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LENZ



Newsletter of The Law and Economics
Association of New Zealand Incorporated

*The AGM is coming up on 6 July so make sure you
keep that date free!*

*The speaker will be Peter Hartley from the Australian
National University*

Further details will be announced shortly

Why be apologetic about Law and Economics

Bernard Robertson, Editor of The New Zealand Law Journal

In New Zealand even those proposing that greater attention be paid to 'Law and Economics' seem to find it necessary to genuflect in the direction of at least two ideas:

- the government or community may legitimately follow goals other than economic efficiency and
- there are values which cannot be measured in economic terms.

This leads to the idea that there is a distinction between 'descriptive' and 'prescriptive' roles for Law and Economics. This is an essentially defensive distinction, designed to put those opposing Law and Economics discourse into the position of admitting that they wish to conceal the costs of their policies. It also however leads to the putting forward of Law and Economics in an apologetic fashion in which the proponent starts to distance him or herself from any conclusions which may be drawn from economic analysis of the law. The 'core' role of Law and Economics becomes dispassionately to watch economic

planning and redistribution in action and mildly to point out that this will be at the expense of economic growth.

This is unfortunate and it is based on false premises.

First, let us pursue the notion that the government may legitimately pursue goals other than economic efficiency. There are two major problems with this statement. First, there is an implicit assumption that government attempts to pursue a goal will achieve the desired result. The lesson of experience is that these attempts will not do so and the prediction for the future is that they are even less likely to do so in future.

The reason for this is eminently simple. Government action to pursue some goal axiomatically means distorting the market in order to produce some result other than that which the market would have produced. But the private sector employs economists. These economists can assess what the government is likely to do and tell their employers. Their employers, including overseas employers, will alter their

positions in order to benefit, or to avoid loss, from the expected government action. These alterations of position will alter the relationships between the macro-economic indicators (production, employment, inflation etc). Thus by the time the government action takes effect the relationships between the indicators will have changed and the government action will have an effect different from that intended. So the pragmatic argument for government distortion of the market is likely to be disproved by experience. As the New Zealand economy becomes increasingly integrated into the global economy the government's ability to effect change will decline further.

To lawyers however, the second major problem ought to be of prime concern. This is the relationship between government distortion of the market and the Rule of Law. It is evident, first, that government distortion of the market with a goal in view is a breach of the principle of equal treatment (presumably in pursuit of greater equality of outcome). Some people will have wealth compulsorily transferred from themselves to others. This would not be so bad if this transfer consisted of the majority voting to make sacrifices to benefit the less well off, but this is not what occurs in practice. In practice two things occur. One is, as predicted by public choice theory, that small groups who stand to benefit a great deal from government action invest considerable resources in influencing government decisions, while the great bulk of the population, including many people less well-off, who have to pay for this benefit lose out. The result may well be legislation which is contrary to the general welfare but benefits a particular group. The obvious example is the anti-dumping regime. The Minister is required only to have regard to the position of the relevant

New Zealand industry and not to the economy of New Zealand as a whole.

The second consequence of political redistribution is not that the majority vote to make sacrifices to benefit the less well-off but that the majority uses its voting power to impose on minorities requirements it is not willing to fulfil. The obvious example is so-called 'progressive taxation' by which the majority vote to take money from a minority at a rate which they themselves are not willing to pay. This is oppression.

It may be said that at least these measures are in conformity with the Rule of Law in a limited sense that they are authorised by law which is published, prospective and certain. Individuals can therefore adjust their positions accordingly.

The problems of economic planning go deeper however. The problem of the changing relationships between macro-economic indicators has already been alluded to. The argument for macro-economic planning goes like this: "at any particular moment there is a policy setting which will achieve the desired goal". Now, we will leave aside for now the questions of how reliably we can identify those policy settings and how reliably we can expect politicians to implement them if this might lose them votes. The key point is the phrase 'at any particular moment'.

Action at the wrong time is wrong action. Since the relationships between the indicators is admitted to change, the timing of government action is as important as its content. Obviously action taken to boost spending may help the economy up from the bottom of the cycle but if taken on the up-swing, may simply lead to over-heating.

In order for economic planning to be successful therefore, the government

must have power to implement changes in policy without consultation and without warning. This means that government must have enormous discretionary power to take decisions which will adversely affect certain individuals and benefit others. These decisions cannot effectively be taken if legislation is required to authorise them. This means discretionary power to make people suffer in goods despite their not having committed any breach of the law and without their being able to predict how they will be affected by government action.

The principle of Ministerial Responsibility is also in issue. Successful economic planning requires a large measure of secrecy for the reasons explained above. If one is engaged in managing the exchange rate one cannot announce a devaluation in advance. We have therefore been treated to the spectacle of Ministers lying to the House about their intentions up to the moment before a devaluation. The proponents of economic planning well recognise this point.

Fundamental constitutional principles are therefore at stake. Economic planning requires us to change our whole view of what a constitution is. The classical view, to which many still pay lip service, is that a constitution is a device which limits the power of government and explains how that power will be exercised. Economic planning requires a constitution to become simply a device for delivering to the government the power it requires to achieve its chosen ends. This will include breaking down the separation of powers, so that we have judges pursuing social goals and politicians deciding individual cases.

The Rule of Law itself becomes an empty concept. It is impossible to reconcile the extent of government discretion required for the pursuit of

social goals with any meaningful definition of the Rule of Law. Socialists used not to be shy of this. "As, in a socialist community there was no scope for autonomous private legal relations, but only for regulation in the interest of the community, all law is transformed into administration; all fixed rules into discretion and considerations of utility."

The author of these views was the first President of the Soviet Supreme Court. He looked forward to the 'gradual extinction of law as such'. Unfortunately he was unable to adjust his views on various matters rapidly enough to keep up with discretionary changes in government policy and the absence of any fixed rules and the requirements of utility subsequently lead to his being executed.

So it seems that there are some basic principles at work and that there may be more to the study of law and economics than simple cost benefit analysis. Indeed the real lesson may be that cost benefit analysis is ineffective because of the problems of knowledge. If this is so then there can be no distinction between normative and descriptive economic analysis. A measure proposed by the government which can be predicted by micro-economic analysis to produce perverse and value reducing results is a bad law, unless it can be argued that there are some overwhelming values which are not taken into account.

But this cannot be argued. To say that there are values which cannot be quantified in economic terms is to say that there are values whose value cannot be measured and compared. I doubt that this is true, but let us take it at face value.

If it is true that there are values such as egalitarianism and communitarianism that cannot be quantified, then there are also values such as individual freedom which also cannot be quantified. Since

they cannot be quantified, it cannot be said that one is more important than the other. Therefore the adoption of any of these values by anyone with coercive power is simply the imposition of one's own views on others. It is equally impermissible to forbid and to force people to join trade unions, for example.

This being the case, the only possible route is to allow people the greatest degree of freedom so that they can decide for themselves when, to what extent and for what purposes to act individually and when to act collectively.

It will then be found that allowing people the maximum amount of freedom to make their own decisions actually has a spin-off maximum efficiency, whereas all attempts by third parties, whether they be bureaucrats or judges, deliberately to maximise efficiency are doomed for the reasons given above.

It is sad to see that the only academic who has so far commented on the West Coast logging case in terms of the rule of law is an economist. The only speaker at the recent Constitutional conference who attempted to give the concept of the rule of law any content was another economist, Dr Roderick Deane.

Lawyers have become bored with the fundamental principles of the legal system. Policy is much more exciting. The interesting thing is that those who decry law and economics have actually become seduced by what is essentially an ill-informed economic approach, namely the idea that there are certain goals which can be achieved by changing the law in particular ways and since these goals are laudable, the law should be changed in these ways.

It is up to law and economics students to point out that efforts by governments to

distort markets to achieve goals inevitably fail, and that since preferences are personal and subjective welfare can only be maximised by allowing people the greatest degree of freedom to pursue their own preferences.

Law and economics can only therefore be divided into 'descriptive' and prescriptive' if one holds the following beliefs:

- ❑ Law is nothing more than the current commands of the sovereign; there are no fundamental principles, the ends justify the means and we are all bound to obey today's rules and then obey new rules tomorrow simply because other people have changed their minds about how we ought to live;
- ❑ Economics is a discipline which enables us to predict accurately the consequences for the aggregated general welfare of taking certain policy decisions rather than other decisions.

If one does not subscribe to either of these views then there is no room for a distinction between prescriptive and descriptive law and economics.