

Right wing jurisprudence and its relationship to law and economics



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Question: *Law and Economics has been described as right-wing jurisprudence. What is the basis of such a claim and what different evaluations can be made of the claim? Illustrate your argument with references to Australian policy, legislation and case law .*

Right wing Politics Law and Economic Theory.

In order address the main question of this paper the examination of what right and left wing in politics needs to be unpacked. The origin of the term left and right originated from the time of the French Revolution where those who supported the revolution literally hung to the left side of the room whereas those who supported the king, the French monarchy sat to the right. [1]When looking at the historical nature of the left and right one can surmise that from the French revolution the left wing is more characterized as more liberal (in the classical understanding of liberalism) forward thinking and progressive. In contrast the right is more conservative, less willing to change conventional systems of governance and more likely to believe in traditional systems of order and social hierarchy.[2]In terms of jurisprudence the principles a right wing actor adheres to, in the context of economics are of strong authority, hierarchy, order and an intrinsic belief in personal duty and responsibility. However, the art of economical analysis is not purely political it is an observation of how a market trades and operates combining right wing ideologies with the practise of economics is largely unfair, economics is a social science of consumption.[3]

The Jurisprudential idea of law and economics is widely seen as right wing, as the right believes in free markets, the righter you go, the more the views tend toward ‘ *laissez faire*’ .[4]The view here is that markets are the most

efficient allocators of resources, and that as prosperity increases, the benefits will flow down to poorer levels. The term '*law and economics*' is derived from the application of microeconomic analysis to legal problems.

[5]The phrase overlaps into fields of study such as political economy, constitutional economics, international relations and political science.

[6]From the right-wing There is also a corollary belief that the poor are that way because of their own faulty decisions, and if they will just gird up and work hard, their lot will improve. The left wing in contrast believes in monitored markets, in higher taxation to raise money for doing social welfare, in forced percolation of economic and social benefits down the ladder. The extreme left is the kind of socialism we saw in USSR and Mao's communist China where the government owned all the assets, and the ideal was '*from each according to his/her ability, to each according to his/her needs*'. [7]But it was a remote government that decided abilities and needs.

There are various claims that suggest there is a relationship between the two fields of Law and Economics, which can be explained in: Natural Law, Liberalism, Positivism, Realism and Marxism philosophical theories. One major belief of the right wing is the acceptance that there is social and economic inequality in society on the basis of Natural law, a major study area of jurisprudence study.[8]As such economics in the general zeitgeist of the modern world's population is generally seen as a right ring institution however to characterise the entire system as totally conservative is dismissing other economic facilities and benefit programs that have been influenced by left wing critical theory. If Law and Economics has been described as right-wing jurisprudence there must have been great critical

analysis of such a claim, as such theorists attach this notion from both a legal and economical perspective.

Natural Law: Economic and Legal approach

Natural law theory is characterised by the idea that law is discoverable through process of 'natural' reasoning to arrive at an understanding of social and moral relationships that are universal.[9]John Finnis who is considered to be the leading contemporary natural law theorists argues that 'self-evident values' that are fundamental and obvious. The self-evident values are pre-moral, universal and applicable across all cultures and related to human action. Finnis sees the self-evident values as constituting a natural order that should guide the creation of law.[10]It seems counterintuitive to argue that all law as based upon market principles. What the economic analysis of law manages, however, is an observation of disparate areas as contract, tort and criminal law as all based upon economic aims, therefore giving law a more coherent basis than other theories can offer. Posner argues that tort cases involving two or more private non-government parties involving harm in their nature contractual in their administration looking for elements that in a perceived wrong could have been observed if the two parties engaged in contract formulation thus leading to a negative consequence.[11]By that standard, contract law although a large field in more commonly understood as an economical regulatory tool or department of law that largely relates to private economical dealings. In the case of *Shaddock v Parramatta City Council* the main principle of this tort case was of economic loss based on a reliance on a statement from the Parramatta City Council.[12]The case involved Shaddock purchasing property after

confirming with the local council that it was not subject to any redevelopment plans. The council confirmed it was not. Road was widened later regardless, and property had to be demolished. It was held that the council owed a duty of care to plaintiff (Shaddock) because incorrect information was given by those who are responsible for it and Shaddock was awarded damages. How this relates to law and economics is simple; If transaction costs are somewhat high, then it does matter how property rights are assigned.[13]Therefore, the enforcement and allocation of legal entitlements will be an important factor in ensuring economically efficient exchanges. Thus, tort law can be seen as an extension of contract law which in itself is an extension of economic regulation, indicating that the Law and Economics Movements analysis of economics and law is beneficial in understanding jurisprudential development.[14]How this can be understood as right wing is that both parties in *Shaddock v Parramatta City Council* must be held to their own personal responsibility and accountability, government bodies are not immune from litigation.

The law and economics movement applies both to the broad human economic theory and the method to the practice of law. It asserts that the tools of economic reasoning offer the best possibility for justified and consistent legal practice.[15]Generally the movement (Law and Economics Movement) is viewed as a social tool that both promotes economic efficiency and economic analysis that in turn guides legal practise. The movement considers framework of legal theory and economic precedent that has led to the understanding of how both game theory, public choice theory and collective behaviour theory all effect legislation leading to a blooming field in

articulating potential strategic action within the legal context.[16]What does this have to do with natural law? The natural law, in its briefest statement, is acting reasonably, is the ‘*normalcy of functioning*’ of a thing.[17]The natural law of a market then is its normal functioning, its ability to concentrate reason and good judgment on the production and distribution of goods. [18]The medieval theologians talked of a ‘*just price*’. [19]At its best, the market price of a thing is the just price of a thing. This conclusion does not mean that there is no such thing as gouging or cheating or any of the other distortions we might find in an actual exchange. It means rather that we do recognize that something is wrong with the system when such things occur. Our reason, our judgment, our natural sense of equity operates in all of our exchanges if we are free to compare, to withhold our purchases, and find alternatives.[20]When looking at natural law through the lens economic analysis we can see that the process of natural reasoning is the answer to the principle that everything that is done in an exchange can be remedied by the guarantee that something is good and legitimate by providing a check and reasoning about what is inherently not good. Is natural law intended to be a wholly right-wing consideration of the movement? Not necessarily it stems from what is inherently moral in each human individual, thus natural law in its field is neither left or right, rather it is a synthesis of characteristics from each side of the coin.

Liberalism, Neo Liberalism, Law and Economics

Classical Liberalism is a political ideology most famously pioneered by John Locke that rejected the ideas of hereditary privilege, state religion, absolute monarchy, and the Divine Right of Kings.[21]Classical Liberalism supports

civil liberties, political freedom, representative democracy, and economic freedom. To citizens of the United States Classical Liberalism can be considered the driving philosophy of the founding fathers. As aforementioned, the principle of the rule of law coexists with the notion of Classical Liberalism, a free society requires laws that in turn must be universally adhered to and applied to the society's citizens.[22]

Steve Burchill within chapter 3 of *Theories of International Relations* rationalises the liberal perspective on global organisation in combination with the 'inside-out' approach and economic globalisation.[23] Considering realist perspective, one could make the point Burchill is taking an idealist perspective to how globalisation will positively effect sovereign states economic buying power, which in the right wing perspective will trickle down throughout the nation's peoples classes to be ultimately beneficial. This is not to say that as a theory, a means to understanding, creating and conceptualising real effective policy and economic changed cannot be obtained through a liberal policy or any other likeminded theory but rather liberalism is quite idealistic, (not as much as positivism or post-positivism however). This is raised in Francis Fukuyama's contention that culture and the spreading of western civilisation's ideals will lead to a global authoritarian nanny-state that is ultimately dictated by control of the free market, which by that stage is not totally free.[24]It doesn't sound particularly idealistic, but it is fascinating to see this articulated and be challenged due to the rise of more nationalistic sentiment in the past few months, which has shaken up the international economic system and

leading to states becoming more isolationist, where in which conflict has arisen in examples such as the Chinese/American trade war.[25]

According to liberalism (and neo liberalism) Burchill's analysis of *Mitrany, Keohame and Nye* is that if institutions were to arise in international anarchy there would be a higher possibility for peace and cooperation that would benefit mankind.[26] Again, liberal theory in focusing in international institutional systems and their implementation is too idealistic, according to perceived right wing commentators, further epitomised in the failure of the Trans Pacific Partnership, a globalisation effort, fail, due to this nationalistic backlash against the more 'inside out' approach to international economical trading.[27] Of course international economics in the modern age is dictated by the emergence of neo-liberalism, an economic theory largely associated with Nobel Prize-winning economists *Friedrich Hayek and Milton Friedman*. [28] Neo-liberalism supports *laissez-faire* (meaning let go or hands off) economics.[29] This supports privatization, fiscal austerity, deregulation, free trade, and reductions in government spending in order to enhance the role of the private sector in the economy. *Friedman* argued that the best way to end a recession wasn't to coddle the companies that were failing.[30] Instead it was to let them quickly fail so that the people who worked there could move on to more efficient industries. It would be like ripping off the band-aid, more painful in the short term, but the recession would end quicker and would be better in the long term. Hayek and Friedman are also incredibly influential economists, and their work became the basis of Ronald Reagan, Margaret Thatcher, and many other prominent politicians' economic strategies.[31] Keynesian Economics is economic theory that was started by

20th century economist *John Maynard Keynes* .[32]The founder of modern macroeconomics, he is one of the most influential economists of all time. *Keynes* was one of the first to extensively describe the business cycle. When demand is high, businesses grow and grow. More people start businesses in that industry. The economy booms. But then there's a point when too many people start businesses and the supply is too high. Then the weakest companies go out of business. This is called a recession . *Keynes* argued that governments should save money when the economy booms and spend money on supporting people when there is a recession.[33]All modern democracies are founded on classical liberalism. The other two ideas are both popular economic ideas today. *Keynesian* ideas tend to be supported by left leaning politicians, and neoliberal ideas tend to be supported by right leaning politicians. Economists debate which one is better in academic journals and bars all the time. Many proponents of both ideas have won Nobel prizes for their work, so there isn't any clear-cut winner. Modern day politicians tend to use elements of both theories in their economic strategies. For example; Donald Trump endorses the tax cuts associated with neoliberalism but opposes free trade.[34]As such, arguing that Law and Economics is wholly right wing is fanciful as politicians and legislators tend to pick and chose the policy that helps them not only win elections, but also, ideally, to benefit the citizens of the nation state. Jurisprudence in this area may have a bedrock of right leaning theory, but if the modern age has anything to say on this sentiment it should be known that modern economic and legal theory is certainly affected by more left leaning ideology.

The middle way then between neoliberal and Keynes principles has been adopted in many countries, including the Scandinavian, Canada, New Zealand, India, and many others. The MGNREGA was a huge attempt in this direction.[35]The Congress party in India has always been slightly left of centre, leaned more leftward during Indira Gandhi, has been slightly left of centre at other times. As neo-liberalism is more characterised by its right-wing leaning attitude to economics its relation to law in the Australian context can be teased out. A brief look at coalition attitudes toward the fledgling clean energy industry serves to further highlight the divergence between classical and neo-classical economics.[36]In our neo-classical world view the value of a tonne of coal, nickel or iron ore is what a company in China, India or Japan is willing to pay for it. (In real world terms, a tonne of iron ore costs \$50 to produce while its price has fallen from a height of \$150 per tonne and is predicted to bottom at \$75.)[37]Hence it is undervalued, as the Greens rightly argue, not just in terms of environmental cost, but in opportunity cost. The concept of the ‘parterro-efficiency’ theory comes into effect in this context. This ‘parterro-efficiency’ theory is governed by the ideal that a state of allocation of resources reaches a point where it is impossible to be reallocated without negatively affecting another, potentially random individuals’ position.[38]The social order imposed by law is then seen as a cost/benefit system with the assumption that individuals are rational actors, making rational decisions. Criticisms of this system, or ‘Positive economics’ stems from the idea that inherently not all people are always going to be rational actors.[39]Thus in the policy of the Australian liberal government in terms of electrical energy leads into a [The] Australian Competition and Consumer Commission (ACCC) report, which sees the <https://assignbuster.com/right-wing-jurisprudence-and-its-relationship-to-law-economics/>

essential causes of high electricity prices in recent years as market-dominant companies (including via vertical integration), an inadequate regulatory framework that has been ‘gamed’ by participants, and product ranges and information designed to hinder rather than help consumer choice.

[40]According to criticism of neo-liberal theory is entrenched then in Australia’s electrical distribution, as the privatisation of electricity has led to record high bills for the everyday Australian.[41]The boom of neoliberalism then is slowing, and public entities should take back areas such as electricity as a matter of public interest. In this circumstance the damage and dysfunction wrought by neoliberal ideology is breathtakingly deep, wide and across much of the planet. In this case, criticism of the movement of law and economics in defining the movement as right wing is not wholly incorrect. The surge of privatisation post World War II fundamentally is beginning to crack. Thus, in this circumstance, neo-liberalism defining the movement to be dominated by the right’s free market principle is wholly sustained.

Game Theory and Public Choice Theory

Game theory adds to economic modelling the phenomenon of strategic action. Strategic action being the process of adopting positions of a competitive nature due to social transactions. In the larger societal context these actions are adopted due to how an individual expects another to act in response.[42]An example would be a person who wishes to buy a certain item feigns disinterest in the item leader to the seller potentially lowering the price in order to entice the potential buying in engaging in the transaction.[43]In the Coase Theorem, cooperation is assumed, excluding the need to engage in strategic action, where this relates to law is in the

principle that the law is animated by strategic motivation. One idea that comes from the law and economic movement is that laws and legal action should be done with an eye on the possibility of strategic action in helping eliminate perverse outcomes. In context of criminal law, the right of a defendant to not self-incriminate would encourage an inference from silence as guilt that would be ultimately useless.[44] For example if certain section 128(1) of the *Uniform Evidence Act* was changed to allow witnesses no penalty in the giving of false evidence, the system of evidence would collapse.[45] This type of claim, though, is often better analysed by the tools offered in public choice theory.[46] Public choice theory is centered upon how the nature of the legislative process and collective decision making influence the nature of law.[47] It is the application of economic models of decision-making and their results to the issues that traditionally occupy political science. One claim made within public choice theory is that a proper understanding of collective decision processes will help judges understand their position within the system.[48] If all collective decisions are unavoidably influenced by those who get to frame the questions debated and the order of voting - the agenda-setters - public legislation will need to be interpreted differently than if it were a more neutral recording of collective wishes. Such a theoretical result makes problematic a court's reference to the intent of the legislature.[49] Thus these two developments of the Law and Economics movement represent a more left or critical analysis of the entire system which further criticise the system as wholly right wing.

Conclusion

The fertility for the economic analysis of law has spawned many tools that are helpful in understanding legal institutions. When presented with the notion of is this movement wholly right wing the very criticism of the methodology is indicative that the system is not wholly right. As such the movements criticisms stem from classical liberal principles that the market should be a net benefit for mankind in combination with ideals from Natural Law. As a natural consequence of international markets and huge efforts for privatisation legal institutions now rely on systems of governance designed to keep multinationals in check. As such neo-liberalism acts as the defining characteristic of the law and economics movement. Thus, defining the movement as right wing is a valid criticism. As Jurisprudence field of study is underpinned by more traditional philosophical benchmarks the movement is fundamentally right wing.

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