



## Defining the developments and issues in public law

By  
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One of the important issues in public law is that of jurisdiction and illegality. Public law is the body of law dealing with the relations between private individuals and the government and with the structure and operations of the government. This two-way relationship gives rise to many issues. The actions of the public authorities affect many individuals and resultantly issues of jurisdiction and illegality arise.

Jurisdiction is the power to exercise authority over all persons and things within the competence of government and its departments. It is the power to decide a case or an issue between the parties to the conflict.

Illegality, on the other hand, is an act that is not authorised by law. The state of not being legally authorised includes many actions. For example, "a contract made ultra vires is void; but not strictly speaking on the ground of illegality. Lord Cairns ... takes exception to the use of the term 'illegality,' pointing out that it is not the object of the contracting parties, but the incapacity of one of them, that avoids the contract."<sup>1</sup>

"It must not be thought that illegality in the law of contract is co-terminus with illegality in the criminal law, for a contract may be illegal without involving any breach of the criminal law at all."<sup>2</sup>

Illegality is the state or condition of being unlawful. The affirmative defence of illegality must be expressly set forth in the response to the opponent's pleading.

The problems of public law did not agitate public minds until very recently. The Report of the Law Reform Commission (1958-59) did not deal with the question of public bodies. But the term 'administrative law' had, received an extra-judicial recognition. A R Cornelius, CJ, Supreme Court of Pakistan, said in the course of an address to civil servants, referring to the power of the superior courts to interfere with arbitrary decisions.

'So, there you have in our country a fine example of the development and the operation of administrative law according to the very highest standards.'<sup>3</sup>

The specific issue of the 'writ jurisdiction of the superior courts' to interfere with the exercise of illegal power has, however, arisen before the courts of law time and again. Many constitutional battles have been fought over the issue.<sup>4</sup> At times, sharp conflicts have occurred between the judiciary and the executive over this question. The writ jurisdiction was conferred on the high court's in October 1955 by section 223A of the Government of India (Amendment) Act 1954.<sup>5</sup> The Constitution of 1956, which came into force on 23rd March 1956, superseding the above provision, conferred this jurisdiction on the Supreme Court and the high court's by virtue of articles 22 and 170 respectively.

The Constitution of 1956 was abrogated in 1958, and martial law stood proclaimed. In 1962, a new Constitution was enacted. Article 98 of the 1962 Constitution empowered the high court's to exercise writ jurisdiction. The 1962 Constitution was replaced by a new Constitution in 1973, and Article 199 of the 1973 Constitution, conferred writ jurisdiction in similar terms. Article 184 permitted the Supreme Court to exercise writ jurisdiction under its original jurisdiction in exceptional cases (when a question of public importance with reference to any of the fundamental rights enshrined in the Constitution was involved). Article 185 conferred on the Supreme Court the appellate jurisdiction over high courts inclusive of writ jurisdiction. The 1973 Constitution was suspended on 5 July 1977. On the same day, the Laws (Continuance in Force) Order<sup>6</sup> was issued. This order maintained the writ jurisdiction of the High Courts and Supreme Court except in relation to the Martial Law proclamation of 5 July 1977, Martial Law Regulation or Actions of the Martial Law Authorities. On 30th December 1985, the Constitution of 1973 was revived with some changes.<sup>7</sup> These changes did not affect the writ jurisdiction of the high court's and the Supreme Court.

With the addition of Article 2A to the Constitution of Pakistan and the enactment of the Enforcement of Shariat Act 1991 (10 of 1991), the position of judicial review seems to have undergone a radical change. These provisions, particularly those of Article 2A, have enlarged the jurisdiction of the high court in matters relating to Islam to such an extent that in certain fields when the jurisdiction of even the Federal Shariat Court stands ousted, that of the high court stands restored and enlarged. For instance, under Article 203D read with Article 203(C) the Federal Shariat Court has no jurisdiction to examine the vires of Muslim personal laws but under Article 2A the high court has jurisdiction even to examine the vires of this law as un-Islamic.<sup>8</sup>

Article 2A of the Constitution appears to have contributed to the substantive content of judicial control to a degree comparable to substantive due process of the American Constitution. Thus, in one case<sup>9</sup> a company had argued its case so as to deprive a section of the public of social security cover. But the Supreme Court ruled that this was not a case of equal strength of the parties. In such a situation under Islamic dispensation, even if the case for both sides had been equally balanced, in order to advance the cause of social justice as contained in the Objective Resolution, the decision of the Supreme Court would have gone in favour of upholding the workers' right to the social security cover. Thus, Article 2A of the Constitution read with the Objective Resolution is to be used as a tool of interpretation 'so as to advance the dictates of justice'. Justice would not only be done but be seen to be done.<sup>10</sup>

But now we are gradually moving in the direction of public law. This is illustrated in *Pakistan v Salahuddin*.<sup>11</sup> In this case, the question was whether the petitioners for judicial review had a vested right in obtaining an import licence and in importing machinery for which licence had already been issued notwithstanding a prohibitory notification under section 3 of the Imports and Exports (Control) Act 1950. It was held that the petitioners could rely on the licences issued to them.

It was stated that the doctrine of promissory estoppels does not extend to legislative and sovereign functions but executive functions are not excluded from its operation. In other words, promissory estoppels could be invoked against public authorities, but the Supreme Court spelt out its limitations as follows:

1. It cannot be invoked against legislature or laws;
2. It cannot be invoked for doing what is against the law;
3. No agency or authority can be bound by a promise when it had no jurisdiction to act in the matter;
4. It does not apply when the applicant did not suffer the damage; and
5. A party, which has indulged in fraud or collusion, cannot invoke the doctrine of promissory estoppels.

One can discern in this ruling a mixture of private law and public law elements - promissory estoppels and jurisdictional principle. It would be preferable to found the law wholly on the public law principle. The *Res judicata* principle has also been applied to decisions of such bodies such as the income tax authority subject to certain qualifications.<sup>12</sup>

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1. William R. Anson, *Principles of the Law of Contract* 190 (Arthur L. Corbin ed., 3d Am. Ed. 1919).
2. P.S. Atiyah, *An Introduction to the Law of Contract* 257 (3d ed. 1981).
3. A. R. Cornelius, *Development and Administration of Evacuee and Refugee Laws in Pakistan*, PLDJ (1966), 47.
4. Thus, the famous Constitutional-law case, *Fed of Pak v Tamizuddin Khan* (1956), PLR (WP) 306, was concerned with the question of validity of s 223A of the Government of India (Amendment) Act 1954, which conferred writ jurisdiction on the High Courts. It was held invalid having never received the assent of the Governor-General; see *W I Jennings, Constitutional Problems in Pakistan* (1957); subsequent leading cases on this issue are: *Sir Edward Snelson v judges of the High Court of W Pak* PLD 1961 SC 237; *Abut A 'la Maudoodi v Government of W Pak* PLD 1964 SC 673; see also *A R Cornelius, Writ Jurisdiction of Superior Courts* PLDJ (1964), 77.
5. Section 223A took effect from 2 October 1955, this being the date of the commencement of the Government of the India (Amendment) Act 1954; see the *Validation of Laws Act 1955*, s 3; prior to this date the East Bengal High Court at Dacca possessed the writ jurisdiction as successor of the Calcutta High Court: see s 5 of the *Governor-General's High Court (Bengal) Order 1947*.
6. *C MLA Order No 1 of 1977*. See also the *Constitutional (Amendment) Order 1980*, (PO No 1 of 1980, art 2).
7. *The Revival of the Constitution of 1973 order under 1985* (PO No 14 of 1985).
8. *Allah Ditta v The State* PLD 1992 Lah 45.
9. *MacDonald Layton Costain Ltd v Punjab Employees' Social Security Institution* PLD 1991 SC 1055.
10. *Resham Bibi v Elahi Sain* PLD 1991 SC 1034.
11. PLD 1991 SC 546. See also *Asif Iqbal v Kamkehi Metropolitan Corpn* PLD (1994) Kar 60.
12. *Commissioner of Income Tax v Pak Eng Agencies* PLD 1992 SC 362.

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Zafar Azeem, "Defining the developments and issues in public law," *Business recorder*. 21-06-2012.

**Keywords:** Law, Judicial system, Constitutional law, Constitution-Pakistan, Supreme Court-Pakistan, Public law, High Court-Calcutta, Government-India, Judiciary, Jurisdiction, Pakistan, India, PLD