

# Contents

<b>1</b>	<b>Introduction</b> . . . . .	1
1.1	The Three Ideologies of Judicial Decision-Making by Jerzy Wróblewski . . . . .	1
1.2	The Three Situations of Legal Decision-Making by Kaarle Makkonen . . . . .	6
1.3	The Subject Matter of the Treatise: Legal Argumentation, or How to Construct and Read the Law in a Reasoned Manner . . . . .	11
1.4	The Concept of a Frame of Legal Analysis . . . . .	12
1.5	The Theories of Truth and Legal Analysis . . . . .	14
1.6	The Semantics of Law: Rudolf Carnap's Method of Extension and Intension . . . . .	20
<b>2</b>	<b>An Isomorphic Theory of Law: A Relation of Structural Similarity Between the Two Fact-Constellations Compared</b> . . . . .	29
2.1	Kaarle Makkonen on Legal Isomorphism . . . . .	29
2.2	The Picture Theory of Language in Ludwig Wittgenstein's <i>Tractatus Logico-Philosophicus</i> , as Read in Light of Erik Stenius' <i>Wittgenstein's Tractatus. A Critical Exposition of the Main Lines of Thought</i> . . . . .	31
2.2.1	The Internal Categorial Structure and the External Configuration Structure of Reality . . . . .	31
2.2.2	A Legal Fact-Situation as an Analysed Fact-Situation . . . . .	36
2.3	The Two Requirements Placed on Legal Isomorphism . . . . .	41
2.4	The Transition From an Isomorphic Situation to a Situation of Semantic Ambiguity . . . . .	43
2.5	Legal Isomorphism and Institutional Facts . . . . .	45
2.6	The Semantic Theory of Truth by Alfred Tarski . . . . .	47
2.7	A Critical Evaluation of the Isomorphic Theory of Law . . . . .	48
<b>3</b>	<b>Coherence Theory of Law: Shared Congruence Among Arguments Drawn from the Institutional and Societal Sources of Law</b> . . . . .	53
3.1	Truth As Coherence Among the Sentences of a Scientific Theory . . . . .	53



3.2	In Search for the Concept of Coherence . . . . .	55
3.2.1	A Quantitative Approach: “The More/Longer/Greater (. . .), the More Coherent the Theory” . . . . .	55
3.2.2	A Qualitative Approach: “That the Law is Structured by a Coherent Set of Principles About Justice and Fairness and Procedural Due Process. . .” . . . . .	60
3.3	The <i>Duhem-Quine Thesis</i> : The Inherently Holistic and Underdetermined Character of a Scientific Theory, and Its Implications for Legal Analysis . . . . .	68
3.4	Towards Partial Coherence in Law . . . . .	71
3.5	The Concept of Coherence Redefined . . . . .	73
3.6	A Critical Evaluation of the Coherence Theory of Law . . . . .	77
<b>4</b>	<b>“Between the Evident and the Irrational”: The New Rhetoric and Legal Argumentation Theory</b> . . . . .	<b>79</b>
4.1	The Varieties of Pragmatism and the Law . . . . .	79
4.2	The Universal Audience as a Subjective Thought Construct of the Speaker by Chaïm Perelman . . . . .	81
4.3	The Realm of Rhetoric and the Quest for Value-Cognitivism . . . . .	87
4.4	The New Rhetoric and Its Alternatives . . . . .	93
<b>5</b>	<b>Philosophical Pragmatism: Law, Judged in Light of Its Social Effects</b> . . . . .	<b>97</b>
5.1	“What, In Short, is the Truth’s Cash Value in Experiential Terms?” . . . . .	97
5.2	The Lure of Pragmatism and the Law . . . . .	102
5.3	“These Doctrines Form a System for Inducing People to Behave Efficiently. . .” . . . . .	106
5.4	“Why Efficiency?” and “Is Wealth a Value?” – A Critical Evaluation of the Economic Analysis of Law, with Brief Comments on the Marxist Theory of Law . . . . .	108
<b>6</b>	<b>Analytical Legal Positivism: Retracing the Original Intentions of the Legislator Under Legal Exegesis</b> . . . . .	<b>113</b>
6.1	Scientific Positivism Defined . . . . .	113
6.2	What Is Analytical Philosophy? . . . . .	116
6.3	Legal Positivism Defined . . . . .	118
6.4	The Saga of Modern Legal Positivism . . . . .	124
6.4.1	Analytical Legal Positivism . . . . .	124
6.4.2	Institutional Legal Positivism . . . . .	130
6.4.3	Exclusive and Inclusive Legal Positivism . . . . .	132
6.5	The Unresolvable Dilemma of Kaarlo Tuori’s Critical Legal Positivism . . . . .	136



6.6	One Step (or Two) Back in History: The Exegetical School of Law ( <i>École de l'Exégèse</i> ) in France and Belgium in the Nineteenth Century . . . . .	138
6.7	A Critical Evaluation of Legal Exegesis . . . . .	141
<b>7</b>	<b>Legal Realism: The Law in Action, Not the Law in Books, As the Subject Matter of Legal Analysis . . . . .</b>	<b>145</b>
7.1	Philosophical Realism Defined . . . . .	145
7.2	Legal Realism, American and Scandinavian . . . . .	148
7.3	The Legacy of American Legal Realism . . . . .	151
7.4	The Concept of A Judicial Ideology by Alf Ross, and the Rule of Recognition by H. L. A. Hart . . . . .	154
7.5	The Formal Validity and Efficient Enforcement of Law . . . . .	160
7.6	A Critical Evaluation of Analytical Legal Realism . . . . .	162
<b>8</b>	<b>Legal Conventionalism: Law as an Expression of Collective Intentionality . . . . .</b>	<b>165</b>
8.1	Brute Facts and Institutional Facts . . . . .	165
8.2	The Definitional Characteristics of Institutional Facts by John R. Searle, with Special Concern for Self-Referentiality . . . . .	169
8.3	Conventions as Mutual Expectations of the Members of a Community . . . . .	173
8.4	Nominalism vs. Realism: Are Intentions Attributable to a Collective Agent as a Whole or to Its Individual Members Only? . . . . .	177
8.5	The Institutionally Qualified Character of Legal Conventions . . . . .	179
8.6	Shared Legal Convictions as an Expression of the <i>Volksgeist</i> , or the Spirit of the Nation, by Friedrich Carl von Savigny . . . . .	182
8.7	The Transformations of Customary Law in Modern Society . . . . .	183
8.8	Legal Conventionalism and Legal Argumentation Theory . . . . .	185
<b>9</b>	<b><i>“Die Rechtssätze in ihrem systematischen Zusammenhang zu erkennen”</i> – The Thrust of Legal Formalism . . . . .</b>	<b>187</b>
9.1	A Genealogy of Legal Concepts by Georg Friedrich Puchta . . . . .	187
9.2	A Jurisprudence, Based on Legal Concepts and Their Systemic Relations . . . . .	189
9.3	The Langdellian Orthodoxy – A Brief Account of Legal Formalism in America . . . . .	192
9.4	The Constitutive Elements of Legal Formality by Robert S. Summers . . . . .	194
9.5	<i>“Der Zweck ist der Schöpfer des ganzen Rechts”</i> – A Critique of Legal Formalism by Rudolf von Jhering and Lon L. Fuller . . . . .	196



<b>10</b>	<b>Natural Law Philosophy: Law as Subordinate to Social Justice and Political Morality in Society</b> . . . . .	201
10.1	The Evolvement of Natural Law Philosophy . . . . .	201
10.2	“ <i>eine wertfreie Beschreibung ihres Gegenstandes</i> ” – The Challenge of Hans Kelsen’s <i>Pure Theory of Law</i> for Natural Law Philosophy . . . . .	206
10.3	The Internal Morality of Law by Lon L. Fuller . . . . .	208
10.4	“The Core of Good Sense in the Doctrine of Natural Law” – The Minimum Content of Natural Law by H. L. A. Hart . . . . .	212
10.5	The Seven Basic Values by John Finnis . . . . .	216
10.6	A Critical Evaluation of Natural Law Theory . . . . .	223
<b>11</b>	<b>Radical Decisionism: Social Justice on a Strictly Contextualist Basis</b> . . . . .	225
11.1	The Significance of the Institutional Meta-Theory of Law . . . . .	225
11.2	Denial of All Feasible Meta-Theories of Law: Kadi-Justice, the German Free Law Movement, and Carl Schmitt on the Law . . . . .	226
11.3	Decisionism in Jurisprudence, I: Thomas Wilhelmsson on the Small-Scale, Good Narratives on Legal Responsibility . . . . .	230
11.4	Decisionism in Jurisprudence, II: Martti Koskenniemi on the International Lawyer’s Radically Situational Ethics . . . . .	232
11.5	A Critical Comment of Radical Decisionism . . . . .	236
<b>12</b>	<b>Intermission</b> . . . . .	239
12.1	The Ten Frames of Legal Analysis, as Contrasted with Jerzy Wróblewski’s Three Ideologies of Judicial Decision-Making and Kaarle Makkonen’s Three Situations of Legal Decision-Making . . . . .	239
12.2	Jerzy Wróblewski’s Ideology of Legal and Rational Judicial Decision-Making Law as a Compound of the Legislative Ideology, Judicial Ideology, and a Societal Conception of Law and Justice . . . . .	243
12.3	From a Synchronic to a Diachronic Approach: Two Sequential Models of Legal Reasoning . . . . .	248
12.3.1	Neil MacCormick’s Theory of the Three C’s in Legal Reasoning: From Consistency and Coherence to the Consequences of Law . . . . .	249
12.3.2	The <i>Bielefelder Kreis</i> : A Sequential Order of the Linguistic, Systemic, Teleological-Axiological, and Transcategorical Arguments in Legal Reasoning . . . . .	251
<b>13</b>	<b>Law and Metaphysics</b> . . . . .	255
13.1	The Truth of a Legal Sentence As Determined by the Frame of Analysis Adopted . . . . .	255



13.2	The Logico-Conceptual Constitution, Normative Ontology, and Structural Axiology of Law . . . . .	258
13.3	A Systemic Order of Things Among the Rules and Principles of Law . . . . .	263
13.4	Textual Coherence, Institutional Authorities, and the Legal Community . . . . .	266
13.5	(Is There) A Future for Analytical Jurisprudence? . . . . .	268
<b>References . . . . .</b>		<b>271</b>
<b>Name Index . . . . .</b>		<b>283</b>
<b>Subject Index . . . . .</b>		<b>287</b>