

Title: Law, Markets and Justice

Convener: The course will be taught by Dr Will Bateman and Dr Ntina Tzouvala.

Pre-requisites: LLB and JD Students will need to have completed successfully the following courses in order to enroll: LAWS1204/6104 Contracts; LAWS1205/6105 Australian Public Law; LAWS2201/6201 Administrative Law; LAWS2204/6204 Property; LAWS2250/6250 International Law.

Learning Outcomes: Upon successful completion, students will have the knowledge and skills to:

1. Investigate, explain and apply the frameworks of law and political economy covered in the course;
2. Explore and critically analyse some of the current controversies and trends in the areas of law and political economy;
3. Understand the evolution of economic thought and the ways it has interacted with law in Australia and overseas;
4. Synthesise, investigate and interpret the policy issues arising from the topics covered
5. Select and apply a range of approaches to written and oral communication, and hypothesise solutions to complex problems in economic regulation.

Course Description: Legal education generally relies upon two unsustainable demarcations: first, it separates law from politics and economics and, secondly, it treats legal fields (contracts, constitutional law, property etc) separately from each other. Generally speaking, private law is equated with ‘economics’ and public law with ‘politics’. These demarcations are neither intellectually rigorous nor practically useful. For that reason, the proposed course aims to bridge these gaps. It will offer our students an opportunity to bring together different strands of their studies, including public and private as well as domestic and international law. In so doing, the course will invite students to think about how law creates the concepts and institutions that sustain economic production and circulation in Australia and globally. Additionally, it will give students the tools to understand the changing ideas about the relationship between law and political economy that have underpinned common law legal systems for the past 150 years.

Methodologically pluralist and legally innovative, this course will prepare our students for varying aspects legal practice. To our knowledge, no other law school in Australia currently offers a similar course. Introducing such an option will align the College with major law schools in the US (notably, Yale Law School), which are experiencing a marked emergence of interest in law and political economy.

Assessment: The course will be assessed by: 1) a 1,000-word case-note (30%) 2) a 2,500-word research essay (70%).

Week 1: Introduction to Law and Political Economy

This session will introduce the students to the questions and methods of law and political economy. We will discuss foundational questions such as: what is the role in the production and distribution of wealth both domestically and internationally? What is the role of ideas in shaping both law and political economy? How do ideas interact with material conditions in shaping law and political economy?

Essential Readings

- Jedediah Britton-Purdy, Amy Kapczynski, David Singh Grewal, 'Law and Political Economy: Toward a Manifesto' available at: <https://lpeproject.org/blog/law-and-political-economy-toward-a-manifesto/>.
- David Motadel, Richard Drayton, 'Material Conditions and Ideas in Global History' (2020) 72 *British Journal of Sociology* 26-38.

Week 2: American Legal Realism and the Rise of the Welfare State in the early 20th Century

In this session we will discuss the legal battles that accompanied the rise of state interventionism and the welfare state in the United States. We will try to understand: if there was an intrinsic relationship between laissez-faire economic liberalism and legal formalism; the main contributions of American legal realists; whether legal realism can be a useful tool in the context of Australian law.

Essential Readings

- *Lochner v. New York*, 198 U.S. 45 (1905) (Holmes J., dissenting).
- Robert L. Hale, 'Coercion and Distribution in a Supposedly Non-Coercive State' (1923) 38(3) *Political Science Quarterly* 470.
- Felix S. Cohen, 'Transcendental Nonsense and the Functional Approach' (1935) 35(6) *Columbia Law Review* 809 **ONLY** pp. 814-817 ('What's in a Trade Name?')

Week 3: Parliamentary Socialism and Legal Positivism

After the World War 2, Western governments fundamentally transformed their role in society via the implementation of welfare state policies. Public agencies used public money to provide basic goods for society: public health, public education, unemployment insurance, workers' compensation and pensions. Parliamentary legislation provided those basic goods and created new government agencies and tribunals for their delivery. The judiciary, and the rule of law, were seen as a serious threat to the welfare state's viability: more concerned with protecting private capital and the class structures it supported than the re-distributive aims of welfare legislation.

We explore those momentous developments in this session: studying the legal foundations of the welfare state and the political economy of prominent constitutional legal thinkers, particularly AV Dicey and Ivor Jennings.

Essential Readings

- John Maynard Keynes, *The End of Laissez-Faire* (Hogarth Press, 1926).
- Brendan Edgeworth, 'H. L. A. Hart, Legal Positivism and Post-war British Labourism' 19 *University of Western Australia Law Review* 275.

- Ivor Jennings, *The Law and the Constitution* (University of London Press, 1933) **ONLY** 18-41, 54-62, 195-208.

Week 4: The (Successful) Neoliberal Challenge to the Welfare State

Between 1950-1980, core pillars of the welfare state were attacked by economists and jurists who argued that state provided welfare was a threat to freedom and incompatible with the rule of law. We will study the core political and legal theories that motivated those attacks and try to understand why the neoliberal opposition to the post-War welfarism was largely successful. We will also look at some core examples of neoliberal thinking by prominent lawyers of this era.

Essential Readings

- FA Hayek, ‘The Changing Concept of Law’ in *Law, Liberty and Legislation* (Routledge,1982).
- Elizabeth M. Landes, Richard A. Posner, ‘The Economics of Baby Shortage’ (1978) 7 *Journal of Legal Studies* 323 **ONLY** pp. 323-327, 342-347.

Week 5: The (Failed) Left-wing Challenge to the Welfare State

The welfare state and its legal edifice was not only challenged from the right, but also from the left. In this session we will revisit some of these challenges and trying to decipher their specific jurisprudential interventions. Was the welfare state a desperate attempt to save capitalism from its own contradiction? Did it produce forms of legality that were inherently arbitrary and authoritarian? Were welfare laws inherently (as opposed to contingently) exclusionary of women, people of colour and migrants?

Essential Readings

- Nicos Poulantzas, ‘The Irresistible Rise of the State Administration’ in *State, Power, Socialism* (Verso, 2001) **ONLY** pp. 217-224.
- Sidney Jacobs, ‘Race, empire and the welfare state: Council housing and racism’ (1985) 5 *Critical Social Policy* 6 **ONLY** pp. 6-18.
- Sheila Shaver, ‘Gender, Class and the Welfare State: The Case of Income Security in Australia’ (1989) 32(2) *Feminist Review* 90 **ONLY** pp. 99-110

Week 6: Money, democracy and the rule of law

Money is the backbone of capitalism, but its legal nature is contested and obscure. State agencies, central banks and treasuries, issue “public money” and control the issue of “private money” by commercial banks and financial firms. Citizens in liberal democracies use both public and private money, but have no meaningful control over monetary institutions. In this session, we will explore the legal fundamentals of “money creation”, the democratic bona fides of the “monetary system” and the applicability of the “rule of law” as a principle of economic management.

Essential Readings

- Christine Desan, *Making Money* (Oxford University Press,2014), chapter 1.

- Robert C Hockett and Saule Omarova, 'The Finance Franchise' (2017) 102 *Cornell Law Review* 1143.
- Will Bateman, *The Law of Central Bank Reserve Creation* (2021) 84 *Modern Law Review*.

Week 7: Financial crises, austerity and liberal constitutionalism

When financial systems fail, governments spend huge amounts of money to support commercial banking businesses. Bank bail-outs lead to very large withdrawals of the state from welfare provision, with heavy impacts on the lives of ordinary people. Often those bailouts are impossible to obtain through the ordinary institutional channels and are delivered covertly. In this session we will learn about the most recent case study of this phenomenon: the Global Financial Crisis (2007-2009). We will concentrate on the compatibility of government responses to financial distress with core principles of liberal constitutionalism: democracy and the rule of law.

- Adam Tooze, *Crashed: How a Decade of Financial Crises Changed the World* (Viking, 2018), chapters 6 and 7.
- Will Bateman, *Public Finance and Parliamentary Constitutionalism* (Cambridge University Press, 2020), chapters 5 and 6.

Week 8: Do banks always win?

Banks appear to be largely immune to legal and social standards that apply to other enterprises and individuals. Investigations following the Global Financial Crisis and in the Australian Royal Commission into Financial Service exposed widespread illegality at the heart of the credit system. Despite those prominent public events, few sanctions were applied to banks or bankers. This week we will investigate a key theory regarding the operation of legal norms to the banking sector and an Australian case study demonstrating the difficulties of applying legal norms to banks that constrain their financial power.

- Katarina Pistor, 'A Legal Theory of Finance' (2013) 41 *Journal of Comparative Economics* 315.
- *Andrews v Australia and New Zealand Banking Group Ltd* (2012) 247 CLR 205, [3]-[15], [78]-[83].
- *Paciocco v Australia and New Zealand Banking Group Ltd* (2016) 258 CLR 525, [71]-[90], [160]-[177].

Week 9: Law and Political Economy beyond the State: International Investment Law

At least since the 19th century and certainly nowadays, neither law nor political economy are confined within the borders of the nation-state. This session will invite students to think about the economic implications of international law. We will discuss questions of imperialism and colonialism both as economic and as legally constructed phenomena. In particular, we focus on the rise and present crisis of international investment law and, in particular, of investor-state dispute settlement. We will examine its origins and justifications as well as its impact on the global distribution of wealth and risk.

Essential Readings

- Gus van Harten, 'Five Justifications for Investment Treaties: A Critical Discussion' (2010) 2(1) *Trade, Law and Development* 20 **ONLY** pp.28-41.
- Ntina Tzouvala, 'The Ordo-Liberal Origins of Modern International Investment Law: Constructing Competition on a Global Scale' (2020) *European Yearbook of International Law* 37.

Week 10: Law and Political Economy beyond the State: the War on Terror

This sessions aims to illustrate the fact that a political economic analysis may be useful tool even regarding legal fields that are not obviously related to economics and distribution. To do so, we will focus on the global ‘war on terror’ that has been unfolding since 9/11. We will discuss to what extent the economic imperatives of the war have influenced the ways in which the law is used, interpreted and developed.

Essential Readings

- Aziz Rana, ‘Who Decides on National Security’ (2012) 44(5) *Connecticut Law Review* 1417 **ONLY** pp. 1480-1490.
- Ntina Tzouvala, ‘From Iraq to Syria: Legal Arguments for the Civilising Missions of the Twenty-First Century’ in *Capitalism as Civilisation: a History of International Law* (Cambridge University Press, 2020), **ONLY** pp. 167-187.

Week 11: Law and Political Economy in Settler Colonies

In this session we will focus on the particularities of law and political economy in settler colonial contexts. We will examine how law engineered Indigenous dispossession and the mechanisms through which it continues to do so. Additionally, we will try to understand whether contemporary forms of recognition have rectified or deepened (or both) the mal-distributive effects of settler colonialism.

Essential Readings

- Brenna Bhandar, ‘Title by Registration: Instituting Modern Property Law and Creating Racial Value in the Settler Colony’ (2015) 42(2) *Journal of Law and Society* 253.
- Catherine Howlett, Rebecca Lawrence ‘Accumulating Minerals and Dispossessioning Indigenous Australians: Native Title Recognition as Settler-Colonialism’ (2019) 51(3) *Antipode: A Radical Journal of Geography* 818.

Week 12: Revision and Preparation for Assessment

In this concluding session we will bring together the different threads of the course and discuss strategies for writing clearly and persuasively about law and political economy.

Essential Readings

Frank Stilwell, ‘Writing Political Economy: Useful Hints’, available at: <https://www.ppesydney.net/writing-political-economy-helpful-hints/>.