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SUBSTANTIVE LAW AND PROCEDURAL OR ADJECTIVE LAW

The Substantive and Procedural Laws are the two important branches of Law. The terms “Substantive” and “Adjective” seem to have been invented by Bentham in 1843. Austin criticized the distinction’ saying “it cannot be made the basis of a just division.”. Holland in his ‘Treatise on Jurisprudence’ popularized the terms “Substantive” and “Adjective” and that have been accepted by writers in general. In this lesson we will discuss the ‘Juristic Approach’ towards distinction between these two branches of law as both the laws are important and one could not be effective in the absence of other. Though there may be some overlapping between these two branches of Law. It is not an easy task to state with precision the exact nature of the distinction between the two. But it can be said that without laws of a Substantive Nature, Procedural Law would not have much to regulate, and in absence of Procedural Law, fair and consistent application of Substantive Law is not possible.



OBJECTIVES

After studying this lesson you will be able to:

- explain the Juristic Approach towards distinction between Substantive and Procedural Law;
- understand the meaning and nature of Substantive Law;
- know meaning and nature of Procedural or Adjective Law;
- distinguish between Substantive and Procedural Law; and
- describe those Procedural and Substantive Rules/Principles which are equivalent.

11.1 PROCEDURAL LAW VIS A VIS SUBSTANTIVE LAW - JURISTIC APPROACH



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Bentham has propounded that the ‘Substance Law’ and ‘Procedural Law’ can be clearly and sharply separated. He has stated that “By procedure, is meant the course taken for the execution of the laws Laws prescribing, the course of procedure have on a former occasion been characterized by the term *Adjective* Laws. This is in contradiction to those other laws, the execution of which they have in view, and which for this same purpose have been characterized by the correspondent opposite term, *Substantive* Laws”.

Holland in his book ‘Treatise on Jurisprudence’ has stated : “Law – defines the rights which it will aid, and specifies the way in which it will aid them. So far as it defines, thereby creating, ‘Substantive Law.’ So far as it provides a method of aiding and protecting, it is ‘Adjective Law’, or Procedure.”

However **Salmond**, on the other hand, holds the view that separation “is sharply drawn in theory but in practical operation many procedural rules are “wholly or substantially equivalent to rules of Substantive Law”. Salmond has noted that if one takes the view of the fact that ‘the administration of justice in its typical form consist in the application of remedies to the violations of rights’, this may mean that the Substantive Law is that which defines the rights, while Procedural Law determines the remedies. But this distinction between ‘*jus* and *remedium*’ (*right and remedy*) is inadmissible as there are many rights (in the wide sense) which belong to the sphere of procedure; for example, a right of appeal, a right to give evidence on one’s own behalf, a right to interrogate the other party, and so on. In the second place, rules defining the remedy may be as much a part of the Substantive Law as are those which define the right itself. The substantive part of the Criminal Law deals, not with crimes alone, but with punishments also. So, in the Civil Law, the rules as to the measure of damages pertain to the Substantive Law, no less than those declaring what ‘damage’ is actionable. Thus, to define procedure as concerned not with rights, but with remedies, is to confront the ‘remedy’ with the process by which it is made available.

Salmond has stated that ‘The Law of Procedure may be defined as that branch of the law which governs the process of litigation. It is law of action. The entire residue is Substantive Law, and relates, not to the process of litigation, but to its purposes and subject-matter.... Substantive Law is concerned with the ends which the administration of justice seeks. It determines their conduct and relations in respect of the matters litigated. Procedural Law deals with the means and instruments by which those ends are to be attained. It regulates the conduct and relations of courts and litigants in respect of the litigation itself’. Further he pointed that “Procedural Law is concerned with affairs inside the courts of justice” while “Substantive Law deals with matters in the world outside.”

Another juristic view is that there is no distinction between “Substance” and “Procedure”. “The distinction between Substantive and Procedural Law is artificial and illusory. In essence, there is none. The remedy and the predetermined machinery, so far as the litigant has a recognized claim to use it, are, legally speaking, part of the right itself.

Professor **Cook** in, “*Substance and Procedure in the Conflict of Laws*” had arrived at a tri- chotomy. There are: (i) “substance,” (ii) “procedure,” and (iii) apenumbra, a “twilight zone,” a “no-man’s land,” which may be “substance “or “procedure” conditioned on the end to be attained.

**Notes****INTEXT QUESTIONS 11.1****Write True/False.**

1. “The distinction between Substantive Law and Procedural Law is artificial and illusory”. (True/False)
2. “The Separation between Substantive Law and Procedural Law is sharply drawn in theory but in practical operation many procedural rules are wholly or substantially equivalent to rules of Substantive Law” Salmond. (True/False)

11.2 MEANING AND NATURE OF SUBSTANTIVE LAW

Let us now discuss the meaning and nature of Substantive Law and Procedural Law and also look into the areas that falls into the domains of both Laws.

The Substantive Laws are basically derived from Common, Statutory, Constitution and from the Principles found in judicial decisions following the legal precedents to cases with similar facts and situations. With the passage of time and creation of new Statutes, the volume of Substantive Law has increased. **For Example:-** Penal Law, Law of Contract, Law of Property, Specific Relief Act, etc are Substantive Law.

It can be concluded out from writings of various professional texts that Substantive Law deals with the legal relationship between subjects (individuals) or the subject and the State. Substantive Law is a Statutory Law that defines and determines the rights and obligations of the citizens to be protected by law; defines the crime or wrong and also their remedies; determines the facts that constitute a wrong -i.e. the subject-matter of litigation in the context of administration of justice. The Substantive Law, defines the ‘remedy’ and the right; includes all categories of Public and Private Law and also includes both Substantive Civil and Criminal Law.

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In short, it can be said that Substantive Law is a Statutory Law that deals with the relationship between the people and the State. Therefore, Substantive Law defines the rights and the duties of the people. Substantive Law deals with the structure and facts of the case; defines the rights and duties of the citizens and can not be applied in non-legal contexts.

11.2.1 Substantive Civil Law

The Civil Law includes any private wrong, a 'Tort', which unfairly causes someone else to suffer loss or harm resulting in legal liability for the person who commits the tortious act. Substantive Law defines to charge the 'Tort'. Substantive Civil Law also includes the Law of Contract- defines what is essential elements required for formation of contract; real property. The Indian Succession Act, 1925 deals with Substantive Law of testamentary succession in regard to persons other than Muslims and intestate succession in regard to persons other than Hindu and Muslims in India. Other Acts that provides for Substantive Civil Law in India are *Indian Contract Act, 1872*; *Transfer of Property Act 1882*; Specific Relief Act; Indian Trust Act, 1882.

11.2.2 Substantive Criminal Law

The Indian Penal Code (IPC) in India defines various penal offences and lists the elements that must be proved to convict a person of a crime. It also provides for punishment applicable to these offences. For example Substantive Criminal Law defines what constitutes 'Murder', 'Robbery', 'Rape', 'Assault' etc.

**INTEXT QUESTIONS 11.2**

1. List the various Sources of Substantive Law.
2. Define Substantive Civil Law

11.3 MEANING AND NATURE OF PROCEDURAL LAW

Procedural Law (or Adjective Law) deals with the enforcement of law that is guided and regulated by the practice, procedure and machinery. This law is very important in administration of justice. Procedural law functions as the means by which society implements its substantive goals. Procedural law is derived from constitutional law, Statutes enacted by legislature, law enforcement agencies promulgating written regulations for their employees, which may not have the force of law but their violation may result in internal sanctions; and the rules and procedural guidelines laid down by the Supreme Court. According to Holland, Adjective law, though concerns primarily with the rights and acts of private litigants, touches closely on topics, such as the organization of Courts

and the duties of judges and sheriffs, which belong to public law. It comprises of (i) jurisdiction (in the conflicts sense); (ii) jurisdiction (domestic sense) ; (iii) the action, including summons, pleadings, trial(including evidence); (iv) judgment; (v) appeal; (vi) execution.

Procedural Law is that law which prescribes method of enforcing rights or obtaining redress for their invasion; machinery for carrying on a Suit.

The Code of Civil Procedure, 1908; Code of Criminal Procedure, 1973; Indian Evidence Act, 1872; Limitation Act, 1963; The Court Fees Act 1870; The Suits Valuation Act, 1887 are examples of Procedural Law in India.

The Procedural Law can be said, is a law that:

- Lays down the rules with the help of which law is enforced.
- Relates to process of litigation and determines- what facts constitute proof of a 'wrong' or 'Tort'.
- In the context of administration of justice -the law of procedure defines the modes and conditions of the application of remedies to violated rights.
- Are the adjective rules, prescribing the mode in which the State, as such a personality, may sue or be sued.
- Provides for mechanism for: obtaining evidence by police and judges, conduct of searches, arrests, bail, and presentation of evidence at trial and process of sentencing.
- It is the law of action that includes all legal proceedings, civil or criminal.

11.3.1 Law of Civil Procedure

Civil Procedural Law consists of the rules and standards which courts follows while conduct civil trials. These rules govern how a civil suit or case may be commenced, what kind of service of process (if any) is required, the types of pleadings or statements of case, motions or applications, and orders allowed in civil cases, the timing and manner of depositions and discovery or disclosure, the conduct of trials, the process for judgment, various available remedies, and how the courts and clerks must function. Civil actions concern with the judicial resolution of claims by private individual or group, companies or organisations against another and in addition, governments (or their subdivisions or agencies) may also be parties to civil actions. In India Code of Civil Procedure, 1908 consolidates and amend the laws relating to the procedure of the Courts of Civil Judicature.

11.3.2 Law of Criminal Procedure

Law relating to criminal, Procedure provides or regulates the steps by which one that violate a criminal Statute is punished. Procedural Criminal Law can



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be divided into two parts, the investigatory and the adjudicatory stages. In the investigatory phase, investigation primarily consists of ascertaining of facts and circumstances of the case by police officers and arrest of suspect of criminal offence. The adjudicatory phase begins when with the trial of suspect for the alleged criminal conduct in the court of Law. In India Criminal Procedure Code, provides the procedure of getting the penal offences prosecuted and punished by the criminal courts. It also lays down the details regarding the arrest, investigation, bail, jurisdiction, appeals, and revisions and compounding of offence etc with regards to the various offences.



INTEXT QUESTIONS 11.3

1. Define Procedural Law.
2. Give examples of Civil Procedural Law in India.
3. Give examples of Criminal Procedural Law in India.
4. List the various Sources of Procedural Law.



Do you know

Adjective/Procedural Law is not less than Substantive Law and may also be normal or abnormal (i.e. artificial persons, and such varieties of natural persons who are in a different position with reference to suing and being sued from that occupied by ordinary individuals-e.g. lunatics, minors)

11.4 DISTINCTION BETWEEN SUBSTANTIVE AND PROCEDURAL LAW

Procedural Law is always subservient to the Substantive Law. Nothing can be given by a procedural law what is not sought to be given by a Substantive Law and nothing can be taken away by the Procedural Law what is given by Substantive Law.

Comparison between Substantive Law and Procedural Law

| Substantive law | Procedural Law |
|----------------------------------------------------------------------------------------------------|---------------------------------------------------------------------------------------------------------------------|
| The Substantive law defines and determines the obligations and rights of people and legal entities | Procedural law lays down the method of aiding, the steps and procedures for enforcement of Law- Civil and Criminal. |



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|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <p>When a particular law defines rights or crimes or any status, it is called Substantive Law. It defines how a crime or tort will be charged and how the evidence and case facts will be presented and handled. EX: The definition of ‘manslaughter’ is substantive</p> | <p>The laws that determine how the rights of the plaintiff and defendant will be protected and enforced throughout the course of the case Procedural Laws. It includes procedure, pleading, and evidence. Ex: The right to a speedy trial for a person accused of ‘manslaughter’ is procedural.</p> |
| <p>A Substantive Law also provides for Prohibitions administered by courts which behaviors are to be allowed and which are prohibited- such as law providing prohibition against murder or the sale of narcotics.</p> | <p>Procedural Laws provides rules to determine, how the Substantive Laws are to be administered, enforced, changed, and used in the mediation of disputes -such as filing charges or presenting evidence in court.</p> |

Let us now see some examples illustrating distinction between Substantive Law and Procedural Law.

- A Right of appeal is a Substantive and is creature of the Statute. Rules of Limitation pertain to the domain of Adjective Law.
- Right to recover certain property is a question of Substantive Law (for the determination and the protection of such rights are among the ends of the administration of justice); but in what courts and within what time the person may institute proceedings are questions of Procedural Law (for they relate merely to the modes in which the courts fulfil their functions).
- So far as the administration of justice is concerned with the application of remedies to violated rights, the Substantive Law defines the ‘remedy’ and the right, while the Law of Procedure defines the modes and conditions of the application of the one to the other.
- The law that to possess ‘cocaine’ is crime in Substantive Law . Criminal Procedure sets the rules for discovering and adjudicating violations of that criminal statute — for example, police may not subject suspects to unreasonable searches and seizures, or coerce confessions. If the police violate these or other procedural rules, various procedural consequences may arise, such as exclusion of evidence at trial or dismissal of the charge.
- Whether an offence is punishable by fine or by imprisonment is a question of Substantive Law. But whether an offence is punishable summarily or only on indictment is a question of procedure and is, therefore, a question of Procedural Law.

**INTEXT QUESTIONS 11.4**

Write True/False.

1. The Substantive Law defines and determines the obligations and rights of people and legal entities. (True/False)
2. The Procedural Law lays down the Method of aiding, the steps and procedures for the enforcement of Law – Civil and Criminal. (True/False)



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11.5 SUBSTANTIVE AND PROCEDURAL LAWS – RETROSPECTIVE OR PROSPECTIVE

In general, all Procedural Laws are retrospective unless a legislature specifies so.

In 'Nani Gopal Mitra v. State of Bihar' (AIR 1970 SC 1636), the Court declared that amendments relating to procedure operated retrospectively subject to the exception that whatever be the procedure which was correctly adopted and proceedings concluded under the old law the same cannot be reopened for the purpose of applying the new procedure.

In 'Hitendra Vishnu Thakur and others etc. etc. v. State of Maharashtra and others (1994) 4 SCC 602- the Court summed up the legal position with regard to the Procedural Law being retrospective in its operation and the right of a litigant to claim that he/she be tried by a particular Court, in the following words:

- (i) A Statute which affects substantive rights is presumed to be prospective in operation unless made retrospective, either expressly or by necessary intendment, whereas a statute which merely affects procedure, unless such a construction is textually impossible, is presumed to be retrospective in its application, should not be given an extended meaning and should be strictly confined to its clearly defined limits.
- (ii) Law relating to form and limitation is procedural in nature, whereas law relating to right of action and right of appeal even though remedial is substantive in nature. (iii) Every litigant has a vested right in Substantive Law but no such right exists in Procedural Law.
- (iv) A Procedural Statute should not generally speaking be applied retrospectively where the result would be to create new disabilities or obligations or to impose new duties in respect of transactions already accomplished.
- (v) A Statute which not only changes the procedure but also creates new rights and liabilities shall be construed to be prospective in operation, unless otherwise provided, either expressly or by necessary implication.”

In Rajasthan State Road Transport Corporation and Anr. v. Bal Mukund Bairwa (2009) 4 SCC 299 the Court relied upon the observations made by Justice Benjamin N. Cardozo in his famous compilation of lectures *The Nature of Judicial Process* – that “in the vast majority of cases, a judgment would be retrospective. It is only where the hardships are too great that retrospective operation is withheld.”



INTEXT QUESTIONS 11.5

Write True/False.

1. In general, all Laws are retrospective unless a legislation specifies so.
(True/False)
2. Both– Public and Private Law may be ‘Substantive Law or Procedural Law’.
(True/False)



Do you know

Both Public and Private Law may be Substantive Law or Procedural Law. 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. For Example: Evidence Act, 1872.

11.6 EQUIVALENT- PROCEDURAL AND SUBSTANTIVE RULES/PRINCIPLES

According to Salmond, although the distinction between Substantive Law and Procedural Law is sharply drawn in theory, there are many rules of procedure which, in their practical operation, are wholly or substantially equivalent to rules of Substantive Law. Of these equivalent Procedural and Substantive principles there are at least three classes as discussed below:

1. An exclusive evidential fact is practically equivalent to a constituent element in the title of the right to be proved. e.g. the Rule of Evidence that a Contract can be proved only by writing corresponds to a Rule of Substantive Law that a Contract is void unless reduced to writing.
2. Conclusive evidential fact is equivalent to and tends to take the place of the fact proved by it. For example:
 - A child under the age of eight years is incapable of criminal intention is a rule of evidence, but differs only in form from the substantive rule that no child under that age is punishable for a crime.



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- The acts of a servant done about his master's business are done with his master's authority is a conclusive presumption of law, and pertains to procedure; but it is the forerunner and equivalent of our modern substantive law of employer's liability.
 - A 'Bond' (that is to say, an admission of indebtedness under seal) was originally operative as being conclusive proof of the existence of the debt so acknowledged; but it is now itself creative of a debt; for it has passed from the domain of procedure into that of Substantive Law.
3. The limitation of actions is the procedural equivalent of the prescription of rights. The former is the operation of time in severing the bond between right and remedy; the latter is the operation of time in destroying the right.

**INTEXT QUESTIONS 11.6****Write True/False.**

1. An exclusive evidential fact is practically equivalent to a constituent element in the title of the right to be proved. (True/False)
2. Conclusive evidential fact is equivalent to and tends to take the place of the fact proved by it. (True/False)

**WHAT YOU HAVE LEARNT**

The Substantive and Procedural laws are the two important branches of Law. The Substantive Law is a Statutory law that defines and determines the rights and obligations of the citizen to be protected by law. Procedural Law or Adjective Law deals with the enforcement of Law that is guided and regulated by the practice, procedure and machinery.

Substantive Law also defines the crime or 'wrong' and also their 'remedies'; determines the facts that constitute a wrong -i.e. the subject-matter of litigation; in the context of administration of justice. the substantive law defines the remedy and the right; includes all categories of Public and Private Law. It includes both Substantive Civil and Criminal Law.

Procedural Law lays down the rules with the help of which law is enforced; determines what facts constitute proof of a wrong; in the context of administration of justice –The Procedural Law defines the modes and conditions of the application of remedies to violated rights; provides for mechanism for obtaining evidence by police and judges, conduct of searches, arrests, bail, and presentation of evidence at trial and process of sentencing. It is the law of action that includes all legal proceedings, Civil or Criminal.

Although the distinction between Substantive Law and Procedure is sharply drawn in theory, there are many rules of procedure which, in their practical operation, are wholly or substantially equivalent to rules of Substantive Law. e.g. Evidence Law (Evidence Act, 1872).

A Statute which affects substantive rights is presumed to be prospective in operation unless made retrospective, either expressly or by necessary intendment, whereas a Statute which merely affects procedure, unless such a construction is textually impossible, is presumed to be retrospective in its application, should not be given an extended meaning and should be strictly confined to its clearly defined limits.

**Notes****TERMINAL QUESTIONS**

1. Define 'Substantive Law'.
2. Define 'Procedural Law' or Adjective Law.
3. Distinguish between Substantive Law and Procedural or Adjective Law with the help of Examples.
4. Describe those Rules/Principles, where the Procedural Law and Substantive Law may be same.
5. Discuss whether the Substantive Law and Procedural Law are retrospective or prospective in nature.

**ANSWER TO INTEXT QUESTIONS****11.1**

1. True
2. True

11.2

1. The Substantive Laws are basically derived from Common Law, Statutory Law, Constitution and from the Legal Precedents.
2. Substantive Law is a Statutory Law that deals with the relationship between the people and the State. Substantive Law defines the rights and the duties of the people. The Substantive Civil Law can be defined as a Law which includes any private wrong, which unfairly causes someone else to suffer loss or harm resulting in legal liability.

**Notes****11.3**

1. Procedural Law is that Law which prescribes methods of enforcing rights or obtaining redress for their invasion; machinery for carrying on a suit. Procedural Law deals with the enforcement of Law that is guided and regulated by practice, procedure and Machinery. This law is very important in the administration of Justice.
2. The Code of Civil Procedure, 1908; Code of Criminal Procedure, 1973; Indian Evidence Act, 1872; Limitation Act, 1963; The Court Fees Act 1870; The Suits Valuation Act 1887 are examples of Procedural Law in India.
3. In India, The Criminal Procedure Code 1973, provides the procedure for punishing the penal offences.
4. The various sources of Procedural Law are (i) Constitutional Law (ii) Statutes enacted by Legislature (iii) Rules the Supreme Court and (iv) Written Regulations promulgated by Law Enforcement Agencies for their employees.

11.4

1. True
2. True

11.5

1. True
2. True

11.6

1. True
2. True