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Jan McCormick-Watson

（第二版）

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图书在版编目(CIP)数据

英国法律体系基础=Essential English Legal System:第2版/(英)詹·迈克科米克-华生(Jan McCormick-Watson)著.—武汉:武汉大学出版社,2004.6
(影印版法学基础系列)
ISBN 7-307-04225-8

Ⅰ.英… Ⅱ.詹… Ⅲ.法律体系—英国—高等学校—教材—英文 Ⅳ.D956.1

中国版本图书馆CIP数据核字(2004)第034287号

著作权合同登记号:图字17-2004-010

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责任编辑:王军风 马栩生 版式设计:支 笛

出版发行:**武汉大学出版社** (430072 武昌 珞珈山)
(电子邮件:wdp4@whu.edu.cn 网址:www.wdp.whu.edu.cn)
印刷:武汉大学出版社印刷总厂
开本:920×1250 1/32 印张:5.25 字数:209千字
版次:2004年6月第1版 2004年6月第1次印刷
ISBN 7-307-04225-8/D·564 定价:9.00元

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本书导读

本书主要内容涵盖了英国法律体系的全部，全书共分为八个部分，第一部分是法律渊源，主要介绍了普通法与衡平法的划分，英宪史、欧盟法等相关内容。第二部分为法律职业编，着墨于英国的律师制度。第三部分的核心内容是法官制度，司法推理仅为一辅助内容。本书的第四部分（刑事诉讼程序）与第五部分（民事诉讼程序）大致相当于大陆法系有关诉讼法的内容（当然，大陆法系诉讼法的完整体系还包括"行政诉讼法"）。第六部分通过对行政裁判以及仲裁机制优缺点的分析，我们可以看到英美国家如何解决对抗制诉讼高耗费、耗时长的缺点，以更好实现其接近正义（access to justice）的目标。陪审团制度是英国法最具特色的制度，其发源于英国，并对英美法系影响深远。然而在当代，陪审团制度在英国本土功能已经极度萎缩，成为日渐没落的制度，陪审团只是在美国得到了广泛的适用。所以在当代英国仍将其视为"特色"，是缺乏实证基础的。因此，本书第七部分介绍有关陪审团的内容更多是出于体系上的需要，仅仅具有资料意义。法律服务（legal services）是本书的最后部分，其核心内容是法律援助问题。

纵观全书，有如下几个特点：1．简明扼要，通俗易懂。该书的主要对象是在校大学生，目的就是帮助他们更容易、更快捷的理解和掌握庞杂的英国法律体系。所以，本书并非晦涩难懂的学理著作，而以平易的介绍性文字为主，对问题不做过多发挥，"点到即止"，使处于起步阶段的大学生能够迅速建立对英国法律体系全貌的基本印象。2．程序本位。从全书的内容我们可以看出，所谓的英国法律体系，实际上就是围绕诉讼程序开始和终结的体系。从诉讼程序的参与者（律师、法官），到具体的诉讼程序（民事诉讼与刑事诉讼），及至诉讼程序弱点的规制（非讼机制），最后到弱者的救济（法律援助），无不体现出程序本位的鲜明特色，这与大陆法系注重实体、轻视程序的传统是南辕北辙的。

本书中中文翻译的内容由马栩生负责，不当之处请专家、读者指正。

译　者

2004 年 3 月

Foreword

This book is part of the Cavendish Essential series. The books in the series are designed to provide useful revision aids for the hard-pressed student. They are not, of course, intended to be substitutes for more detailed treatises. Other textbooks in the Cavendish portfolio must supply these gaps.

The Cavendish Essential Series is now in its second edition and is a well established favourite among students.

The team of authors bring a wealth of lecturing and examining experience to the task in hand. Many of us can even recall what it was like to face law examinations!

Professor Nicholas Bourne
General Editor, Essential Series
Swansea Law School
Summer 1997

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1 Sources of law

You should be familiar with the following areas:

- common law and equity: the Judicature Acts 1873–75
- English and European law
- the legislative process
- types of delegated legislation and its disadvantages
- case law

Common law and equity

Pre-Norman Conquest

Under the Saxons there was not such a thing as English law. Communities were small and isolated because travel was dangerous and difficult. The administration of justice was centred locally, each small community having its own court where customs, according to that part of the country, were applied. There was a court in each Shire, and one in each Hundred (a sub-division of a Shire). These courts were dominated by wealthy local landowners and noblemen. There were a few written laws known as King Alfred's laws.

The Norman Conquest

The Norman Conquest replaced this with a stronger centralised system. The Normans utilised the existing structure of courts, developing it and appointing their own judges. The country was divided into 'circuits', which judges would follow, administering justice. They were called *itinerant justices in eyre*. They each visited a circuit of county towns hearing all the cases that had amounted since their last visit to the county.

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The emergence of common law

As the judges became more established in their travelling of circuits, there was a unification of the various local customs. The King created new legal rules and gradually local customs were replaced by rules common to the whole country; this eventually became known as the common law. There were few statutes or written laws and judges would look to similar cases to guide them. Thus we can see the emergence of the doctrine of precedent.

Common law and equity

In order to bring an action in the common law courts a writ had to be issued by the chancellor. These writs were very specific in nature. If there was no writ available to fit your particular action then you would be without redress. The Provisions of Oxford 1258 prevented the chancellor's office from creating new writs which led to a very rigid system. The development and growth of the common law system had not been expected and caused difficulties. Many people complained about the injustices that were inherent in the system. Individuals, disenchanted by the system, made pleas to the King for protection. Because of the increasing number of these pleas the chancellor created his own court, punishing those who put too much reliance on the strict operation of the common law.

The Court of Chancery

The Court of Chancery offered a route which enabled individuals to obtain justice alleviating the harshness of the common law. Equitable maxims were developed, such as, 'equity follows the law'. Equity developed its own set of rules which came into conflict with common law rules. This conflict between the two systems came to a head in the *Earl of Oxford's Case* (1615). Here it was decided that if there was conflict between the two systems, equity would prevail.

The defects of equity: Judicature Acts 1873–75

However, equity eventually became as rigid in form as the common law and it suffered many defects. It became overburdened and very slow. Reform became necessary and this came in the shape of the Judicature Acts 1873–75 which fused the two systems together. Common law and equitable remedies were available in all law courts.

Important events in English constitutional history

DATE	EVENT
890	ALFRED'S LAWS
1066	NORMAN CONQUEST
1086	SEPARATION OF CHURCH AND LAY COURTS: DOMESDAY BOOK
1164	JURIES INSTITUTED IN SOME PROCEEDINGS
1215	MAGNA CARTA
1279	STATUTE OF MORTMAIN
1534	REFORMATION
1535	STATUTE OF USES
1601	JAMES 1 SEVERS LINKS WITH SCOTLAND
1629	CHARLES 1 DISSOLUTION OF PARLIAMENT
1649	CROMWELL'S COMMONWEALTH OF ENGLAND
1660	RESTORATION OF CHARLES II
1662	ACT OF SETTLEMENT
1679	HABEAS CORPUS ACT
1689	BILL OF RIGHTS
1701	ACT OF UNION WITH SCOTLAND
1772	ROYAL MARRIAGE ACT
1832	REFORM ACT
1867	SECOND REFORM ACT
1911	PARLIAMENT ACT LIMITING POWER OF HOUSE OF LORDS
1949	PARLIAMENT ACT
1958	LIFE PEERAGES ACT
1963	PEERAGE ACT
1972	EUROPEAN COMMUNITIES ACT
1986	SINGLE EUROPEAN ACT
1992	TREATY ON EUROPEAN UNION: MAASTRICHT TREATY

English and European law

Institutions of the EEC

The European Parliament

The European Parliament meets in Strasbourg. It has no legislative powers. It is responsible for the community budget and possesses the power to freeze community spending. It has the power to sack the entire Commission if it chooses, but is unable to sack an individual Commissioner. It is a directly elected body of 518 Members of the European Parliament, they are elected for five years. Each Member State is allocated seats in accordance with the population of that State. Various committees are formed, for example, agriculture, fisheries, food, transport, social matters, employment. Proposals from the Commission pass through these committees before being sent to the Councils of Ministers.

The Council of Ministers

The Council of Ministers is based in Brussels and could be said to be the actual legislative body of the Community, because this is where the major decisions are taken. It consists of 12 members, one from each Member State. Voting is by 'qualified majority', the States' votes are weighted, eg UK has 10 votes whereas Spain has eight votes. A qualified majority is achieved by gaining 62 out of the total of 87 votes. Ministers from the Member States meeting together form the Council of Ministers. The Presidency of the Council changes hands between Member States every six months. The Council of Ministers is a series of Councils containing Ministers of each Member State responsible for the specific items under consideration

The Commission

The Commission proposes the Community policy and legislation. It is the executive branch of the EEC. The Commission is responsible for bringing any breaches of the Treaties before the European Court. The Commission sends its proposals to Parliament, which then delivers an opinion. The Commission then informs the parties of remedies they need to implement in respect of the breach.

The European Court of Justice

The court is very influential and the decisions it makes binds the courts of Member States. The court itself is not bound by its own previous decisions, but these could be of persuasive value. When

Community law conflicts with national law, the European Court of Justice has clearly stated that Community law must prevail. The English courts, therefore, must apply such law, even if it is at variance with what has been enacted by Parliament. In 1991, the European Court of Justice overruled a UK Act of Parliament, ruling that the Merchant Shipping Act 1988 was in contravention of EC Law.

Procedure of the European Court of Justice

The court sits in Luxembourg and consists of 13 judges and six Advocate Generals. The procedure is different from an English court. An Advocate General sits on the bench with the judges and once the parties have given their views, he will deliver his opinion, which cannot be deliberated upon by the parties. Advocate Generals are responsible for investigating the issue placed before the court. A report is compiled and recommendations made, which the court will consider. The court is not bound by the report or recommendations made by the Advocate Generals; it can act upon them or reject them as it chooses.

Sources of European Community law

The main source of Community law is embodied in the Treaties which established the EC as it is today. Most important is the Treaty of Rome 1957. In 1972 the European Communities Act was incorporated into English law.

Main sources of law

The Council of Ministers, the European Commission and the European Parliament can make law in the form of regulations, directives and decisions.

Regulations

Regulations are made by the Council of Ministers. They are directly applicable in all Member States.

Directives

Directives have much less influence. The national authorities have a discretion as to the form the directive will take; for example, it could be implemented by an Act of Parliament, or by subordinate legislation.

Decisions

Decisions are binding on those to whom they are addressed, this may be an individual, a company or a State. They are created to deal with a particular case.

Non-binding instruments

These include:

Opinions and recommendations

Made under the EC Treaty do not have the force of law. However, they represent statements of EC policy and it could be argued that the Member States should not implement policies at variance with them.

Resolutions, memoranda, guidelines, programmes and communications

Very often the European Commission issues documents detailing actions or procedures being adopted in the Community and laying out the Commission's view on these.

Recommendations and opinions

Recommendations and opinions are not binding at all.

Legislation

Forms of legislation

There are a number of forms of legislation. The most important form is an Act of Parliament. Law is made by the passing of statutes. Until the Act is passed it is known as a bill. The bill must follow a set procedure before it passes into law.

The legislative procedure

- The bill is drafted by lawyers.
- First reading: purely formal, it is read by the clerk of the House, then ordered to be printed.
- Second reading: the general principles of the bill are discussed.
- Committee stage: this is a debate about the bill in detail.
- Report stage: any amendments to the bill are discussed.
- Third reading: final discussion of the amended bill.
- Bill is passed to the House of Lords, goes through the same procedure.
- Royal Assent: bill passes into law and becomes an Act of Parliament.

The Fellicoe procedure was introduced in 1994 to speed up the process of non-contentious Bills through Parliament. The Law of Property (Miscellaneous Provisions) Act 1994, for example, was passed using this faster procedure.

Parliament Acts 1911 and 1949

The House of Lords acts as an important 'checks and balance', considering bills passed to them by the House of Commons. However, the power of the House of Lords to block a bill has been curtailed by the Parliament Acts of 1911 and 1949. Bills can be delayed for a year by the House of Lords, but any 'money bills' which relate purely to financial provisions can be passed without seeking the approval of the House of Lords.

Delegated legislation

Types of legislation

Legislation can be supreme (Acts of Parliament) or subordinate. Subordinate legislation is legislation promulgated by bodies other than Parliament. Because of the complexities of modern society, Parliament is forced to delegate some of its powers to bodies such as local authorities, ministries, etc.

Main types of delegated legislation

Orders In Council

Drafted by Ministers for the Queen's approval.

Statutory instruments

Orders made by Ministers and submitted to Parliament for its approval.

By-laws

By-laws are made by local authorities.

Dangers of delegated legislation

The abuse of power is the chief danger. Parliament attempts to control this by review procedures and delegated legislation can be tested in courts if it is thought to exceed its authority, ie if it has acted *ultra vires* (beyond its powers).

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