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*The Machinery of Justice*  
*An Introduction to Legal Structures and Process*

**公平机制**  
—— 法律体系和程序导论



上海外语教育出版社

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# The Machinery of Justice

An Introduction to

Legal Structures and Process

## 公平机制

—— 法律体系和程序导论

Lewis Mayers 著

宋雷 注释

上海外语教育出版社

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# 1

## How legal rules are made

The legal rules which guide our courts and other tribunals in deciding the particular matters that come before them are expressed in varying forms. There are, of course, the enactments<sup>[1]</sup> of our legislatures, federal, state, and local, and of the myriad of executive agencies authorized to promulgate regulations<sup>[2]</sup>. Also, we have the authoritative opinion of a court, rendered by it in deciding a case before it, setting forth the precise construction<sup>[3]</sup> to be given to a specific statutory provision. But in addition to these, there are rules, or perhaps more correctly, doctrines<sup>[4]</sup>, which are of wide importance and yet are to be found in no express enactment and in no one judicial opinion. They are the traditional doctrines which have been developed over the years, in some cases<sup>[5]</sup> over the centuries, as the outcome of the views expressed by the courts in disposing of particular cases. Such doctrines, rather than being set forth in definitive form in any one court opinion, are to be collected from

---

[1] enactments 制定法。等同 statute。

[2] regulations 条例、地方法规。具有法律效力,由行政机构或地方政府所颁布,也称为 agency regulation、subordinate legislation 或 delegated legislation。

[3] precise construction 准确解释。construction 指对法律文件(如 statute、opinion 以及 instrument 等)的解释。

[4] doctrines 学说、原理。指广泛被遵循的法律原则。

[5] cases 案件、案例。

a long succession of such opinions<sup>[1]</sup>.

### Legal rules and "law"

The body of our legal rules<sup>[2]</sup> is, of course, usually referred to as "the law." This term, in contrast to the term "legal rules" (or "rules of law") is, however, sometimes used in a wider sense. The term "legal rules" unequivocally describes merely a collection of man-made regulations, at a given time<sup>[3]</sup> recognized by the public power<sup>[4]</sup> as binding, and enforced by it, while the term "law" has been used by some thinkers to connote a body of eternal principles, having an existence independent of transient man-made regulations. To distinguish this latter concept, the term "natural law"<sup>[5]</sup> has been employed, while the body of rules enforced by the state, in contradistinction, is termed "positive law."<sup>[6]</sup> Needless to say, our concern in these pages<sup>[7]</sup> is solely with positive law.

The operation of rules of law is, of course, twofold. They guide and control the agencies of government, executive as well

---

[1] are to be ... such opinions 从一连串类似的判决意见提炼而成。opinion 判决意见。指法官解释其对特定案件判决的说明,通常包括诉争事实陈述、法律要点、理由、法官附带意见等,也称为 judicial opinion。

[2] legal rules 法律规则。在法律文件中,rule(规则)、principle(原则)和 doctrine(原理或学说)有时可交替使用,但总体说来,rule 表示最一般和原始之规则,经提炼和升华到 principle,而 doctrine 则具有更高的概括和理论层次。

[3] a given time 特定时间。

[4] public power 公共权力。可授予个人或政府机构,包括各种形式的立法、司法和行政权力( various forms of legislative, judicial, and executive authority)。

[5] "natural law" "自然法"。与"实在法"(positive law)相对,一般说来,指一种对公正或正义秩序的信念,是因人类自然要求而永远存在的法则。

[6] "positive law" "实在法"。国家制定或认可的法律,包括成文法、判例法和习惯法,也称为 made law。

[7] in these pages 在本文中。

as judicial<sup>[1]</sup>; and they guide and control the individual, to the extent that he is familiar with them, in his dealings and behavior. The actions of individuals are of course guided and controlled also by innumerable rules and standards of conduct<sup>[2]</sup> which are not enforceable<sup>[3]</sup> by any agency of government; but such rules and standards, particularly if they relate to property or business transactions, or to family obligations, from mere custom tend to become rules of law<sup>[4]</sup>, recognized and enforced by the tribunals of the state. A large part of our rules of law had its origin in such community custom, rather than<sup>[5]</sup> in any deliberate act of legislative creation.

### The formulation of the law: cases and statutes

When the judge or lawyer must ascertain the legal rule governing a given state of facts, he of course turns in many cases to the statutes<sup>[6]</sup> enacted by Congress, or by the state legislatures. In a host of situations, however, there is no applicable statute<sup>[7]</sup> — not because the question is a new one, but, more likely, because it is an old one, and the rule applicable to it has long been well-settled and well-understood, so that no need has been felt for a

---

[1] agencies of government, executive as well as judicial 政府机关,除司法外还包括行政机关。

[2] rules and standards of conduct 行为规则和标准。

[3] enforceable 可强制执行的。

[4] from mere custom tend to become rules of law 常从一般的习惯变成法律规则。介词短语 from mere custom 在此作为状语,修饰动词 tend。

[5] rather than 而不是。

[6] turns in many cases to the statutes 在很多案件中求助于制定法。其中,介词短语 in many cases 作为插入语放到了短语 turn to 的中间,此种用法在法律英语中颇为常见。statutes 制定法、成文法。指由立法机关制定并颁布的法律。

[7] applicable statute 可以适用的成文法。

legislative declaration<sup>[1]</sup>. Initially our law, as carried over from England, was chiefly traditional rather than statutory; that is to say, it had been formulated not through enactments by Parliament<sup>[2]</sup> but through the pronouncements of the courts over the two or three centuries preceding, as new questions arose in the cases brought before them. Today, by contrast, over very large areas of our law, the starting point is a statute enacted by the legislature, in conjunction, perhaps, with a regulation promulgated by an executive agency pursuant to statutory authorization<sup>[3]</sup>.

Nevertheless, the statement, so common in our elementary textbooks on American government, that today the legislature makes the law and the courts merely interpret<sup>[4]</sup> it, greatly oversimplifies the situation. It fails to take into account the fact that a case before a court may, and in fact often does, present a situation in which there exists no established rule of law by which the court may be guided. Where this occurs<sup>[5]</sup>, the courts do not hesitate, in a proper case<sup>[6]</sup>, to create a new rule of law. A rule so created governs the particular case in which it is announced, and may be followed in subsequent cases presenting the same question. It is, of course, always open to the legislature to change the rule as to future cases, or to reaffirm it by enacting it in

---

[1] legislative declaration 立法机关正式颁布(为成文法)。指人们感到没有必要通过立法机关正式将有关问题制定并颁布成文法。

[2] Parliament 议会。世界各国议会的名称各不相同,如:美国为 Congress;英国和加拿大为 Parliament;日本为 Diet;俄罗斯为 Duma;法国为 Legislative Assembly;我国则为 the National People's Congress。

[3] pursuant to statutory authorization 根据制定法的授权。

[4] interpret 解释。如 interpret the document literally 按字面意义解释文件。等同 construe。

[5] Where this occurs 如果此种情况发生。在法律英语中,where 是个意思极含糊的单词,可根据上下文表示很多意思,如:if, which, in case that, where 等。

[6] in a proper case 在合理(或允许)的情况下。proper 在此等同 reasonable 或 admissible。

statutory form<sup>[1]</sup>. But if it does neither, and the rule is accepted by the highest state court (or, if a question of federal law is involved, by the United States Supreme Court<sup>[2]</sup>), it may be said to be as fully a part of the law as any legislative enactment; and a very considerable part of our substantive law<sup>[3]</sup>, and a measurable but smaller part of our procedural law<sup>[4]</sup>, are of this judge-made character.

The extent to which our statutes have created new rules of law, rather than merely restating antecedent, traditional legal doctrine, varies greatly from one legal area to another. At one extreme is found a statute (e. g., the federal labor relations statute<sup>[5]</sup>) which created entirely novel rights and liabilities, previously unknown to our law. At the other extreme is a statute (e. g., the Uniform Negotiable Instruments Law<sup>[6]</sup>) which, for the most part, merely sets forth in systematic fashion doctrines long-accepted by the courts everywhere (and on a few points enacts a rule which some courts had adopted and others had rejected).

- 
- [1] to reaffirm it by enacting it in statutory form 以制定法形式经颁布对该法律规则加以确认。
- [2] the United States Supreme Court 美国联邦最高法院。由于美国是联邦制国家,在法律英语中,the United States 常用做与 state(州)相对,故在翻译中,the United States(或 the US)一般应译为“美国联邦”,而非“美国”,如:US Constitution《美国联邦宪法》(而非各州的宪法);US Code《美国联邦法律汇纂》或《美国联邦法典》(其汇集的是联邦立法机关,即国会制定的法律,而非由各州的议会或其他机构制定的法律)。
- [3] substantive law 实体法。指规定人们在政治、经济、文化和家庭婚姻等事实关系的权利和义务的法律,与“程序法”(procedural law)相对。
- [4] procedural law 程序法。指为保证实体法所规定的权利义务关系的实现而制定的诉讼程序的法律,也称为 adjective law,与 substantive law 相对。
- [5] the federal labor relations statute 联邦劳动关系法。
- [6] the Uniform Negotiable Instruments Law 统一流通票据法。negotiable instrument 为流通票据,也称为 negotiable paper 或 negotiable note,包括汇票(bill of exchange)、本票(promissory note)、银行支票(bank check)、存款单证(certificate of deposit)等。

Despite the considerable area of the traditional law<sup>〔1〕</sup> which has thus been converted into statute, a surprisingly large body of our basic legal doctrine still remains purely traditional; that is to say, there exists no legislative formulation (or indeed any other systematic formulation having official sanction<sup>〔2〕</sup>) to which the inquirer can resort. The doctrine in such cases is not expressed in any single formulation; its purport can be gleaned only from the writings of judges and commentators (the writings of the judges being the “opinions” written by them, ordinarily only in the appellate courts<sup>〔3〕</sup>, in explanation of their decisions in particular cases). Though this may seem, abstractly, an irrational arrangement for the formulation and communication of legal doctrine, in practice it works at least well enough to discourage any proposal for massive or comprehensive codification<sup>〔4〕</sup> of those areas of our law which still remain chiefly traditional, particularly since codification itself, however skillfully done, carries with it the seeds of new uncertainties of meaning. The adjudication of the legal rights of individuals<sup>〔5〕</sup> is not by any means carried on exclusively by the courts; a vast array of administrative tribunals<sup>〔6〕</sup>, so-called, also adjudicate legal rights, often in matters of great importance. Like the courts, these tribunals amplify and elaborate<sup>〔7〕</sup> the statutes which they enforce. Their holdings<sup>〔8〕</sup> are in all cases subject to revision by the

---

〔1〕 traditional law 传统法。

〔2〕 systematic formulation having official sanction 经官方正式认可的体系规范。  
sanction 批准或认可, 如 The committee gave sanction to the proposal. 委员会批准了该建议。

〔3〕 appellate courts 上诉法院。

〔4〕 codification 法典编纂。

〔5〕 The adjudication of the legal rights of individuals 个人法律权利的裁决。

〔6〕 administrative tribunals 行政裁判机构、行政庭。

〔7〕 amplify and elaborate 扩充和发展。

〔8〕 holdings 裁决。

courts<sup>[1]</sup> on appeal; but since, in many cases, the parties<sup>[2]</sup> before them do not seek a review by the courts, their decisions in a number of instances come to be accepted as authoritative. Hence, it is correct to say that our legal rules are made by our administrative tribunals as well as by the courts and the legislatures.

### English ancestry of American law

The traditional rules of law which, whether or not now formulated in statutory garb<sup>[3]</sup>, comprise so important a part of our law, both substantive and procedural, are, as already indicated, largely of English rather than American origin<sup>[4]</sup>. Many of them formed part of the legal tradition which the English settlers<sup>[5]</sup> carried with them to these shores; and becoming in turn a part of the legal tradition of the Atlantic seaboard, they eventually extended their sway over the entire country<sup>[6]</sup>, including those parts of it which had earlier been governed by Spanish or French legal doctrine.

The law and procedure of seventeenth century England, which the English settlers had thus transported across the Atlantic, had been a growth of some five centuries, with diverse roots<sup>[7]</sup>. The Roman occupation of England, though it endured

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[1] are ... subject to revision by the courts 可由法院予以更改。be subject to 受制于，如 The contract is subject to the law and regulations of the People's Republic of China. 本合同受中华人民共和国的法律和规则调整。

[2] the parties 双方当事人。

[3] statutory garb 制定法形式。

[4] largely of English rather than American origin 主要来源于英国法而非美国法。

[5] the English settlers 英国殖民者们。

[6] extended their sway over the entire country 将他们的影响力扩展到了整个国家。sway 具有支配作用的影响力。

[7] with diverse roots 具有不同的渊源。

for a period about a third as long as has since ensued<sup>[1]</sup>, apparently left little permanent impress on the legal institutions of the country. Nor, during the six centuries that followed, did any of the dynasties of Norse invaders<sup>[2]</sup> who managed to establish a precarious dominion over the country succeed in setting up a centrally controlled system of justice; local custom governed law and procedure, and local magnates<sup>[3]</sup>, whether lay or ecclesiastical<sup>[4]</sup>, administered justice. It was the Norman conquerors<sup>[5]</sup> of the eleventh century who for the first time extended a strong central control over the whole territory of England, and subsequently over Wales as well; but only gradually did a centrally controlled system of justice<sup>[6]</sup>— central courts and a central supervision over local courts — take shape. By the beginning of the fifteenth century, the process had been substantially completed. The law which was now developed by the central courts, and was applied also by the itinerant justices regularly sent out from London, became a national or “common” law<sup>[7]</sup>.

The law of seventeenth century England was in part statutory; but far the greater part of it reposed not in statutes but in the accumulated decisions of the courts — case law<sup>[8]</sup>, as it is

- 
- [1] a period about a third as long as has since ensued 从那时(指罗马人的占领)起至今约有 1/3 的漫长时间(为占领期)。
- [2] the dynasties of Norse invaders 古代斯堪的纳维亚侵略者所建立的数个王朝。
- [3] local magnates 当地的权贵。
- [4] lay or ecclesiastical 世俗的或宗教的。
- [5] Norman conquerors 诺曼征服者们。指诺曼底公爵威廉于 1066 年对英格兰的军事征服,即诺曼征服。
- [6] centrally controlled system of justice 由中央政府控制的司法体系。
- [7] “common” law “普通”法。指英国的判例法,因为它不同于以往的地方习惯,而是由国家确认的“通行于全国”的法律,故得此名。
- [8] case law 判例法。泛指可作为先例而判案的法院判决,常与制定法(statute law)相对,是英美法系法律的一个重要渊源。



called. England's case law had not, however, been shaped by a single tribunal. There was at this time no single high tribunal with jurisdiction<sup>[1]</sup> over the entire field of English law. Instead, there were, in addition to the regular courts dealing with civil and criminal cases<sup>[2]</sup>, various special courts<sup>[3]</sup>. Thus there were (not to mention several other independent courts that had no influence on the subsequent development of English law) a special set of courts for dealing with maritime cases<sup>[4]</sup>, a set of church courts for dealing with matrimonial cases and with the estates of deceased persons, and the Court of Chancery<sup>[5]</sup>.

Space does not permit an account of the development, in the chief ports, of the special courts to deal with maritime cases — courts which, because their supervision was entrusted to the admiral of the fleet, came to be known as admiralty courts<sup>[6]</sup>; nor of the reasons why the church courts<sup>[7]</sup>, long after they had lost the rest of the extensive civil jurisdiction over laymen<sup>[8]</sup> they had once possessed, continued to exercise jurisdiction over matrimonial cases<sup>[9]</sup> and decedents' estates<sup>[10]</sup>. Some account of the development of the Chancery Court is, however, essential.

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[1] jurisdiction 司法管辖权。

[2] the regular courts dealing with civil and criminal cases 处理民事和刑事案件的一般法院。

[3] special courts 专门法院。指审理特定的而非一般民事或刑事案件的法院,如军事法院、铁路运输法院、水上运输法院、森林法院、家事法院等。

[4] maritime cases 海事案件。指涉及海商、海运、海上交通等事项的案件。

[5] Court of Chancery 衡平法院。对普通法法院(court of law)无法提供适当救济的案件进行救济,也称为 Chancery 或 Chancery Court。

[6] admiralty courts 海事法院。对所有海事事项(如合同、侵权、伤害或犯罪)实施管辖权的法院,也称为 admiralty 或 maritime court。

[7] church courts 教会法院。指处理有关特定宗教事务(包括纪律及教会财产等)的法院,也称为 ecclesiastical court、court Christian、spiritual court。

[8] laymen 世俗人士、非宗教人士。

[9] matrimonial cases 婚姻案件。

[10] decedents' estates 遗产。