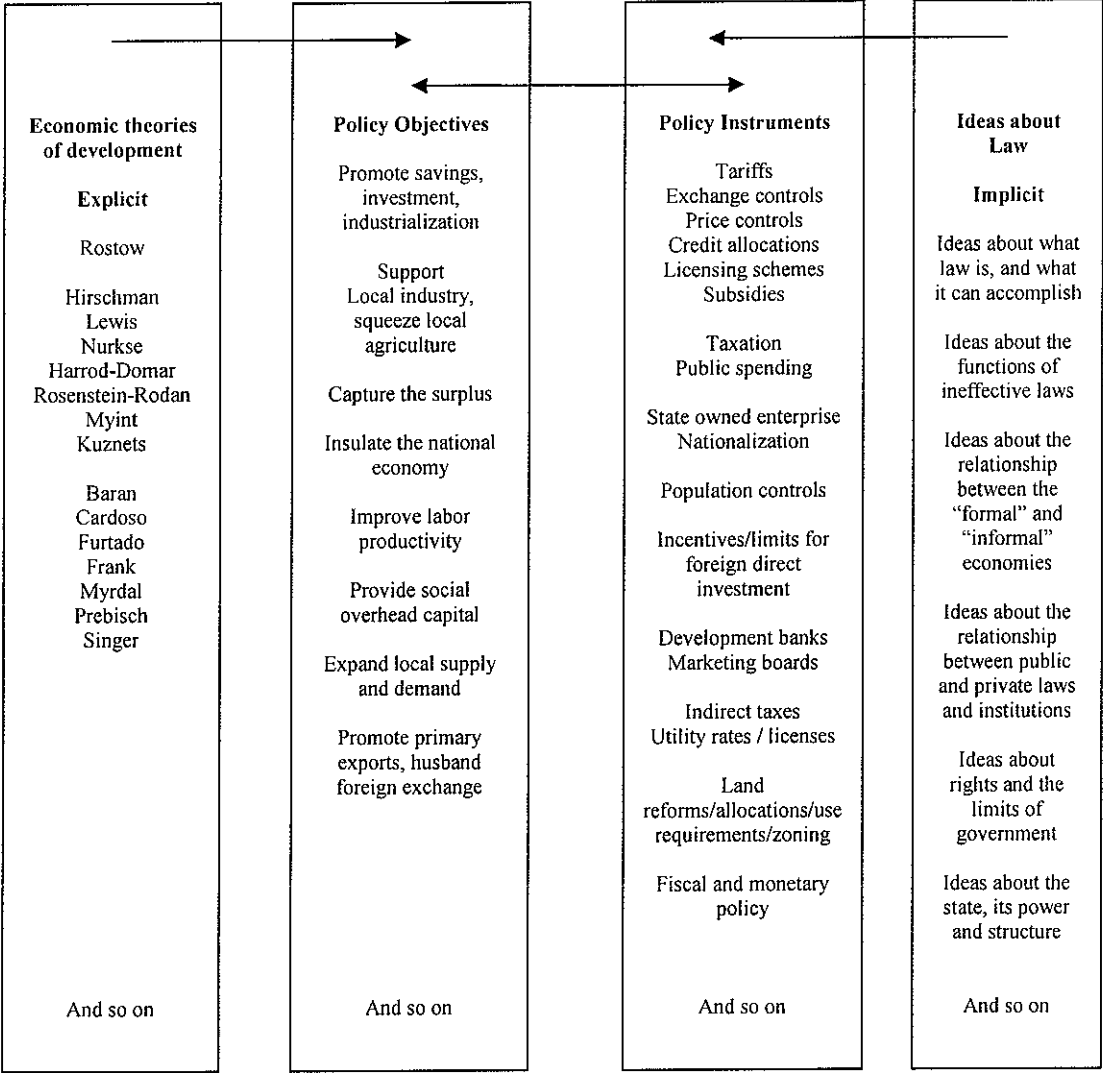


Theories, Objectives, Instruments and Law: 1950-1970



Ideas and Assumptions about Law: 1950-1980

Mainstream Ideas and Assumptions

Legal Pragmatism
Law as the instrument of power
Functionalism

Administrative Law / Bureaucracy
Priority of Public law
Focus on formal regulation

Positivism
Sovereign Authority
Legislative or executive supremacy

Little judicial review
Judges as administrative agents of sovereign purpose

Interpretive discretion
Antiformalism
Standards and principles more significant than rules
Expertise

Law as policy

Economic and social rights

International law formalism
National sovereignty and self determination

United Nations

Heterogeneous ideas and assumptions (from left and right)

Legal sociology
Gap between law in the books and law in action

Criticism of legal instrumentalism

Legal pluralism
More than one legal order
More than one function or purpose
More than one applicable rule

Significance of informal arrangements, private ordering, customary practices and norms
Importance of exceptions and non-compliance
Strategic use of non-enforcement, non-compliance, legal permissions and privileges

Loss of faith in expert discretion
A more emphatic anti-formalism

Appreciation for the significance of private ordering and dynamics of private reaction to legal rules and institutions
Strategic uses of law by social actors

Importance of restraints on public power
Rise of legal rights as restraints on the state
International human rights

Pessimism about law as an instrument of social and economic change

Judicial review and autonomy

Public choice theory – rent-seeking
Irrationality of the state

Loss of confidence in public international law as mechanism for distributive justice

Rise of interest in international private ordering, private finance, trade law, the GATT, Central bank cooperation

Legal ideas and assumptions: 1980-2000

Mainstream – neoliberal ideas and assumptions

Instrumentalism and faith in legislative effectiveness continued

Private law > public law
Law as a limit on administrative and legislative discretion
Private rights and constitutional process
Judicial review
Neo-formalism about public law limits

Property rights yes, price distorting entitlements no

Private standard setting and codes of conduct
Government failure

GATT / TRIPS
Formalism about international obligations
Bilateral investment treaties

Formalization of private law and of entrenched rights

Anticorruption campaigns
Transparency

Kaldor-Hicks for judges
Efficiency as adjudicative target

Corporate law reform
Investor protection and guarantees

International human rights as a development strategy

Heterogeneous ideas and assumptions

Legal sociology / limits to legislative effectiveness

Private rent seeking
Failures of private decision making and management

Legal pluralism

Critiques of formalization and anti-corruption as coherent strategies for legal implementation

Significance of background norms for private bargaining power
Market prices a function of background legal entitlements

Critiques of informality and private dispute settlement – ubiquity of unequal bargaining power, information asymmetries and agency problems

Distributional and cultural significance of alternative corporate governance models

Instability of distinctions between private law and regulation, subsidies and non-tariff barriers, costs of the transaction and costs of the product
Need for discretion
Distributive significance of interpretive choices

Arguments for regulation:
compensation for market failures, for transaction costs, for information problems, for the irrationality of markets, for protection and allocation of public goods

reinterpretation of private law arrangements as regulatory

Distributional significance of choices among regulatory forms – disclosure, mandates, private liability, criminal sanction, taxation

Interactions of regulatory machinery, institutional forms and private rights

Critique of human rights as a recipe for development rather than a vernacular for distributive choice

New governance ideas – regulatory negotiations

International significance of rents for bargaining power

An alliance of heterogeneities

Political and Economic Thought

Institutionalism in Economics
Endogeneity of social and institutional factors

Focus on information costs, public goods, path dependence, ubiquity of micro-markets, bargaining power problems, agency problems, monopoly and anticompetitive behavior, transactions costs, arguments for regulation -- Stiglitz

Social disaggregated powers
Public choice theory
Power/knowledge -- identity constitution
Foucault

Social structures and dynamics
Dualism -- Myrdal
Leading and lagging sectors

World Systems Analysis
Center and Periphery
Dependency theory

Dependent development
Modes of insertion in the global economy
Significance of bargaining power, opportunities to capture rents

Decisionism -- foregrounding the political and ethical choices inherent in policy
The experience of deciding / ubiquity of unknowing critiques of expertise

Critiques of human rights as universal ethical or economic models

Legal Thought

Legal sociology
Gap between law in the books and in action

Internal critiques of formalism
Conflicts, gaps and ambiguities in the law
Critiques of analytic and formal legal reasoning, whether ethical or instrumental
Significance of privileges and competing rights

American legal realism
Criticism of legal instrumentalism, pragmatism, deduction from social form and purpose
Dualing principles and purposes
Legal pluralism
Overlapping legal regimes

The semiotics of legal reasoning
The importance of stylized argument fragments and background conceptions of the normal
Legal consciousness and the ideological component of legal reasoning
Internal and external criticisms of rules and of standards

Criticism of modern liberal modes of adjudication rooted in economic analytics, ethical theory or political philosophy

Criticism of expertise, blind spots and biases
The institutional and normative fetishism of best practice

Attention to distributive choices
Politics and economics of legal science

Critiques of human rights