

Understanding Jurisprudence

An Introduction to Legal Theory

Third edition

RAYMOND WACKS

BA, LLB, LLM, LLD, MLitt, PhD

Emeritus Professor of Law and Legal Theory

OXFORD
UNIVERSITY PRESS

Contents

<i>Preface</i>	xv
<i>Preface to first edition</i>	xvii
<i>List of Tables and Figures</i>	xix
<i>Acknowledgements</i>	xxi
1 Introduction	1
2 Natural law and morality	10
3 Classical legal positivism	57
4 Modern legal positivism	77
5 Dworkin and the moral integrity of law	118
6 Legal realism	145
7 Law and social theory	162
8 Historical and anthropological jurisprudence	196
9 Theories of justice	212
10 Rights	233
11 Why obey the law?	265
12 Why punish?	271
13 Critical legal theory	281
14 Feminist and critical race theory	299
15 Jurisprudence understood?	317
Glossary	319
Index	323

Detailed Contents

<i>Preface</i>	xv
<i>Preface to first edition</i>	xvii
<i>List of Tables and Figures</i>	xix
<i>Acknowledgements</i>	xxi
1 Introduction	1
1.1 An analgesic?	1
1.2 Reading	3
1.3 Why jurisprudence?	4
1.4 Descriptive, normative, and critical legal theory	5
1.5 Is eating people wrong?	6
1.6 The point of legal theory	8
2 Natural law and morality	10
2.1 Classical natural law theory	11
2.1.1 Plato and Aristotle	11
2.1.2 St Thomas Aquinas	12
2.2 Contemporary natural law theory	16
2.3 Natural law in political philosophy	17
2.3.1 Hobbes	17
2.3.2 Locke	19
2.3.3 Rousseau	20
2.4 The decline of natural law theory	21
2.5 The revival of natural law theory	22
2.6 John Finnis	23
2.7 Hard and soft natural law?	26
2.8 Moral realism	27
2.9 Critique	30
2.10 Law and morality	30
2.10.1 Natural law v positivism	31
2.10.2 Hart v Fuller	33
2.10.3 Hart v Devlin	35
2.11 Judicial morality: a case study	40
2.11.1 Moral questions	40
2.11.2 Semantic questions	41
2.11.3 Public or private morality?	44
2.11.4 The judge's duty	45
2.11.5 The judge's choice	46
2.11.6 The judge's surrender	49
2.11.7 The judge and the lawyer	50
2.12 Questions	51
2.13 Further reading	53

3 Classical legal positivism	57
3.1 What is legal positivism?	57
3.1.1 What legal positivism is not	58
3.2 Jeremy Bentham: the Luther of jurisprudence?	60
3.2.1 In search of determinacy	61
3.2.2 Judge & Co	62
3.2.3 Codification	63
3.3 John Austin: naive empiricist?	64
3.3.1 Imperatives	64
3.3.2 Laws properly so called	65
3.3.3 Law and power	65
3.4 Bentham and Austin compared	67
3.4.1 Their general approaches	67
3.4.2 The definition of law	68
3.4.3 Commands	68
3.4.4 Sovereignty	71
3.4.5 Sanctions	73
3.5 Questions	74
3.6 Further reading	75
4 Modern legal positivism	77
4.1 The foundations	77
4.2 HLA Hart	78
4.2.1 Hart as legal positivist	79
4.2.2 Law and language	80
4.2.3 Law as a system of rules	81
4.2.4 Social rules	81
4.2.5 Secondary rules	82
4.2.6 The rule of recognition	83
4.2.7 The existence of a legal system	85
4.2.8 The 'internal point of view'	86
4.2.9 The judicial function	87
4.2.10 'An essay in descriptive sociology'?	87
4.2.11 Critique	88
4.3 Hans Kelsen	89
4.3.1 Unadulterated law	90
4.3.2 A hierarchy of norms	92
4.3.3 The <i>Grundnorm</i>	92
4.3.4 Validity, efficacy, and revolution	97
4.3.5 International law	99
4.3.6 Kelsen and Kant	102
4.3.7 Democracy and the rule of law	104
4.3.8 Critique	105
4.4 Joseph Raz	106
4.4.1 The 'sources thesis'	106
4.4.2 Practical reason	107
4.4.3 Committed and detached statements	108
4.4.4 Critique	108
4.5 Hard and soft positivism	110

4.6 Questions	113
4.7 Further reading	115
5 Dworkin and the moral integrity of law	118
5.1 An overview	119
5.2 The assault on positivism	120
5.2.1 Principles and policies	121
5.2.2 Hercules and hard cases	122
5.2.3 One right answer	124
5.2.4 The semantic sting	124
5.2.5 The rights thesis	127
5.2.6 Law as literature	128
5.2.7 Law as integrity	129
5.2.8 Community	130
5.3 Equality	131
5.4 Good lives and living well	133
5.5 The assault on Dworkin	134
5.6 Questions	142
5.7 Further reading	143
6 Legal realism	145
6.1 What are realists realistic about?	145
6.2 American Realism	146
6.2.1 Oliver Wendell Holmes Jr	149
6.2.2 Karl Llewellyn	149
6.2.3 Jerome Frank	151
6.2.4 The American realist method	152
6.3 The Scandinavian realists	154
6.3.1 Alf Ross	155
6.3.2 Karl Olivecrona	157
6.3.3 Critique	158
6.4 Realism and psychology	158
6.5 Questions	159
6.6 Further reading	160
7 Law and social theory	162
7.1 What is a sociological perspective?	163
7.2 Roscoe Pound	164
7.2.1 Social interests and 'jural postulates'	164
7.2.2 Critique of Pound	165
7.3 Eugen Ehrlich	166
7.4 Émile Durkheim	167
7.4.1 Law and social solidarity	168
7.4.2 The function of punishment	168
7.4.3 Critique of Durkheim	169
7.5 Max Weber	170
7.5.1 Weber's typology of law	171
7.5.2 Weber's theory of legitimate domination	173
7.5.3 Capitalism and law	174
7.5.4 Critique of Weber	176

7.6 Karl Marx	177
7.6.1 Historicism	178
7.6.2 Base and superstructure	179
7.6.3 Ideology	180
7.6.4 Goodbye to law?	181
7.6.5 Legal fetishism	181
7.6.6 Conflict or consensus?	182
7.7 Michel Foucault	186
7.7.1 Power	187
7.7.2 The law	188
7.7.3 Critique	189
7.8 Jürgen Habermas	189
7.8.1 The modern state	189
7.8.2 The law	190
7.8.3 Critique	190
7.9 Autopoiesis	191
7.10 Whither the sociology of law?	191
7.11 Questions	192
7.12 Further reading	193
8 Historical and anthropological jurisprudence	196
8.1 Why do legal systems differ?	196
8.2 The historical school	198
8.2.1 Savigny	198
8.3 Sir Henry Maine	200
8.3.1 The evolution of law	201
8.3.2 Natural law	201
8.3.3 Fictions	202
8.3.4 Critique	202
8.4 Anthropological jurisprudence	203
8.4.1 'Law' in tribal societies	203
8.4.2 Bronislaw Malinowski	204
8.4.3 E Adamson Hoebel	205
8.4.4 Max Gluckman	205
8.4.5 Paul Bohannan	206
8.4.6 Leopold Pospisil	206
8.4.7 Other theorists	207
8.5 Legal pluralism	207
8.6 Questions	208
8.7 Further reading	209
9 Theories of justice	212
9.1 Utilitarianism	213
9.1.1 Consequences	214
9.1.2 Preferences	215
9.1.3 Critique of utilitarianism	215
9.2 The economic analysis of law	217
9.2.1 Critique	220

9.3	John Rawls	221
9.3.1	The rejection of utilitarianism	222
9.3.2	Social contractarianism	222
9.3.3	The original position	223
9.3.4	The two principles of justice	223
9.3.5	Reconsideration	225
9.3.6	Critique of Rawls	226
9.4	Robert Nozick	227
9.5	Questions	231
9.6	Further reading	231
10	Rights	233
10.1	What is a right?	233
10.2	Theories of rights	236
10.2.1	Right-based theories	237
10.3	Human rights	239
10.3.1	Communitarianism	241
10.3.2	Relativism	243
10.3.3	Utilitarianism	243
10.3.4	Socialism	244
10.3.5	Legal positivism	244
10.3.6	Critical theory	245
10.4	The future of human rights	245
10.5	Animal rights	246
10.5.1	Ethical subjectivism and intuitionism	246
10.5.2	Utilitarianism	247
10.5.3	Can animals have rights?	248
10.5.4	Social contractarianism	251
10.5.5	Intrinsic worth	252
10.5.6	The rights of animals	252
10.6	Freedom of expression: a case study	254
10.6.1	Individual or community?	255
10.6.2	Speaker or audience?	255
10.6.3	The argument from truth	256
10.6.4	Self-government	257
10.6.5	Press freedom	258
10.6.6	The First Amendment	259
10.6.7	Speech and action	260
10.6.8	Balancing	260
10.7	Questions	261
10.8	Further reading	262
11	Why obey the law?	265
11.1	The terms of the debate	265
11.1.1	A <i>prima facie</i> duty?	266
11.1.2	Justifying the duty	266
11.2	Questions	269
11.3	Further reading	269

12 Why punish?	271
12.1 Justifying punishment	272
12.2 Retributivism	273
12.2.1 Weak and strong retributivists	274
12.2.2 Critique	275
12.3 Consequentialism	276
12.4 Critique	276
12.5 Restorative justice	277
12.6 Critique	277
12.7 Communication	278
12.8 Critique	278
12.9 Questions	278
12.10 Further reading	279
13 Critical legal theory	281
13.1 Critical Legal Studies	281
13.1.1 Trashing CLS?	285
13.2 Postmodern legal theory	287
13.2.1 What is it?	287
13.2.2 The death of the subject	289
13.2.3 Jacques Lacan	289
13.2.4 Jacques Derrida	290
13.2.5 Foucault and Habermas	291
13.2.6 The postmodern agenda	291
13.2.7 Language	292
13.2.8 Critical theory and individual rights	293
13.2.9 Critique	294
13.3 Questions	295
13.4 Further reading	296
14 Feminist and critical race theory	299
14.1 Feminist legal theories	299
14.2 Origins of feminism	300
14.3 Legal feminisms	302
14.3.1 Liberal feminism	302
14.3.2 Radical feminism	303
14.3.3 Postmodern feminism	305
14.3.4 Difference feminism	306
14.3.5 Other feminisms	308
14.4 Critique	308
14.5 Critical race theory	310
14.5.1 CRT and feminist theory	312
14.5.2 CRT and postmodernism	313
14.6 Questions	314
14.7 Further reading	315
15 Jurisprudence understood?	317
Glossary	319
Index	323