PART I

Principles and Theory

CHAPTER 1

Introduction to the Legal System

LEARNING OBJECTIVES

After reading this chapter, you will understand

- what is meant by the term "law";
- why we need laws, as well as other, less formal rules, to govern our conduct;
- what kinds of behaviour are regulated by laws;
- how laws are made;
- who has the authority to make laws;
- what distinguishes various categories of laws; and
- how different kinds of laws are administered and enforced.

This introduction is mainly for readers who have had limited exposure to law or political science.

The law is the last result of human wisdom acting upon human experience for the benefit of the public.

Samuel Johnson

WHAT IS A LAW?

There are various ways of defining the concept of a **law**. For the purposes of this book, a law is described as a rule made by a body of elected representatives or their delegates or by a court, using procedures that are also prescribed by law. All the steps set out in the procedural rules must be followed. For example, in the case of laws made by Canada's federal Parliament, a provincial legislature, or the council of one of the territories, the proposed law must be

- read three times in the open assembly,
- debated,
- passed at the second and third reading by a majority of the elected representatives present, and
- assented to by the Queen's representative (the governor general for federal laws and the lieutenant governor for provincial laws).

If any of those steps are missed, the law will not be valid.

WHY DO WE NEED LAWS?

People often think of laws as rules that prohibit them from doing something and punish them if they break the rule. Although that is the nature and effect of many laws, laws do not just impose duties; they also create rights. In addition, laws create a framework to ensure that the many complex activities of contemporary society are carried out in an honest, fair, efficient, and effective manner. Laws are, in effect, a blueprint or a set of "rules of the road" for carrying on business, protecting consumers, regulating the use and development of land, conferring government benefits, protecting human dignity and preventing discrimination, and distributing and redistributing wealth. Imagine driving a car in a crowded city if there were no rules requiring motor vehicle safety, driver training, when to stop and go, when to make turns, how fast to go, and which side of the road to drive on. Imagine the chaos if half the drivers chose to drive on the right-hand side of the road and the other half decided to drive on the left!

HOW DO LAWS DIFFER FROM OTHER RULES?

In a democratic society, people have considerable freedom to do what they want in any way they want. However, certain behaviour is restricted either by formal laws imposed by governments and the courts, or by other kinds of rules that are followed by most people but are less strictly enforced. These other rules may be imposed through social pressure or by mutual agreement (social norms), or may be accepted as a condition of belonging to some group or organization, such as a school, business, church, or club. Compliance with these rules is, in a sense, a matter of choice for the individual, although breaking a rule may lead to penalties, such as loss of membership in a group. In contrast, compliance with laws is required.

While governments and the courts can restrain the activities of ordinary people, they can do so only by passing, enforcing, or applying a law. As discussed above, in order to be valid as a law, any rule made by a government in the form of a law must be passed by a majority of the elected representatives, using the prescribed procedures. Similarly, any restraints imposed by tribunals or courts must be authorized by laws passed by governments or made by judges.

> Law will never be strong or respected unless it has the sentiment of the people behind it.
>
> James Bryce, *The American Commonwealth*, vol. 2 (1888)

Governments and courts must also follow laws that set out the procedures for applying or enforcing laws, and they must limit their activities to those that are **delegated** to them by a valid law. In other words, governments, tribunals, and courts are not entitled to do whatever they want, but only what validly made laws authorize them to do. This limit on the right of governments, tribunals, and courts to control the conduct of citizens is known as the **rule of law**.

According to the rule of law, all law making is governed by a supreme law called the **constitution**. The constitution establishes the basic institutions of government, reflects some of the fundamental values of society, and determines the

values or goals that all other laws must reflect. In this way, the constitution governs the validity of all other laws. This relationship between the constitution and the creation of other laws is discussed in more detail below.

The purpose of the rule of law is to prevent arbitrariness and, at worst, tyranny. By restricting the powers of government, and by setting out strict rules for the passing, application, and enforcement of laws, the democratic system deters those who are granted these powers from acting impulsively or capriciously, making up the rules as they go along. It also deters individuals or groups from assuming or exercising powers that they do not legitimately possess.

Using the rule of law as a method of curbing the powers of government prevents many abuses. To avoid arbitrariness, the rule of law requires that like situations be treated alike and different situations be appropriately distinguished from each other. In addition, new rules are subjected to a predetermined process of scrutiny by elected representatives. They are not imposed in a dictatorial fashion with no accountability.

A Hollywood take on the meaning and importance of law:

Let me tell you what justice is. Justice is the law. And the law is man's feeble attempt to lay down the principles of decency. And decency isn't a deal, it's not a contract or a hustle or an angle! Decency—decency is what your grandmother taught you. It's in your bones.

Morgan Freeman as Judge Leonard White in *The Bonfire of the Vanities*

THE CANADIAN CONSTITUTION AND ITS LIMITS ON LAW MAKING

The constitution of Canada is the supreme law of the land. All other laws must conform to it. The constitution consists of a combination of principles of democracy inherited from Britain as traditions and a statute passed by the Parliament of Canada called the *Constitution Act*. A court can declare any law that conflicts with the constitution to be invalid, or the effect of such a law may be restricted by a court or, in some circumstances, by a tribunal. An invalid law is called "unconstitutional." No one is required to follow an unconstitutional law.

There are two parts of the constitution that determine the validity of laws passed by the federal and provincial governments and of municipal bylaws. The first is the division of powers. The second is the *Canadian Charter of Rights and Freedoms*.

Division of Powers

The constitution allocates law-making powers between the federal government and the provinces according to subject matter.[1] If one level of government passes a law that regulates a subject granted to the other level by the constitution, the law is

---

1 The division of powers is found primarily in the *Constitution Act, 1867*, 30 & 31 Vict., c. 3 (formerly known as the *British North America Act*). Some clarification of the division of powers is also found in the *Constitution Act, 1982*, RSC 1985, app. II, no. 44.

considered invalid. For example, if a provincial government passes a criminal law, an area of jurisdiction that the constitution grants exclusively to the federal government, that law cannot be enforced.

The Charter

The second part of the constitution to which laws must conform is the *Canadian Charter of Rights and Freedoms*.[2] The Charter sets out a list of fundamental freedoms, democratic or political rights, legal rights, mobility rights, and equality rights belonging to persons. Any law or government action that infringes these rights to a greater extent than can be justified in a free and democratic society is either invalid or has no effect to the extent that it infringes these rights. That is, the rights set out in the Charter are not absolute.

The Charter allows a court (and in some cases, tribunals) to balance the civil liberties of individuals and corporations against the collective rights of the public as a whole. If the constitutional rights of a person are infringed by a law or by the way the law is implemented, the government is required to demonstrate that the infringement is important for the benefit of the community and that the intrusion is no greater than is necessary to achieve this social benefit.

If the government can justify the extent to which the law infringes a right or freedom guaranteed by the Charter, the courts will consider the law to be valid. If the government cannot justify the infringement, the law will not be binding on the person whose right or freedom it infringes.

WHO MAKES THE LAWS?

Our system of government has three basic branches—legislative, executive, and judicial. In general, the legislative branch (such as the federal Parliament or provincial legislatures) makes laws; the executive branch (such as government departments or police forces) enforces laws; and the judicial branch (the courts) interprets laws.

Our system also has three levels of government—federal, provincial (or territorial), and municipal. As discussed above, and in more detail below, the division of powers between the federal and provincial governments is set out in the constitution. For example, criminal law is under federal jurisdiction, and employment law is under the jurisdiction of each of the provinces. Some subject areas, such as family law, are shared. The provinces also have the power to delegate authority over local issues to municipal governments. For example, municipalities generally have the authority to pass and enforce bylaws governing land development and public transit.

As indicated in the chart below, the federal and provincial governments have all three branches of government, and the municipal governments have only legislative and executive branches. The territories have judicial branches, but their judges are appointed by the federal government, not the territorial governments.

2 The *Canadian Charter of Rights and Freedoms* is contained in part I of the *Constitution Act, 1982*, supra note 1. Before 1982, the civil liberties of Canadians were not part of the constitution. There were some federal and provincial statutes, such as the federal *Canadian Bill of Rights*, Quebec's *Charter of Human Rights and Freedoms* (RSQ, c. C-12), and the human rights codes of other provinces, that guaranteed civil liberties, but they did not have constitutional status; that is, they did not override conflicting statutes.

Level of government	Branch of government		
	Legislative	*Executive*	*Judicial*
Federal	✓	✓	✓
Provincial	✓	✓	✓
Territorial (Nunavut, Yukon, and the Northwest Territories)	✓	✓	✓ (Judges are appointed by the federal government.)
Municipal	✓	✓	

Each of these levels and branches of government must stay within the authority granted to it by the constitution or by another statute. This concept of "separation of powers" follows from the principle of the rule of law. It is intended to be a safeguard against any of the three levels or branches becoming too powerful and abusing its authority. A challenge of administrative law is to ensure that this safeguard continues to operate while society benefits from the flexibility and efficiencies that can result from delegating powers. The authority, structure, and levels of government are described more fully below.

The Three Branches of Government

LAW-MAKING POWERS OF THE LEGISLATIVE BRANCH

The legislative branch consists of individuals elected by citizens (the general public) to represent them in the federal Parliament, the provincial legislatures, councils of the territories, and municipal councils. It is called the legislative branch because under Canada's constitution, its members have a monopoly on the power to **legislate** (pass laws). More specifically, these elected representatives as a group pass statutes (or **acts**) or, at the municipal level, bylaws. The federal and provincial legislatures can also make other kinds of laws called **regulations**, or they can pass a statute in which this authority is delegated to a body that is part of the executive branch. Regulations are detailed rules that "flesh out" the meaning and requirements of a statute. They are discussed in more detail below, under the heading "Statute Law."

Delegation of Law-Making Powers to Ministries, Agencies, Boards, and Commissions

A body of elected representatives such as a provincial Legislative Assembly will occasionally pass a law that delegates the power to make binding rules or regulations to an agency created by that assembly. Only in these circumstances does an unelected agency have the authority to make binding rules. Sometimes the rules are procedural; in other cases, they are more substantive. (See "Delegation of Legislative Functions.")

Delegation of Law-Making Powers to Territories

The three northern territories are a hybrid. Like municipalities, they have no powers of their own, but only those delegated to them by statute. However, in practice,

Delegation of Legislative Functions

- **Substantive rules** Ontario's *Conservation Authorities Act* establishes conservation authorities to protect watersheds from flooding and erosion, and permits them to make binding regulations that govern development of land along riverbanks. Other commissions established by the Ontario government have the right to amalgamate municipalities or close hospitals.
- **Procedural rules** Ontario's *Statutory Powers Procedure Act*, which sets out various procedural requirements to be met by administrative tribunals, also permits tribunals to make their own rules for the conduct of certain aspects of their proceedings, such as postponement of a hearing, preliminary motions, and pre-hearing conferences.

each territory has almost the same law-making powers as a province. The federal government has passed statutes giving each of the three territories powers to pass **ordinances**, which are similar in content to provincial and federal statutes.

LAW-MAKING POWERS OF THE EXECUTIVE BRANCH

The second branch of government is the executive, which consists of the federal or provincial Cabinet, or the executive committees of municipal councils, and their staff—the many civil servants who report to the ministers of Cabinet and to the municipal councils and their committees. This branch administers and enforces the laws that the legislative branch passes. However, in the case of the federal and provincial governments, the Cabinet, and sometimes individual Cabinet ministers, also make the regulations that implement the statutes. This is actually a legislative function, but it has been delegated by the legislators to the executive. (For this reason, regulations are sometimes called "delegated legislation.")

These cabinets and committees of municipal councils consist of a group of elected representatives chosen by the other elected representatives. In theory, this system preserves the accountability of the people who carry out the laws as well as the people who make them. However, these elected groups are just the tip of the iceberg. They preside over an extensive network of hired civil servants, as well as members of agencies, boards, and commissions (ABCs, collectively known as **agencies**) appointed by the executive, who are not directly accountable to the electorate. In the federal and provincial governments, each Cabinet minister is responsible for the work of a **department** (called a **ministry** in some provinces). A department consists of hundreds or thousands of civil servants who carry out the laws and administer government programs. In many cases, the minister will also be responsible for several agencies established by the government.

LAW-MAKING POWERS OF THE JUDICIAL BRANCH

The third branch of government is the judiciary. The judiciary consists of the courts and judges who decide disputes between citizens (individuals or organizations) and between the government and citizens as to the interpretation or application of the law. They decide whether someone has broken the law, and, if so, what

punishment will be imposed, what compensation must be paid, or what other action the violator must take.

Judges are appointed by the executive branch of the federal or provincial government. Once appointed, they are independent and have the right to decide disputes, including disputes between the government and citizens, without fear of losing their job, having their salary reduced, or being subject to any other form of government interference or pressure. The judiciary therefore provides an important protection for the citizen against violations of the law either by the government or by other citizens. The duties of the judiciary include interpreting laws and striking down laws that are passed without proper authority. Moreover, since the passage of the ***Canadian Charter of Rights and Freedoms***, the courts can strike down any law that violates fundamental rights and freedoms set out in the Charter.

Judges also have a legislative function within certain areas of law. The body of law that is made by judges is called "common law." It is discussed later in this chapter under the heading "Types of Law."

The Three Levels of Government

As discussed earlier, in Canada we have three levels of government—the federal government, the provincial governments (and territorial councils), and municipal governments. Each is presided over by an assembly of elected representatives, which exercises the government's law-making powers.

The federal and provincial governments are permanently established under our constitution. Municipal and territorial governments have no constitutional status or permanence. The existence of municipalities depends upon the will of the provincial government, and their powers are limited to those specifically granted by provincial statute. For this reason, municipalities are often referred to as "creatures of the province." Similarly, territorial councils owe their existence and their law-making powers entirely to the federal government.

Laws that apply throughout the whole country are passed by the federal **Parliament**, which consists of the House of Commons, whose members are elected, and the Senate, whose members are appointed by the government of the day. These laws are called federal laws.

Provincial laws apply throughout a province. They are passed by the provincial **legislature** or **Legislative Assembly**[3] (in Quebec, known as the "National Assembly").

Municipal bylaws apply only within the boundaries of a municipality. They are passed by the municipal council, consisting of elected councillors (sometimes called "aldermen"). Similarly, territorial ordinances are passed by the elected councils of the territories and apply only within the territory.

Each level of government has the constitutional or statutory authority to pass laws in certain subject areas. In some areas, there may be overlap or duplication between the law-making powers of these levels of government. Where there is such overlap, if a higher level of government has the authority to pass a law and has done so, any conflicting laws or bylaws passed by a lower level of government cannot be enforced.

3 Provincial legislatures are also known as "provincial parliaments." To avoid confusion, this book will use the term "Parliament" to refer only to the federal legislature.

FEDERAL LAW-MAKING POWERS

The federal government has authority under s. 91 of the constitution to make laws in a variety of fields that were considered at the time of Confederation (1867) to require uniform standards throughout the entire country. Generally, federal laws deal with matters of national concern, such as criminal activity, monetary policy, foreign relations, interprovincial and international trade and commerce, and interprovincial and international transportation.

PROVINCIAL LAW-MAKING POWERS

The provincial government may make laws under s. 92 of the constitution governing matters that were considered in 1867 to be primarily regional or local in nature. These include the regulation of business activities that take place within the province; the regulation of professions; the creation of local infrastructure such as roads, water treatment plants, and sewer systems; the creation of the structure of municipal government; the establishment of municipal boundaries; and land use planning.

MUNICIPAL LAW-MAKING POWERS

Municipal councils may make bylaws governing conduct within the municipal boundaries, such as licensing local businesses, zoning, policing, and operating schools and libraries. However, as discussed earlier, the powers of municipal governments are limited to those specifically granted by laws passed by the provincial legislature.

OVERLAPPING OR UNCLEAR LAW-MAKING AUTHORITY

For many areas of conduct, the constitution is silent or ambiguous with respect to the level of government that has authority to pass laws. In some cases, the particular subject area did not exist in 1867; examples are atomic energy, aeronautics, telecommunications, and the Internet. In other cases, matters that were primarily of local or regional interest in 1867 have since taken on national dimensions.

Confusion often arises because a law has aspects that fall within both federal and provincial powers. For example, the provinces have authority to regulate labour relations, but the federal government regulates telecommunications. Therefore, if a law regulates union activities at a telephone company, it will be unclear which level of government has the authority to pass the law. A court will have to decide whether the dominant purpose of the law is the regulation of labour relations or the regulation of telecommunications.

TYPES OF LAW

Laws can be divided into categories in several ways. These categories overlap, so that an individual law may fall into more than one of the categories. A body of law, such as administrative law, may be a combination of laws in two or more categories.

It is important to understand how categories of laws are distinguished from each other. Some of the categories to be distinguished are

- common law and statute law;
- public law and private law;
- statutes and subordinate legislation; and
- substantive law and procedural law.

The distinctions between these categories are briefly explained below.

Common Law and Statute Law

In Canada, we have laws developed by the courts as well as laws passed by governments. The laws made by courts are called "common law." "Statute law" is the body of law (**legislation**) made by elected representatives, consisting of statutes, regulations, territorial ordinances, and municipal bylaws.

A harmful activity may become the subject of both common law and statute law. Under common law, a person who is harmed by a particular activity (a **tort**, or wrong) is given the right to sue the wrongdoer for compensation (**damages**) or for an order to stop carrying on the activity (an injunction). Under a statute, the government may designate the same activity as an "offence" and impose a punishment for it. (See "Interaction of Common Law and Statute Law.")

Interaction of Common Law and Statute Law

A car driver carelessly injures a pedestrian, who sues for compensation under the common law tort of negligence. If the court upholds the claim, the driver will be required to compensate the victim for the harm she has suffered. However, careless driving is also an offence under the provincial highway traffic statutes, and the police may lay a charge against the driver. If the driver is found guilty, he may be required to pay a fine or may be sentenced to prison or have his driver's licence or vehicle permit suspended.

The differences between common law and statute law are described in more detail below.

COMMON LAW

Common law is the body of rules established by judges over the centuries in the course of making decisions in disputes between citizens and between citizens and their government. The common law embodies certain rights and principles on which the courts base their decisions. Among the most important of these are principles of fairness or reasonableness.

There is a hierarchy of courts, and cases that are heard by a lower court may sometimes be appealed to one or more higher courts. Once a court has established the principles that should apply to a particular type of situation, in all future cases similar to the one in which the principle was established, all other courts that are lower in the judicial hierarchy must apply that principle in deciding the case. This is called the requirement to follow **precedent**. (In Latin, it is known as the doctrine of ***stare decisis***.) It is this requirement to follow precedent that gives the principles the force of law.

Other courts will usually apply the principle previously established by a court at the same level in the judicial hierarchy. However, two courts at the same level may reach conflicting decisions about what is the proper principle to apply to a particular situation. Where such conflict arises, a higher court, ultimately the Supreme Court of Canada, will settle the matter.

> The judges developing the common law proceed from case to case, like the ancient Mediterranean mariners, hugging the coast from point to point and avoiding the danger of the open sea of system or science.
>
> Lord Wright, "The Study of Law" (1938) vol. 54 *Law Quarterly Review* 185, at 186

An example of a common law principle and how it developed following the doctrine of ***stare decisis*** is the doctrine of "negligence." Until 1932, the courts had ruled that a person injured by the use of a product could not sue the manufacturer unless he or she had purchased the product directly from the manufacturer. In other words, the manufacturer could be sued under the common law principles governing contracts (explained below) if there was a breach of the contractual obligation to provide a safe product, but not otherwise.

In 1932, however, in the case of *Donoghue v. Stevenson*,[4] Britain's highest court established a new principle: if it is foreseeable that a person's actions might cause someone harm, the person carrying on the activity has a duty to take reasonable steps to prevent the harm whether or not there is a contract between the parties. This means, among other things, that if a manufacturer makes a defective product, it can be held responsible for injuring anyone who might foreseeably use the product, whether the person purchased the product from the manufacturer, bought it from a store that purchased it from the manufacturer, found it on the street, or was given it as a gift. Because of the requirement that all lower courts follow precedent, this principle of legal liability has been adopted by the courts in jurisdictions, such as Canada and the United States, that inherited the common law system from Britain, and it forms the basis for the common law doctrine of negligence.

If Canada's highest court, the Supreme Court of Canada, declares that a right exists or a principle applies, all courts must follow this rule unless and until the Supreme Court modifies or changes its ruling—something that occurs infrequently. These principles are gathered together and published in legal texts, and important decisions of the courts are published and also made available on computer databases. By referring to these sources, lawyers and others undertaking legal research or legal action can keep abreast of how the courts are applying these principles in their interpretation of the law.

STATUTE LAW

From time to time, the government enacts **statutes** that incorporate or supersede many of these common law rights and obligations.

Common law principles may be incorporated into statutes either in the form in which they were developed by the courts or with changes that reflect current needs. When the common law rules are included in statutes with little or no change, the process is referred to as **codification**. Examples are Ontario's *Statutory Powers Procedure Act*[5] (SPPA), Alberta's *Administrative Procedures Act*[6] (APA), and

4 *Donoghue v. Stevenson*, [1932] AC 562; 101 LJPC 119; 147 LT 281.

5 RSO 1990, c. S.22.

6 RSA 2000, c. A-3.

Quebec's *Administrative Justice Act*[7] (AJA), which set out basic rules of procedural fairness for tribunals that formerly were part of the common law.

On other occasions, a statute is passed to replace a common law doctrine that the legislature considers to have outlived its usefulness. (For example, at common law, jilted lovers could sue their fiancé(e) for breaking a promise to marry them—a tort that has now been abolished by statute in some provinces.)

A statute may be passed to make it an offence to do something that is considered wrong and requires compensation at common law, so that a person who commits the offence will also be subject to punishment such as a fine or jail. A statute may also be passed to establish a new procedure or set up a bureaucracy to enforce certain common law rights, so that people are not required to use the more cumbersome procedures of the courts to address infringement of those rights. Sometimes the purpose of affirming common law rights in a statute is to clarify ambiguities or remove contradictions created when courts are inconsistent in interpreting or applying a principle.

As discussed earlier, **statute law** consists of statutes, regulations, and bylaws. Both the federal and the provincial governments have the authority to pass statutes. These laws usually do not set out all the rules that the public must obey. Instead, they set out a framework for creating the more detailed rules contained in accompanying regulations. Usually, the statute permits the Cabinet of the governing party (referred to in statutes by its formal name—provincially, the lieutenant governor in council, and federally, the governor in council) to make regulations, but occasionally a statute delegates the power to make regulations to an individual Cabinet minister or a regulatory agency or board. There is no constitutional requirement that regulations be scrutinized by the federal or provincial legislature, although in practice there are often parliamentary committees that review some aspects of these rules before they take effect.

To be valid, the contents of regulations must be explicitly or implicitly authorized by the wording of the statute under which they are made. If regulations set out requirements that go beyond the matters that the statute permits them to address, the regulations are not valid.

As stated earlier, statute law also includes **bylaws**, which are passed by elected municipal councils. These bylaws are often voluminous and very detailed, because municipal councils do not have the power either to make regulations or to delegate such power to committees or boards. As a result, compliance requirements must be included in the bylaw itself. Bylaws are valid only if the provincial statutes granting municipalities the power to pass laws state that the municipality may pass bylaws of that nature.

Public Law and Private Law

PUBLIC LAW

Different authors have suggested different definitions of **public law**. In general, public law deals with the structure and operation of government. It regulates how the three branches at each level of government carry out their responsibilities.

7 RSQ, c. J-3.

Public laws govern the relationship between an individual or private organization and the government, the relationship between one government and another (for example, between the government of Canada and the government of Ontario or of India), and relationships between departments and agencies of the same government. Criminal law, constitutional law, administrative law, and treaties made under international law are all considered part of the public law.

Public laws dictate how government bodies may raise money (for example, by imposing taxes or levying fees or fines), how they may spend money (for example, building roads or airports, operating schools, providing medicare, giving subsidies to businesses, or hiring police), and what procedures they must follow to account for money spent (financial administration). (See "How Public Laws Regulate Provincial Elections.")

How Public Laws Regulate Provincial Elections

In Ontario, for example, the provincial *Representation Act* determines the size and boundaries of electoral districts, which in turn dictate how many seats there will be in the Legislative Assembly. The *Elections Act* authorizes the lieutenant governor to decide the length of the election campaign. The *Election Finances Act* determines how much money candidates may spend on their campaigns and what activities they may spend money on; it also requires disclosure to the public of amounts raised and the identity of donors. The *Public Service Act* sets out rules governing which public servants are permitted to engage in partisan campaigning and what limits are imposed on their activities. Under the *Broadcasting Act*, radio and television stations and networks must make advertising time available to all political parties on an equitable basis during elections. If the political parties cannot agree on how to divide the time among them, a broadcasting arbitrator appointed under the *Canada Elections Act* may allocate the amount of air time for each party.

Administrative Law

As indicated above, public law regulates the structure and activities of all three branches of government—legislative, executive, and judiciary. **Administrative law** is a branch of public law that regulates the executive branch.

Until the 20th century, the executive branch at the federal and provincial levels consisted largely of a set of departments headed by ministers and staffed by civil servants. However, as government became involved in a broader range of activities requiring more expertise, flexibility, and independent advice, a variety of **administrative agencies** developed to supplement, or in some cases replace, the role of the departments in meeting these needs. Administrative law developed as a way of ensuring that these departments and agencies do not exceed their authority, abuse their power, or follow unfair procedures when making decisions.

Procedural fairness is a fundamental principle of administrative law. The two pillars of procedural fairness are

1. the duty to give persons notice of decisions that may affect them and an opportunity to be heard before such decisions are put into effect, and
2. the duty to provide an impartial decision maker.

Other principles of administrative law include the requirement that agencies act only within their jurisdiction (the powers granted to them by statute), rules governing how agencies exercise their discretion, and the rule against subdelegation of decision-making powers. These terms and rules are explained in more depth in later chapters.

PRIVATE LAW

Private law is the body of laws that regulate how individuals or corporations are required to treat each other. Private law includes torts, contract law, property law, and family law.

Both private and public laws can be statutory or can consist of common law rights and remedies. Moreover, a single law may have both public and private aspects or components. For example, Ontario's *Trespass to Property Act*[8] (TPA) prohibits trespassing on both public and private property. Although financial compensation for harm is usually a matter of private law and fines are normally imposed only under public law, the TPA permits a court that convicts someone of trespassing both to impose a fine and to award compensation.

Statutes and Subordinate Legislation

As discussed earlier, although only elected legislatures can pass statutes, these statutes may grant the Cabinet, individual Cabinet ministers, and special interest bodies the authority to make more detailed regulations that flesh out the meaning and requirements of the statute. These regulations are sometimes called **subordinate legislation** or **delegated legislation**. They are valid only if they conform to the statute under which they are passed.

Substantive Law and Procedural Law

Laws may also be characterized as substantive or procedural. **Substantive law** is concerned with the substance of a problem or the legal issue that the law is designed to solve or address. **Procedural law** sets out procedures for implementing substantive law; a simple example is the combination of substantive and procedural provisions of the *Criminal Code*[9] dealing with theft.

The *substantive* provisions of the Code make it an offence to take someone else's property without the owner's consent. Its *procedural* provisions specify how the police and courts will treat someone once he or she is believed to have committed theft. These procedures deal with the steps taken by the police (such as fingerprinting) in arresting someone and laying charges; the procedures that the courts will follow before trial, such as granting bail and holding preliminary inquiries; the procedures during the trial, such as reading the charge, entering a plea, and calling evidence; and the procedure for deciding what sentence to impose if the person is convicted of the crime.

---

8 RSO 1990, c. T.21.

9 RSC 1985, c. C-46, as amended.

The difference between substantive law and procedural law is important because the characterization of a law as substantive or procedural affects whether it can apply to conduct that took place before the law was passed (that is, "retroactively") and how far authorities can stray from following the strict letter of the law and still have their actions upheld by the court. Generally, officials have more flexibility and leeway in applying procedural laws than in applying substantive laws. Also, procedural laws may apply retroactively, but substantive laws do not.

HOW VARIOUS TYPES OF LAW ARE ADMINISTERED AND ENFORCED

Enforcement by Government Agencies

Different laws are administered and enforced in different ways.

Violations of criminal laws, for example, are usually investigated by federal, provincial, or municipal police forces. Charges for such violations are laid by the police and prosecuted by federal and provincial Crown prosecutors in the criminal courts.

Breaches of federal and provincial regulatory statutes are sometimes investigated by inspectors in government departments and sometimes by police. Charges for violating municipal bylaws are sometimes laid by police and sometimes by bylaw enforcement officers employed by the municipality. The prosecutors are usually lawyers or prosecution officers hired by the government department or agency responsible for administering the law in question.

Enforcement by the Person Affected

As discussed above, common law rights and remedies are considered private law rather than public law. That is, although the government or the courts have established the rights and obligations governing certain private relationships, and the government provides the court system in which the rights may be enforced, the government does not consider that there is a sufficient public interest in the outcome of such disputes to justify the government's also providing a staff of investigators, inspectors, and prosecutors. The person aggrieved must pursue a remedy at his or her own expense, usually hiring a lawyer to advise and represent him or her in court.

Some statutory rights also must be pursued privately by the person entitled to redress. For example, certain remedies available to consumers under consumer protection statutes must be pursued by the consumer against the seller. The government does not enforce these rights.

Many laws do not create duties whose breach leads to punishment or payment of compensation. Some laws create a set of procedures that must be followed or standards that must be met in undertaking certain activities. For example, where a developer requires the approval of government authorities before proceeding with a project, the developer generally must submit an application, plans, and other specified information to the government agency, which then assesses the proposal against legislated standards and decides whether or not to grant approval.

Other laws confer privileges or benefits (such as social assistance or compensation for injuries suffered in the workplace or losses to the victim of a crime) on classes of people who qualify for these benefits. In some cases, the government hires staff or provides resources or funding to assist the person in making a case for

receiving the benefits. In other cases, the person must apply for the benefits on his or her own, or with the assistance of an advisor hired at the person's own expense.

In most provinces, for example, the government has staff who represent employees who are challenging decisions to deny workers' compensation benefits. A few provinces also provide this assistance to small employers. Individuals challenging immigration decisions are often represented by lawyers or legal workers employed by independent community legal clinics that receive funding from the government. In contrast, most governments provide no legal assistance to individuals challenging government decisions to refuse access to records under freedom-of-information laws.

In some cases, government officials make the initial decision whether to issue a licence, approve an activity, enforce a right, or confer a benefit under a statute. In other cases, the government creates an arm's-length agency (that is, an agency with some independence or separation from the government) to make the initial decision on how to apply or implement the law. In either case, the person or persons affected may be entitled to appeal the decision to an arm's-length agency, such as a tribunal or a court.

Often, the arm's-length agencies that are established for these purposes are administrative tribunals. Administrative tribunals are an important part of our system of government, and they play a significant role in administering our statute laws.

Tribunals, as well as other government decision makers, are regulated by the branch of public law known as administrative law. Administrative law evolved out of the legal system described above, and the fundamental principles on which it is based are rooted in that broader legal system. The next chapter provides a detailed discussion of these relationships and principles.

CHAPTER SUMMARY

Laws are binding rules made by governments. They regulate almost every aspect of human life, from birth to death; a vast range of social and economic activities; and formal relationships among citizens (both individuals and organizations) and between citizens and government.

There are three levels of government that make laws—the federal, provincial, and municipal or territorial governments. There are also three branches of government that, respectively, pass, apply, and interpret laws—the legislature, the executive, and the judiciary.

Laws take a variety of forms and regulate particular spheres of conduct. They can be categorized in a number of ways—as common law or statute law, as public law or private law, as statutes or subordinate legislation, and as substantive law or procedural law. How a law is administered and enforced, and by whom, depends on the nature of the law and the category into which it falls.

KEY TERMS

act *see* statute

administrative agency *see* agency

administrative law law that governs the organization, duties, and quasi-judicial and judicial powers of the executive branch of government, including both central departments and agencies; a branch of public law

agency any body such as a board, commission, or tribunal established by government and subject to government control to carry out a specialized function that is not an integral part of a government ministry or department

bylaw law enacted by a subordinate legislative body, such as a municipality, under the authority of a statute

codification the collection of the principles of a system or subject of law into a single statute or set of statutes

common law a body of law set out in court decisions; derives its authority from the recognition given by the courts to principles, standards, customs, and rules of conduct (generally reflecting those accepted in society) in deciding disputes; distinguished from statute law

constitution the body of binding fundamental rules that govern the exercise of power by government; to be valid, all other laws must conform to this set of fundamental rules

damages a sum of money awarded by a court as compensation for harm or loss caused by a violation of the law

delegate entrust a person or body to act in another's place

delegated legislation *see* subordinate legislation

department a unit of the executive branch of government over which a minister presides; usually established to administer a specific set of laws and programs relating to a particular subject area, such as health, protection of the environment, government finance, or stimulation of business activity

law a rule made by a body of elected representatives or their delegates or by a court, using procedures that are also prescribed by law

legislate pass statutes and bylaws, and make regulations

legislation the creation of law; the statutes, regulations, and bylaws passed by bodies of elected representatives or their delegates

Legislative Assembly the body of elected representatives constituting the legislative branch of a provincial government; in Quebec, known as the "National Assembly"; also called the "legislature" or "provincial parliament"

legislature in Canada, the body of elected representatives constituting the legislative branch of the federal or a provincial government; *see also* Legislative Assembly; Parliament

ministry *see* department

ordinances laws enacted by the northern territories, similar in content to provincial and federal statutes

Parliament the body of elected representatives constituting the legislative branch of Canada's federal government; also called the "legislature"

precedent a decision or judgment of a court of law that is cited as the authority for deciding a similar situation in the same manner, on the same principle, or by analogy; *see also stare decisis*

private law law that governs the conduct of persons other than government; distinguished from public law

procedural law law that prescribes methods of administration, application, or enforcement of a law; for example, the provisions of the *Criminal Code* that

specify the procedures followed when a person is believed to have committed an offence such as theft; distinguished from substantive law

public law law that deals with the structure and operation of government; governs the relationship between individuals or private organizations and the government, between governments, and between departments and agencies of the same government; includes administrative law; distinguished from private law

regulations detailed rules that flesh out the meaning and requirements of a statute; made under the authority of a statute, either by Cabinet or by a body to which this power is delegated; also called “subordinate legislation” or “delegated legislation”

rule of law the principle that governments, as well as individuals and corporations, must follow the law; in particular, governments may take actions that limit the activities of citizens or their access to rights or benefits only in accordance with substantive and procedural requirements prescribed by law

stare decisis Latin term referring to the principle that courts should decide similar cases in the same way unless there is good reason for them to do otherwise; the rule that courts must follow previous decisions made by higher courts; *see also* precedent

statute law passed by Parliament or a provincial legislature; also called an “act”; often specifically provides for the authority to make regulations or to delegate this power; distinguished from subordinate legislation; *see also* statute law

statute law in Canada, the body of laws passed by Parliament or a provincial legislature; generally, the body of laws passed by an assembly of elected representatives of the public; distinguished from common law

subordinate legislation legislation made by a body other than Parliament or a provincial legislature (such as Cabinet, a Cabinet minister, an agency, or a municipal council), as authorized by statute; generally includes regulations, proclamations, rules, orders, bylaws, or other instruments; also called “delegated legislation”; distinguished from a statute

substantive law law that is concerned with the substance of a problem or the legal issue that the law is designed to address; for example, the provisions of the *Criminal Code* setting out the elements of the offence of theft; distinguished from procedural law

tort a wrongful act or omission causing an injury, other than a breach of contract, for which recovery of damages is permitted by law

REVIEW QUESTIONS

1. What is a “law”? How does a law differ from other rules or customs that people follow?
2. What is the “rule of law” and what is its purpose? To whom does it apply?
3. What are the three branches of government in Canada, and what are the functions of each?
4. What are the three levels of government in Canada? Describe briefly the law-making power of each level of government.

5. What is a “constitution”? How does the constitution of Canada restrict the power of governments to pass or implement laws?
6. Name four different ways in which laws can be categorized? Give an example of a law that falls into each category and explain why that law fits within that particular category.
7. What are the consequences of breaking a law? Are the consequences the same for all categories of law? Explain.
8. Who administers and enforces laws? Is the answer the same for all laws? Explain.

EXERCISES

1. Using any of the research tools described in appendix B, find and briefly describe the contents of
   - two examples of a statute that regulates government elections;
   - two examples of a statute that protects consumers;
   - two examples of a statute that establishes a government agency;
   - two examples of a statute that prohibits certain conduct and imposes penalties for violating the prohibition;
   - two examples of a statute that regulates a trade, profession, or business;
   - two examples of a statute that provides a right of compensation for harm done by individuals or corporations; and
   - two examples of a statute that provides a right of compensation for a loss resulting from government action.
2. Categorize each of the above laws as public or private, or substantive or procedural. If the law fits into both of these categories, list them both. (For example, a statute may be public and substantive, or private and procedural.)
3. Explain why you have chosen the category or categories in each case.
4. Explain briefly some of the rights and obligations imposed by these laws.
5. Explain who administers or enforces each of these laws.
6. Discuss briefly some of the procedures that are followed in enforcing or administering these statutes.

FURTHER READING

Lisa Braverman, *Administrative Tribunals: A Legal Handbook* (Aurora, ON: Canada Law Book, 2001), chapter 1.

Nora Rock and Dayna E. Simon, *Foundations of Criminal and Civil Law in Canada* (Toronto: Emond Montgomery, 2000).

Linda Silver Dranoff, *Everyone’s Guide to the Law: A Handbook for Canadians*, revised ed. (Toronto: HarperCollins, 2001).

Philip Sworden, *An Introduction to Canadian Law* (Toronto: Emond Montgomery, 2002).