.

[12] For instance, the fate of lustration laws that arguably held collaborators with previous regime to account in Central Europe depended on what conception of the rule of law was endorsed by a particular constitutional court. See David Robertson, "A Problem of their Own, Solutions of their Own: CEE Jurisdictions and the Problems of Lustration and Retroactivity" in Wojciech Sadurski, ed., *Spreading Democracy and the Rule of Law? The Impact of EU Enlargement on the Rule of Law, Democracy and Constitutionalism in Post-Communist Legal Orders* (Dordrecht: Springer, 2006).

countries.[13]

The only drawback of their analysis of the concepts of independence and accountability[14] is the fact that they do not define the precise contours of these two concepts. This is troubling in the case of accountability, since it has drawn less attention in the rule of law context than its counterpart. The available literature[15] on the notion of accountability identifies three issues inherent to the definition of this term, namely the *ex ante* vs. *ex post* nature of accountability mechanisms, (non-)existence of sanctions, and a character of sanction. Put differently, any definition of accountability must provide answers to three fundamental questions: (1) is the term accountability reserved solely to *ex post* mechanisms?; (2) must accountability mechanisms entail a power of the principal to impose sanctions?; and (3) does accountability encompass only negative sanctions?

Trebilcock and Daniels do not address these three questions at all. This solution gives them a significant leeway in the second part of the book where they discuss accountability mechanisms for each legal institution, but such approach undermines the conceptual clarity of their book. For instance, when one adopts a definition of accountability that only encompasses ex post mechanisms entailing sanctions, then various mechanisms discussed by Trebilcock and Daniels do not count as accountability mechanisms. This is the case with mechanisms such as appointment or transparency-inducing measures like the publication of court proceedings. Conversely, if one opts for a broad definition of accountability, then it overlaps with the other rule of law principles identified by the authors, such as the principle of transparency.

Trebilcock and Daniels are even more succinct in discussing legitimacy values. Similarly to their analysis of independence and accountability, they do not specify in the first part of their book—which lays down the theoretical basis for their project—what precisely they mean by legitimacy values. Instead, they explain them by referring to notions such as "social legitimacy",[16] "public acceptance"[17] or "public confidence,"[18] that do not move us much further. However, and perhaps more importantly, Trebilcock and Daniels spend little time justifying *why* legitimacy should be considered a principle of the rule of law. Not to be misunderstood, no one can object to the view that legitimacy is critical for every legal institution and necessary

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13 For perverse effects of too much emphasis on judicial independence, see Michal Bobek, "The Fortress of Judicial Independence and the Mental Transitions of the Central European Judiciaries" (2008) 14:1 European Public Law 99.

14 See Trebilcock & Daniels, *supra* note 1 at 30-33.

15 See e.g. Mark Bovens, "Analysing and Assessing Accountability: Conceptual Framework" (2007) 13:4 Eur. L.J. 447; Richard Mulgan, *Holding Power to Account: Accountability in Modern Democracies* (Gordonsville: Palgrave Macmillan, 2003); Andreas Schedler, "Conceptualizing Accountability" in Andreas Schedler, Larry Diamond & Marc F. Plattner, eds., *The Self-Restraining State: Power and Accountability in New Democracies* (Boulder: Lynne Rienner Publishers, 1999); or Stefan Voigt, "The Economic Effects of Judicial Accountability: Cross-Country Evidence" (2008) 25 Eur. J. L. & Econ. 95.

16 Trebilcock & Daniels, *supra* note 1 at 34.

17 *Ibid.* at 65.

18 *Ibid.* at 155.

for the success of any reform of legal institutions. But that does not mean that legitimacy is *also* a principle of the rule of law. Such claim is a huge leap, and given its novelty in the rule of law literature, Trebilcock and Daniels do not sufficiently substantiate it. In fact, their position, as it stands right now, is susceptible to the modified "Razian" critique of any substantive conception of the rule of law:[19] they mistake the rule of law *simpliciter* with "the rule of *legitimate* law" with the consequence of "robbing the concept of rule of law of any function which is independent of the theory of [legitimacy] which imbues such an account of law."[20]

In the second part of the book, the authors collected extremely rich and diverse experiences dealing with the reform of legal institutions in Latin America, Africa, Central and Eastern Europe, and Asia. Trebilcock and Daniels do a particularly good job here and it would be niggling to ask for more details in a book covering so many legal institutions. Authors simply provide a very helpful checklist of what should be factored in when preparing and implementing a reform of a given legal institution.

But a reader is left wishing that more attention was paid to the consistent application of rule of law principles identified by the authors to all institutions examined in the second part of the book. As mentioned above, Trebilcock and Daniels decided to apply only institutional and legitimacy values to the examined legal institutions. However, these two sets of rule of law values are *not* addressed in full in certain chapters. For instance, Trebilcock and Daniels do not discuss legitimacy values in their chapters on police, correctional institutions and tax administration without any explanation. The authors' exposition of normative benchmarks applicable to correctional institutions is particularly intriguing. In this chapter, Trebilcock and Daniels downplay not only legitimacy values but also the principles of independence and accountability. Instead, they redirect their focus on "achieving professional, civilian systems of corrections geared towards retribution and rehabilitation, while also maintaining basic protections for prison inmates"[21] and discuss various facets of prison management such as concern for overcrowding, health and medical services, the treatment of prisoners by prison staff and monitoring mechanisms. How these facets fit within the authors' definition of the rule of law is not entirely clear. A reader is thus left with the impression that the authors are incorporating human rights standards into their definition of the rule of law which renders it more substantive.

The third part of the book suggests improvements to rule of law reform strategies. This part deals primarily with issues related to the funding of rule of law reforms by the international community and how to overcome obstacles to these reforms. Since Trebilcock and Daniels identify political economy as "the most important area of focus for the international community",[22] they devote most of this part of the book to exploring techniques available to the international community to

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19 See Joseph Raz, "The Rule of Law and Its Virtue" (1977) 93 Law Q. Rev. 195 at 195-196.

20 Paul Craig, "Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework" (1997) P.L. 467 at 487.

21 Trebilcock & Daniels, *supra* note 1 at 171.

22 *Ibid.* at 339.

minimize political economy-based impediments to rule of law reforms. Ultimately, they propose specific rule of law reform strategies for three stylized political formations. Whether their conclusions are right is an empirical question, which this review has no ambition to answer.

Now this review moves to the general characteristics of the book that permeate all of its three parts. These three general features should help readers to locate Trebilcock and Daniels' position within the rule of law scholarship. First, Trebilcock and Daniels make clear that they have a normative project in mind. They claim that "initiating a discussion of 'rule of law *reform*', as [they] have set out to do in this book, implies the existence of a background of normative expectations" and that they "are seeking a definition of the rule of law which coheres with the goals of development, a normatively driven project *par excellence*".[23] For them, "[a] definition of the rule of law *for* development can scarcely be indifferent towards the values inherent *in* development"[24] and their "definition [of the rule of law] focuses on what is necessary […] to assure maximum compatibility with the most widely acceptable, minimal goals of *development*".[25] From these quotes it is clear that the book perceives development as an ultimate goal of the rule of law.

Second, Trebilcock and Daniels start from the proposition that "institutions, including legal institutions, are an important determinant of economic development (and probably other aspects of development)"[26] and then, based on this proposition, they adopt a procedural approach to the rule of law since it "stands a good chance of yielding *institutions* that are both strong and worthy of popular legitimacy, and conducive to the broader goals of development".[27] By adopting an "institutional focus", Trebilcock and Daniels clearly side with "rule of law practitioners". They put it bluntly: "institutional instantiations […], at the end of the day, is what is likely to matter most to a country's citizens".[28] Nevertheless, as mentioned above, Trebilcock and Daniels are fully aware of a widening gap between "rule of law scholars" and "rule of law practitioners"[29] and their book thus can be interpreted as an attempt to bridge the gap between these two groups.

Third, the book has a strong Anglo-American "common law flavour". This is evidenced by several examples. Trebilcock and Daniels cite almost exclusively Anglo-American authors[30] and neglect the rule of law scholarship of non-common law authors. As a result, they do not address the significant differences between the common law concept of the rule of law and competing concepts such as *Rechtsstaat*,

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23 *Ibid*. at 24 (emphasis in original).
24 *Ibid.* (emphasis in original).
25 *Ibid.* at 25 (original emphasis deleted, my emphasis added).
26 *Ibid*. at 12.
27 *Ibid.* at 25.
28 *Ibid.* at 42.
29 See *ibid*. at 13 and 41-42.
30 By Anglo-American authors I mean not only authors born in common law countries but also authors such as Friedrich von Hayek or Adam Przeworski who have worked and lectured in common law countries.

l'État de droit, *Estado de derecho* and *Stato di diritto*.[31] Also, Trebilcock and Daniels build heavily on the "law and development" literature, but overlook that in other parts of the world similar issues are debated under the heading of "transitional justice".[32]

This emphasis on common law scholarship is not surprising, given the authors' affiliation with Canadian (Trebilcock) and U.S. (Daniels) universities. The abovementioned omissions may also sound as pettiness since it is increasingly difficult to cover the burgeoning literature on the rule of law and its non-common law equivalents. However, the narrow approach adopted by Trebilcock and Daniels limits the audience of the book to those who share a common legal paradigm of the rule of law. For this very reason, their book would considerably benefit from discussing the rich literature that exists on the various equivalents to the rule of law (*Rechtsstaat, l'État de droit*, etc.) and on transitional justice. Not only is such discussion needed in the rule of law scholarship, it is also critical to the success of rule of law reforms. In other words, unless one knows how lawyers—and particularly legal thinkers—from a given polity understand the rule of law and its place within *their* legal system, one can hardly succeed in implementing rule of law reforms in such polity.[33]

In sum, Trebilcock and Daniels make a strong claim for the "procedural definition of the rule of law" with a distinctive institutional focus. This review argues that their model goes beyond the purely "procedural definition of the rule of law" and seems to be "thicker" than authors are willing to acknowledge. Perhaps "institutional model of the rule of law" would be a more suitable title in this case. The strengths of their book are that it builds upon rich experiences of institution-building in developing countries across the world, and that it narrows the gap between "rule of law scholars" and "rule of law practitioners". More is waiting to be said on the non-common law conceptions of the rule of law, the notion of accountability, and the relationship between the rule of law and legitimacy. The book under review would also benefit from adding a complete bibliography of its cited literature.[34] Despite these caveats, it is a welcome contribution to the rule of law scholarship that will attract a wide readership.

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[31] See e.g. Rainer Grote, "Rule of law, Rechtsstaat and «État de droit»" in Christian Starck, ed., *Constitutionalism, Universalism, and Democracy – A Comparative Analysis: The German Contributions to the Fifth World Congress of the International Association of Constitutional Law* (Baden-Baden: Nomos Verlagsgesellschaft, 1999); or Luc Heuschling, *État de droit, Rechtsstaat, Rule of Law* (Paris: Dalloz, 2002).

[32] See e.g. Adam Czarnota, M. Krygier & W. Sadurski, eds., *Rethinking the Rule of Law after Communism* (Budapest: Central European University Press, 2005); or Ruti G. Teitel, *Transitional Justice* (Oxford: Oxford University Press, 2000).

[33] To give Trebilcock and Daniels "their due", it is correct to mention that they put strong emphasis on local fine-tuning of rule of law reforms (see e.g. Trebilcock & Daniels, *supra* note 1 at 13 and 337-339).

[34] This step would also remedy minor flaws in cross-referencing. In particular, the authors' use of abbreviations "op. cit." and "id." in footnotes is sometimes confusing. For instance, at p. 41 they cite to Rachel Kleinfeld but the text of the relevant footnote 122 ("Kleinfeld, *op. cit.*") does not refer a reader to the footnote with a full citation (footnote 28 at p. 13). Similarly, citations of Michael Neumann's book (The Rule of Law (Ashgate, 2002)) at pp. 22-23 are incorrectly attributed to William Whitford due to improper use of "id.".