

**GENERAL CONCEPTS AND CATEGORIES OF LAW**

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**4.7 Public Law**

As discussed above, the principal fields of public law are constitutional law, administrative law, trade regulation, labour law, criminal law, and environmental law. We look at each below.

**4.7.1 Constitutional Law**

The study of constitutional law is basically the study of those decisions of the Supreme Court of Pakistan that have interpreted the Constitution of Pakistan of 1973, and even the text of the Constitution that has not been interpreted so far. A modern state, as was stated earlier in this book, is expected to deal with a mass of social

The trust is widely used in the common law world for both real and personal property, especially income-producing securities. They are also relied upon to dispose of most substantial family wealth at death; charitable trusts are used to create large philanthropic foundations. Constructive trusts, implied as a matter of law, have become an essential device for avoiding unjust enrichment in cases of fraud and mistake.<sup>141</sup>

Equity found its way into most of the colonies in spite of some resistance that stemmed from the close relationship between equity and the crown. It was generally received in the states, was developed by the courts in the early part of the nineteenth century, and was the subject of one of Story's great treatises. Some states had separate systems of courts for law and equity; others had a single system in which a court might sit as either a law court or an equity court, depending on the nature of the case. Both schemes occasioned inconvenience, expense, and delay, as where a party sought relief in the wrong kind of court and had to begin all over again.

There was a demand for merger of law and equity in the United States. New York led the reform by enactment of the Field Code of Civil Procedure in 1848. The code abolished the distinction between a suit in equity and an action at law, substituted a single civil action for the different forms of action previously available, and consolidated the rules of procedure, borrowing heavily from the more liberal equity rules. In England, this was accomplished by the Judicature Acts, beginning in the 1870s and going up to 1875. In India, the Judicature Act of 1781 achieved the merger. The student will study this in a later course.

### ✓ 4.3 Substantive Law and Procedural Law

Procedure is concerned with all aspects of the conduct of legal controversy before the courts, including access to the courts, who may sue and be sued, the form of the action, the availability of countervailing claims, the conditions of maintaining suit, the steps before trial, the method of proof, remedies, the effects of the court's judgment, and appeals. Procedure includes both criminal and civil

<sup>141</sup>Hudson, *Equity & Trusts*, 13-45.

procedure. It also encompasses the subject of evidence, which is concerned with the rules relating to proof before a court. Because the significance and intricacy of this field are greatly heightened by the adversary system, which Pakistan follows. The law of evidence, however, is generally treated as a distinct branch of the law. Finally, the subject of conflict of laws, or private international law, has a very heavy procedural ingredient. Substantive law, on the other hand, defines acts, both civil and criminal, that may be declared lawful or unlawful. Thus, it creates or abolishes rights and duties. Substantive law also lays down sanctions in the form of penalties, fines, damages and so on.

The distinction between substance and procedure or substantive law and procedure is found in almost all systems, even the very primitive ones. Procedural law, or adjective law as it is sometimes called, is very important in all common law countries especially because of the creative role played by the courts in such jurisdictions. Federal systems may create additional significance due to the complexities involved in such systems. There are points may be noted as important for this classification, for example, if a statute concerns a matter of "procedure" rather than "substance," it will not be affected by constitutional prohibitions against retroactive legislation. In addition to this, courts have greater liberty in deciding which procedure to follow. In the case of certain provisions, it is sometimes difficult to decide when a court will consider the provision to be procedural at one time and substantive at another. Thus, a statute of limitations may be regarded as "procedural," as barring a remedy, for one purpose and as "substantive," as terminating a right, for another, but the number of such borderline cases is relatively small, and the boundaries of the field of procedure are in the main well established.

#### 4.4 Public and Private Law

The classification of public and private law pertains to substantive law. It is often convenient to describe particular claims as invoking public or private rights, and this handy classification is valid for some purposes. But usually the real significance and legal consequence of each term will depend upon its context and the nature

of the interests being distinguished. As there is no special system of courts to handle public law matters, there is rarely an occasion when the distinction is of practical importance. It has been suggested that public law encompasses those rights that are enforced through the administrative process, while private law is concerned with those that are left to enforcement on private initiative through the law courts. This, however, gives a narrow operation to public law. Even constitutional law, for example, is part of the everyday work of the ordinary courts in resolving suits between private parties. Probably the lawyer thinks of public law in the classic sense of a branch of law devoted to the functioning of government and the adjustment of relations between individuals and the government, while private law is occupied with the rights of individuals among themselves. Even this distinction becomes difficult to apply to situations where the state intervenes in relations between private individuals.

Having said that we may note that public law will include the fields of constitutional law and administrative law. Also included are labour law, which is primarily concerned with government control over labour relations, and trade regulation, which is primarily concerned with government control over business activity, as well as criminal law, which directly affects the relationship between the individual and the government. The inclusion of tax law may be more controversial because of its strong affinity in practice with private law fields such as companies and property law. Private law includes contracts, family law, property law, and torts. The laws of negotiable instruments, sales, agency, corporations, and partnerships.

#### 4.5 Classifications and Islamic Law

Islamic law has more branches as compared to common law. It is divided into two main fields first: *ibādāt* (acts of worship) and *mu'āmalāt* (worldly activity). Worldly activity may then be classified in the same way as is done for the law above into public and private law, substantive and procedural law. The jurists, however, do not give too much significance to this classification and proceed to discuss the major legal branches or concepts under which rules are gathered.

It is to be noted that certain classifications used for Islamic law

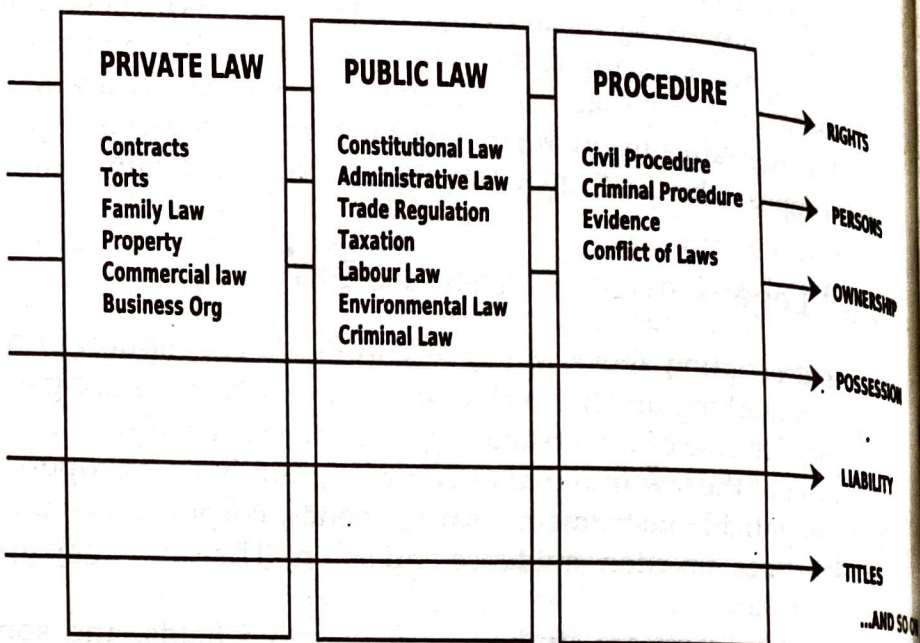
in the modern times are not followed by traditional Islamic law, but have been imposed by Western ideas. Thus, there is no such thing as "personal law" in Islam. It is a label given to this law by the British. Accordingly, saying that a law belongs to personal law and will not apply to non-Muslims living in Pakistan may be correct according to ideas imposed by the British, but not according to Islamic law.

#### 4.6 Legal Concepts and the Law

In the description above, we have said that a conception or a concept is something under which a series of related rules are gathered together for ease of understanding and analysis. This leads to a classification of the law into that of contracts, family law, property law, torts, negotiable instruments, sales, agency, corporations, partnerships, crimes, taxation, evidence and so on. The same may apply to Islamic law.

These concepts are studied as independent fields, and some of these will be briefly described below. There are, however, other concepts that may not be considered for independent study, but are taken up in the subject of jurisprudence. These concepts cut across the ordinary branches of law, that is, they are to be found in almost every field. Thus, the concept of "right" is found in every field of law, so is person. Such concepts are taken up as a special study within jurisprudence for greater understanding of the law. The figure given below attempts to explain their relationship with the main branches of law.

In Islamic law too, in addition to the major branches, there are other concepts that cut across the regular concepts. The position is the same as law. For example, we have the *bāb* of *ribā*, the *bāb* of *damān* and so on; these concepts cut across the concepts in the manuals of *fiqh* (where *bāb* is deemed a concept here). In other words, a *bāb* does not necessarily coincide with the chapters in a manual of *fiqh*. Further, there might be several *abwāb* within a *bāb*. For example, contracts is a huge category that contains within it other *abwāb*, like *bay'*, *nikāh*, *ṣarf* and so on.



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problems. To carry out these functions, the state must have agents or organs through which to operate.<sup>142</sup> The constitution is a document that deals with the appointment of these agents or organs, lays down their functions and powers, describes the relations of these organs among themselves along with their relations with the citizens.<sup>143</sup> Pakistan follows the British model of government. At the time of partition and creation of Pakistan, the country was governed by a modified version of the Government of India Act, 1935. Over the years three constitutions have been made: 1956, 1962 and the current Constitution of 1973.

Unlike the United Kingdom, Pakistan has a written constitution. Consequently, law schools should teach how a written constitution, especially our Constitution, is interpreted. The entire focus, like Britain, is on the interpretation of statutes. It is to be noted that a large number of decisions of the Supreme Court are not about constitutional grounds, but deal with other matters.

The primary source in this field is, of course, the text of the Constitution itself. It has been amended several times. The last amendment was the twentieth. A written constitution implies that there is a hierarchy of the sources of law and government. The constitution is at the top of this hierarchy. This means that any law that is not in conformity with the Constitution can be declared to be unlawful and void. As to whether this applies to the constitution itself is still far from clear. There has been an idea called "the basic structure doctrine," which implies that no amendment can destroy this basic structure.

The Constitution begins with a preamble and Article 1 declares it to be a federation, while Article 2 declares Islam to be the state religion. Article 2A makes the Objectives Resolution a substantive part. Articles 8 to 28, in Chapter 1 of Part II, list the fundamental rights guaranteed by the Constitution. Article 8 declares that all laws made in derogation of the fundamental rights shall be void. The 18th amendment recently added Article 10A (right to fair trial and due process), Article 19A (right to have access to information in all matters of public importance), and Article 25A (free and compulsory

<sup>142</sup>Jackson and Leopold, *O. Hood Phillips and Jackson: Constitutional and Administrative Law*, 5.

<sup>143</sup>*Ibid.*

education to all children of the age of five to sixteen years). Articles 29 to 40 deal with the Principles of Policy. These are the general goals to be pursued, but are not justiciable, that is, one cannot go to court on this basis.

Part III contains three chapters, and is about the Federation of Pakistan. Chapter I in this part is about the President (Articles 41 to 49), Chapter 2 is about Majlis i Shura (Parliament) (Articles 50 to 89), and Chapter 3 on the Federal Government (Articles 90 to 100). Part III IV is about the Provinces, their Assemblies, governments and governors. Part V is about the relationship between the Federation and the Provinces, that is, distribution of legislative powers, administrative relations and other miscellaneous matters like security and so on. Part VI is about the finance, contracts and property of the state. Articles 160 to 174 are devoted to these matters.

Part VII is about the Judicature, that is, the Supreme Court, the High Courts and the Federal Shariat Court. The part lays out in some detail the powers and jurisdiction of these courts and also addresses other general matters like contempt of court and so on. Part VIII is about elections and the constitution of an election commission, electoral rolls and conduct of elections. Part IX is about the Islamic provisions, while Part X is about provisions for dealing with emergencies. Part XI is about the amendment of the constitution and Part XII contains a large number of miscellaneous provisions dealing with the Services, the Armed Forces, Tribal Areas and other general matters. The Constitution contains more than 300 articles and five schedules with the Objectives Resolution attached as an annexure. It is, thus, a highly detailed and comprehensive document. As compared to this, the Constitution of the United States consist of just 12 pages.

As the Constitution has already been discussed above, we will not discuss it further. We will also not allude to the role of Islamic law within the Constitution, as that has been discussed above.

### ✓ 4.7.2 Administrative Law

Administrative law (like constitutional law) is a branch of "public law." It is part of the legal framework for public administration. Public administration is the day-to-day implementation of public policy and public programmes in all areas of social and economic life in which public programmes operate. It works hand in hand with



constitutional law, but whereas administrative law focuses on public administration, constitutional law is broader, being concerned with the whole gamut of public institutions and public functions.

As part of public law, administrative law may be broadly defined as the law which regulates the exercise of power conferred under the law upon governmental bodies. The term "governmental" is not restricted to central government in the form of the executive (the Prime Minister and ministers) and federal government departments, although these are clearly included within the term. "Governmental" refers to all public bodies invested with power under the law and so includes, for example, local authorities, the police and public corporations as well as federal government. In this context, a body may be defined as a public body and, as such, be subject to the principles of administrative law, even though it was not established by, and did not derive its powers from, government.

Administrative law, then, is concerned with the powers and procedures of those organs of government, other than legislatures and courts, that affect private interests either by rule or by decision. It deals chiefly, though not exclusively, with the discharge by public officials of functions related to rule making and adjudication and focuses on the oversight of administrators by the courts. The monitoring and control of the executive is mainly through the courts and the legislature, but now the Muhtasib Ala also exercises some form of control. The form of control exercised by the courts is called the judicial review of administrative action. Administrative agencies, in spite of their considerable independence, are also subject to some control by the legislative and executive branches.

The sources for administrative law are constitutional law, statutes, case law, and agency rules and decisions. The new laws on the freedom of information are likely to provide additional opportunity to make the executive accountable. In the study of administrative law, one comes across terms like enactment, regulation, rules, orders (quasi-judicial or executive), scheme, instruction, circular and so on. It is, therefore, good to have some idea of what these terms mean. Thus, for example, section 3(47) of the General Clauses Act defines a rule as: 'Rule' shall mean a rule made in exercise of a power conferred by any enactment, and shall include a regulation made as a rule under any enactment. Section 3(46) defines the term