# LLOYD'S INTRODUCTION TO JURISPRUDENCE

### SIXTH EDITION

by

M.D.A. FREEMAN, LL.M.

Professor of English Law in the University of London

LONDON SWEET & MAXWELL LTD. 1994

# Contents

	ace to the Sixth Edition	page v
	n the Preface to the First Edition	ix
	nowledgments	XV 
	e of Cases	xxxiii
Iabi	e of Statutes	xxxvii
1.	NATURE OF JURISPRUDENCE	1
	What is Jurisprudence?	1
	The Relevance of Jurisprudence	2
	Acquiring Social Knowledge	6
	Normative Character of Law	11 12
	"Ought" and "Is"	14
	Form (or Structure) and Content	14
	Philosophy of Law? The Need for a Comprehensive Jurisprudence	15
	Jurisprudence Today	16
	Julispi udence Today	10
	EXTRACTS	
	J. Austin The Uses of the Study of Jurisprudence	20
	W.L. Twining Some Jobs for Jurisprudence	
	J. Shklar Legalism	
	T. Eagleton <i>Ideology</i>	
	D. Hume A Treatise of Human Nature	34
	K. Popper The Poverty of Historicism	35
	T.S. Kuhn The Structure of Scientific Revolutions	38
	T. Campbell Seven Theories of Human Society	43
2.	MEANING OF LAW	47
۷.	MEANING OF LAW The Nature of Definitions	47
	"Naming a Thing"	47
	"Essentialism"	48
	Analysis of Words or Fact	50
	Are Definitions Necessary?	51
	Ideological Factors	51
	Criterion of Validity	52
	Law and Regularity	55
	Law and Morals	56
	Morals as Part of Law	58
	Law and Value Judgments	59

xxiv Contents

# **EXTRACTS**

	L.L. Fuller G. Williams	The Case of the Speluncean Explorers International Law and the Controversy	60
		Concerning the Word "Law"	73
		Definition and Theory in Jurisprudence	74
	R. Wollheim	The Nature of Law	77
3.	NATURAL LAW		79
	What is Natural		79
	The Attractions	of Natural Law	86 93
	Greek Origins Jus Gentium		93
	Medieval Period		95
		formation and Counter-Reformation	97
	Grotius and Inte		100
		I the Social Contract	101
	Kant and Huma	n Freedom	108
	The Eighteenth		110
	Nineteenth Cent		113
	Fuller and the M		114 119
	Hart on Natural	Law Restatement of Natural Law	122
	Conclusion	Restatement of Natural Law	129
		EXTRACTS	
	Aristotle	Nicomachean Ethics	130
	Cicero	De Re Publica	130
	Justinian	Institutes	131
	Aquinas	Summa Theologica	132
	T. Hobbes	Leviathan	137 139
	Locke J.J. Rousseau	Two Treatises of Government	141
	J. Maritain	The Social Contract Man and the State	145
	M. MacDonald	Natural Rights	147
	L.L. Fuller	The Morality of Law	149
	J.M. Finnis	Natural Law and Natural Rights	163
	Margaret Mead	Some Anthropological Considerations	
	A . C	Concerning Natural Law	185
	A. Gewirth	The Epistemology of Human Rights	187
4.	BENTHAM, Aus	TIN AND CLASSICAL POSITIVISM	205
	Sovereignty and	l its Origins	205
	Bentham and the	ne Utilitarians	206
	Bentham's "Of	Laws in General"	209
	Austin		213

	Contents	XXV
	Conclusion	227
	EXTRACTS	
	J. Bentham  A Fragment on Government J. Bentham  An Introduction to the Principles of Morals	229
	and Legislation	229
	J. Bentham  J. Austin  Of Laws in General  J. Austin  The Province of Jurisprudence Determined	233 251
	J. Austin The Province of Jurisprudence Determined W.J. Rees The Theory of Sovereignty Re-stated	264
5.	Pure Theory of Law	271
	Normativism	272
	The Pure Science of Law	273
	Norms and the Basic Norm	274
	Hierarchy of Norms and Law-making Process	276
	Sanctions Kelsen and Austin	277 280
	Norm and Command	280
	Sanctions	280
	Legal Dynamics	281
	Basic Norm	281
	Critique	281
	The Basic Norm	282
International Law		288 289
	Law and Fact	
	Non-legal Norms	290
	EXTRACTS	
	H. Kelsen The Pure Theory of Law	291
	H. Kelsen General Theory of Law and State	297
	H. Kelsen Causality and Imputation	304
	H. Kelsen Professor Stone and the Pure Theory of Law	307
	H. Kelsen The Pure Theory of Law	309
	H. Kelsen The Function of a Constitution J. Raz The Purity of the Pure Theory	321 327
4	Morania Transport Assertance Assertance	
υ.	Modern Trends in Analytical and Normative Jurisprudence	339
	Hart's Concept of Law	344
	An Outline of Hart's Jurisprudence	345
	The "Internal Aspect" of Law	348
	The Rule of Recognition	350
	Is Law A System of Rules?	354
	Rawls and Distributive Justice	356
	Nozick and the Minimal State	367

xxvi Contents

	The Economic Analysis of Law	374 379
	Rights The Nature of Biolete	387
	The Nature of Rights Hohfeld's Analysis of Rights	390
	EXTRACTS	
	H.L.A. Hart Positivism and the Separation of Law and	
	Morals	393
	L.L. Fuller Positivism and Fidelity to Law – a Reply to	
	Professor Hart	396
	H.L.A. Hart Definition and Theory in Jurisprudence	400
	N. MacCormick Contemporary Legal Philosophy: the	
	Rediscovery of Practical Reason	405
	J. Raz The Problem about the Nature of Law	419
	J. Raz Practical Reason and Norms	430
	Ronald Dworkin A Trump Over Utility	434
	H.L.A. Hart Between Utility and Rights	444
	Ronald Dworkin  Is Wealth a Value?	454
	Richard A. Posner Dworkin's Critique of Wealth	459
	Maximisation  B.S. Marlassita, Second B. 4.71	439
	R.S. Markovits Second-Best Theory and the Standard	463
	Analysis of Monopoly Rent Seeking J. Rawls A Theory of Justice	466
	J. Rawls A Theory of Justice J. Rawls Political Liberalism	477
	J. Rawls  The Law of Peoples	485
	R. Nozick Anarchy, State and Utopia	491
	W.N. Hohfeld Fundamental Legal Conceptions as	-171
	Applied in Judicial Reasoning	494
	N. MacCormick The Ethics of Legalism	500
	The Lines of Legalism	
7.	SOCIOLOGICAL JURISPRUDENCE AND THE SOCIOLOG	Y OF
	Law	509
	Introduction	509
	Comte and Sociology	510
	Laissez Faire and Herbert Spencer	511
	Jhering (1818–1892)	514
	Max Weber (1864–1920)	514
	Emile Durkheim (1858–1917)	518
	Eugen Ehrlich (1862–1922)	522
	Roscoe Pound (1870–1964)	524
	Social Engineering	525
	Values N. 1.10	528
	A Consensus Model Society	529 521
	Sociological Jurisprudence since Pound	531
	Lasswell and McDougal Talcott Parsons	533 534
	Selznick	536
	SCIZITICA	JJU

Contents xxvii

	From Sociological Ju	urisprudence – Towards a Sociology o	
	Unger and the Deve	elopment of Modern Law	537 542
	Critical Empiricism	sopment of wiodern Law	544
	Autopoiesis and Lav	N	547
		EXTRACTS	
	R. von Jhering	Law as Means to an End	550
	M. Weber	Economy and Society	552
	E. Durkheim	The Division of Labour in Society	562
	Ehrlich	Principles of the Sociology of Law	565
	R. Pound	Philosophy of Law	570
	R. Pound	Outlines of Jurisprudence	572
	R. Pound	Contemporary Juristic Theory	573
	R. Pound	Social Control Through Law	578
		r Law as an Integrative Mechanism	579
	P. Selznick	The Sociology of Law	584
	R.M. Unger	Law in Modern Society	589
	A. Hunt Dichotomy a	and Contradiction in the Sociology of	504
	D C-44 11	Law	594
	R. Cotterrell	The Sociological Concept of Law	602
	D.M. Trubek Back to	the Future: The Short Happy Life of	613
	C Cilbar & A Carat	the Law and Society Movement	013
	S. Silbey & A. Sarat C	Critical Traditions in Law and Society Research	622
	N. Lubmann	Operational Closure and Structural	022
	N. Luhmann	Differentiation of the Legal System	627
	G. Teubner	How the Law Thinks	636
	G. Teublief		050
8.	AMERICAN REALISM	M	655
	The "Revolt against	Formalism"	655
	Mr Justice Holmes		656
	The American Legal System		658
	The "Realist" Move		658
	Fact-skeptics and Rule-skeptics		659
		itutions and "Law-Jobs"	661
	The Common Lav		662
	Scientific and Norma		666
	Realism: An Assess	ment	667
		EXTRACTS	
	O.W. Holmes	The Path of the Law	670
	W. Twining	The Bad Man Revisited	671
	J. Dewey	Logical Method and Law	677
	J. Frank	Law and the Modern Mind	679
	J. Frank	Courts on Trial	683

xxviii Contents

	Law-Jobs: 7	Some Realism about Realism Using the New Jurisprudence The Common Law Tradition My Philosophy of Law Normative, The Legal and the The Problem of Juristic Method	686 691 694 703
	W. Twining	The Significance of Realism	723
9.	THE SCANDINAVIAN RE		731
	Axel Hägerström (1868-	-1939)	731
	Law as Fact		734
	Ross's Theory of Law		737
	"Valid Law"		
	The "Verifiability" Prince	ciple	740
	Origin of Law	_	742
	"Reductionism" and Le	gal Concepts	743
	Features of Law	-	744
	Law and Morals		745
	Legal Ideology – the Me	thod of Justice v. Social Welfare	747
	Scandinavian and Amer	ican Realism	749
	F V	TED A CITIC	
	EX	TRACTS	
	Axel Hägerström Inqui	ries into the Nature of Law and	
	<b>q</b>	Morals	750
	K. Olivecrona	Law as Fact	755
	K. Olivecrona	Legal Language and Reality	764
	A.V. Lundstedt	Legal Thinking Revised	766
	A. Ross	On Law and Justice	769
	A. Ross	Directives and Norms	772
	A. Ross	Tû-tû	778
	F. Castberg	Problems of Legal Philosophy	781
		Trobicins of Legal Thuosophy	,
10.	<b>Цитория</b> нур А.	T	702
10.		ROPOLOGICAL JURISPRUDENCE	783 783
	The Romantic Reaction		783
	Herder and Hegel	6.11	785
	The German Historical	School	785
	F.K. von Savigny (1779-	-1861)	
	The Volkgeist – Some Pr	roblems	786 787
	Legislation and Juristens	recht 1000	789
	Sir Henry Maine (1822–	1888)	790
	Law and Anthropology Dispute Processes		797
	EX	TRACTS	
	F.K. von Savigny	System of Modern Roman Law	799
	Sir Henry Maine	Ancient Law	804

$\boldsymbol{C}$	Contents	xxix

	E.A. Hoebel	The Law of Primitive Man	807
	M. Gluckman	Judicial Process among the Barotse	813
	L.L. Fuller	Human Interaction and the Law	819
	Paul Bohannan	The Differing Realms of the Law	829
		of Law versus the Order of Custom	832
11.	Dialectics, Hegel an Marx and Hegel's Po Materialist Concepti	olitical Philosophy ion	837 838 839 840 842
	Base and Superstruc	aure	848
	The Question of Cla Marx and Ideology	188	850
	The State and Law		853
		orality and Human Rights	857
	The "Withering Aw		862
	Other Marxisms	ay of the state	864
	Karl Renner		864
	Antonio Gramsci		866
	The Frankfurt Sch	1001	866
	Pashukanis		867
	Marxist Theories of	Law and State – a Critique	871
		EXTRACTS	
	F. Hegel	Philosophy of Right	876
	K. Marx Criti	que of Hegel's Philosophy of Right	877
	K. Marx Preface to 6	Contribution to Critique of Political	
		Economy	877
	K. Marx and F. Enge		878
	F. Engels	The Housing Question	879
	G.A. Cohen S. Lukes Can	Karl Marx's Theory of History the Base be Distinguished from the	880
		Superstructure?	885
	K. Marx and F. Enge	ls The German Ideology	890
	M. Foucault	Two Lectures	891
		The Critique of Political Economy	897
	K. Marx	Capital	898
	K. Marx and F. Enge	ls The German Ideology	905
	E.P. Thompson	Whigs and Hunters	906 912
	K. Marx	The Civil War in France	912
	K. Marx F. Engels	Critique of the Gotha Programme Anti-Dühring	914
	V. Lenin	State and Revolution	915
		tions of Private Law and their Social	-10
		Functions	916
	E. Pashukanis	Law and Marxism	924

xxx Contents

12. THE CRITICAL LEGAL STUDIES MOVEMENT	935
Critical Legal Studies and Liberalism's Contradictions	936
Rules and Reasoning	942
Critical Legal Studies and Legal Practice	944
Legal Theory and Social Theory	947
Conclusion	949
EXTRACTS	
R.W. Gordon Law and Ideology	950
R.W. Gordon New Developments in Legal Theory	959
D. Kennedy The Structure of Blackstone's Commentaries	966
P. Gabel Reification in Legal Reasoning	972
M. Kelman Interpretive Construction in the Substantive	
Criminal Law	987
C. Dalton An Essay in the Deconstruction of Contract	
Doctrine	1001
G. Peller The Metaphysics of American Law	1012
D. Kennedy The Ideological Content of Legal Education	1019
13. Feminist Jurisprudence	1025
Origins	1025
The Inquiries of Feminist Jurisprudence	1028
Equality and Difference	1030
Feminist Legal Methods	1033
EXTRACTS	
D.L. Rhode Feminist Critical Theories	1036
A.C. Scales The Emergence of Feminist Jurisprudence:	40
An essay	1048
R. West Jurisprudence and Gender	1062
C.A. MacKinnon Difference and Dominance: On Sex	
Discrimination	1081
C.A. Littleton Reconstructing Sexual Equality	1091
P.A. Cain Feminism and the Limits of Equality	1106
K.T. Bartlett Feminist Legal Methods	1115
L.M. Finley Breaking Women's Silence in Law: The	1125
Dilemma of the Gendered Nature of Legal Reasoning	1135
14. Postmodernist Jurisprudence	1147
Postmodernism and Modernism	1147
The Death of the Subject	1148
The "Subject" and the Least Sustain	1149
The "Subject" and the Legal System A Political Agenda	1151
Postmodern Law: Postmodern State	1153
Semiotics and Legal Theory	1155

Contents xxxi

## **EXTRACTS**

	J.F. Lyotard Answering the Question: What is	
	Postmodernism?	1159
	J. Wicke Postmodern Identity and the Legal Subject	1166
	P. Schlag Normativity and the Politics of Form	1179
	J.M. Balkin Understanding Legal Understanding: The	
	Legal Subject and the Problem of Legal Coherence	1189
	B. de Sousa Santos The Postmodern Transition: Law and	1107
		1206
	Politics Politics	1206
	M.J. Frug Rescuing Impossibility Doctrine: A	
	Postmodern Feminist Analysis of Contract Law	1214
	K. Crenshaw Race, Reform and Retrenchment:	
	Transformation and Legitimation in Anti-Discrimination	
	Law	1222
	C. Douzinas and R. Warrington "A Well-Founded Fear of	
	Justice": Law and Ethics in Postmodernity	1237
	B. Jackson On Scholarly Developments in Legal Semiotics	1246
	B. Jackson On Scholarly Developments in Legal Schuolics	1270
15.	THEORIES OF ADJUDICATION	1255
	The Nature of Legal Sources	1255
	The Institution of Adjudication	1257
	Stare Decisis	1260
		1268
	Judges and Discretion	1270
	Dworkin and "hard cases"	
	Dworkin and Discretion	1272
	Dworkin and Interpretation	1273
	Law as Integrity	1275
	One Right Answer?	1277
	Integrity and Legitimacy	1279
	Right Answers and Wrong Answers	1281
	Judge-Made Law	1283
	Judicial Reasoning	1285
	Statutory Construction	1289
		1299
	Statutory Construction and Democracy	1299
	EXTRACTS	
	J. Austin Lectures on Jurisprudence	1301
		1301
	H.L.A. Hart Problems of the Philosophy of Law	
	R. Dworkin Taking Rights Seriously	1308
	R. Dworkin Law as Interpretation	1319
	R. Dworkin Law's Empire	1326
	Cardozo Nature of the Judicial Process	1346
	G. Williams  Language and the Law	1350
	J. Wisdom Gods	1353
	D.N. MacCormick Formal Justice and the Form of Legal	
	Arguments	1354
	2 it guinents	1001

xxxii	Contents
-------	----------

F. Castberg	Problems of Legal Philosophy	1358
E.H. Levi	An Introduction to Legal Reasoning	1362
R. Sartorius	Social Policy and Judicial Legislation	1365
Index of Authors Index of Subjects		1369 1379