

CONTENTS

Preface *page* xv

1 Introduction 1

Practical skills and legal theory 1

Judges make law – endlessly 3

And judges also make policy – regularly 4

The interpretative approach is wanting 6

Judges and legal theory 7

Theorists and legal practice 9

Bridging the divide 12

A précis – more or less 14

Conclusion 23

2 Muddling along 24

Practical muddling along 24

The declaratory theory of law 25

Positivism 27

Die Meistersinger von Nürnberg 27

Positivism and its stubborn survival 29

Aspirational positivism 34

Romantic positivism 37

| | |
|---|-----------|
| Natural law | 42 |
| Superstition and/or speculation | 42 |
| Natural law and human rights jurisprudence | 45 |
| Natural law and parliamentary supremacy | 49 |
| Conclusion | 52 |
| 3 The 'curse' of formalism | 54 |
| Timur, the barbarian | 54 |
| The lingering legacy of formalism | 55 |
| Formalism will not stay dead | 56 |
| The formalism of 'presumptive positivism' | 58 |
| A short portrait of the formalist judge | 62 |
| A case study: <i>Sevcon Ltd v Lucas CAB Ltd</i> | 66 |
| Conclusion | 73 |
| 4 Legal fundamentalism | 75 |
| Legal fundamentalism | 75 |
| The democratic legitimacy of the judiciary | 77 |
| Judicial independence and impartiality | 77 |
| The will of the people | 79 |
| The judge's values! | 84 |
| Other considerations | 86 |
| 'Judicial activism' | 88 |
| The parable of the activist judge | 88 |
| An ersatz concept | 91 |
| And Lord Denning? | 94 |
| Conservative activism | 99 |

| | |
|--|------------|
| A 'political' process! | 101 |
| Conclusion | 104 |
| 5 The idolatry of certainty | 108 |
| A conversation in chambers | 108 |
| An uncertain world | 115 |
| The law is inherently uncertain | 115 |
| Acknowledged causes of uncertainty | 122 |
| The uncertainty of the facts | 122 |
| The uncertainty in defining the legal dispute | 123 |
| The uncertainty of the <i>ratio</i> | 123 |
| The uncertainty of exceptions | 124 |
| The uncertainty as to what other jurisdictions are up to | 124 |
| The uncertainty arising from an abundance of riches | 125 |
| Some underlying causes of uncertainty | 125 |
| The imprecision of language | 125 |
| The need for finality in judicial adjudication | 126 |
| The 'status' of justice | 128 |
| Two critical consequences | 130 |
| Certainty and precedent | 131 |
| Certainty as a relevant consideration | 135 |
| Conclusion | 137 |
| 6 The piety of precedent | 139 |
| A foolish consistency . . . | 139 |
| The doctrine of precedent | 141 |
| The perceived value of precedent unmasked | 144 |

| | |
|--|------------|
| Stability | 145 |
| Reliance | 148 |
| Legitimacy | 150 |
| Judicial craftsmanship and so on | 151 |
| Efficiency | 153 |
| 'Non-binding' precedents? | 153 |
| Persuasive precedents | 154 |
| 'Famous dicta' | 154 |
| Relevance and justice | 155 |
| The 'attitude of mind' | 157 |
| Conclusion | 161 |
| 7 The foibles of precedent – a case study | 164 |
| <i>Lewis v Attorney-General of Jamaica</i> | 164 |
| An assessment, a rebuke and a note of optimism | 173 |
| Postscript; don't speak too soon! | 176 |
| 8 There is no impersonal law | 184 |
| A shout from the rooftops | 184 |
| An internal logic and coherence? | 186 |
| The doyen – Ronald Dworkin | 188 |
| Dworkin's implausible distinction between principles and rules | 192 |
| Dworkin's implausible distinction between principles and policy | 195 |
| Dworkin's implausible rejection of judicial discretion | 202 |
| Dworkin's implausible justification for precedent | 205 |

| | |
|--|------------|
| <i>Trigwell's case: Hercules J confronts Athena J</i> | 208 |
| Conclusion | 214 |
| 9 So, what is the law? | 217 |
| 'The law' is essentially a process | 217 |
| Is 'the law' what the courts ultimately decide? | 219 |
| A more fluid concept | 222 |
| The 'as is' and 'ought to be' distinction dissimulated | 224 |
| The rule of law in the scheme of things | 225 |
| <i>Rechtsstaat</i> or <i>justizstaat</i> ? | 231 |
| The judicial oath | 238 |
| Conclusion | 239 |
| 10 The constraints on the judiciary | 241 |
| The significance of judicial constraints | 241 |
| The external constraints | 243 |
| Internalised constraints | 245 |
| Some structural constraints | 249 |
| A legitimate role for certainty | 250 |
| A justifiable role for precedent | 251 |
| 'Leave it to Parliament' | 254 |
| Minimalism | 265 |
| Vanquishing general discretions | 266 |
| Conclusion | 267 |
| 11 Towards a new judicial methodology | 270 |
| A methodology for the twenty-first century | 270 |
| Justice and relevance | 272 |

| | | |
|-----------|---|------------|
| | The reality of justice | 272 |
| | But is justice 'knowable'? | 281 |
| | The imperative to be relevant | 287 |
| | A case study: <i>Fletcher Challenge Energy v ECNZ Ltd</i> | 289 |
| | Conclusion | 299 |
| 12 | Of realism and pragmatism | 302 |
| | Hard realism | 302 |
| | A new realism | 302 |
| | Realism in practice | 305 |
| | Determined pragmatism | 307 |
| | Legal pragmatism | 307 |
| | Pragmatism in practice | 312 |
| | Conclusion | 314 |
| 13 | Of ... practical reasoning and principles | 316 |
| | Practical reasoning | 316 |
| | The theory of practical reasoning | 316 |
| | Practical, practical reasoning | 320 |
| | The all-important facts | 321 |
| | The legal issue | 327 |
| | The initial premise | 329 |
| | A community of considerations | 329 |
| | Community values | 331 |
| | Principles to the forefront | 334 |
| | Common sense | 334 |
| | A summary | 338 |

| | |
|--|------------|
| Principles | 339 |
| Principles and reason | 339 |
| Legal principles | 343 |
| Conclusion | 347 |
| 14 Taking law seriously | 349 |
| So, will there be a difference? | 349 |
| Making overt that which is covert | 349 |
| The flow of the river ... | 350 |
| The main differences | 351 |
| Taking law seriously | 354 |
| 15 A theory of ameliorative justice | 358 |
| Our Lady of Justice ... why the sword? | 358 |
| The precept of non-exploitation | 360 |
| The ground is cleared – a reconciliation | 364 |
| The ground is further cleared – justice? | 367 |
| Liberal individualism | 371 |
| Equity | 375 |
| The common law | 379 |
| Contract | 382 |
| Tort | 386 |
| Public and administrative law | 387 |
| ... of Marxism and Critical Legal Studies | 388 |
| Justice and fairness | 392 |
| Conclusion | 394 |
| <i>Subject index</i> | 396 |
| <i>Authors index</i> | 411 |