

Core Text  
Series



# THE LEGAL SYSTEM

Kate Malleson

second  
edition

OXFORD  
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CORE TEXT SERIES

# The Legal System

Second Edition

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**OXFORD**  
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# The Legal System

## Preface

Most people know something about the legal system without ever having opened a textbook. The police, judges, juries, lawyers, courts and Parliament are subjects which fall within almost everyone's field of general knowledge. The advantage of such familiarity is that the legal system is one of the least intimidating areas of the law to study. The disadvantage is that the preconceptions which people bring to the subject often make it difficult to approach its study with an open mind. Much of our common knowledge of the legal system comes via the news and fictional accounts on television and film. The preoccupations and content of this material is often skewed and sometimes inaccurate. It also gives rise to a range of common myths; for example, that most criminal trials are heard by a jury, that contested trials of any kind are the norm, that most convicted offenders are sent to jail, that barristers spend all their time in court and solicitors in offices (and that judges in England and Wales have gavels!).

The job of disentangling fact from fiction and redirecting attention to neglected but important aspects of the process requires detailed attention to empirical data. Some of this is available but passed over because it is not considered newsworthy, such as statistics on the functioning of the magistrates' courts or the detailed workings of police powers. Other data are simply not collected. We only have a very partial picture, for example, of how the civil justice system works which has hampered the assessment of the impact of recent reforms in that area.

In addition to the empirical difficulties faced by a student of the legal system, the familiarity of the subject-matter can obscure the fact that many aspects of it are complex and require considerable analytical rigour to make sense of them. For example, it is difficult enough to grasp the various arrangements by which legal services are funded; the task of determining which of these works well or badly and assessing the effect

of various changes to the funding system requires the combined skills of a lawyer, an economist and a political scientist. The result is that it is relatively easy to say *something* about the legal system, but much more difficult to make an empirically informed and intellectually rigorous contribution to the subject.

The task of building up an accurate and comprehensive analysis of the legal system is not made any easier by the fact that the legal system is a moving target. Barely a week goes by when some aspect of the system is not subject to review. The Human Rights Act 1998, the restructuring of Legal Aid, the introduction of Conditional Fees Agreements and the Woolf reforms to civil justice have all had a profound impact on the legal system in recent years. As I write, the Criminal Justice Bill is going through Parliament bringing significant changes to the criminal justice system. On the horizon is a full review by the Government of the way legal services are regulated, while looking further ahead the role of the Lord Chancellor, the judicial appointments process and the organisation of the highest courts are all areas in which criticism is building up and change looks increasingly likely.

One effect of this stream of reform is that it is inevitable that by the time this book is being read it will be out of date in some important respects. To deal with this problem it is necessary for students of the legal system to be equipped with a variety of sources with which to supplement and update their knowledge. For this reason, the text has pointed to a range of additional sources of information such as websites and journals which are a vital addition to any textbook, however recent.

Although the speed of changes to the processes and institutions which make up the legal system poses challenges for the student and author alike, the good news is that many of the issues which inform our understanding of it remain relatively constant. One of the main aims of this book is to identify and analyse these underlying themes and trends. The general editor of this series, Nicola Padfield, has described its aim as being to write at several levels simultaneously; to strip the subject to its core while continuing to point out the intellectual challenges and difficulties within it. This book is structured with this aim in mind. In the first chapter I identify a series of themes, trends and tensions which run through the system and which provide a framework for analysing the subject. These are then picked up and expanded in the following chapters as they relate to individual topics.

The book seeks to show that the system is run through with different and inevitably competing aims and functions. Which of these takes precedence at any one time will affect the detailed arrangements of the system. It is essential that anyone wanting to understand the legal system in England and Wales is aware that the policies which shape it are ultimately decided not merely, or even very greatly, with reference to its own internal logic or needs but on the basis of the political and economic priorities of society more generally. There is no such thing as a strictly legal reading of the legal system. Law is not politics by a different name, but the legal system is intimately connected with the political system. What follows should always be read with that in mind.

*Dr Kate Malleson*  
April 2003

## Preface to the second edition

One of the key trends which I sought to highlight in the first edition of this book was the accelerating pace of change in the legal system. In the last two years this has, if anything, increased, and the legal system has experienced reform on an unprecedented scale. I noted in the preface to the first edition that by the time the text was on the shelves it would be out of date in some important respects. I did not expect, however, that within two months of publication, the government would have announced the most far-reaching constitutional reforms in recent history. Under the provisions of the Constitutional Reform Bill 2003, the office of the Lord Chancellor is to be radically reformed, a new judicial appointments commission will be set up and the Law Lords will be removed from the House of Lords and established as an independent Supreme Court. These changes will have a long-term impact on almost all the areas covered in this book. At the time of writing, the Constitutional Reform Bill is still before Parliament. The text therefore sets out the existing arrangements while exploring the changes and analysing their likely effects. Some aspects of the reforms will be implemented quickly, others will take longer. Either way, it seems likely that the seemingly constant pressure for change in the legal system will continue.

*Kate Malleson*  
London  
March 2005



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# CHAPTER ONE

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## Introduction

### SUMMARY

**This chapter outlines a number of trends and themes which link the different topics covered in the book. It highlights the increase in size and the growth in economic and political importance of the legal system. It argues that the impact of this expansion includes an acceleration of the pace and amount of reform to the legal system and an intensification of the debate about its role and function. This debate raises questions which go to the heart of the legal system: Is the justice system private or public? How much do we want to spend on civil and criminal justice? Can an acceptable quality of justice be maintained if costs are cut? Do we want more civil litigation or less? Is there still a place for lay personnel? Are inquisitorial methods better than the traditional adversarial system? Should judges make political decisions? Does the executive have too much control over the law-making process? What are the implications for the legal system of the increasing importance of human rights? These questions help to frame our analysis of the legal system and recur in different contexts throughout the chapters which follow.**

### Trends and themes

**1.1** The institutions, procedures and personnel which make up the legal system of England and Wales are at first sight only a very loosely connected set of subjects. It is not immediately obvious that there is much to link, say, the rights of suspects, the court structure and the judicial appointments process. Indeed, these and other topics which are commonly found in most legal system courses are often taught as distinct areas connected only by the overarching subject of the law. For this