

Table of Contents

Chapter 1

Method: Ontology, Epistemology, Axiology 25

A. Introduction	25
B. Ontology: Materialism v. Philosophical Idealism	31
C. Epistemology: Realism v. Atomism	32
I. Atomism	33
II. Critique of Atomism and, by Extension, (International Relations) Realism	34
III. Holism	37
IV. Critiques of Holism	37
V. Is it Possible to Synthesize Holist and Atomist Methods?	38
D. Axiology: Relativism (Post-modernism and Neo-liberals) v. Cognitivism (Classical Liberals)	39
E. A New Natural Law Theory of International Relations	39
F. Conclusion	43

Chapter 2

Legal Theory in Antiquity: Aristotle 46

A. Introduction	46
B. Aristotle's Contributions to Legal Science	46
I. Logic and Dialectical Reasoning	46
II. Tort Law: Causality is Rooted in Aristotle's Thought	49
C. Aristotle and Justice	49
I. Political Justice – A Relation	50
1. Elements and Origins of the Polis	51
a) The Family	51
b) The Individual: Dependency	51
2. Inequality	52
a) The Condition of Slaves	52
b) The Condition of Women	52
3. Rationality	53
4. State of Nature?	53

5. The Ends of the Polis.....	54
a) The Good	54
b) Autarchy	54
II. Typology of Justice According to Aristotle	54
1. The Just Man, Justice, and Just Acts	55
a) The Just Man	55
b) Universal Justice (the Lawful).....	55
c) Just Acts: Justice in the Particular (Fairness).....	55
2. Distributive Justice ("Geometric" Justice)	55
3. Corrective Justice (Arithmetic Justice)	56
III. Critique of the Aristotelian Theory of Justice	56
1. What are the Sources of Inequality?	56
2. What are the Consequences of Inequality?.....	57
a) Limitation of the Development of Individuals.....	57
b) Limitation of the Development of the Polis.....	57
c) Economic Inequality.....	58
IV. Global Elements of Justice: Volition and Equity.....	58
1. The Relation between Volition and Culpability: Aristotle's Influence on the Concept of Culpability in the Common Law.....	59
2. Equity.....	59
D. Criticisms of Aristotle	60
E. Aristotle and Foucault	63
F. Conclusion.....	64

Chapter 3

Pre Modern Theory: Medieval Scholasticism and the Universals (1400–1600)

	65
A. Introduction.....	65
B. Problématique	65
C. History: From Realism to Nominalism by Way of the Universals	66
I. The Scholastics	66
1. External Contradictions	66
2. Internal Contradictions.....	67
II. The Universals.....	68
1. Verum.....	68
a) Truth Scepticism: Nietzsche – The Will to Truth.....	69
b) Moral Relativism: Freud and Psychological Interpretation.....	71
c) The American Realists.....	71
aa) Fact Sceptics	71
bb) Rules Sceptics	72

Table of Contents

15

2. Bonum.....	73
3. Unum.....	75
D. Logic: Indeterminacy and Decidability	75
I. Gödel.....	76
II. Quine.....	77
1. Linguistic Indeterminacy	77
2. Paradox.....	78
a) Definition of Paradox	78
b) Self Reference.....	79
c) Paradoxes of the State.....	81
d) The Paradox of Omnipotence and Self-limitation	81
e) Paradox of Universal Truth	81
III. Raz and the Paradox of Authority	82
IV. Kelsen and the Paradox of the Prescription of Prescription	83
V. Juridical Functions as Determining Legal Knowledge	83
1. The Maintenance of Order.....	84
2. Prediction.....	84
E. Conclusion: The Temporary Victory of Relativism	85
I. Voluntarism	85
II. Relativism	85

Chapter 4

Into Modernity: Natural Law and Normative Inference 86

A. Introduction: The Contemporary View	86
B. The False Dichotomy of Either Positivism or Natural Law but not Both ...	91
I. Aristotle	91
II. Hobbes	95
III. The Implications of Re-cognizing the False Dichotomy of "Natural-ism v. Positivism"	98
C. Normative Inferencing.....	99
I. Hume's Trap	99
II. Hume and Kelsen.....	102
III. Conclusion.....	107

Chapter 5

Modernity: Social Contract and Natural Law 109

A. Natural Rights	112
I. Foundation of Natural Law in Intellectual Realism.....	112
II. Human Rights.....	118

1. The Central Function of Human Rights is Political Legitimation...	118
2. The Idea of Human Rights is Necessarily Ambiguous	118
a) Universal Terminology is a Source of Ambiguity in Human Rights.....	118
b) The Multiplicity of Theoretical Sources of Law is the Source of the Ambiguity Inherent in Human Rights	119
c) The Multiplicity of Legal Sources is also at the Root of the Ambiguity of Human Rights	119
d) The Quest for Political Legitimacy based on Human Rights is Unworkable because of the Ambiguity Inherent in the Idea of Human Rights	120
B. Social Contract Theory.....	120
I. The State of Nature	121
II. The Social Contract	122
C. Contemporary Social Contract Theorists	124
I. Ronald Dworkin	124
1. Dworkin on Natural Law and Positivism	125
a) Principles and Policies.....	126
b) Intensive Reiteration to Exhaustion of a Fundamental Principle	127
c) The Inductive Deductive Method	128
2. Dworkin versus Posner on Law and Economics	129
3. Conclusion: A Potentially Powerful Synthesis as yet Undeveloped and Rife with Contradictions Due to Absent Resolution of Conflicting Presuppositions	129
II. John Rawls	130
1. The "Original Position"	130
2. Rawls and the School of "Public Choice"	134
3. Rawls Contrasted with Aristotle	134
a) Origin of the State	134
b) Human Inequality	135
c) The Theory of Justice	135
d) A Catholic Inspired Synthesis of Rights Theory and Natural Justice	136
D. Libertarians	137
I. Introduction: Commonalities between Different Anarchisms.....	137
II. Points of Divergence among Anarchisms	138
III. Anarcho-Capitalists (Libertarians).....	139
1. Nozick	140
a) The Political Theory of Anarcho-capitalism	140
b) Nozick's Ultra Minimal State	142
2. David Friedman – the Economic Theory of Anarcho Capitalism (Libertarianism).....	144
3. Conclusions.....	146

a) Anarcho-capitalism is Unrealistic	146
b) No Dissolution of Private Property	147
c) Privatization of State Functions	147
d) Negativism.....	147
E. Criticisms of the Social Contract	149
I. Criticisms of the Social Contract from within its own Terms	149
1. The State of Nature is an Impossibility	149
2. The Social Contract is but a Fiction	149
II. Criticisms of the Social Contract from Outside its own Terms	150
1. The Necessity of Government.....	150
2. The Impossibility of an End of History	151
F. Conclusion: Explaining the Success of the Theory of Social Contract Theory	151

Chapter 6

Late Modernity: Legal Realism 155

A. Introduction	155
B. The Judicial "Revolution"	155
I. The Great Depression: The Judicial Revolution.....	157
II. Legal Realism "We are all Legal Realists now. Or are we?"	159
III. The Realist Rejection of "Formalism"	162
C. Post War: Co-opting Radicalism to Serve Global Hegemony.....	168
I. Law and Economics	170
II. Legal Process Interest Balancing	172
D. Conclusion	179

Chapter 7

Beyond Legal Realism (1950–1980) 181

A. Introduction: The Failure of the Left.....	181
B. Epistemological Basis of Realist Legal Method	185
I. Dualism (Plato).....	189
II. Relativism	192
1. Nietzsche	192
2. Gödel, Quine, Saussure.....	199
3. Constructivism: Popper.....	201
4. Intersubjectivism.....	203
C. Axiological Basis of Realist Legal Method – Hume and Kelsen	204
D. Legal Method.....	212

I.	Legal Realism v. Formalism	214
II.	Realism Set the Stage for Law and Economics.....	219
III.	Critique of Realist Legal Method	220
E.	Conclusion: Beyond Legal Realism	223

Chapter 8

	Law and Economics (1980-?)	225
A.	Introduction.....	225
B.	The Origin of Contemporary L&E in Classical Economists.....	227
I.	Adam Smith	227
II.	David Ricardo	228
C.	Law and Economics: Richard Posner.....	228
D.	The Chicago School (Supply Side Theory): Milton Friedman.....	231
I.	Supply Determines Demand.....	232
II.	The General Theory as a Special Theory	232
III.	Primacy of the Market.....	232
1.	The Role of Prices	232
2.	Monetary Policy	233
a)	Money as a Signalling System.....	234
b)	Money as an Instrument of Economic Management	234
c)	Monetary Policy must Prevent Inflation (and Deflation)	235
d)	Opposition to State Intervention	236
E.	The Vienna School	236
I.	Mises and Rothbard	238
II.	Hayek.....	241
1.	Hayek on Inflation	241
2.	Hayek on Epistemology.....	241
3.	Hayek's Prescriptions.....	246
F.	The School of Public Choice: James Buchanan.....	247
I.	The Analysis of "Political Markets".....	248
1.	Political Failure	251
2.	Bureaucracy	252
3.	Public Bads.....	252
4.	The Political Market.....	253
II.	Consequences of the Analysis	253
1.	Balanced Budget	253
2.	Privatization of Legal Functions	254
III.	Critiques of the School of Public Choice	255
G.	Conclusions	256

I.	Valid Applications of Economic Methods in Law – “Weak” Law and Economics	256
1.	Balancing Tests.....	256
2.	Cost-benefit Analysis	257
II.	Invalid Claims: “Strong” Law and Economics.....	258
1.	Homo Economicus – An Unrealistic Model of Human Behaviour in the Real World.....	259
2.	Presumptions about Markets – And Failure to Account for Market Failure.....	260
3.	Information Theory	261
III.	Why Law and Economics?	262
IV.	A Reductio to Refute Strong Law and Economics	262

Chapter 9

Kelsen	264
---------------	-----

A.	Normative Inference.....	265
I.	Rejection of Normative Inference	265
II.	The Normative Syllogism	274
III.	Demonstration of Legal Inferencing	277
B.	Critique	278
I.	Terminology	278
1.	Polysemy	278
2.	Ambiguity	279
3.	Confusion.....	280
4.	Neutrality?	281
II.	Useless Complexity.....	282
1.	Terminological Multiplication.....	282
2.	Multiplication of Syllogisms	282
3.	Imputation: A Useless Distinction	283
4.	A Special Juridical Logic?.....	283
5.	The Posthumous Character of the ATN	283
III.	Methodological Aporia.....	284
IV.	Problem of Postulates	284
1.	Separation of Law and Morality.....	284
2.	The Basic Norm	284
V.	Tautology of the Basic Norm	285
VI.	Rationalisation	285
VII.	From Subjective to Objective Signification.....	286
C.	Conclusion	286

*Chapter 10***After Modernity? – Critical Legal Studies**

287

A. The Origins of Critical Legal Studies: Legal Realism	287
B. Marxist Legal Theory	290
I. Antinomianism	290
II. Historical (Dialectical) Materialism	290
III. Socialist Legalism	291
IV. Criminal Theory	291
C. Critical Legal Studies	291
D. Post Modernism	293

*Chapter 11***Contemporary Legal Theory: Scientificity**

296

A. Introduction	296
B. Scientificity of Law – How the Study of Law is Scientific?	298
I. Past Efforts at Universalisation in Human Sciences	298
II. Borrowing Methods, Observations, and Analogies from Natural Sciences	299
III. Human Sciences are not Nomothetical	302
IV. Human Sciences are Dialectical	303
1. Union of Opposites	305
2. Struggle of Opposites	305
3. Each Opposite Holds the Seeds of its Opposite	306
4. Transformation of Opposites into each other Through Struggle	306
5. Dynamic Change	308
6. A Long Series of Quantitative Changes Leads to a Sudden Qualitative Change	308
7. The Importance of Dialectics for Science	308
V. Object of Study	310
VI. Analytical Method: False Dichotomies	311
VII. Synthetic Method: Discover Latent Hidden Similarities in Apparently Different Institutions by Abstraction and Comparison	312
VIII. Teleology of Legal Science	313
1. Structuralist Approach	313
2. Goal of Science – the Good Life (Aristotle, Maslow)	313
IX. Hume, Weber and Kelsen	314
C. Language, Logic, and Law	317
I. Logic	317
1. The Paradox of Crows & The Problem of Causality	318

2. The Correspondence Theory of Truth.....	322
3. Truth Functionality (Truth, Falsehood and Indeterminacy)	323
4. Logical Implication: Ternary Logic.....	325
5. Normative Inferencing	330
II. Language	334
1. Language – The Arbitrary Character of Signs	334
2. Linguistic Determinacy and Law	335
3. Interpretation and Argumentation.....	337
D. A Critical Response to Duncan Kennedy's Theory of Argumentation	338
I. The Death of Reason Narrative	338
II. Critique of the Death of Reason Critique	347
III. Frames of Reference	349
1. Base/Superstructure	349
2. Structuralism	350
3. Post-structuralism.....	352
4. Post Modernism (PoMo).....	352
IV. Kennedy's Theory of U.S. Law	353
1. Before CLT – The "Classical Period" (Natural Law) (Individualism – Begriffsjurisprudenz)	354
2. Classical Legal Thought (CLT) (Positivism – Interessenjurisprudenz)	355
3. The Social (Legal Realism/CLS) (Collectivism)	363
4. Contemporary Legal Thought (Neo-formalism)	366
5. Mediation	374
6. Law as Logical Equations	375
V. "Outs" and Contestable Points	376
E. Pedagogy.....	378
I. Constructivism	378
II. Research Networks	380
III. Peer Review.....	381
F. Conclusion	381

Chapter 12

Legal Indeterminacy and Autonomy of Law 382

A. Introduction	382
B. Truth	385
I. Kurt Gödel, Indeterminacy and Autonomy	385
II. Theories of Truth	387
1. The Correspondence Theory of Truth.....	387
2. The Consensus Theory of Truth.....	388

3. The Coherence Theory of Truth	388
4. The Pragmatic Theory of Truth.....	390
5. Truth Statements are Reflections of the Material World.....	391
C. Logic.....	393
I. Practical versus Theoretical Logic	393
1. Theoretical Rationality.....	393
2. Practical Reasoning.....	393
II. (Qua-)Ternary Logic.....	394
1. Interpretations (Values) of Statements.....	394
2. Truth Functors	396
3. Multivariate Logic Invalidates Reductio Proofs	399
III. Puzzles in Law.....	400
1. Antinomies in Law	400
a) Conflicts of Law	401
b) Lacunae	401
2. Paradox	402
a) Paradoxes of Material Implication Reveal the Inadequacy of Binary Logic.....	403
b) Paradox in Laws	404
c) Circling the Square: Statements about Pegasus.....	404
D. Conclusion: Law and Morality.....	406

Chapter 13

Rights Discourse 407

A. Introduction.....	407
B. Rights and Laws.....	408
C. Rights Discourse	409
I. Dworkin.....	409
II. Rawls	413
III. Hohfeld	414
D. Types of Rights	416
I. Perfect (Vested) Rights	417
II. Imperfect Rights	418
1. Rights at Will: Permissions, Privileges and Licenses.....	418
Example: Ferae Naturae	418
2. Potential Rights: Mere Expectancies	419
Example: Ferae Naturae	419
3. Hortatory Rights: Programmatic Goals	419
Example: The Right to Food, "Third Generation Rights".....	420
III. Other Distinctions among Rights	421

Table of Contents	23
-------------------	----

E. Inferring Rights	422
F. Conclusion	425

Chapter 14

The Right to Food	427
--------------------------	-----

A. On Radical Legal Critique	427
B. Classical Law: <i>More Geometrico</i>	429
C. Taking Empire Seriously: Radicalized Rights as a Key to Third World Well Being	433
I. A Typology of Rights	435
II. Positive Policies, Natural Rights	438
III. The Right to Food (Basic Alimentary Rights)	440
D. Conclusion	441
Global Conclusions	443
Bibliography	444
Table of Cases	468
Index	469