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An economic perspective on the law: Is there “legal failure”? 

A thesis presented in partial fulfilment of the requirements for the degree of 

PhD 
in 
Economics 

at Massey University, Palmerston North New Zealand. 

Keith Stuart Birks 

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Abstract

The law fulfils important functions in society, contributing to its institutional structure, its policies and resolution of disputes. Workers employed in the law are providing a service, and economics can be applied to analyse the nature of this service. Such analysis must recognise the characteristics of law, including the costs and nature of deliberation. This requires more than the use of theoretical approaches which assume exogenous preferences and no transaction costs.

Rhetoric is important in law, and there may be a rhetorical dimension to economics itself. This theme has led to the thesis having two components. The first considers methodological issues in the application of theories and techniques. The second then assesses aspects of the law.

Groups and group cultures are considered as influences on academic disciplines including economics, and professions such as the law, as well as shaping political activity and social beliefs. The interpretation of theory as analogy is developed to evaluate the application of theory and empirical analysis to real world issues. Cross-disciplinary material is then used to provide alternative perspectives on democracy. These aspects assist in identifying possible failures in the formulation and implementation of law.

From this foundation, and using selected criteria to assess policy development, parliamentary debate leading to changed legislation is investigated and limitations identified. Characteristics are then identified for the services provided to consumers by the legal sector. Provision involves a mix of participants, including lawyers, court staff and other professions. Process and persuasion are important, and there can be game playing between opposing parties. The result may be misleading signals to others operating “in the shadow of the law”.

Overall, concerns are identified about research methods, the quality of laws, the cost and quality of legal deliberation, and implications for behaviour by others. This a relatively untapped area with much potential for further research.
Acknowledgements

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<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Description</th>
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<tbody>
<tr>
<td>CDA</td>
<td>Critical discourse analysis</td>
</tr>
<tr>
<td>CEDAW</td>
<td>The Convention on the Elimination of All Forms of Discrimination against Women</td>
</tr>
<tr>
<td>IDF</td>
<td>Ideological-discursive formation</td>
</tr>
<tr>
<td>INUS</td>
<td>INUS condition – insufficient but necessary part of an unnecessary but sufficient set of conditions</td>
</tr>
<tr>
<td>MMP</td>
<td>Mixed Member Proportional (voting system)</td>
</tr>
<tr>
<td>MSD</td>
<td>Ministry of Social Development</td>
</tr>
<tr>
<td>MWA</td>
<td>Ministry of Women’s Affairs</td>
</tr>
<tr>
<td>NCWNZ</td>
<td>National Council of Women of New Zealand</td>
</tr>
<tr>
<td>NGO</td>
<td>Non-government organisation</td>
</tr>
<tr>
<td>NZCTU</td>
<td>New Zealand Council of Trade Unions</td>
</tr>
<tr>
<td>NZFLR</td>
<td>New Zealand Family Law Reports</td>
</tr>
<tr>
<td>NZLR</td>
<td>New Zealand Law Reports</td>
</tr>
<tr>
<td>NZPD</td>
<td>New Zealand Parliamentary Debates</td>
</tr>
<tr>
<td>NZPDQS</td>
<td>New Zealand Parliamentary Debates Question Supplement</td>
</tr>
<tr>
<td>QALYs</td>
<td>Quality Adjusted Life Years</td>
</tr>
<tr>
<td>RIA</td>
<td>Regulatory Impact Assessment</td>
</tr>
<tr>
<td>RMA</td>
<td>Resource Management Act</td>
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