
Contents

Figures ix

Acknowledgements x

1 Introduction 1

Rewards of jurisprudence 2

Jurisprudence 3

The arrangement of the contents of this book 9

Old debates and new frontiers 19

PART 1 LAW AS IT IS

2 British legal positivism: Philosophical roots and command theories 23

Positivism and logical positivism 24

A continental beginning 31

Thomas Hobbes and *Leviathan* 32

Jeremy Bentham: law and the principle of utility 34

John Austin's command theory of law 40

Recommended further reading 52

3 Herbert Hart's new beginning and new questions 53

Rules and obligations 54

External and internal aspects of a legal rule 55

Primary and secondary rules of obligation: emergence of
a legal system 57

The rule of recognition 59

International law 63

Law and morality 64

British positivism's contribution to jurisprudence 67

Recommended further reading 68

4 Germanic legal positivism: Hans Kelsen's quest for the pure theory of law 69

From empiricism to transcendental idealism 70

From transcendental idealism to the pure theory of law 72

Distinguishing legal and moral norms 76

Validity and the basic norm 79

| | |
|--|-----|
| Logical unity of the legal order and determining whether a norm belongs to the legal order | 83 |
| Legitimacy and revolution | 87 |
| International law | 97 |
| An evaluation of the pure theory of law | 103 |
| Recommended further reading | 107 |

| | |
|--------------------------------------|------------|
| 5 Realism in legal theory | 109 |
| Legal formalism and legal positivism | 110 |
| American realism | 112 |
| Scandinavian realism | 126 |
| Recommended further reading | 137 |

PART 2 LAW AND MORALITY

| | |
|---|------------|
| 6 Natural law tradition from antiquity to the Enlightenment | 141 |
| Law of nature, natural right and natural law | 142 |
| Two great questions in natural law theory | 145 |
| Fusion of law and morals in early societies | 146 |
| Natural law thinking in Greek philosophy | 148 |
| Reception of natural law in Rome | 158 |
| Christian natural law | 161 |
| Theological beginnings of a secular natural law | 169 |
| The rise of secular natural law: natural rights and social contract | 174 |
| Natural rights and common law rights | 183 |
| Legacy of the natural rights theorists | 186 |
| Recommended further reading | 186 |
| 7 John Finnis' restatement of classical natural law | 187 |
| Finnis' defence of classical natural law | 188 |
| A return to divine natural law? | 198 |
| The enduring legacy of natural law theory | 203 |
| Recommended further reading | 203 |
| 8 Separation of law and morality | 204 |
| Lon Fuller on the morality of law | 205 |
| Ronald Dworkin and the integrity of law | 217 |
| Recommended further reading | 228 |

PART 3 SOCIAL DIMENSIONS OF LAW

| | |
|---|------------|
| 9 Sociological jurisprudence and sociology of law | 231 |
| Sociology, sociology of law and sociological jurisprudence | 232 |
| Society and class struggle: the sociology of Karl Marx | 235 |
| Max Weber and the rationalisation of the law | 241 |
| Law and social solidarity: Emile Durkheim's legal sociology | 247 |

- The living law: the legal sociology of Eugen Ehrlich 253
- Roscoe Pound and law as social engineering 258
- The achievements of the sociological tradition 261
- Recommended further reading 262
- 10 Radical jurisprudence: Challenges to liberal legal theory 263**
 - Liberalism and liberal legal theory 263
 - Challenge of the critical legal studies (CLS) movement 268
 - Postmodernist challenge 275
 - Radical feminist jurisprudence 290
 - Challenges to liberal jurisprudence: concluding thoughts 298
 - Recommended further reading 300
- 11 Economic analysis of law 301**
 - Background and basic concepts 303
 - Transaction costs and the law 307
 - Efficiency of the common law hypothesis 318
 - Efficiency, wealth maximisation and justice: some criticisms of the Coasean analysis 323
 - Public choice theory: the economics of legislation 325
 - Importance of economic analysis of law 331
 - Recommended further reading 332
- 12 Evolutionary jurisprudence 333**
 - Introduction 333
 - Argument from design versus the principle of the accumulation of design 335
 - The common law beginnings and the Darwinians before Darwin 337
 - Eighteenth-century evolutionism compared with the German historical approach 343
 - The Austrian school and spontaneous order 344
 - Scientific explanations 349
 - Role of purposive action in legal evolution: the contribution of institutional theory 350
 - Pathways of legal evolution: the lessons from new institutionalism 357
 - Normative implications 359
 - Recommended further reading 362

PART 4 RIGHTS AND JUSTICE

- 13 Fundamental legal conceptions: The building blocks of legal norms 365**
 - Bentham and the classification of legal mandates 366
 - Hohfeld's analysis of jural relations: the exposition of fundamental legal conceptions 370
 - Connecting the two 'boxes' in Hohfeld's system 381

| | |
|---|------------|
| Some logical puzzles in Hohfeld's system | 382 |
| The value of Hohfeld's system | 387 |
| Recommended further reading | 388 |
| 14 Justice | 389 |
| Justice according to law and justice of the law | 390 |
| Justice as virtue | 393 |
| Legal justice | 400 |
| Distributive justice as social justice | 405 |
| Justice as fairness: Rawls' theory of justice | 409 |
| Entitlement theory of justice: Nozick's response to Rawls | 415 |
| Evolutionary theory of justice | 422 |
| Recommended further reading | 434 |
| References | 435 |
| Index | 448 |