12

PUBLIC LAW AND PRIVATE LAW

In any legal system the juristic principles are evolved in the context of rights and the law as command regulates the relationship between individuals and also the relationship between individual and the government. The Private Law of Contract and obligations plays an important role in shaping the socio-economic conditions different from the sphere of Public Law. In his introduction to 'Holland on jurisprudence', *N R Madhav Menon* has pointed out that as per Holland, the State's presence in the sphere of Private Law is only as arbiter of the rights and duties which exists between the citizens. In Public Law, the State is not only the arbiter, but is also one of the parties interested. The rights and duties with which it deals concern itself of the one part and its subjects on the other part, and this union in one personality of the attributes of judge and party, has given rise to the view that the State (Sovereign) not only has no duties, but also has no rights properly so called. Of the two persons who are the constituent elements of every right, one must always be the State, acting, of course, through its various functionaries. The Private Law is continuously evolving. The growth in technology has added new dimensions to the concept and the distinction between Public and Private law, both in their Substantive and Procedural aspects, may be inadequate to comprehend these changes. Today the public-private classification is breaking down and the theory of State as the arbiter of all disputes is being questioned. In fact, many disputes today are against the State and its functionaries. Independent Judiciary has become the key element of rule of law necessitating the need to re-write jurisprudence originally articulated from the point of view of the Sovereign State.

OBJECTIVES

After studying this lesson, you will be able to:

- explain the meaning and nature of Public Law;
- explain the meaning and nature of Private Law;
- understand the concept of Constitutional Law;
- discuss the concept of Administrative Law;

- define Criminal Law;
- list the differences between Public and Private Law; and
- discuss the role of Judges in shaping Law

Notes

12.1 MEANING AND NATURE OF PUBLIC LAW

Public Law is that part of law, which governs relationship between the State (government/government agencies) with its subject and also the relationship between individuals directly concerning the society. According to Loughlin, 'Public law is a form of political jurisprudence that incorporates no transcendental or metaphysical ideas of justice and goodness; it is concerned solely with those precepts of conduct that have evolved through political practice to ensure the maintenance of the public realm as an autonomous entity.'

The Public Law deals with the social problems in the broad context and may include the following heads: Constitutional Law, Administrative Law, Criminal Law and Criminal Procedure, Law of the State considered in its quasi private personality, Procedure relating to the State as so considered and Judge made Law.

In short, Public Law governs relationship between the State with its citizens and also relationship between individuals directly concerning the Society. Constitutional Law, Administrative Law, Criminal Law and Criminal Procedure are the subject matter of Public Law.

12.1.1 Constitutional Law

The primary function of Constitutional Law is to ascertain the political center of gravity of any given State postulating the supremacy of law in the functioning of State. In India, the Constitution makes India: Sovereign, Socialist, Secular, Democratic, Republic with a Federal System with Parliamentary form of Government in the Union and the States; and with an Independent Judiciary. It also establishes the structure, procedures, powers and duties of the government and spells out basic human rights which are fundamental in the governance of Nation in the form of Fundamental Rights and Directive Principles of State Policy.

Constitutional Law is a branch of Public Law. It determines the political organization of the State and its powers, while also setting certain substantive and procedural limitations on the exercise of governing power. Constitutional Law consists of the application of fundamental principles of law based on the document, as interpreted by the Supreme Court. In the words of Salmond, "Constitutional Law is the body of those legal principles which determine the

Constitution of a State- i.e., the essential and fundamental portions of the State's organization."

12.1.2 Administrative Law

As per *Holland*, Administrative Law provides for the manner of activities or the various organs of the Sovereign Power as provided by the Constitution. In this sense Administration has been defined as 'the exercise of political powers within the limits of the Constitution as the total concrete and manifoldly changing activity of the State in particular cases as the functions, or the activity, of the Sovereign Power'. It may fairly be said to include the making and promulgation of laws; the action of the government in guiding the State in its foreign relations; the administration of justice; the management of the property and business transactions of the State; and the working in detail, by means of subordinates entrusted with a certain amount of discretion, of the complex machinery by which the State provides at once for its own existence and for the general welfare. It deals, with the collection of the revenue, the collection of statistic, international trade, manufacturing, pollution, taxation, and the like. This is sometimes seen as a sub-category of Civil Law and sometimes seen as Public Law as it deals with regulation and public institutions. The Administrative Laws are enforced by the executive branch of a Government rather than the judicial or legislative branches (if they are different in that particular jurisdiction). According to *Vago Steven*, "Administrative Law is a body of the law created by administrative agencies in the form of regulations, orders, and decisions."

12.1.3 Criminal Law

The most important of the functions of the State is that which it discharges as the guardian of order; preventing and punishing all injuries to itself, and all disobedience to the rules which it has laid down for the common welfare. In defining the orbit of its rights in this respect, the State usually proceeds by an enumeration of the acts which infringe upon them, coupled with an intimation of the penalty to which any one committing such acts will be liable. The branch of law which contains the rules about this subject is accordingly described as 'Criminal law'. Criminal Law denotes wrongs against the State, community, and public. Adjective Criminal Law,' Penal Procedure,' Instruction Criminology,' is the body of rules whereby the machinery of the Courts is set in motion for the punishment of offenders.

'Criminal Law is concerned with the definition of crime and the prosecution and penal treatment of offenders'. Although a criminal act may cause harm to some individual, crimes are regarded as offenses against the State or "the people." A 'crime' is a "public" as opposed to an "individual" or "private" wrong. It is the State, not the harmed individual that takes action against the offender.

Notes

INTEXT QUESTIONS 12.1

1. Explain briefly Constitutional Law.
2. Define 'Criminal Law'?
3. What do you understand by 'Administrative Law'?
4. Define Public Law.

12.2 MEANING OF PRIVATE LAW

Private Law is concerned with the relationship between individuals with one another or private relationship between citizens and companies that are not of public importance. In the case of Private Law the role of the State is merely to recognize and enforce the relevant law and to adjudicate the matters in dispute between them through its judicial organs. Private Law as per Holland is substantive and defines the rights of individuals or it may be adjective indicating the procedure by which rights are to be enforced or protected.

In simple words Private Law governs the relations of citizens with each other. Law of Torts, Law of Contract, Private and Intellectual Property Rights are the subject matters of Private Law.

12.2.1 Private Substantive Law

The study of Private Law commences with the consideration of the Substantive Law of the various species as follows:

1. Normal Substantative Rights are the Antecedent Rights. The antecedent rights may be 'in rem' or 'in personam'. The antecedent rights 'in rem' are rights which, irrespectively of any wrong having been committed, are available for the benefit of the person of inherence against a person of incidence so unlimited so as to comprise the whole world. Example: right to personal freedom, reputation, possession and ownership.

   The rights 'in personam' are those available rights against a definite person and may arise out of agreement of the parties or by virtue of duty casted by law. Example: right of one member of family against another, right of person for action against surgeon for want of skill.

   Illustration: 'X' has land. He/she enters in to contract with gardener to maintain his/her land for one year. Here general duty is on the whole world not to trespass on land of 'X'. The gardener, however, owes special duty to 'X' over and above the duty owed to him/her by the entire world.

   Normal substantive rights may also be 'Remedial' –the objective of the right is either restitution or compensation. Remedial Rights as a rule are available in personam against the wrongdoer.

2. Abnormal Antecedent Rights–abnormal can be natural individual human beings (minors infants, lunatics convict) or artificial i.e. aggregate of human beings or of persons property which are treated by law as individual human being (associations, foundation, corporation).

12.2.2 Private Adjective Law

The Substantive Law affecting the State as a quasi-private juristic personality is supplemented by a body of adjective rules, prescribing the mode in which the State, as such a personality, may sue or be sued. Adjective Law, no less than Substantive Law may be normal or abnormal and the position with respect to artificial persons and such varieties of natural persons as pointed above are different with reference to suing and being sued from that occupied by ordinary individuals.

According to Bernard Rudden Private Law deals with the legal relations between persons. It covers matters of pure status (marriage, divorce, kinship and so on); matters involving assets of some sort (property, succession, contracts); and commercial activities in the wider sense. Its essential feature is that the participants are presumed to be juridically equals (unlike the public law structure where relations are hierarchical) so that one cannot give orders to another, unless so authorised under some previous contractual or family arrangement. Its essential technique is that much of it is not automatically binding (*jus cogens* in lawyers' language) but serves to cut down the cost of legal transactions by providing a set of patterns which citizens may use if they wish. For instance the intestacy rules operate only if a person dies without having made a will. The rules on sale, lease, loan, partnership and so on are there as models which can be adopted in full or modified if the parties so desire. Despite the many differences on the surface and in particular detailed rules, the overall structure of Private Law in both Civil and Common-Law Systems can be stated quite simply in a formula derived ultimately from the Roman jurists: Private Law deals with persons, property, obligations and liability.

Thus, it can be said that Private Law includes (i) Law of obligations /Law of Contract (organizes and regulates legal relations between individuals under contract) (ii) Law of Tort (addresses and remedies issues for civil wrongs, not arising from any contractual obligation). (iii) Law of Property (iv) Law of Succession, (v) Family Laws- family rights against abduction and adultery.

INTEXT QUESTIONS 12.2

1. Define Private Law.
2. Distinguish between antecedent right 'in rem' with right 'in personam'.
3. What is 'Private Adjective Law'?

12.3 DISTINCTION BETWEEN PUBLIC AND PRIVATE LAW

To determine the conception of Public, as opposed to Private, Law dates back to the Romans, who say of it *'ad statum rei Romanae spectat,' 'in sacris, in*

sacerdotibus, in magistratibus consistit' and, as a matter of fact also includes the law of crime. The distinction between Public and Private Law was also followed in countries of civil law traditions, common law countries.

Do you know

The distinction between Public and Private Law is a purely academic debate, nevertheless, it also affects legal practice. There are areas of law, which may not fit into distinction of Public or Private Law e.g. employment law –the employment contract is in nature of Private Law and other activities, where an employment inspector investigates workplace safety falls under Public Law

12.3.1 Theories to determine distinction between Public Law and Private Law.

Several Theories have been evolved to determine the nature of the distinction between Public Law and Private Law. Let us discuss some theories which distinguish between public and private law

The **'Interest Theory'** has been developed by the Roman jurist Ulpian: "*Publicum ius est, quod ad statum rei Romanae spectat, privatum quod ad singulorum utilitatem.* Public law is that, which concerns Roman State, Private Law is concerned with the interests of citizens. The weak point of this theory is how to define public interest as many issues of private law may also affect the public interest.

The **'Subordinate Theory'** differentiates according to the relationship between the participants. Public law is characterized by a superior-subordinate relationship, whereas private law creates a relationship of coordination. Therefore, Public Law is prominent for unilateral binding regulations such as statues and administrative acts and private law for contracts. This theory has been developed in the last century based on the idea of administration being restricted to executory administration. It clearly fails to explain relationship in the area of public service administration.

The **'Subject Theory'** is concerned with the position of the subject of law in the legal relationship, to which the rights and duties are assigned. If it finds itself in a particular situation, as a public person (the holders of Sovereign Authority such as a State or a Municipality), the public law applies, otherwise it is private law authorizing or obliging everyone.

A combination of above theories can provide a workable distinction. We can now say that a field of law is considered Public Law or Private Law on the basis of public interest, endowment of the power and the relation to the State.

12.3.2 Public Vs Private Law

Public law	Private law
It deals more with issues that affect the general public (may be individual, citizen or corporation) or the State itself.	It focuses more on issues affecting private individuals, or corporations.
The persons concerned in a Public Law, right are, therefore, necessarily dissimilar, one of them being always that highly abnormal person which is called a State.	Both of the persons concerned in Private Law, rights are as a rule, perfectly similar, and of that normal type which requires no special investigation.
It may also be remarked that the majority of the rights dealt with in Public Law are permanently enjoyed by the State as the person of inherence against its subjects as the persons of incidence.	In Private Law on the contrary, he/she who is today the person of inherence with reference to a right of any given description may very probably become tomorrow the person of incidence with reference to a precisely similar right and *vice versa).*
In Public law the State is not only arbiter, but is also one of the parties interested. The rights and duties with which it deals concern itself of the one part and its subjects of the other part.	In Private law the State is indeed present, but it is present only as arbiter of the rights and duties which exist between one of its subjects and another.
Public Law is concerned with the structure of government, the duties and powers of officials, and the relationship between the individual and the State. "It includes such subjects as Constitutional Law, Administrative Law, regulation of public utilities, Criminal Law and Procedure, and Law relating to the proprietary powers of the State and its political subdivisions"	Private Law is concerned with both substantive and procedural rules governing relationship between individuals (such as the law of torts or private injuries, contracts, property, wills, inheritance, marriage, divorce, adoption, and the like).

ACTIVITY 12.1

Write down in the boxes given below any two differences between Public and Private law.

Notes

INTEXT QUESTIONS 12.3

1. List the Theories which have been evolved to determine the nature of distinction between Public Law and Private Law.
2. What is Interest Theory?

12.4 ROLE OF JUDGES IN SHAPING LAW

The Common Law is generally uncodified with no comprehensive compilation of Legal Rules and Statutes. Though the Common Law does rely on some scattered Statutes, which are legislative decisions, it is largely based on 'Precedent', meaning the judicial decisions that have already been made in similar cases. The 'precedents' to be applied in the decision of each new case are determined by the presiding judge. As a result, judges have an enormous role in shaping American and British law.

Bernard Rudden has noted that the main creator of the Common Law is the Judiciary. However, in Civil Law Systems (codified), at least until very recently, judges played the comparatively minor role of settling the dispute in front of them. In countries of the Civil Law group, these three areas of status, assets, and business may be dealt with in separate codes of Family Law, Civil Law (using the word in a narrower sense) and Commercial Law. In the Common Law world the basic system is laid down by case law, although there are many modern Statutes which often re-state and systematize the work of the judges. The **'doctrine of precedent'** is an operating rule of a Common Law System so the rule itself was never laid down by a legislator. It is a judicial creation and can be amended or adapted by its makers. In England, for instance, the highest court (the House of Lords) held in the 19th century that it was bound by the law laid down in its own prior decisions and in the 1960 it amended rule, and gave notice that it was now free, to change its mind. Lower Courts, however, are bound by the highest Court's rulings on matters of law.

Speaking on the role of the judges, President Roosevelt in his message of 8 December, 1908 to the Congress of the United States, said: "The chief law-makers in our country may be, and often are, the judges, because they are the final seat of authority. Every time they interpret contract, property, vested rights, due process or law, liberty, they necessarily enact into law parts of the system of social philosophy; and as such interpretation is fundamental, they give direction to all law making. The decisions of the courts on economic and social questions depend upon their economic and social philosophy; and for the

peaceful progress of our people during the twentieth century, we shall owe most to those judges who hold to a twentieth century economic and social philosophy and not to a long outgrown philosophy which was itself the product of primitive economic conditions."

Prof. A. V. Dicey was of the view that the Courts must act as judges, not as arbitrators, and that the duty of a Court is to follow 'Precedents' though to a limited extent is admitted in all civilised countries have obtained more complete acceptance in England than in any Continent, and perhaps in any other existing, State. According to Dicey, the judge made law is real law, though made under the form of, and often described, by judges no less than by jurists, as the mere interpretation of law. There are, however, certain limitations of the Judges/ Courts: (a) It cannot openly declare a new principle of law: it must always take the form of a deduction from some legal principle whereof the validity is admitted, or of the application or interpretation of some statutory enactment (b) It cannot override Statute Law (c) the Courts may, by a process of interpretation, indirectly limit or possibly extend the operation of a Statute, but they cannot set a Statute aside. It cannot, by its very nature, override any established principle of judge-made law. A superior Court may, of course, overrule any principle of law that derives its authority merely from the decisions of an inferior Court.

Hart accepts that in 'hard cases' judges make law since in arriving at decisions, judges have a fairly wide discretion by virtue of the rule of recognition: if there is some 'acid test' by which judges are to able to decide what are the valid legal rules, then where there is no applicable legal rule or the rule or rules are uncertain or ambiguous, the judge must have a strong discretion to 'fill in the gaps' in such 'hard cases.' Judges are nonetheless guided by various sources but ultimately they base their decision on subjective conceptions of fairness and justice. Sometimes there is no source (rule or precedent) to guide the judge and he/she must use strong discretion and legislate.

According to T. R.S. Allan, Rule of Law purports to be a principle implicit in all Common Law Legal System that judges may invoke to strike down government, and even legislative, action. Allan was of the view that the Rule of Law is a legal principle; a substantive legal rule which is, or should be, applied by Commonwealth Courts and to be understood through examination of case law.

On the other hand Tomkins is of view that the role of the Courts is merely to police the boundaries set by Parliament. Scrutiny of the rationality of Executive decision-making should be left to the Commons. Further, T. Poole claims that 'judicial review' by judges cannot legitimately replace political debate in legislatures as the principle forum for debates about policy. Legislatures are

better placed than courts to accommodate a wide range of different points of view and different interests. And, we could add, only legislatures can produce systematic solutions to social problems – the judicial process ordinarily only allows for slow, incremental, changes to the law.

However, here we will not go into debate whether judges are creators of law or not, but certainly they can play an important role in shaping law. In India, there are some classic examples where the judgments of the courts have resulted in to making of law. *in* '*Vishaka* Vs. State of Rajasthan', the Supreme Court laid down guidelines and norms against sexual harassment at workplace and recognized sexual harassment as a violation of fundamental rights of women to equality. The Court stressed that this should operate as a binding law upholding gender equality. *In 'Indira Swahney I' and 'Indira Swahney-II'* – In these two cases law was declared that caste alone could not be the basis for determining the socially and economically backward class. The creamy layer of those who were advanced socially and economically would not come under backward class irrespective of their caste. In '*Raj Narain* vs State of UP', the Supreme Court declared that people cannot speak or express themselves unless they know. Therefore, right to information is embedded in article 19 and is a fundamental right. *In 'People's Union for Civil Liberties (PUCL) & another vs. Union of India and another'* the Supreme Court held that securing information on the basic details concerning the candidates contesting for elections to the parliament or State Legislature promotes freedom of expression and therefore, the right to information forms an integral part of Article 19(1)(a). This Right to Information is, however, qualitatively different from the right to get information about public affairs or the right to receive information through the Press and Electronic Media, though, to a certain extent, there may be overlapping.

Do you know

Common Law functions as an Adversarial System and inquisitional system is followed in Civil Law System. The Adversarial System implies the contest between two opposing parties which present their cases to neutral judge who has to ensure that the trial proceeds according to the procedural rules of trial or due process of law and that evidence entered is done so according to established rules and guidelines. Most of countries that derive their legal systems from the English model, have the Adversarial Legal System. In an Inquisitorial System, a judge is involved in the preparation of evidence along with the police and in how the various parties are to present their case at

the trial. The judge takes on the role of prosecutor and judge in the 'Inquisitorial System'. There are no jury trials in an 'Inquisitorial System' and a judge can compel an accused to make statements and answer questions. This differs from the Common Law and adversarial system of not to take the stand in one's own defence.

ACTIVITY 12.2

Collect the opinion of at least five of your classmates, friends or adults in your neighborhood on the following questions:

1. Do you think that judges make Law?
2. Do you think that judges interpret Law?
3. Do you agree that duty of a Court is to follow 'Precedents'?

Put their responses in the Table given below and draw conclusions. What opinion do you have regarding these questions?

Questions	Responses of Persons				
	Person 1	Person 2	Person 3	Person 4	Person 5
Question 1					
Question 2					
Question 3					

INTEXT QUESTIONS 12.4

Write True/False.

1. Judges play an important role in shaping Law. (True/False)
2. The 'Doctrine of Precedent' is an operating rule of a Common Law System. (True/False)

WHAT YOU HAVE LEARNT

In any Legal System the Juristic Principles are evolved in the context of rights and the law as command regulates the relationship between individuals and the also the relationship between individual and the government.

Public Law is that part of law, which governs relationship between the State (government / government agencies) with its subject and also the relationship between individuals directly concerning the society.

Private Law is concerned with the relationship between individuals with one another or private relationships between citizens and companies that are not of public importance. It covers matters of pure status (marriage, divorce, kinship and so on); matters involving assets of some sort (property, succession, contracts); and commercial activities in the wider sense.

In Common Law countries, judges play important role and follow the 'Doctrine of Precedent' on the other hand in Civil Law Systems, judges play the comparatively minor role of settling the dispute in front of them.

TERMINAL QUESTIONS

1. Explain meaning and nature of Public Law.
2. Define Private Law.
3. Write short notes on the following:
   (a) Constitutional Law
   (b) Administrative Law
4. Differentiate between Public and Private Law.
5. Write short notes on the following:
   (a) Interest Theory
   (b) Subordinate Theory
   (c) Subject Theory
6. Discuss the role of Judges in Shaping Law.

ANSWER TO IN TEXT QUESTIONS

12.1

1. Constitutional Law is a branch of Public Law. It determines the political organization of the State and its powers.
2. Criminal Law is the body of law that relates to crime. It enumerates Acts that are threatening, harming, or otherwise endangering the health, safety, and moral welfare of people. It also provides for the punishment /penalty to which any one committing such acts will be liable.

3. Administrative Law is a body of the law created by Administrative Agencies in the form of Regulations, Orders, and Decisions
4. In Short, Public Law governs relationship between the State with its citizens and also relationship bewteen individuals diretly concernings the society. Constitutional Law, Administrative Law, Criminal Law and Criminal Procedure are the Subject matter of Public Law.

12.2

1. Private Law is concerned with the relationship between individuals with one another or private relationship between citizens and companies that are not of public importance. Private is substantive and defines the rights of the individuals or it may be adjective indicating the procedure by which rights are to be enforced or protected.
2. The antecedent rights 'in rem' are rights which, irrespective of any wrong having been committed, are available for the benefit of the person of inherence against a person of incidence so unlimited so as to comprise the whole world, while the rights 'in personam' are those available against a definite person and may arise out of agreement of the parties or by virtue of duty assigned by law.
3. The Private 'Adjective Law' provides for the mode in which the State, as such a personality, may sue or be sued.

12.3

1. (i) The Interest Theory (ii) The subordinate Theory (iii) The Subject Theory.
2. The 'Interest Theory' as developed by the Roman jurist Ulpian provides that Public Law is that, which concerns Roman State and Private Law is concerned with the interests of citizens.

12.4

1. True
2. True