

Cambridge University Press
978-0-521-61483-2 - Jurisprudence
Suri Ratnapala
Frontmatter
[More information](#)

Jurisprudence

Jurisprudence is about the nature of law and justice. It embraces studies and theories from a range of disciplines such as history, sociology, political science, philosophy, psychology and even economics. Why do people obey the law? How does law serve society? What is law's relation to morality? What is the nature of rights?

This book introduces and critically discusses the major traditions of jurisprudence. Writing in a lucid and accessible style, Suri Ratnapala considers a wide range of views, bringing conceptual clarity to the debates at hand.

From Plato and Aristotle to the medieval Scholastics, from Enlightenment thinkers to postmodernists and economic analysts of law, this important volume examines the great philosophical debates and gives insight into the central questions concerning law and justice.

Suri Ratnapala is Professor of Public Law at the University of Queensland.

Cambridge University Press
978-0-521-61483-2 - Jurisprudence
Suri Ratnapala
Frontmatter
[More information](#)

Jurisprudence

Suri Ratnapala



CAMBRIDGE
UNIVERSITY PRESS

Cambridge University Press
978-0-521-61483-2 - Jurisprudence
Suri Ratnapala
Frontmatter
[More information](#)

CAMBRIDGE UNIVERSITY PRESS

Cambridge, New York, Melbourne, Madrid, Cape Town, Singapore, São Paulo, Delhi

Cambridge University Press
477 Williamstown Road, Port Melbourne, VIC 3207, Australia
www.cambridge.edu.au
Information on this title: www.cambridge.org/9780521614832

© Suri Ratnapala 2009

First published 2009

Cover design by Modern Art Production Group
Typeset by Aptara
Printed in China by Printplus

National Library of Australia Cataloguing in Publication data
Suri Ratnapala
Jurisprudence
9780521614832 (pbk.)
Includes index
Bibliography
Jurisprudence
340.1

978-0-521-614-832 paperback

Reproduction and Communication for educational purposes

The Australian *Copyright Act 1968* (the Act) allows a maximum of one chapter or 10% of the pages of this publication, whichever is the greater, to be reproduced and/or communicated by any educational institution for its educational purposes provided that the educational institution (or the body that administers it) has given a remuneration notice to Copyright Agency Limited (CAL) under the Act.

For details of the CAL licence for educational institutions contact:

Copyright Agency Limited
Level 15, 233 Castlereagh Street
Sydney NSW 2000
Telephone: (02) 9394 7600
Facsimile: (02) 9394 7601
Email: info@copyright.com.au

Reproduction and Communication for other purposes

Except as permitted under the Act (for example a fair dealing for the purposes of study, research, criticism or review) no part of this publication may be reproduced, stored in a retrieval system, communicated or transmitted in any form or by any means without prior written permission. All inquiries should be made to the publisher at the address above.

Cambridge University Press has no responsibility for the persistence or accuracy of URLs for external or third-party internet websites referred to in this publication and does not guarantee that any content on such websites is, or will remain, accurate or appropriate. Information regarding prices, travel timetables and other factual information given in this work are correct at the time of first printing but Cambridge University Press does not guarantee the accuracy of such information thereafter.

Cambridge University Press
978-0-521-61483-2 - Jurisprudence
Suri Ratnapala
Frontmatter
[More information](#)

To Vidura Ravindranatha, Rusri and Adrian Surindra

Contents

Acknowledgements xi

List of figures xiii

1 Introduction 1

Rewards of jurisprudence 2

Jurisprudence 3

The arrangement of the contents of this book 9

Old debates and new frontiers 17

PART 1 LAW AS IT IS

2 British Legal Positivism 21

Positivism and logical positivism 22

Thomas Hobbes and *Leviathan* 28

Jeremy Bentham: law and the principle of utility 30

John Austin's command theory of law 36

Herbert Hart's new beginning: the burial of the command
concept of law 48

British positivism's contribution to jurisprudence 56

3 Germanic Legal Positivism: Hans Kelsen's Quest for the Pure Theory of Law 58

From empiricism to transcendental idealism 59

From transcendental idealism to the pure theory of law 61

Distinguishing legal and moral norms 65

Validity and the basic norm 67

Logical unity of the legal order and determining whether a
norm belongs to the legal order 71

Legitimacy and revolution 75

International law 84

An evaluation of the pure theory of law 89

4 Realism in Legal Theory 93

Legal formalism and legal positivism 94

American realism 96

Scandinavian realism 109

PART 2 LAW AND MORALITY

- 5 Natural Law Tradition in Jurisprudence 119**
 Law of nature, natural right and natural law 120
 Two great questions in natural law theory 122
 Fusion of law and morals in early societies 123
 Natural law thinking in Greek philosophy 125
 Reception of natural law in Rome 133
 Christian natural law 136
 Theological beginnings of a secular natural law 143
 Rise of secular natural law: natural rights and social contract 146
 John Finnis' restatement of classical natural law 151
 The enduring legacy of natural law theory 159
- 6 Separation of Law and Morality 161**
 Lon Fuller on the morality of law 161
 Ronald Dworkin and the integrity of law 173

PART 3 SOCIAL DIMENSIONS OF LAW

- 7 Sociological Jurisprudence and Sociology of Law 185**
 Sociology, sociology of law and sociological jurisprudence 186
 Society and class struggle: the sociology of Karl Marx 189
 Max Weber and the rationalisation of the law 192
 Law and social solidarity: Émile Durkheim's legal sociology 197
 The living law: the legal sociology of Eugen Ehrlich 203
 Roscoe Pound and law as social engineering 207
 The achievements of the sociological tradition 210
- 8 Radical Jurisprudence: Challenges to Liberal Legal Theory 212**
 Liberalism and liberal legal theory 212
 Challenge of the critical legal studies (CLS) movement 217
 Postmodernist challenge 223
 Feminist jurisprudence 233
 Challenges to liberal jurisprudence: concluding thoughts 239
- 9 Economic Analysis of Law 242**
 Background and basic concepts 243
 Transaction costs and the law 247
 Efficiency of the common law hypothesis 256
 Public choice theory: the economics of legislation 261
 Efficiency, wealth maximisation and justice 264
- 10 Evolutionary Jurisprudence 267**
 Introduction 267
 Argument from design versus the principle of the accumulation
 of design 269
 The common law beginnings and the Darwinians before Darwin 271

Eighteenth century evolutionism compared with the German historical approach	277
The Austrian school and spontaneous order	277
Scientific explanations	279
Role of purposive action in legal evolution: the contribution of institutional theory	280
Pathways of legal evolution: the lessons from new institutionalism	287
Normative implications	289

PART 4 RIGHTS AND JUSTICE

11 Fundamental Legal Conceptions: the Building Blocks of Legal Norms	295
Bentham and the classification of legal mandates	296
Hohfeld's analysis of jural relations: the exposition of fundamental legal conceptions	300
Connecting the two 'boxes' in Hohfeld's system	310
Some logical puzzles in Hohfeld's system	311
Value of Hohfeld's system	316
12 Justice	318
Justice according to law and justice of the law	319
Justice as virtue	320
Legal justice	329
Distributive justice as social justice	333
Justice as fairness: Rawls' theory of justice	336
Entitlement theory of justice: Nozick's response to Rawls	343
Evolutionary theory of justice	349
<i>References</i>	358
<i>Index</i>	366

Acknowledgements

The birth of this book owes most to the people at the Cambridge University Press who foresaw its value, placed their confidence in me to deliver the work and patiently, kindly but relentlessly pressured me to complete it. I must mention first Jill Henry, the publisher who persuaded me to undertake this work amidst the enormous pressures of teaching and the somewhat different research expectations of my school and university. Jill's enthusiasm and commitment was maintained by her successors, Zoe Hamilton and Susan Hanley, whose encouragement and understanding helped me to sustain my effort. I am grateful to Kath Harper, for her sharp editorial scrutiny of the manuscript and the improvements that she offered.

I received useful insights from the anonymous reviewers and I am indebted to the scholars, both past and present, who have inspired me over the years, particularly in the classical liberal tradition.

Work of this nature consumes precious years of an author's life and is not possible without the sympathy and support of family. I owe them the greatest debt.

Suri Ratnapala
2009

Figures

- 1.1 Types of jurisprudence 5
- 2.1 Forms of knowledge 23
- 2.2 Province of law according to legal positivism 27
- 2.3 Austin's laws 40
- 2.4 Hart's positivism 53
- 3.1 Transcendental idealism in the pure theory of law 63
- 3.2 The tree of norms 73
- 3.3 Monist version 1: primacy of international law 87
- 3.4 Monist version 2: primacy of national law 88
- 4.1 American and Scandinavian realisms at a glance 94
- 4.2 Divergence of legal positivism and American legal realism 96
- 4.3 Idea and fact 112
- 5.1 Variance of theories concerning sources and effects of natural law 124
- 5.2 Aquinas' universe of the law 143
- 11.1 Bentham on liberty and duty 297
- 11.2 Jural correlatives 301
- 11.3 Jural opposites 302
- 11.4 Jural contradictories 303
- 11.5 All the jural relations 303
- 11.6 Liberty and right disentangled 307
- 12.1 Kinds of justice 321
- 12.2 Aristotle and justice 323
- 12.3 Aristotle's just constitution 327
- 12.4 Legal justice 329