

Basic Law

L. B. Curzon



M&E HANDBOOKS

THE M & E HANDBOOK

Basic Law

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MACDONALD AND EVANS

Macdonald & Evans Ltd
Estover, Plymouth PL6 7PZ

First published 1978
Reprinted, with amendments, 1981

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7121 0245 0

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Printed in Great Britain by
Hazell Watson & Viney Ltd,
Aylesbury, Bucks

Preface

This HANDBOOK has been produced for those who, having little or no knowledge of English law, wish to obtain a general picture of its main principles and procedures. The author has kept in mind some of the syllabuses for "O" and "A" levels in English Law, but has taken into account also the needs of the general reader who requires an overview of our system of law. A small number of case references is given and it is hoped that readers will use these as an introduction to the vast and rich store of cases that record so much of our law. Where references to statutes are made, the reader is recommended to examine the appropriate Acts and sections.

For those who intend to use this HANDBOOK as preparation for an examination, or as a swift method of pre-examination revision, the following methodical approach is recommended:

(a) Read through the book in its entirety but omit the progress tests.

(b) Read through each chapter separately and in detail. Move to the next chapter only after completing the progress test and checking the answers.

(c) Re-read the text swiftly.

(d) Attempt, at three separate sittings, the test papers which form Appendix II.

I wish to thank the Controller of Publications of Her Majesty's Stationery Office for permission to reproduce the Act of Parliament which appears on pp. 42-43.

The law is stated, in general, as on January 1st, 1981.

L.B.C.

January, 1981

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CHAPTER I

Law and Justice

INTRODUCTORY MATTERS

1. Purpose of the book. This book is intended to provide an elementary introduction to English law for those who have little or no knowledge of the subject-matter. It is in no sense a detailed account of the workings of the law; rather it is a very general overview of the basis and functioning of the English legal system. It aims at presenting to the reader some of the fundamental concepts upon which that system rests and some of the ways in which those concepts are translated into the everyday working of our system of law. Specifically, after studying the text carefully and working through the progress tests and test papers, the reader should be in a position:

(a) to evaluate the most important of the basic ideas underlying our legal system;

(b) to understand the unifying notions of “law” and “justice” which are the very keystones of our legal system;

(c) to outline the essential patterns of civil and criminal proceedings;

(d) to describe the rudiments of the criminal law;

(e) to sketch the outlines of some important sections of the civil law;

(f) to comment with understanding on the place of English law in the wider setting of our way of life.

2. Plan of the book. In order that the objectives set out above might be attained, the text concentrates on the following selected topics:

(a) Chapters I-IV deal with some of the theoretical bases of our law. What is meant by “law” and by “justice”? What place do they occupy in our society? Why are they indispensable to our way of life? From whence is our law derived? What characteristics give our law its unique quality? Why do everyday words,

such as "possession" and "person", have highly-specialised meaning in our law?

(b) Chapters V–VI comment on the basis and significance of the British Constitution. The workings of Parliament are also examined. If our constitution has not been reduced to writing, can it be said to "exist"? Is the "Rule of Law" essential in our society? Is Parliament "supreme"? How does a Bill become an Act? What is the role of the Queen in the legislative process?

(c) Chapters VII–XI are concerned with the machinery and procedures of the law, with the courts and their personnel, with the conduct of civil and criminal trials, with the formalities of evidence and with appeals. What is the hierarchy of our courts? How does the House of Lords function as the final court of appeal? How are judges appointed? What is the precise difference between barristers and solicitors? How does county court procedure differ from criminal court procedure? Is hearsay evidence ever admissible? How are appeals from Commonwealth courts considered in the English courts?

(d) Chapters XII–XIV examine some aspects of our criminal law by reference to some specific types of offence. What is a crime? Is it an offence to attempt to commit a crime? Are there different categories of homicide? How does the law define assault and theft? What are some of the main offences relating to the misuse of drugs?

(e) Chapters XV–XVII identify and describe some of the more important facets of the many-sided civil law, by referring to contracts, torts, land law and trusts. When will the courts uphold an agreement? When does the negligence of one person become the basis of an action in tort by another? What is defamation? What are the rights of a mortgagor? What are a trustee's duties?

(f) Chapters XVIII–XX consider aspects of the law relating to the family, employment and consumers. What is the sole ground for divorce? Have illegitimate persons the full rights of a legitimate person? Must the signing of a will be witnessed? What is unfair dismissal? How does the law define a trade description?

3. The vocabulary of the law: a caution. One of the most important problems confronting a law student arises from the highly-specialised vocabulary which is used. It is crucial, therefore, that the student and general reader should differentiate very carefully between the everyday use of some words and their use in a restricted, technical sense in the vocabulary of the law. This is not

surprising; every body of specialised knowledge has its own jargon to describe in "shorthand terms" the matters with which it is concerned. Terms such as "energy", "heat" and "light" are used by the physicist in a very precise and unique fashion. The specialised vocabulary of the law must be approached in the light of the following observations:

(a) Legal terminology is often ancient in derivation; it carries the very fingerprints of English history. "Murder", "mortgage", "justice of the peace" are terms which originated many centuries ago. Anglo-Saxon and Norman concepts are reflected today in the lawyer's vocabulary.

(b) Legal vocabulary makes use of many Latin terms. For example, *mens rea* (see XII, 7); *res gestae* (see X, 25).

(c) Some legal phrases involve words having no parallel whatsoever with those words used in non-legal senses; they can rarely be understood by noting their non-legal use. For example, "battery" (see XIII, 15); "fee simple absolute in possession" (see XVII, 6).

(d) Legal terms may change in meaning. Thus, burglary has altered in meaning following the Theft Act 1968, s.9.

(e) Some legal terms may become obsolete. "Larceny" and "embezzlement", for example, have now disappeared from current legal usage.

(f) Legal idiom is often rich in social and historical overtones. Reference to a dictionary repays exploration of the derivation of legal terms.

THE NECESSITY FOR LAW

4. Preliminary matters. Readers who have lived in developed countries in which law is a fact of everyday life may learn with surprise of the philosophical and political school of thought which denies the need for law. (This opinion must be separated from the argument—voiced even by some lawyers—which holds that there is *too much* law. This is a separate issue.) It is suggested that persons could live in society without the restraints imposed by law. Most people, however, would agree, if questioned, with the belief that, in the absence of law, man's life would be "brutish, nasty and short".

5. Civilisation and the law. It has been said that law is like the air around us; without it we would perish; often we fail to notice it

until its diminution draws attention to its vital nature. The "law of the jungle"—the antithesis of civilisation—is based on the domination of the weak by the strong. Consider some earlier epochs in our history in which slavery and an absence of rights for large numbers of people were common, so that St. Augustine was able to comment with truth: "Justice being taken away, then what are Kingdoms but great robberies?"

(a) Our way of life, based on ownership of property, respect for the rights of others, would not endure if legal rules were continually disobeyed. Thus, the flow of road traffic involves acceptance of many rules and regulations; trade would collapse if contracts were generally ignored; ownership of property would not long survive the widespread rejection of the law relating to stealing. Civilisation, it has been suggested, reflects the acceptance of rights and duties, and these require the support of law. What is the value of the right to enjoy one's property if there is no law to enforce that right?

(b) The codes of conduct which are at the basis of civilisation have emerged from eras in which disputes were settled by blood feud and an appeal to arms. In the absence of accepted codes of procedure relating to the settling of disputes by arbitration and adjudication, there is little doubt of a return to the private warfare which characterised the darkest, lawless epochs of our history.

6. Freedom and the law. "We must all be slaves of the law if we are to be free." Cicero's paradox reminds us that unrestricted freedom means no freedom. Freedom to exchange one's money for another's goods is diminished if some persons are free to forge money so that it becomes worthless. Freedom to enjoy one's reputation is vitiated if one can be defamed with impunity. Freedom to live in one's home is lost if others are free to invade and occupy one's property.

(a) The existence of the law is a partial guarantee of one's rights to enjoy certain freedoms.

(b) The law discourages and punishes the disregard of rights.

(c) The law provides no more than a framework within which freedom may be realised and enjoyed; but that framework is essential to a free society.

7. Law in a changing society. Law mirrors and reflects the society of which it is a part. Our land law, for example, mirrors the linger-

ing remnants of feudal concepts; our criminal law has reflected changes in society's attitudes to what is right and wrong. Where the law fails to bow to the winds of change it tends to fall into disrepute. The disappearance of capital punishment (save in relation to treason and piracy with violence), the many recent changes in laws affecting the rights of the consumer and the duties of the seller of goods, show some of the changes in attitudes and patterns of thought prevalent in society.

DEFINING THE LAW

8. Preliminary matters. Definitions should assist understanding. In this section we consider some of the problems involved in defining "the law" and give examples of some well-known definitions.

9. Some problems of definition. It is relatively simple to define "table" or "book", but it is more difficult to define "a well-designed table" or "a good book". No definition of "law" can be exact, since law is not objective, in the sense which applies to a table or book. There are many conflicting definitions of law, reflecting the attitudes of those who view the functions of the law in different ways. Two points are of importance:

(a) A country's "law" is not the same as its "laws". The latter term refers to statutes and other enactments, e.g. Theft Act 1968, Animals Act 1971; the former term refers to the wider concepts which frame the making of laws or the very philosophy from which statutes are derived.

(b) The term "law" bears no relationship to "law of nature". Thus, the law of gravity posits a relationship between objects and the earth which is true at all times and everywhere in our world. The "law of contract" has no such meaning; it applies solely to the U.K. and, unlike a scientific law, can be modified or annulled by the courts or Parliament.

10. Some definitions of law. No one definition is authoritative. The following definitions are worthy of careful consideration and analysis:

(a) "What officials do about disputes is the law itself": Llewellyn.

(b) "The prophecies of what the courts will do . . . are what I mean by the law": Holmes.

(c) "Law, in its most general and comprehensive sense, signifies a rule of action . . . it is that rule of action which is prescribed by some superior and which the inferior is bound to obey": Blackstone.

(d) "The body of principles recognised and applied by the state in the administration of justice": Salmond.

(e) "Law is a coercive order of human behaviour": Kelsen.

11. Primary and secondary rules. The "primary rules" of the law have been defined as those rules which formulate the modes in which the citizens of a state are obliged to behave. The "secondary rules" have been defined as those rules specifying the appropriate sanctions to be imposed on those who violate the primary rules, and the circumstances in which the sanctions may be applied.

JUSTICE AND LAW

12. Preliminary matters. One writer has observed, cynically: "The last place in which I would look for justice is a court of law." At the other end of the spectrum of argument is the assertion that "justice and law are synonymous". In this section we consider this matter and enumerate some well-known definitions of justice.

13. Is "justice" synonymous with "law"? Many people would agree that "justice is what the law is supposed to produce", or, conversely, that "the law is the practice of justice". Yet the existence of a gap is often admitted. A judge, in sentencing a convicted person, may express his regrets at being unable to impose a heavier sentence than that permitted by statute; he here acknowledges a gap between law and justice. The rigid application of a law, with no consideration for circumstance, may result in injustice. The rise of equity (*see* II, 9) testifies to the fact that, in practice, "justice" and "law" may not be synonymous.

14. Definitions of justice. "Justice" is as difficult to define as "law". The definitions given below have highly-subjective overtones:

(a) "Justice is the constant and perpetual will to render to everyone that to which he is entitled": Justinian.

(b) "Justice is the correct application of a law, as opposed to arbitrariness": Ross.

(c) "Justice among men involves an impartial and fearless act of choosing a solution for a dispute within a legal order, having regard to the human rights which that order protects": Worsley.

15. Justice, the law and society: a reminder. The following quotations should serve to underline the importance of justice in an understanding of basic law:

(a) "The guiding principle of a judge in deciding cases is to do justice; that is, justice according to law, but still justice. I have not found any satisfactory definition of justice . . . what is just in any particular case is what appears to be just to the just man, in the same way as what is reasonable appears to be reasonable to the reasonable man": Lord Wright.

(b) "Justice has always weighted the scales solely in favour of the weak and the persecuted. A just decision is a decision based on grounds which appeal to a disinterested person; it is a decision which is rendered by a person who is not involved in the conflict of interests, or which, even though it be rendered by a person involved in the conflict, nevertheless is such as a disinterested person would render or approve of": Ehrlich.

(c) "Conceptions of justice may vary from age to age . . . It is indeed the attainment of equality, not the preserving of inequality, that modern moral and legal philosophy treat as the vital function of justice": Lord Lloyd.

PROGRESS TEST 1

1. In what sense is the vocabulary of the law said to be specialised? (3)
2. Give some examples of terms which have a specialised meaning in law. (3)
3. How does civilisation depend on the existence of law? (5)
4. What is the relationship between freedom and law? (6)
5. In what sense does law mirror society? (7)
6. Why is it difficult to define "law"? (9)
7. How is the word "law" used differently in "the law of contract" and "the law of heat exchange"? (9)
8. Give a definition of law. (10)
9. What are the "primary rules" of law? (11)
10. Is "justice" the same as "law"? (13)
11. Give a definition of justice. (14)