CHAPTER I

LAW AND LEGAL SYSTEM

What is Law? A common phrase still haunts jurists as to precisely what law is. There is a saying that if any one were to state categorically that he knew the precise answer to the question "what law is?" he would deserve to be regarded either as a fool or as the greatest philosopher living. The universal problem about defining this term is that the process of definition is itself essentially arbitrary. One may use the term to understand "the laws of nature"; or "the laws of cricket"; or "the laws of morality" etc. If law is given a meaning of "what I choose it to mean" then there is certainly a danger to define it. A good working and practical definition should be that law is a body of rules, whether formally enacted or customary, which a state or community recognises as binding on its members or subjects. It may also be said that law is a body of rules which are enforceable in a court of law. The legal system supplies an orderly means for the settlement of disputes in the state. The law is the means by which the disobedience or violence which underpins the power of the state is sublimated into recognition of the legitimacy of the state's authority.

Law and Politics: From one point of view the two concepts of law and politics seem to be embroiled into the 'chicken and egg' debate. Which one does come first in the society? Law or politics? It is the politics which gives rise to law in the sense that most of the social claims between individuals and between society and individual come into being as a result of social interaction. This interaction between individuals or between society and individuals press for movement so that those claims are recognised as law in the society. This movement is nothing but politics and this politics compels the government to make law in the areas for which the movement is mounted. Seen from the other end of the spectra, it is the law made by the state mechanism and its shortcomings which give rise to movement for necessary change and this movement or politics is nothing but the result of the law.

There is another school of thought which believe that politics is regarded not only as something apart from law but as inferior to law. Law aims at justice, while politics looks only to expediency. The former is neutral and objective; the latter is the uncontrolled child of competing interests and ideologies. Examples may be drawn from international law (soft international law as opposed to hard international law) the obedience to which ultimately rests much more on political expedience than on enforcement machinery[1].

There is another way of contrasting between law and politics. Rules of political practice which are not enforceable by the courts play a crucial role in the unwritten constitution of the UK. Explaining that law means 'rules enforced through courts' may, therefore, provide a convenient practical test for distinguishing legal rules from political rules (politics). Taking this perspective it may be said that both law and politics are the rules of the game of state administration; they together form genus of which 'law is a special branch of politics in which certain kinds of rules are picked out as appropriate for handling by independent bodies known as courts'. However, it should be stressed that distinction between law and politics may be attempted but at the same time recognising that the distinction is neither fundamental nor absolute.

Law and Rights: Right means a claim of some interests adversed by an individual or a group of individuals which has either moral or legal basis and which is essential for his development in the society. In a sense right is not created by law; it originates itself as an obvious result of mutual interaction between man and society. Rights are primarily divided into two categories—moral rights and legal rights. Moral rights are those rights which have their basis on the rule of natural justice and the violation of which results in moral wrong. Legal rights, on the other hand, are those rights which are recognised by the positive law of the country and can be claimed on legal basis and the violation of which results in legal wrong. As mentioned earlier right originates in the society and remains as a moral right so long it is not recognised by law. Whenever a law recognises it and secures its protection, it transforms into a legal

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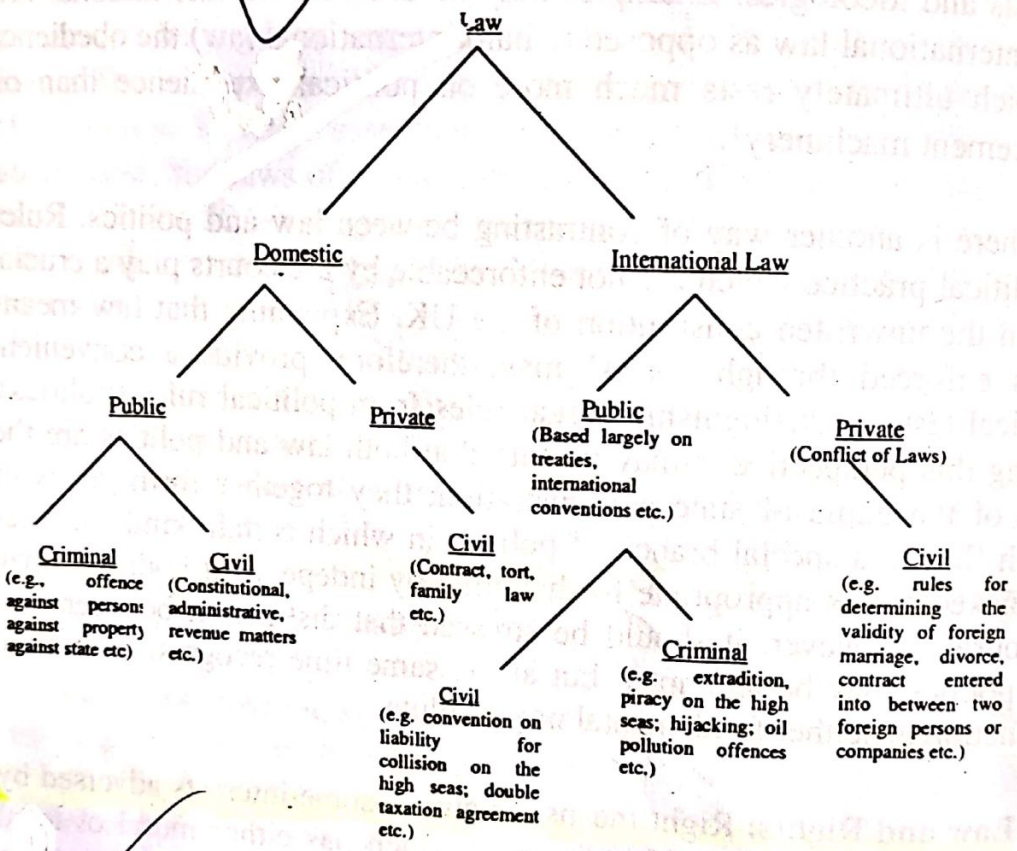
[1] Drewry, Gavin, *Law, Justice and Politics*, (Longman: 1975), p.25

right. All legal rights in this sense are moral rights and the distinction between the two is one of degree rather than of form.

Principal Categories of Law



Legal System: The best known definition of a legal system comes from Professor Hart. He listed five factors which had to co-exist to create a legal system. These are as follows:

(i) Rules which either forbade certain conduct or compelled certain conduct at pain of sanctions;

(ii) Rules requiring people to compensate those whom they injured;

(iii) Rules stating what needs to be done in certain 'mechanical' areas of law such as making a contract or making a will;

(iv) A system of courts to determine what the rules are, whether they have been broken and what the appropriate sanction is; and

(v) A body whose responsibility it is to make rules, and amend or repeal them as necessary.

The above five factors seem to be the minimum requirements for a legal system. Considering these in the context of the legal system of Bangladesh, the first three types of rule all exist the first one being the criminal law, and the second two being part of civil law in Bangladesh. There are both civil and criminal courts regarding the points in factor 4 and the parliament is the legislative body as pointed out in factor 5.

The legal system of a country the main purpose of which is the administration of justice has three aspect. The first is the institutional aspect which includes courts both civil, criminal and special; the judiciary, i.e. the judges; the legal profession, i.e. advocates; law officers, e.g. the Attorney-General, public prosecutors, public pleader, registrars of the court etc; and the jail and police. Second is the procedural or functional aspect which includes the procedure of the judicial or quasi-judicial dispensation of justice, i.e. the procedure of providing remedies through the institutional organs of the legal system. The procedure of investigation, inquiry, filing a suit, taking evidence, steps in appeal, review etc all are within the fold of this procedural aspect. The third aspect relates to all the conceptual components of the legal system and these include, *inter alia*, the historical development, the rules of judicial precedent, statutory interpretation, legislation, legal reform, legal aid etc.

Categories of Law

All existing laws in a country may be divided into two broad categories: national or domestic law and international law. Both these categories may again be divided into two sub-categories: public law and private law.

Public Law: Public law determines and regulates the organization and functioning of the state and determines the relationship of the state

with its subjects. The test of public law depends upon the nature of the parties in the relationship in question; if one of the parties is the state, the relationship belongs to public law. Thus constitutional law, criminal law, tax law, administrative law etc. are the branches of public law.

Private Law: Private law is that branch of law which determines and governs the relations of citizens with each other. In the domain of private law parties are private individuals and the state, taking the position of an arbitrator, through its judicial organ adjudicates the matters in dispute between them. Law of contracts, torts, of property etc. are examples of private law.

Substantive Law and Procedural Law: Both public and private law may be substantive law or procedural (adjective) law. When a particular law defines rights or crimes or any status, it is called substantive law. For example, penal law, law of contract, law of property etc. are substantive laws. When a particular law determines the remedies or outlines the procedures of litigation, it is called procedural law e.g. Civil Procedure Code, Criminal Procedure Code etc. The distinction between the substantive and procedural law is not an always easy and clear-cut. The same law may be procedural as well as substantive.[1]

Laws in Bangladesh

There are about 999 laws in Bangladesh of which 366 are pre-independence laws and 633 have been made after the independence. This statistics is based on the information given in recently published Bangladesh.

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1 See, Salmond, *Jurisprudence*, 10th ed, P. 461

Distinctions between Civil and Criminal cases

Areas of difference	Civil Cases	Criminal Cases
Purposes of the law	To uphold rights of individuals	To maintain law and order; to protect society and to punish offender.
Person starting the case	The individual whose rights have been infringed or threatened.	Usually the State through the police and informant.
Legal name for the persons	Plaintiff/ defendant	Prosecutor/ defendant or accused
Standard of proof	The balance of probability	Beyond reasonable doubt
Courts dealing with the case	Small Cause Courts, Assistant Judge, Senior Assistant Judge, Joint District Judge, Additional District Judge, District Judge and the Supreme Court.	Magistrate Courts (3rd Class, 2nd Class and 1st Class), Metropolitan Magistrate Courts, Joint Sessions Judge, Sessions Judge and the Supreme Court.
Decision	Liable/entitled or not liable/not entitled.	Guilty or not guilty
Powers of the court	Declaration, Award of damages, injunction, specific performance of contract, restitution, rectification, Rescission etc	Prison, fine, probation, discharge etc.
Commuting power of the Crown	The Crown cannot commute any civil judgment.	The Crown can commute a sentence in criminal law.
Nolle prosequi	Even if the suit has been started, it can be settled at any stage by the parties.	Once started criminal proceedings cannot be stopped except by the authority of the Govt/or Attorney-General
Evidence	The defendant can be compelled to give evidence.	The accused cannot be compelled to give evidence.