PHILOSOPHY OF LAW

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Q.

WHAT DO YOU UNDRESTAND BY THE TERM "LAW"? EXPLAIN IT WITH THE HELP OF THE DEFINITIONS GIVEN BY JURISTS. (S2017) (A2018)

DEFINE "LAW", ELABORATE ITS NATRE WITH DIFFERENT DEFINITIONS GIVEN BY JURISTS. (S2018)

WHY DO YOU UNDERSTAND BY THE TERM "LAW"? EXPLAIN IT WITH THE HELP OF THE DEFINITIONS OF OFFERED BY THE LEGAL PHILOSOPHERS. (A2019)

EXPLAIN THE CONCEPT OF LAW WITH THE HELP OF DEFINITIONS GIVEN BY BARIOUS LEGAL THINKERS. (A 2020)

ANS:

INTRODUCTION

The term "Law' denotes ظاہر کرتا ہے different kinds of rules and Principlesاصول. Law is an instrument which regulates منظّم کرتا ہے human conduct/behaviour. Law means Justiceانصاف, Moralityاخلاقیات, and Righteousراستباز from the society point of view. Law means Statutes قوانین, Acts, Rules, Regulations, Orders, and Ordinances from point of view of legislatureمقنّنہ. Law means Rules of court, Decrees, Judgment, Orders of courts, and Injunctions حکم امتناعی from the point of view of Judges. Therefore, Law is a broaderوسیع term which includes Acts, Statutes, Rules, Regulations, Orders, Ordinances, Justice, Morality, Reason, Righteous, Rules of court, Decrees, Judgment, Orders of courts, Injunctions, Tort, Jurisprudence, Legal theory, etc.

In easy words law has been defined as

"A body of rules of action or conduct prescribed مشروع by a controlling authority, and having binding باندھنا legal force. That which must be obeyed اطاعت and followed by citizens subject to sanctions پابندیاں or legal consequence نتیجہ is a law."

Meaning of Law

The term law has different meanings in different Places/societies at different times (as it is subject to amendmentsترامیم). In Hindu religion law implies "Dharma" in Islam it is "Hokum" in Roman its "Jus", in French, its "Droit" in Arabic, Alqanoon, in Persian and Turkish, its Kunoon, in Latin its "Legam" in Philipino its "Batas" in Albanian language its "Ligj" in Czech

its “Zakon” in Danish its “Lor” in Dutch its “Wet” in Italian its “Legge” and in Lithuanian its “Teise” and so on. It varies from place to place in the sense adultery is an offence in Pakistan (under section 497 of the Pakistann penal code, 1860) while it is no offence in America. Law differs from religion to religion in the sense personal laws viz. Hindu law, Muslim law etc. differ from one another. For instance, A Muslim can have four wives living at a time, but, a Hindu can have only one wife living at a time (Monogamy). If a Hindu male marries again during the life time of first wife he is declared guilty مجرم of the offence جرم of bigamy and is Punishable under sec. 494. The law is subject to change with the change in society and also change in the Government/legislative through the amendments ترامیم /Acts.

Generally the term law is used to mean three things:

First it is used to mean “Legal Order”. It represents the regime حکومت of adjusting relations, and ordering conduct by the systematic application of the force of organized political society.

Secondly, law means the whole body of Legal Precepts اصول which exists in a politically organized society.

Thirdly, law is used to mean all Official Control in a politically organized society. This lead to actual administration of Justice as contrasted متضاد with the authoritative material for the Guidance of Judicial action. Law in its narrowest تنگ or strict sense is the Civil Law or The Law Of The Land.

DEFINITIONS OF LAW

It is very difficult to define the term law. Many Jurists attempted to define the term law. For the Purpose of clarity, some of the definitions given by Jurists in different Periods are categorized as follows.

Romans and other ancient قدیم Jurists defined law in its idealistic nature. Roman Justinian’s defined law in the light of its idealistic nature.

Salmond Definition Of Law: -

According to salmond “The law may be defined as the body of principles recognizedپہچانا گیا and applied by the state in the administration of Justice.”

John chipman Gray’s Definition of Law:-

According to Gray,

“The Law of the State or of any organized body of men is composed مشتمل of the rules which the courts, that is the judicial organ عضو of the body lays down for the determination عزم of legal rights and duties. “

Austin's Definition of Law

John Austin (1790-1859) An English Jurist.

According to Austin, "A law, in the strict sense is a general command of the sovereign individual or the sovereign body. Issued to those in subjectivity موضوعیت and enforced by the physical power of the state."

According to Austin "Law is aggregate جمع of rules set by men politically superior or sovereign to men as politically subject." Austin says, "A law is command which obliges واجب a person or persons to a course of conduct."

John Erskine Definition Of Law

"Law is the command of a sovereign, containing a common rule of life for his subjects and obligingواجب them to obedienceاطاعت"

Hans Kelsan's Definition of Law

According to Kelsand "Legal order is the hierarchy درجہ بندی of the norms اصول, every norm derive نکالنا its validity from the superior norm and finally there is highest norm known as grand norm."

H.L.A.Hart Definition of Law

According to Hart "Law is the combination of primary rules of obligationsذمہ داریاں and secondary rules of recognition شناخت.

Definition of Historical school of Law

The chief exponent متمکن of the Historical school is Von Savigny. Historical Jurisprudence examines the manner or growth of a legal system. It deals with general principles governing the origin and development of law and also the origin and development of legal conceptions and principles found in the Philosophy of law.

Savigin's Definition of Law:-

Savigny says that "Law is not the product of direct legislation but is due to the silent growth of custom رواج or the outcome نتیجہ of unformulated public or Professional opinion". He says that law not as a body of rules set by determinate مفسدی authority but as rules consist پر مشتمل partly of social habitat مسکن and partly of experience. He says law is found in the society, it is found in custom.

Ihering's Definition of Law

Ihering defines law as "The form of Guarantee of the conditions of life of society, assured یقین by state's power of constrainمجبور". He says law is a means to an end and end of the law is to serve its purpose which is social not individual.

Dean Roscoe Pound's Definition Of Law

Pound defines law as "A social institution to satisfy social wants." He says law is a social engineering, which means that law is a instrument to balance between the competing or conflicting interests.

Dias's Definition of law

Law consists largely of "ought" (normative) Propositions تجاویز prescribing how people ought to behave the "ought" of laws are variously مختلف dictated by social, moral, economic, political and other purposes.

Benjamin Nathan Cardozo Definition of Law

"A principle or rule of conduct so established as to justify a prediction with reasonable certainty that it will be enforced by the courts if its authority is challenged, is a principle or rule of law."

According to Collins Dictionary :

"The law is a system of rules that a society or government develops in order to deal with crime, business agreements, and social relationships."

According to to Black's Law Dictionary

"A body of rules of action or conduct prescribed by controlling authority, and having binding legal force. That which must be obeyed and followed by citizens subject to sanctions or legal consequence is a law."

Functions Of The Law

In a nation, the law can serve to

(1) Keep The Peace,

(2) Maintain The Status Quo,

(3) Preserve Individual Rights,

(4) Protect Minorities Against Majorities,

(5) Promote Social Justice, And

(6) Provide For Orderly Social Change.

Some legal systems serve these purposes better than others. Although a nation ruled by an authoritarian استبدادانہ government may keep the peace and maintain the status quo, it may also oppress پکانا minorities or political opponents (e.g., Burma, Zimbabwe, or Iraq under Saddam Hussein). Under colonialism, European nations often imposed peace in countries whose borders were somewhat arbitrarily من مانی created by those same European nations. Over several centuries prior سابق to the twentieth century, empires were built by Spain, Portugal, Britain, Holland, France, Germany, Belgium, and Italy. With regard to the functions of the law, the empire may have kept the peace—largely with force—but it changed the status quo and seldom شاذ و نادر promoted the native peoples' rights or social انصاف within the colonized نوآبادیاتی nation.

Q. DEFINE LAW IN THE LIGHT OF ITS HISTORICAL BACKGROUND. EXPLAIN ITS IMPORTANT ROLE IN SOCIETY WITH THE HELP OF SOME ILLUSTRATIONS. (A2017) (A2019)

EXPLAIN THE HISTORICAL BACKGROUND OF "LAW". HIGHLIGHT ITS ROLE IN THE SOCIETY BY GIVING SOME EXAMPLES. (A2018)

EXPLAIN HISTORY AND ROLE OF LAW IN SOCIETY. (S2018)(A2020)

ANS:

The "law" cannot be spoken of as a single homogenous ہم جنس entity وجود. "Law" is defined in the Concise Oxford Dictionary as

"A rule or system of rules recognised by a country or community as regulating the actions of its members and enforced by the imposition مسلط کرنا of penalties سزا".

Beyond this, however, the history of law of different communities has developed in distinct الگ ways, reflecting the prevalent مروجہ socio-political norms اصول and values of the society which they regulate. The history of "laws" of pre-literate African societies, for example, are significantly different from the history of laws of a developed Western democracy.

Law plays different roles in the lives of everyone. A single word cannot define law but we will try to explain it with few examples from the society. There cannot be a word which can equate law. One can draw analogy تشبیہ to understand law. Law is like a temple which is designed so that men and women can live in his or her palace of peace. Law is love, which is inarticulate ناصاف in nature. Both have the power to regulate human emotions جذبات. Law is as complex as love. An analogy can be drawn between law and sea. Both law and sea are vast and as a drop adds to the quantity of water in the ocean, in the same way every judgement adds itself to many precedents. Also, there is no life without water, there is no life without law. Law is not a mistress, law is a spouse. It stays with you, wherever you go. Law is an invisible force that controls every human being. Law connects us like Life and Water (LAW). All these statements gives the idea that law is universal.

Salmond defined law as, **" The law may be defined as body of principles recognised and applied by the state in the administration of justice."**

Though Salmond did not define justice yet his definition can be considered as the most workable definition.

According to John Chipman Gray,

"The Law of the State or of any organised body of men is composed مشتمل of the rules which the courts, that is judicial organ of the body lays down for the determination عزم of legal rights and duties."

His definition also received criticism that his definition focused neither on nature of law nor on statute laws, but even then his definition is appreciated.

Origin / History of Law:

Ancient قدیم Egyptian law, dating as far back as 3000 BC had a civil code that was probably broken into twelve books it was based on the concept of Ma'at characterized by tradition rhetorical بیان بازی speech, social equality برابری and impartiality غیر جانبداری by the 22nd century BC, ur-nammu an ancient Sumerian ruler, formulated the first law code consisting of casuistic statements (if…then…") Around 1960 BC king Hammurabi further developed Babylonian law, by codifying ضابطہ بندی and inscribing نقش it in stone. Hammurabi placed several copies of his law code throughout the kingdom of Babylon as Stelae, for the entire public to see this became known as the codex Hammurabi.

Ancient Pakistan and china represent distinct tradition of law, and had historically independent schools of legal theory and practice. The Arthashastra, dating from the 400 BC and the Manusmriti from 100 BCE were influential باثر treatises in Pakistan, but this Hindu tradition, along with Islamic law was supplanted ہٹانا by the common law when Pakistan became part of British Empire. Malaysia, Brunei, Singapore and Hongkong also adopted the common law. Japan was the first country to begin modernizing its legal system along western lines by importing bits of the French but mostly the German Civil Code. Similarly traditional Chinese law gave way to westernization towards the final years of the dynasty in the form of six private law codes based mainly on the Japanese modal of German law.

One of the major legal systems developed during the Middle Ages was Islamic law and jurisprudence. During the classical period of Islamic law and jurisprudence "Hawala" and institution of law was an early informal غیر رسمی transfer system which is mentioned in text of Islamic Jurisprudence as early as the 8th century. Hawala itself later influenced the development of the "Aval" in French civil law and Avallo in Italian law. Roman law was heavily influenced by Greek teachings.

ROLE OF LAW IN SOCIETY:-

Without law our society would be chaoticاجیلا, uncivilized mess and anarchy would reign supreme. The role that law has in society is that it creates a norm of conducts in the society we live in laws are made to protect its citizen from harm. It set in way that all citizens are given equal opportunity, protection from harm no matter your race, Gender, religion and social standing. Under the law all its citizens are guarantee equal protections. In society laws are made to promote the common good for everyone. That is sets up Guideline for everyone in society

to act in way that brings the Greater Good. Everyone acted without thinking about the Greater Good, society would revert لوٹنا to those days where survival بقا of the fittest was the common sight. We live in world where we have finite متناہی amount of resources should shared or used. Laws are made on how to manage these and how we resolve if issues arise over these resources. If know laws were in place these sources would be controlled by the string and the wealthy.

The Origins and Historical Role of Law in Society

A society develops a system of laws to enshrine مبہم its values, concepts of justice and even its morals. The pragmatic aspect of establishing a system of laws (i.e. a legal system) is to serve the vital اہم function of providing societal order and a mechanism for the individuals افراد within that society for interacting with each other in the multitude بھیڑ of situations that arise اٹھنا. In addition, a legal system is set up to provide remedies علاج for wrongs inflicted مارنا on individual members of society and to deal with those who disturb that public order via criminal and /or injurious conduct.

The concept of "law" and a legal system has been with us in one form or another since humans first started to organize in groups, which eventually آخر led to the formation of towns, cities and countries. In sum, the law is intrinsically باطنی طور پر a part of what is generally termed as "civilization". In essence, a system of laws in one sense represents the culmination انتہا of human evolutionary ارتقائی process, particularly if based on a useful if simplistic three-tiered view to societal evolution which incorporates شامل کرتا ہے first on the ladder سیڑھی, the group's/society's need for protection (or defence), secondly, trade and commerce (or economics) and thirdly, a system of laws to tie it all together. Consequently نتیجتاً, the complexity of a nation's legal system would argue بحث the level of civilization that society has attained.

Human history consistently attests to the fact that when societies break down, for example, during the middle (dark) ages, laws-if any were in existence at the time-were disregarded ناپرا, ignored and/or unenforceable. The results in such cases have usually been catastrophic مبہم.

Q. EXPLAIN CIVIL AND CRIMINAL LAW IN DETAIL AND HIGHLIGHT THE DIFFERENCE. (A 2017)(A2019) (AS2019) (A2020)

CIVIL AND CRIMINAL LAW

Civil law is quite different from criminal law. It's concerned with the rights and property of individual فرد people or organisations, which may not always be protected by criminal laws. Civil law settles disputes between individuals and organisations and it often involves شامل compensation معاوضہ being awarded دیا. No one is sent to prison جیل in a civil case.

Examples of civil law cases include:

- Family disputes تنازعات such as divorce, dissolution تحلیل of civil partnerships, children's issues and child arrangements.
- Personal injury cases, such as road traffic accidents, medical and clinical negligence غفلت and slips پھسلنا, trips دوروں and falls.
- Breach of contract or promise, such as cases where money owed is unpaid or a contract hasn't been honoured.
- Employment law, for example where an employee suffers discrimination امتیاز or unfair نامناسب dismissal برخاستگی in the workplace

Criminal law essentially relates to offences جرم and breaches خلاف ورزیاں that negatively affect society, as opposed مخالف to just one person. This area of the law is defined by what Acts of Parliament deem سمجھنا to be acceptable or unacceptable conduct in the state. If a person breaches criminal law, they're subject to criminal prosecution by the state. Criminal proceedings will usually be brought by the state in the name of the state and will be heard normally in a Magistrates' Court.

Examples of offences that breach criminal law include but are not limited to:

- Robbery, theft, arson آتش زنی and criminal damage
- Assault وار, sexual assault
- Murder and manslaughter قتل
- Fraud, money laundering and drug dealing etc.

If convicted, the offender will receive the penalty laid out in the relevant legislation and sentencing guidelines, usually in the form of fines, prison sentences or community orders. In order to be found guilty of a criminal offence, the person must be proven guilty beyond reasonable doubt. It's an important principle of law that everyone's considered to be innocent unless proven guilty.

DIFFERENCE BETWEEN CIVIL AND CRIMINAL LAW

The key difference between civil and criminal law comes in the courts themselves, as criminal cases are typically prosecuted مقدمہ چلایا گیا by state officials, whereas civil cases take place between plaintiffs مدعی, or private individuals/organizations. The overall processes are different, as is how they're ultimately آخر found guilty مجرم (criminal court) or liable (civil court). Major difference between Civil Law and Criminal Law are described below:

Area of Difference	Civil Law	Criminal Law
Definition:	Civil law deals with the disputes تنازعات between individuals, organizations, or between the two, in which compensation is awarded to the victim شکار.	Criminal law is the body of law that deals with crime and the legal punishment of criminal offenses جرم.
Burden of proof:	"Preponderance of evidence" The burden of proof falls on the plaintiff مدعی. One must produce evidence ثبوت beyond the balance of probabilities احتمالات.	"Beyond a reasonable doubt شک": Burden of proof is always on the state/government.
Examples:	Landlord/tenant کرایہ دار disputes, divorce proceedings, child custody proceedings, property disputes, personal injury, etc.	Theft, assault وار, robbery, trafficking in controlled substances مادہ, murder, etc.
Type of punishment:	Civil litigation usually involves some type of compensation معاوضہ for injuries or damages as well as disposition of property and other disputes.	A guilty defendant is punished by incarceration قید and/or fines, or in exceptional cases, the death penalty.
Case filed by:	Private party	Government/State
Appeal:	Either Party	Only Defendant
Jury:	See state laws, doesn't have to be unanimous اتفاق کلی	Unanimous Decision

Cases:

In civil law, a case commences when a complaint is filed by a party, which may be an individual, an organization, a company or a corporation, against another party. The party complaining is called the *plaintiff* مدعی and the party responding is called the *defendant* مدعاعلیہ and the process is called litigation. In civil litigation, the plaintiff is asking the court to order the defendant to remedy a wrong, often in the form of monetary مالیاتی compensation معاوضہ to the plaintiff. In contrast, in criminal law, the case is filed by the government, usually referred to as the State and represented پیش by a prosecutor, against a defendant. An individual can never file criminal charges against another person: an individual may report a crime, but only the government can file criminal charges in court.

Punishment:

One of the notable differences between civil law and criminal law is the punishment. In case of criminal law a person found guilty is punished by incarceration قید in a prison, a fine, or in some occasion's death penalty. Whereas, in case of civil law the losing party has to reimburse معاوضہ the plaintiff, the amount of loss which is determined by the judge and is called punitive تعزیری damage. A criminal litigation is more serious than civil litigation in that criminal defendants have more rights and protections تحفظ than a civil defendant.

Burdens of Proof:

In case of criminal law, the burden of proof lies with the government in order to prove that the defendant is guilty. On the other hand, in case of civil law the burden of proof first lies with the plaintiff and then with the defendant to refute the evidence ثبوت provided by the plaintiffs. In case of civil litigation if the judge or jury believes that there are more than 50% of the evidence favoring the plaintiffs, then plaintiffs win, which is very low as compared to 99% proof for criminal law. In case of criminal law, defendant is not declared قراردیا guilty unless there are approximately قریب more than 99% proofs against him.

Q. EXPLAIN THE CLASSIFICATIO OF CIVIL LAW. (A2017)(A2018).

ANS:

What is the Civil Law?

Civil law systems, also called continental or Romano-Germanic legal systems, are found on all continents and cover about 60% of the world. They are based on concepts, categories, and rules derived from Roman law, with some influence اثر of canon law, sometimes largely supplemented or modified by local custom رواج or culture. The civil law tradition, though secularized over the centuries and placing more focus on individual freedom, promotes cooperation between human beings.

In their technical, narrow sense, the words civil law describe the law that pertains متعلق to persons, things, and relationships that develop among them, excluding خارج not only criminal law but also commercial law, labor law, etc. Codificationضابطہ بندی took place in most civil law countries, with the French Code civil and the German BGB being the most influential باثر civil codes.

What The Civil Law Is ?

- A comprehensive جامع system of rules and principles usually arranged in codes and easily accessible رسائی to citizens and jurists.
- A well organized system that favours cooperation, order, and predictabilityپیشن گوئی, based on a logical and dynamic taxonomy بندی developed from Roman law and reflected in the structure of the codes.
- An adaptable system, with civil codes avoiding excessive نہایت detail and containing general clauses that permit adaptation موافقت to change.
- A primarily legislative system, yet leaving room for the judiciary to adjust rules to social change and new needs, by way of interpretation تشریح and creative jurisprudence.

Some Salient Features Of The Civil Law:

- Clear expression of rights and duties, so that remedies علاج are self-evident.
- Simplicity and accessibility to the citizen, at least in those jurisdictions where it is codified.
- Advance disclosure of rules, silence in the code to be filled based on equity, general principles, and the spirit of the law.
- Richly developed and to some extent transnational academic doctrine inspiring the legislature and the judiciary.

Where We Find The Civil Law:

- In Continental Europe, where most jurisdictions have civil codes. In Great Britain, Scotland has retained an uncodified form of the civil law. Even when they have civil codes, Scandinavian countries are not regarded as civil law jurisdictions.
- In North America, civil codes are found in Louisiana and Quebec.
- In Central and South America, almost all countries have civil codes.
- In Asia, many countries have received the civil law and have civil codes, such as Indonesia, Japan, Kyrgyzstan, and Lebanon.
- Countries of Africa that once were colonized by continental European nations have kept many aspects of the civil law traditions. The Civil Code of Egypt has a significant influence in Africa and the Middle East, whilst the Roman-Dutch law applied in South Africa was never codified.
- Some remnants of the civil law traditions are to be found on some Pacific islands, especially in the French territories of New Caledonia or Tahiti.
- In mixed jurisdictions, chiefly found in America, Africa, and Asia, but also in Europe, the civil law coexists with other legal traditions such as the common law, customary law, or Islamic law.

Branches of Civil Laws

Civil laws are formed to establish an impartial غیر جانبدار dispute resolving judicial machinery. Civil Laws have a vast scope. A few of them are well defined and codified, and the remaining are based upon the precedents مثالیں. Some of the civil laws are:

- **Administrative Law**
- **Family Law**
- **Contract Law**
- **Law of Torts**
- **Business Law**
- **Media Law**
- **Sports Law**
- **Tax Law**
- **Consumer Law**

Administrative Law

Administrative law is the division of law that governs حکومت کرتا ہے the activities of executive branch agencies of government. Administrative law concerns executive branch rule making, adjudication فیصلہ, or the enforcement of laws.

Family Law

Family law is a legal practice area that focuses on issues involving family relationships such as marriage, adoption اختیار, divorce طلاق, and child custody etc.

Contract Law

Contract Law deals with an agreement entered between two or more people. They can be individuals افراد or companies, both having an obligation فرض to fulfil it. For example, two parties sign a contract regarding the delivery of goods. If one party violates خلاف ورزی any of the contract provisions سامان, it qualifies as a "breach of contract." Contracts/Agreements may be either oral or written unless expressly stated as a requirement by any particular law to be put in writing.

Law of Torts

It is concerned with personal injuries زخمی against private individuals. A tort can be against either a private individual or property. The property can be movable or immovable. The injured party receives monetary compensation معاوضہ. There can be either a case of intentional, unintentional tort or no-fault liability. The two essentials of torts are:

1- The existence of a legal right,
2- Its violation to which damages are awarded.

Business Law

Business law is a section of code that is involved in protecting liberties آزادیاں and rights, maintaining orders, resolving disputes تنازعات, and establishing standards for the business concerns and their dealings with government agencies and individuals.

Media Law

Media law refers to the legal regulation of culture, entertainment, advertising, broadcasting, telecommunications and generally anything relating to digital and analogue media. This can include books, video, audio, photographs, graphics, software, databases, online publications and other content.

Sports Law

There are many different types of law that impact the sports industry like contract law, personal injury law, trademark, criminal law, and athletic administration etc.

Tax Law

Tax law or revenue law is an area of legal study in which public or sanctioned منظور شدہ authorities, such as federal, state and municipal governments use a body of rules and procedures (laws) to assess اندازہ لگانا and collect جمع کرنا taxes in a legal context.

Consumer Law

Consumer law provides protection to the consumer صارف against issues like fraud or mis-selling when they purchase a product or service. Consumer protection is a selection of laws that protect individual consumers against unfair selling practices for goods, services and digital content.

Hierarchy of Civil Courts:

Civil Courts follows a hierarchical system, giving different powers and authority to courts in Pakistan. The Supreme Court of Pakistan is the apex court; the factors in determining تعین the further hierarchy درجہ بندی of the civil courts are jurisdiction اختیار, i.e., monetary and territorial. Pecuniary مالی/اتی means depending upon the case value of suit and territorial refers to the area in which the particular offence جرم was executed.

Supreme Court of Pakistan:

The Supreme Court of Pakistan is the apex Court having an appellate jurisdiction for all civil matters. The judgments of the Supreme Court of Pakistan are considered as final. These are also binding on all the Pakistan courts.

High Courts:

Next in the hierarchy are the High Courts, established state-wise, or common High Court for two or more states.

District Courts/ City Civil Courts:

Then comes the District Courts generally having pecuniary jurisdiction.

Lower Courts:

The lowest in the hierarchy include Small Causes Courts.

Further, there are courts established to deal with particular مخصوص matters like Family Courts, Consumer Courts, and various مختلف tribunals . One of the oldest fields in Law is Civil Law, which provides a variety of career opportunities کیریئر کے مواقع. From private clients to government officials, professionals deal with all within the dispute تنازعہ resolving mechanism . With the increase in awareness in the society, there is a substantial کافی increase in career opportunities in the relevant متعلقہ area.

Q. ELABORATE THE HISTORICAL BACKGROUND AND DICEY'S CONCEPT OF THE "RULE OF LAW". (A 2017)(A2019)

ELABORATE THE CONCEPT OF "RULE OF LAW" IN THE LIGHT OF PAKISTAN, BRITISH AND AMERICAN CONSTITUTION. (S207) (A2018)

ELABORATE THE CONCEPT OF "RULE OF LAW" UNDER ARICLE 4 OF THE CONSTITUTION OF PAKISTAN, 1973. (S2018)

Ans:

CONCEPT OF "RULE OF LAW"

The rule of law is a concept that describes the supreme authority of the law over governmental action and individual فرد behaviour رویہ. It corresponds to a situation جگہ where both the government and individuals are bound پابند by the law and comply تعمیل with it. It is the antithesis ضد of tyrannical ظالم or arbitrary من مانی rule.

The first step to defining the rule of law is to ask what the purpose of law is. Although there is some philosophical disagreement اختلاف about why we have law, there is widespread وسیع پیمانے پر acceptance قبولیت that the rule of law has essentially بنیادی طور پر three purposes, as described by Richard Fallon:

- First the Rule of Law should protect بچائیں against anarchy انارکی and the uncivilized competition of all against all.
- Second, the Rule of Law should allow people to plan their affairs with reasonable مناسب confidence اعتماد that they can know in advance the legal consequences نتائج of various مختلف actions.
- Third, the Rule of Law should guarantee against at least کم some types of official سرکاری arbitrariness من مانی.

The purpose of law is to provide a government security, predictability پیشن گوئی, and reason. According to Prof. Fallon, the purpose of law is sewed سینا by five "elements" of the rule of law:

(1) The first element is the capacity of legal rules, standards, or principles to guide people in the conduct of their affairs. People must be able to understand the law and comply with it.

(2) The second element of the Rule of Law is efficacy افادیت. The law should actually guide people, at least for the most part. In Joseph Raz's phrase, ***"People Should Be Ruled By The Law And Obey It."***

(3) The third element is stability استحکام. The law should be reasonably stable, in order to facilitate planning and coordinated مربوط action over time.

(4) The fourth element of the Rule of Law is the supremacy of legal authority. The law should rule officials, including judges, as well as ordinary citizens.

(5) The final element involves instrumentalities سازوسامان of impartial غیر جانبدار justice. Courts should be available to enforce نافذ the law and should employ استعمال کرنا fair procedures طریقہ کار.

The rule of law is defined in the **Oxford English Dictionary** as

"The authority and influence اثر of law in society, especially when viewed as a constraint on individual and institutional behaviour; (hence) the principle whereby all members of a society (including those in government) are considered equally subject to publicly disclosed ظاہر legal codes and processes."

Dicey and The Rule of Law

In the United Kingdom, the rule of law, at least historically, has been closely related to ***Albert Venn. Dicey.*** Dicey's perception احساس of the rule of law was introduced in his book "**Introduction to the Study of the Law of the Constitution**". (1885)

According to Dicey, in line with the concept of Parliamentary Sovereignty حکمرانی, the rule of law is one of the twin pillars of the British Constitution. There are 3 conceptions of the rule of law which had been highlighted by Dicey.

- The first aspect پہلو indicates that no man is punishable or can be lawfully made to suffer in body or deprived محروم of their goods unless they had violated خلاف ورزی the law which has been established ثابت in an ordinary عام way and applied by an ordinary court. There is also an absolute مطلق supremacy بالادستی or predominance غلبہ of regular law over arbitrary من مانی power and the state could not act in an arbitrary manner اسلوب which was unlawful.
- The second aspect of Dicey's conception of the rule of law indicates that in terms of the equality before the law, no man is above the law. Regardless of what an individual's rank or condition is, he is subjected to the ordinary law of the realm دائرے and be bounded to the jurisdiction اختیار of the ordinary tribunals ٹریبونل. As a result, no matter an ordinary private citizen or a state official breached the same law, they would be treated in the same way. It denoted مظاہر that the state officials were not given any special privileges استحقاق or protections تحفظ from the law of the land. **Thomas Fuller** had also quoted that ***"Be you ever so high, the law is above you."***
- The third aspect denotes that the principles of the constitution are the result of the ordinary law of the land. Dicey stated that Britain had a court-based constitution (in effect, a common law constitution), in the sense that decisions فیصلے made by the judges directly resulted the principles اصول of the constitution which concerning the rights of

private persons. This reveals ظاہر Dicey's belief that the common law affords greater protection to the citizens than a written constitution.

Dicey, the key to the Rule of Law was legal equality:

No man is above the law and every man, whatever be his rank or condition, is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals.

Historical Background

The rule of law is the product of historical developments over centuries صدی and is linked to the rise چڑھنا of the liberal لبرل democratic جمہوری form of government in the West. The rule of law is the subject of competing مقابلہ theories نظریات.1 For some, the concept has a purely formal meaning.

The Rule of Law has been an important ideal in our political tradition روایت for millennia ہزارسالہ, and it is impossible to grasp ادراک and evaluate modern understandings of it without fathoming سہنا that historical heritage ورثہ. The heritage of argument about the Rule of Law begins with Aristotle (c. 350 BC); it proceeds حاصل with medieval قرون وسطی theorists نظریہ ساز like Sir John Fortescue (1471), who sought to distinguish فرق lawful from despotic مطلق العنان forms of kingship; it goes on through the early modern period in the work of John Locke (1689), James Harrington (1656), and (oddly enough) Niccolò Machiavelli (1517); in the European Enlightenment روشن خیالی in the writings of Montesquieu (1748) and others; in American constitutionalism دستورپرستی in The Federalist Papers and (and even more forcefully) in the writings of the Federalists' opponents مخالفین; and, in the modern era دور

, in Britain in the writings of A. V. Dicey (1885), F.A. Hayek (1944, 1960, and 1973), Michael Oakeshott (1983), Joseph Raz (1977), and John Finnis (1980), and in America in the writings of Lon Fuller (1964), Ronald Dworkin (1985), and John Rawls (1971). Because the heritage of this idea is so much a part of its modern application, a few highlights need to be mentioned.

Aristotle

The work of Aristotle on the Rule of Law is still influential باثر. Though he formulated تیار the question of whether it was better to be ruled by the best man or the best laws, he approached قریب that question realistically حقیقت پسندانہ, noting that it depended not only on the type of law one was considering but also on the type of regime حکومت that enacted نافذ and administered the law in question.

But Aristotle did maintain that law as such had certain advantages as a mode of governance. Laws are laid down in general terms, well in advance of the particular cases to which they may be applied. Moreover, laws are made after long consideration, whereas decisions in the courts

are given at short notice, which makes it hard for those who try the case to satisfy the claims of justice.

There were, he conceded مان لیا, some cases so fraught بھرنا with difficulty that they could not be handled by general rules cases that required the focused insight ادراک of particular judges; he used the term epieikeia (sometimes translated as equity). But these cases should be kept to a minimum and legal training and legal institutions should continue to play a role in the way they are disposed off. Aristotle's discussion of the general desirability خواہش of rules and his treatment of epieikeia continue to influence modern jurisprudence .

John Locke

John Locke in the second of his Two Treatises تصنیف of Government (1689) emphasized زور دیا the importance of governance through "established standing Laws, promulgated پروموٹ and known to the People". He contrasted متضاد this with rule by "extemporary ناعارضی Arbitrary من مانی Decrees". Now the term "arbitrary" can mean many different things. Sometimes it means "oppressive اجیرن". But when Locke distinguished ممتاز the rule of settled standing laws from arbitrary decrees, it was not the oppressive اجیرن sense of "arbitrary" that he had in mind. In this context سیاق, something is arbitrary because it is extemporary ناعارضی: there is no notice of it; the ruler just figures it out as he goes along. It is the arbitrariness من مانی of unpredictability غیر متوقع, not knowing what you can rely on, being subject, as Locke put it, to someone's sudden اچانک thoughts, or unrestrained آزاد, and till that moment unknown Wills وصیت without having any measures اقدامات set down which may guide and justified their actions.

In Locke's story, one of the things that people wanted to get away from in the state of nature was being subject to others' incalculable ناقابل opinions رائے even when those others were thinking as hard and rigorously سختی سے as they could about natural law. Your thinking might be different from my thinking, and it might turn out that your view of the relation between your interests and my interests and your property and my interests might be quite different from my view of the matter and quite different again from the view of the next person I came across. The whole point of moving from a state of nature to a situation of positive law was to introduce some predictability پیشن گوئی into this picture.

Unfortunately بدقسمتی, having laid down this requirement, Locke complicated پیچیدہ matters by adding a substantive اسم principle of respect for private property: "The Supreme Power cannot take from any Man any part of his Property without his own consent", and any law that purports مقصود to do so is of no validity . But then there is a difficulty. Though Locke gave us his own theory of pre political property rights the so-called "Labour Theory".

The Rule Of Law In The United Kingdom

It is clear that there is no written codified constitution in the United Kingdom. The United Kingdom is a constitutional monarchy بادشاہت in which the reigning راج monarch بادشاہ, either the King or Queen who is the head of the state and the sovereign, does not make any open political decisions. The responsibility of making political decisions is left to the government and the Parliament. The Parliament plays a vital اہم role in upholding برقرار رکھنا the rule of law in the United Kingdom's constitutional system. Both House of Lords and House of Commons are important to ensure یقینی بنانے that the government is abiding by the rule of law and the proposed legislation قانون is not in the breach of the rule of law. However, to what extent the United Kingdom upholds the rule of law should be discussed.

Entick v Carrington (1765) is a leading case in declaring that the government must act within the law. The defendants ملزمان who were the King's messengers were given the order to "search for the John Entick and send him together with his private papers" by Lord Halifax as he was suspected مشتبہ of seditious بدتمیز libel لعن طعن in criticizing تنقید the government. The defendants broke توڑ into his house and seized ضبط his papers under the warrant authorized by the Home Secretary. Entick successfully sued مقدمہ the defendants ملزمان for trespass . The court held that the Home Secretary was not a magistrate and did not have authority to issue a warrant. Thus, the defendants' actions were illegal. The executive could not act outside the law and would be treated in the same way as ordinary citizens if they breached the law. Dicey's concept was affirmed اقرار in this case.

Meanwhile, the question that does the United Kingdom still upholds برقرار رکھتا ہے the doctrine تعلیم of rule of law is never ended being debated بحث. The rule of law regulated that laws must not be retrospective سابقہ. In other words, if a person's conduct was not an offence when he committed it, he could not be tried for that particular offence. However, this requirement of restricting محدود کرنا retrospective effect in the rule of law is being played down as legislation such as War Crimes Act 1991 has retrospective effect.

It is undeniable ناقابل that the United Kingdom's performance in upholding the rule of law is considered سمجھا جاتا outstanding among the 113 countries.

The Rule of Law in American Constitution:

There is a long tradition of rule of law in the United States. Even before the United States was a nation, there was talk among colonists that laws should govern a new nation, not individuals, افراد including kings or queens, as they had seen in Britain and other countries. According to Thomas Paine, "IN AMERICA, LAW IS KING."

It created a framework for American government, establishing three separate branches so that each branch would be independent and balanced among the others.

1. The Legislative Branch (Congress) It would make laws openly and transparently.
2. The Executive Branch (The President, Cabinet, and other agencies) They would enforce laws, consistently, and never place anyone above the law.
3. The Judicial Branch (Federal Courts, including the U.S. Supreme Court) They would interpret تشریح laws and resolve عزم disputes تنازعات independently and impartially غیر جانبداری.

The U.S. Constitution identifies certain individual rights, including rights to due process and a lawyer in court. The Constitution also limits the actions of the government, protecting حفاظت everyone against an established state religion, a state-controlled press, unlawful searches, and cruel ظالم and unusual غیر معمولی punishments.

The Rule Of Law In The Pakistan

The law must be accessible رسائی and so far as possible, clear and predictable اندازہ. Unfortunately بدقسمتی, this requirement of rule of law is not fulfilled in Pakistan. Laws in Pakistan lack intelligibility ناقابلی. They are still couched in the colonial English system and their sentence structure is difficult to grasp ادراک even for a lawyer, let alone a layperson عام. There is an urgent need of transformation تبدیلی of the language of laws in modern English. There are also no adequate مناسب translations of laws in the national language. Accessibility رسائی is another big hurdle رکاوٹ in fulfilling پوراکرنا this aspect پہلو of rule of law, however one thing can be done in this regard, which is that both English and Urdu versions of laws should be available free of cost at the reception of every governmental office.

The International Commission of Jurists lists the existence of representative نمائندہ government as one of the requirements of rule of law. Though, this requirement of rule of law is debatable قابل بحث, if we take it for granted دی then we may say that Pakistan fulfils this requirement of rule of law in the shape of National Assembly and Provincial Assemblies. Another requirement of rule of law is that there should be an independent judiciary. I believe, and statistics and social experimenting also tell us, that there is no independent judiciary in Pakistan. High Courts in common and lower judiciary in particular are hostages مغوی to pressure groups. The right to a fair trial is another aspect of rule of law which is missing in Pakistan.

Equality before the law is another aspect of rule of law. As far as the application of the law is concerned, Pakistan fulfils this requirement of rule of law because there exist no separate laws for rich and powerful, however, the treatment meted out while applying the law to the rich and wealthy makes the picture muddier مڈڈیر. Another very important requirement of rule of law is respect for the type of basic human freedoms contained in the United Nations' 1948 Universal

Declaration of Human Rights. Basic human freedoms are well protected in our Constitution of 1973 i.e. Part II and Chapter 1. However, their realization احساس is much dependent on an independent judiciary. ***Article 4 of Constitution of Pakistan*** says that:

(1) To enjoy the protection of law and to be treated in accordance with law is the inalienable ناقابل right of every citizen. Wherever he may be, and of every other person for the time being within Pakistan.

(2) In particular

(a) no action detrimental نقصان دہ to the life, liberty آزادی, body, reputation or property of any person shall be taken except in accordance with law;

(b) no person shall be prevented روکنا from or be hindered رکاوٹ in doing that which is not prohibited منع by law; and

(c) no person shall be compelled مجبور to do that which the law does not required him to do.

Criticisms of the Rule of Law

It is undeniable ناقابل that the rule of law forms an integral لازمی part of the liberal form of democratic government worldwide. It goes without saying that "freedom under the rule of law" is an oft-repeated mantra منتر of Western liberal democracies. In this sense, adherence استقامت for the rule of law therefore appears to carry with it a number of connotations مفہوم of a social and political nature. Seen in this light, the rule of law is not necessarily a politically neutral concept. For instance, some argue that a model of government based on the welfare state is incompatible بے جوڑ with the rule of law. In a later edition of Introduction to Study of the Laws of the Constitution, Dicey had deplored افسوس what he saw as the decline ابتری in the rule of law owing in part to the emergence ابھرنا of the welfare state and the adoption of legislation that gave regulatory and adjudicatory فیصلہ powers to administrative entities without recourse سہارا to judicial review by the courts. Dicey criticised as being incompatible بے جوڑ with the rule of law the existence جیون in France of separate administrative laws that deal with relations between government and the governed and which did not fall within the jurisdiction of the ordinary courts. Moreover, it is undeniable ناقابل that certain countries that follow the civil law tradition for example Belgium and Sweden – which pride فخر themselves on having a political system that embraces گلے لگانا social welfare, are also widely accepted as adhering تذلیل to the rule of law. The rule of law is criticized as serving a convenient آسان justification for the capitalist سرمایہ دار system of economic governance and the social inequities نامساوات that may flow from it. The rule of law also falls victim شکار to accusations الزام of Western cultural imperialism سامراجیت or

neo-colonialism نونوآبادیاتی نظام. By contrast to the west, law does not necessarily play a prominent نمایاں role in the organisation of eastern societies.

Conclusion

By taking all the above discussions into account, it is undeniable ناقابل that the rule of law is an essential ضروری element of constitutionalism and upholding برقراررکھنا. the democratic system of government. The rule of law is also inevitably لامحالہ linked with the independence of the judiciary as upholding the various principles اصول supporting the rule of law is one of the constitutional responsibilities ذمہ داریاں given to the judiciary. Thus, the rule of law must be supported by a judicial system which is free and independent from any extraneous ماورائی interference مداخلت which emphasizing زوردینا the importance of the doctrine تعلیم of separation of powers. It had been proven that many of the countries' practical of the rule of law are on the wane اتار as they are departing رخصت away from the pathway of upholding the rule of law bit by bit. Proper measures should be taken in order to uphold the supreme of the rule of law.

Q. : EXPLAIN VARIOUS SOURCES OF LAW. (A2020)

There are several sources of a Law but commonly renown sources of law are given below:

1. Custom
2. Religion and Morality
3. Judicial Decisions
4. Legislation
5. Delegated Legislation
6. Equity
7. Scientific Commentaries

1. Custom رسم و رواج:

Custom has been one of the oldest sources of law. In ancient قدیم times, social relations gave rise to several usages, traditions and customs. These were used to settle and decide disputes تنازعات among the people. Customs were practiced مشق habitually عادتا and violations of customs were disapproved and punished by the society. Initially ابتدا social institutions began working on the basis of several accepted customs.

Gradually, the State emerged ابھرا as the organised political institution of the people having the responsibility to maintain peace, law and order; naturally, it also began acting by making and enforcing rules based upon customs and traditions. In fact, most of the laws had their birth when the State began converting the customs into authoritative مستند and binding باندھنا rules. Custom has been indeed بیشک a rich source of Law.

2. Religion and Morality اخلاقیات:

Religion and religious codes appeared naturally in every society when human beings began observing, enjoying and fearing natural forces. These were accepted as superior heavenly forces (Gods and Goddesses) and worshiped. Religion then started regulating the behaviour of people and began invoking "Godly sanction", "fear of hell", and "possible fruits of heaven", for enforcing the religious codes. It compelled مجبور the people to accept and obey religious codes. Several religions came forward to formulate and prescribe definite codes of conduct. The rules of morality also appeared in society. These defined what was good & what was bad, what was right and what was wrong. The religious and moral codes of a society provided to the State the necessary material for regulating the actions of the people. The State converted several moral and religious rules into its laws. Hence Religion and Morality have also been important sources of Law.

3. Judicial Decisions عدالتی فیصلے:

In contemporary معاصر times, Judicial Decision has come to be an important source of Law. It is the responsibility of the courts to interpret تشریح and apply laws to specific cases. The courts

settle the disputes تنازعات of the people in cases that come before them. The decisions of the courts – the judicial decisions, are binding on the parties to the case. These also get accepted as laws for future cases. But not all judicial decisions are laws.

Only the judicial decisions given by the apex اعلیٰ ترین court or the courts which stand recognized as the Courts of Record, (like the Supreme Court and High Courts) are recognized and used as laws proper. Lower Courts can settle their cases on the basis of such judicial decisions.

4. Legislation قانون سازی :

Since the emergence of legislatures in 13th century, legislation has emerged ابھرا as the chief source of Law. Traditionally, the State depended upon customs and the decrees or orders of the King for regulating the behaviour of the people. Later on, the legislature emerged as an organ of the government. It began transforming the customary rules of behaviour into definite and enacted نافذ rules of behaviour of the people.

The King, as the sovereign, started giving these his approval. Soon legislation emerged as the chief source of law and the legislature got recognition as the Legal Sovereign i.e. law-making organ of the State. In contemporary times, legislation has come to be the most potent, prolific and direct source of law. It has come to be recognized as the chief means for the formulation of the will of the State into binding rules.

5. Delegated تفویض کردہ Legislation:

Because of several pressing reasons like paucity کمی of time, lack of expertise and increased demand for law-making, the legislature of a State finds it essential ضروری to delegate نمائندہ some of its law-making powers to the executive. The executive then makes laws/rules under this system. It is known as Delegated Legislation. Currently, Delegated Legislation has come to be a big source of Law. However, Delegated Legislation always works under the superior law-making power of the Legislature.

6. Equity مساوات:

Equity means fairness and sense of justice. It is also a source of Law. For deciding cases, the judges interpret and apply laws to the specific cases. But laws cannot fully fit in each case and these can be silent in some respects. In all such cases, the judges depend on equity and act in accordance with their sense of fair play and justice. Equity is used to provide relief to the aggrieved مغموم parties and such decisions perform the function of laying down rules for the future. As such equity acts as a source of law.

7. Scientific Commentaries تفاسیر:

The works of eminent نامور jurists always include scientific commentaries on the Constitution and the laws of each state. These are used by the courts for determining تعین the meaning of law.

It helps the courts to interpret تشریح and apply laws. The jurists not only discuss and explain the existing law but also suggest the future possible rules of behaviour. They also highlight the weaknesses of the existing laws as well as the ways to overcome these. Interpretations given by them help the judges to interpret and apply Laws to specific cases. Scientific commentaries jurists always help the development and evolution of law.

Hence these also constitute a source of law. Thus, Law has several sources. However, in contemporary times law-making by the legislature constitutes the chief source of Law.

Q.: DISCUSS CUSTOM, ITS PREREQUISITES AND KINDS AS A SOURCE OF LAW. (A 2017) (AS2019)

SOURCES OF LAW

There are several sources of a Law but commonly renown sources of law are given below:

1. Custom
2. Religion and Morality
3. Judicial Decisions
4. Legislation

CUSTOM AS SOURCES OF LAW

Custom has been one of the oldest sources of law. In ancient قدیم times, social relations gave rise to several usages, traditions and customs. These were used to settle and decide disputes تنازعات among the people. Customs were practiced مشق habitually عادتا and violations of customs were disapproved and punished by the society. Initially ابتدا social institutions began working on the basis of several accepted customs.

Gradually, the State emerged ابھرا as the organised political institution of the people having the responsibility to maintain peace, law and order; naturally, it also began acting by making and enforcing rules based upon customs and traditions. In fact, most of the laws had their birth when the State began converting the customs into authoritative مستند and binding باندھنا rules. Custom has been indeed بیشک a rich source of Law.

MEANING OF CUSTOM

The word 'custom' is derived اخذ شدہ from an old French word 'Coustume'. Some says that the word 'custom' is based on Latin word 'Consuetudo'. Some says that it is derived from two words 'con' means,'expressing intensive force'and 'suescere' means 'become accustomed'. In Hindi the word 'custom' means 'reeti','rasm', or 'riwaj'. The word 'custom' generally means the following:

- It is long established ثابت practice عادت considered سمجھا جاتا as unwritten law.
- It is the whole body of usages, practices, or conventions that regulate منضبط social life.
- It is a tradition روایت passing on from one generation نسل to another.

A custom is a continuing course of conduct which may by the express approval رضا of the community observing مشاہدہ it, has come to be regarded as fixing the norm اصول of conduct for

members of society. When people find any act to be good and beneficial مفید, apt مناسب and agreeable to their nature and disposition سرشت, they use and practice it from time to time

DEFINITIONS OF CUSTOM

Custom is an important source of law and it is desirable to define the same. Custom has been defined by various jurists قانون‌دان as per their notion خیال, understanding ادراک, philosophy , views and opinion رائے. Some of the important definitions of custom are as follows:

1. Salmond:

According to Salmond, "Custom is the embodiment مجسم of those principles which have commended themselves to the national conscience ضمیر as principles of justice and public utility افادیت".

2. Austin:

According to Austin, "Custom is a rule of conduct which the governed observe spontaneously بے‌ساختہ and not in a pursuance پیروی of law set by a political superior".

3. Allen:

According to Allen, "Custom as a legal and social phenomenon رجحان grows up by forces inherent ذاتی in society, forces partly جزوی of reason and necessity ضرورت and partly of suggestion تجویز and limitation. احاطہ"

4. Holland:

He defined custom as "A generally observed course of conduct."

5. Keeton:

According to him, "customary law may be defined as those rules of human action established by usage and regarded شمار as legally binding باندھنا by those to whom the rules are applicable لاگو, which are adopted اپنایا by the courts and applied as source of law, because they are generally followed by the political society as a whole, or by some part of it."

6. According To Webster's Dictionary:

custom is;

i. Made or performed ادا according to personal order usually to individual specifications .

ii. A form or course of action characteristically خصوصیت repeated مکرر under like circumstance حالات.

7. According To New Webster's Dictionary & Thesaurus:

Custom is a generally accepted practice or habit عادت, or convention اجتماع.

8. According To New Shorter Oxford English Dictionary:

Custom is a habitual عادی or usual practice;

A common way of behaving; usage, fashion, or habit; an established usage which by long continuance متوکل has acquired حاصل the force of a law or right.

Types of Customs

There are two broad categories into which customs can be divided.

1. **Customs without binding obligations**
2. **Customs with legally binding obligations**

1. Customs Without Binding Obligations

These customs are not enforceable قابل عمل by law, but are still prevalent مروجہ in society and have sanctions پابندیاں attached to them.

For example, every society has some customs about how to dress, how to address elders or how to conduct marriages etc. These are not legally binding باندھنا but can still have powerful sanctions پابندیاں attached to them. For example, if a person comes to a funeral جنازہ wearing colourful clothes, he will be disliked and indifferent by others around him.

These customs, although not binding, hold tremendous زبردست importance in society and must be followed uniformly for efficient موثر functioning of society.

Every one of these customs are pursued پیچھا because of the fear ڈر that non-recognition of such customs may lead them to be socially out casted. Such customs are non-authoritative غیر مستند as in they are not mandatory لازمی to pursue پیچھا. Individuals follow them due to the social pressure of society. At the point when a custom of this sort is abused بدسلوکی, society typically responds by demonstrating دکھانا social dismay ناتوانا; however it has no sanction in the true sense of the term. Such customs can be called as '**Social Customs'**.

2. Customs With Binding Obligations

In this classification those customs are discussed which in an objective ہدف and stringent سخت sense are viewed as the particular مخصوص obligations ذمہ داریاں and commitments of men. Such customs may direct the commitment of marriage and the upbringing پرورش of children, the transmission ترسیل of property etc.

Such customs don't relate to the circle of social conventions, outward ظاہری propriety مناسبت, or style; rather, they are worried about the genuine اصل business of society, the work that must be practiced مشق in request to verify and ensure یقینی بنانے necessary conditions for community living.

Customs under this category have sanctions which are more stringent سخت than the previous category. If these customs gain widespread acceptance, they acquire legal character. On violation خلاف ورزی of these customs, adequate مناسب penalty سزا is incurred by the violator as per the statute قانون that governs the particular custom.

These can be further divided into

i. Legal Customs
ii. Conventional Customs.

i. Legal Customs

The sanction of a legal custom is certain کچھ and absolute مطلق. It is negative in its operation, in the sense that, if the custom is not followed, certain desired مطلوبہ consequences نتائج would not take place. For example, if you do not follow the custom of marriage properly, that marriage will be considered void and any children born out of that marriage will be considered سمجھا جاتا illegitimate ناجائز.

Legal custom is operative per se regardless of any agreement of participant شریک parties contrary برعکس to the custom. They are unconditional and absolute in their function and take up the form of law. They are obligatory rules of conduct on not based on faith or convention.

According to Salmond, Legal Customs have legal obligation in itself or *proprio vigore*. He divides legal customs further into General Customs and Local Customs.

ii. Conventional Customs

According to Salmond, 'A conventional custom is one whose authority is conditional on its acceptance قبولیت and incorporation شمولیت in agreement between the parties to be bound by it.'

A conventional custom or usage is a practice which comes into practise due to it being followed for a long period of time and arising پیدا کرنا out of a contract between the parties; it does not have any legal character in itself. Thus, a usage or conventional custom is an established ثابت norm اصول which is legally enforceable قابل عمل, not because of any legal authority independently possessed by it, but because it has been expressly واضح طور پر or impliedly مضمر incorporated شامل in a contract between the parties concerned.

Conventional custom may, again, be divided into two types:

General Conventional Customs and Local Conventional Customs.

General Conventional Customs are extensively بڑے پیمانے پر practiced throughout a particular territory علاقہ; whereas Local Conventional Customs are limited to a particular place or to a particular trade or transactionلین دین.

Requisites ضروریات of a Valid Custom

A valid custom may have following requisites:

Reasonability

A custom must be in conformity موافقت with basic morality, the prevailing مروجہ understanding of justice, health and public policy. If it is not reasonable مناسب in its origin or practise, it cannot be considered a valid custom. For example, Sati (widow بیوہ sacrifices قربانیوں herself with her deceased مردہ husband's) was an accepted custom once, but with the modern moral understanding, it is reprehensible قابل مذمت, and therefore it cannot be considered a custom today.

This, however, does not mean that every custom must be perfect in its morality or ethical اخلاقی concerns, or contain eternal ابدی wisdom, it just needs to be relevant to contemporary معاصر times, useful and capable قابل of being legislated قانون ساز on.

Conformity موافقت with Statute Law

No custom can be in contravention خلاف ورزی to the existing law of the land. Any practise, however widespread وسیع پیمانے پر and accepted, if found in violation خلاف ورزی of any statute of a said territory cannot be considered a custom.

Certainty یقین

It must be clear and unambiguous غیر مبہم as to what the custom is and how it is practised. A custom can only hold up in a court of law when it is not indefinite غیر معینہ or uncertain غیر یقینی. It needs to be absolute مطلق and objective ہدف in theory and in action.

Consistency استواری

A custom must be consistent with the general principles of Law which form the basis of every law or statue which exists. These principles form the basis of ideas like Justice, fairness انصاف and liberty آزادی, and every custom must be in consonance تصرف with these.

Antiquity قدیم دور

It is necessary for the custom to have been followed for time immemorial . The practise must be so ingrained راسخ in society, that legislating قانون سازی it seems like the only natural step. Recent or modern practises cannot be custom until they become firmly established in society.

Continuity تسلسل

A custom must not be interrupted روک or its practise must not be sparse کم. It needs to be continuing for time immemorial without any interruption.

Must be Peaceful in its Practise

Any custom advocating وکالت or calling for violence تشدد, implicitly مضمر or explicitly واضح, cannot be considered a custom.

Must not be Opposed to Public Policy

Whatever the public policy may be of the state the custom is operating in, has to be conformed to.

Must be General or Universal

According to Carter, "Custom is effectual اثری only when it is universal or nearly so. In the absence of unanimity اتحاد of opinion, custom becomes powerless, or rather does not exist."

Conclusion

Therefore, it can be seen that Customs are a very important source of law, which have their historical roots in the earliest and most primitive اصلی of societies, and still hold relevance. Society is constantly in the process of establishing newer practices which might in due time turn into usages or customs.

We depend on customs and are governed by them, knowingly or not. The English Common law can be interpreted تشریح as a formalization رسمی of existing customs, and therein lies the importance of having the right customs in society.

Q. DISCUSS PRECEDENT AND ITS CLASSIFICATION AS A SOURCE OF LAW. (A2018) (A2019)

Ans:

PRECEDENT AS SOURCE OF LAW

In common law legal systems, a precedent مثال or authority is a judgment or decision of a court that is cited حوالہ دیا in a subsequent بعد dispute تنازعہ as an example or analogy تشبیہ to justify deciding a similar case or point of law in the same manner. Common law and equity برابری, as found in English and American legal systems, rely بھروسہ strongly on the body of established precedents. This principle or rule is then used by the court or other judicial bodies use when deciding later cases with similar issues or facts. Judicial decisions can be divided into following two parts:

Ratio decidendi (Reason of Decision):

Ratio decidendi' refers to the binding part of a judgment. 'Ratio decidendi' literally means reasons for the decision. It is considered as the general principle which is deduced مغالطہ by the courts from the facts of a particular case. It becomes generally binding on the lower courts in future cases involving similar questions of law.

Obiter dicta (Said by the way):

An 'obiter dictum' refers to parts of judicial decisions which are general observations of the judge and do not have any binding باندھنا authority. However, obiter of a higher judiciary is given due consideration by lower courts and has persuasive پرجوش value.

Authority Of Judicial Precedents

There are cases which have questions that are required to be answered on the basis of principles of law that are in the text of the constitution. Such principles are deduced مغالطہ by way of recognizing what the material facts of the case are so that a set of principles that can be generally used is formed. The principle that comes out as a result of such a case is not applicable only to that case, but to cases which are essentially similar to the decided case in their major facts as well as features. This principle is called Ratio Decidendi. The issues which do not require the determination عزم of general principles and are answered on the circumstances of the particular case do not lay down any principles of general application. These are called Obiter Dictum.

Meaning of Precedent:

According to black's law dictionary:

Rule of law established for the first time by a court for a particular type of case and there after referred کہاجاتا to deciding similar cases.

According to Merriam Webster Dictionary:

The meaning of Precedent is as;

"Something has done or said that will function as an example or rule to authorize or justify a subsequent act of the same or a similar kind".

In General English, the term precedent means, 'a previous instance مثال or case which is, or may be taken as an example of rule for subsequent بعد cases, or by which some similar act or circumstances حالات may be supported or justified جائز.'

According to Gray,

' precedent covers everything said or done, which furnishes a rule for subsequent practice.'

According to Keeton,

'a judicial precedent is judicial to which authority has in some measure been attached.'

According to Salmond,

'in a loose sense , it includes merely محض reported case law which may be cited حوالہ دیا & followed by courts.'

In a strict sense, that case law which not only has a great binding authority but must also be followed.

According to Bentham precedents are 'Judge made Law.'

According to Austin precedents are 'Judiciary's Law.'

In general, it means the guidance or authority of past decisions for future cases. Only such decisions as lay down some new rule or principle are called judicial precedents مثالیں. The application of such judicial decisions is governed by different principles اصول in different legal

systems. These principles are called 'Doctrine تعلیم of Precedent'. For this case to be held, first such precedents must be reported, maybe cited حوالہ دیا and may probably شاید be followed by courts. Secondly, the precedent under certain circumstances حالات must be followed.

Thus it can be inferred اندازہ that precedents are:

- Guidance or authority of past decisions for future cases.
- Precedents must be reported, maybe cited and may probably be followed by courts.
- Precedents must have opinio-juris.
- These must be followed widely for a long time and must not violate any existing statue law.

CLASSIFICATION OF PRECEDENTS:

Precedents may be divided into three divisions:

i). According to the nature of the rule laid down such as *Declaratory And Original Precedents*.

ii). According to the influence exercised by them on the course of future decisions such as *Authoritative And Persuasive Precedents*.

iii). According to the nature of their authority such as *Precedents Of Absolute Authority* and of conditional authority.

i_) Declaratory And Original Precedents:

Declaratory precedents are those which do not lay down a replacement rule of law but only declare a principle of law already existing. Such precedents merely محض declare the law.

Original precedents are those which lay down a replacement rule of law. These are the outcome نتیجہ of the intentional ارادی exercise by the Courts of their privilege استحقاق of developing the law while sitting to administer it. Such precedents make the law.

ii) Authoritative And Persuasive Precedents:

Authoritative مستند precedents are those which must be followed whether the Judge deems سمجھنا the principle laid down as correct or not. Thus, the decisions of the High Court are authoritative precedents for the subordinate ماتحت courts and therefore the decisions of the Supreme Court are authoritative precedents for the High Courts and all other subordinate courts.

Persuasive precedents are those which the courts may or may not follow. Thus, judgements of Pakistann High Courts (after the partition of the sub-continent) and the Supreme Court of Pakistan or of other Foreign Courts are merely persuasive پرجوش precedents for the courts in Pakistan.

iii) Precedents Of Absolute Authority And Of Conditional Authority:

Precedents Of Absolute Authority are those which are absolutely binding, however, unreasonable or erroneous غلط they may appear to be. In this sense also, the precedents of superior courts are precedents of absolute authority for the inferior زیریں or subordinate ماتحت courts.

Similarly اسی طرح, a decision of the Full Bench is binding on a Bench consisting of two or more Judges of an equivalent برابر and subordinate courts.

Precedents Of Conditional Authority are those which are binding but conditionally مشروط. Thus, the decision of a Single Judge of the High Court is only a conditional authoritative precedent for a Judge of the same or another High Court.

Authority Of Judicial Precedents

There are cases which have questions that are required to be answered on the basis of principles of law that are in the text of the constitution. Such principles are deduced مغالطہ by way of recognizing what the material facts of the case are so that a set of principles that can be generally used is formed. The principle that comes out as a result of such a case is not applicable only to that case, but to cases which are essentially similar to the decided case in their major facts as well as features. This principle is called Ratio Decidendi. The issues which do not require the determination عزم of general principles and are answered on the circumstances of the particular case do not lay down any principles of general application. These are called Obiter Dictum.

Circumstances Which Reduce Its Importance Of Precedents:

1. This decision is product of majority and not of all judges.

2. Failure to notice contrary برعکس decision.

3. If judgement is miss-leaded would not have weight.

4. If judgement is compromised base would destitute برعکس from regard.

5. If there is lack of argument برہان and not regarded by bar council or there is no criticism تنقید, it would decrease its validity.

6. Hurry denies justice; haste جلدی judgement decreases its importance.

8. Unreasoning of judgement is also a factor, which reduces it validity.

9. If the judgement is according to law but against the public policy would have less importance.

Advantages Of Judicial Precedent

- Everyone dealing with a similar case is treated in a similar manner اسلوب there is equality and fairness انصاف of justice.
- It acts as guidelines to decide future cases.
- Precedents saves time and increases convenience سہولت as a question once decided is settled and it saves the time and labour of judges and lawyers.
- Precedents help to prepare new statutory قانونی laws and adjust according to the changing conditions of the society.
- Cases which makes them more practical.
- Binding precedent establish a rule that helps to maintain stability استحکام.

Disadvantages Of Precedent

- A precedent makes a lower court bound to follow it which sometimes forces it to take lesser or harsher سخت decisions then actually required.
- It is rigid کڑا to change a precedent once followed.
- There are many precedents regarding many cases and hence it makes it difficult to implement نافذ the right precedent in the right case.
- When a case is distinguished ممتاز it is not mandatory لازمی to follow a precedent.
- Some situations are not recognized under precedent as they are not brought لایا into account.

Conclusion:

From the above discussion it can be inferred اندازہ that precedents play a very important role in filling the lacunas لاکونا in law and various مختلف statues, it also increases the faith ایمان in judiciary and make laws morally acceptable, it also brings certainty یقین to law. Precedents are a very effective مؤثر source of law as they are time efficient موثر and also ensure یقینی بنانے equal justice, but a good system needs to be developed with efficient and clear hierarchy درجہ بندی of court that properly defines the courts in various مختلف levels, Pakistan has adopted this system from common law but lacks کمی in its implementation عمل because of many subordinate courts and a large no. of cases registered, hence the hierarchy درجہ بندی has to be more clear and proper record of all the cases. We have to categorize زمرہ بندی the different courts available under certain categories and specify اختصاص exactly whose decision is binding on whom and maintain برقرار رکھنے record of all the decisions that are declared as precedents. This system helps to interpret تشریح law and make flexible لچکدار changes according to necessity ضرورت and changing requirements..

Q. DISCUSS LEGISLATION AS A SOURCE OF LAW. (S2018)

Ans:

LEGISLATION AS A SOURCE OF LAW

MEANING OF LEGISLATION:

Legislation means the process of ***lawmaking***.

Legis means law and ***Latum*** mean "making", and as a whole it means *lawmaking*.

It means the making of law by a supreme or a sovereign authority which must be followed by people of every stratum شعبہ of the society.

Legislation is the process of lawmaking where a competent authority is given the task of drafting and enacting قانون سازی the law in a state. It is also said to be a strict concept of law making because there is only one body which is entrustedسونپا گیا with the work of lawmaking and also there is no scope of any alteration as such because of codified ضابطہ بند and strict laws which leave a very strong range of the amendment.

DEFINITION OF LEGISLATION

According to Salmond: "Legislation is that source of law which comprises پر مشتمل ہے in the assertion of lawful standards by a competent specialist."

According To Austin: "Legislation is the command of the sovereign or the superior authority which must be followed by the common masses عوام backed by sanctions ".

According to Gray: "Legislation implies مطلب the formal expression of the administrative organs of the general public."

According to Positivist School: "A run of the mill law is a rule and legislation is the typical source and form of law making."

According to Historical School: "The legislation is the least innovative of the forms of law. The authoritative motivation behind the legislation is to give the better framework and increasingly تیزی سے viable قابل عمل the custom which is unexpectedly اچانک طور پر created by the general population."

TYPES OF LEGISLATION

To enacting قانون سازی any legislation and the rule of law, the welfare of the citizens must be kept in mind and therefore, it is must be adopted in the best interests of the citizens. Legislation can be divided into following types:

1. **Supreme Legislation**
2. **Subordinate Legislation**
3. **Delegated Legislation**

1. Supreme Legislation

The Supreme legislation is the legislation adopted by the sovereign intensity شدت of the state. In this manner, some other authorities which are the organ of the state cannot control or check it. It is considered powerful. An established piece of this rule can be found in Dicey's book, '***The Law of the Constitution***'.

There is no legitimate قانونی restriction پابندی on its capacity. Therefore the sovereign jurisdiction of the state can't be revoked مسترد, cancelled or constrainedمجبور by some other authoritative organ of the state.

2. Subordinate Legislation

Subordinate legislation will be legislation by some other authority than the Supreme specialist in the state. It is made under the powers designated by the Supreme authority. Such legislation owes its reality, legitimacy جواز, and continuation تسلسل to the Supreme expert. It can be cancelled and abrogated منسوخ anytime by the power of the sovereign authority and therefore, it must offer an approach to sovereign legislation. Subordinate legislation is liable to parliamentary control. Five unique types of subordinate legislation can be distinguished. These are as follows.

a) **Colonial Legislation**
b) **Executive Legislation**
c) **Judicial Legislation**
d) **Municipal Legislation**
e) **Autonomous Legislation**

a) Colonial Legislation

The nations which are not autonomous خود تحکمی, and are under the control of some other state have no Supreme capacity to make law. Such countries can be in different classes such as colonies, domains, secured or trust regions and so forth. The laws made by them are subject to the Supreme legislation of the state under whose control they are. Therefore it is subordinate legislation.

England has had numerous colonies and territories. The laws made by them for the self-government are subject to modification, supersession by the legislation of the British Parliament. As the colonies are free, accomplished ادا freedom and practically all the British

domains have an unlimited power for legislation, hence sooner rather than later, we might have this class of subordinate legislation no more in existence.

b) Executive Legislation

At the point when legislative powers are delegated by the designated official to an executive, it is called executive legislation. Even though the significant capacity of the official is to execute the laws and carry on the organisation, he/she is continuously dependent on some subordinate enactment قانون سازی powers. Today, for all intents ارادہ and purposes of each law sanctioned by the lawmaking body contains assignment statements giving law-making powers by the official to the executive in order to enhance بڑھانے the statutory قانونی arrangements.

c) Judicial Legislation

Powers delegated to the judicial system to make and implement their own laws to maintain transparency شفافیت in the judicial system of the country. This will also ensure that there is no involvement of any other organ of the government in the governance of the judicial system of the state.

d) Municipal Legislation

Municipal bodies are offered powers to make bye-laws concerning their neighbourhood matters. Bye-law made by a neighbourhood body works inside its individual area. In Pakistan, such municipal bodies are Municipal corporations, Municipal Committees, Zila councils, and so on. There is a move for allowing extensive وسیع powers to Panchayats. Along these lines, there is a appropriateness مناسبت of extension توسیع of this sort of subordinate enactment قانون سازی in our nation.

e) Autonomous خودتحکمی Legislation

At the point when the Supreme authority gives powers upon a gathering of people to administer on the issues depended to them as a gathering, the law made by the last is known as the autonomous خود تحکمی law and the body is known as a self-ruling body. A railway is an independent body. It makes bye-laws for the guideline of its organisation, and so on. A college is likewise a self-governing body. Even some universities in Pakistan have been granted the status of autonomous bodies.

3 Delegated Legislation

- Delegated تفویض کردہ (subordinate or subsidiary) Legislation are those laws made by people or bodies to whom parliament has delegated law-making powers.

- Where Acts are made by Parliament, a Principal Act may cause arrangement for Subsidiary Legislation to be made and will to indicate اشارہ کرنا who can make laws as such under that Act.
- Delegated Legislation can just exist in connection to an empowering بااختیار or parent Act.
- Delegated Legislation contains the numerous regulatory subtleties essential ضروری to guarantee that the arrangements of the Act will work effectively. It might be directed by Government Departments, Local Councils or Courts.
- Guidelines and Statutory قانونی Rules are the most widely recognised types of Delegated Legislation. They are made by the Executive or a Minister which apply to the overall public. By-laws, and once in a while Ordinances are made by a Local Government Authority which also appliesاطلاق to the general population who live around there. Principle and Parent Act regularly depict دکھانا methodology طریقہ کار to be followed in Courts if there is any flaw in a delegated law.

Advantages of Legislation as a Source of Law

Verifiablyقابل تصدیق additionally مزید برآں the legislation has dependably been perceived متصور as a significant اہم source of law as contrasted متضاد and different sources. There are two apparent ظاہر explanations behind the legislation is viewed as a standout amongst the most significant sources of law. *Right off the bat*, it includes setting down of legitimate principles by the lawmaking bodies which the State perceives as law.

Besides, it has the power and authority of the State. It is hence said by *Dias* and *Hughes* that conscious ادراک ہونا law-production by a legitimate power, i.e. the State is called '*legislation*' which gave that sovereign is correctly perceived متصور as the supreme power by the courts. Relative Merit of Legislation over Precedent and customs have been discussed below.

Some main advantages of legislation are as follows.

- **Abrogative Power**—It can change or annul old law, which control isn't controlled by different sources.
- **Effectiveness**—It separates the elements of making law and overseeing it between the Legislature and the legal executive.
- **Declaration** — it gives that principles of law will be known before they are authorised.
- **Reliance on Accidental Legislation** — Legislation is independent and emerges ابھرتا ہے out of as the authoritative source of law it need not hold up until the original case of legislation.
- **Unrivalled بے مثل in Form** — It is predominant غالب in structure, brief, clear, effectively available and understandable as against case law, which is an increase of sense in a considerable amount of pointless issue.

Conclusion

In conclusion, we can say that legislation is a very important source of law in the modern era دور. In comparison to other legal sources, it appears to be more authoritative. To facilitate understanding, legislation has been further classified into several types. In terms of delegated تفویض کردہ قانون سازی legislation, it has become a requirement for modern society.

In today's globe, most countries see the legislation as an important source of law and follow to this legal system. Although there are some flaws خامیوں and loopholes سقم in the current form, the challenges faced are far less than those faced by other sources of law, such as custom and precedent, because legislation as a source of law strives کوشش کرتا ہے to create uniformity یکسانیت by minimizing ambiguity ابہام.

Q: EXPLAIN JEAN JACQUES ROUSSEAU'S SOCIAL CONTRACT THEORY WITH REFERENCE TO ITS CRITICISM. (A2017)(S2018)(A2019) (A2020)

WHAT WAS THE STATE OF NATURE AND CHALLENGES TO THE LIFE OF MEN ACCORDING TO JOHN LOCKE'S SOCIAL CONTRACT THEORY(S2017) (A2018) (AS2019)

Ans:

SOCIAL CONTRACT THEORY

Social contract theory, nearly as old as philosophy itself, is the view that persons' moral and/or political obligations ذمہ داریاں are dependent منحصر upon a contract or agreement among them to form the society in which they live. Socrates سقراط uses something quite like a social contract argument to explain to Crito کریتو why he must remain in prison جیل and accept the death penalty. However, social contract theory is rightly associated with modern moral and political theory and is given its first full exposition تصرف and defence by Thomas Hobbes. After Hobbes, John Locke and Jean-Jacques Rousseau are the best known proponents حامی of this enormously بے حد influential باثر theory, which has been one of the most dominant theories within moral and political theory throughout the history of the modern West. In the twentieth century, moral and political theory regained philosophical momentum تیزی as a result of John Rawls' Kantian version of social contract theory, and was followed by new analyses of the subject by David Gauthier and others. More recently, philosophers from different perspectives نقطہ نظر have offered new criticisms of social contract theory. In particular, feminists حقوق نسواں and race-conscious philosophers have argued that social contract theory is at least an incomplete picture of our moral and political lives, and may in fact camouflage some of the ways in which the contract is itself parasitical پرجیوی upon the subjugations محکومی of classes of persons.

Definition of Social Contract Theory

You're likely already familiar مانوس with the concept of contracts. Marriage, citizenship, and employment are all forms of contracts. Put simply, a contract is an agreement between two parties. If one party violates خلاف ورزی the terms of the agreement, the contract is no longer valid.

Societies are controlled by governments. This is the starting point for discussing social contract theory. Thinkers who believe in this theory argue بحث that people benefit from living together in countries, kingdoms, or under other types of governmental oversight نگرانی. Living in society, however, requires rules and laws. Societies are the result of compromises سمجھوتے, and social contracts provide the framework for how people and governments interact بات چیت.

Individuals who live within a social structure gain protection from outsiders who may seek ڈھونڈھنا to harm نقصان them. In return, they must give up certain کچھ freedoms (like the ability to commit crimes without being punished), and they should contribute to making society stable, wealthy, and happy.

"Morality consists پر مشتمل in the set of rules governing behaviour رویہ, that rational ناطق people would accept, on the condition that others accept them as well."

The Actual Concept of Social Contract Theory

The concept of social contract theory is that in the beginning man lived in the state of nature. They had no government and there was no law to regulate منضبط them. There were hardships and oppression ظلم on the sections of the society. To overcome from these hardships they entered into two agreements which are:-

1. Pactum Unionis
2. Pactum Subjectionis

By the first pact of unionis, people sought protection of their lives and property. As, a result of it a society was formed where people undertook to respect each other and live in peace and harmony. By the second pact of subjection is, people united together and pledged to obey an authority and surrendered the whole or part of their freedom and rights to an authority. The authority guaranteed everyone protection of life, property and to a certain extentحدتک. Thus, they must agree to establish society by collectively اجتماعی طورپر and reciprocally باہمی renouncing ترک the rights they had against one another in the State of Nature and they must imbue اثر کرنا some one person or assembly of persons with the authority and power to enforce the initial contract. In other words, to ensure their escape from the State of Nature, they must both agree to live together under common laws, and create an enforcement نفاذ mechanism میکانزم for the social contract and the laws that constitute it. Thus, the authority or the government or the sovereign خودمختار or the state came into being because of the two agreements.

JOHN LOCKE'S THEORY OF SOCIAL CONTRACT

Locke's take on the social contract theory, which he lays out in his 1689 work, Two Treatise of Government, is both widely known and widely critiqued تنقید. The age-old social contract theory, which assures یقین دلاتا ہے that the government in question has been consented رضامند to by the people it has jurisdiction اختیار over, gives people the right to check their government if it steps out of line, leaving power with the majority. In simple terms, social contract theory asserts that government exists only by the consent اجازت of the people in order to protect basic rights and promote the common good of society. While the social contract theory questions the legitimacy جواز of government. According to John Locke , man lived in the "***State of Nature***".

State Of Nature And Challenges To The Life Of Men:

We can understand Locke's point of view about "State of Nature" through following points:

- It was reasonably good and enjoyable, but the property was not secure. He considered State of Nature as a "Golden Age". It was a state of peace, goodwill, mutual assistance, and preservation.
- In that state of nature, men had all the rights which nature could give them. Locke justifies جائز this by saying that in the State of Nature, the natural condition of mankind was a state of perfect and complete liberty آزادی to conduct one's life as one best sees دیکھتا ہے fit. It was free from the interference مداخلت of others. In that state of nature, all were equal and independent. This does not mean, however, that it was a state of license. It was one not free to do anything at all one pleases خوش, or even anything that one judges to be in one's interest. The State of Nature, although a state wherein there was no civil authority or government to punish people for transgressions خلاف ورزیاں against laws, was not a state without morality اخلاقیات. The State of Nature was pre-political, but it was not pre moral. Persons are assumed فرضی to be equal to one another in such a state, and therefore equally capable قابل of discovering دریافت and being bound by the Law of Nature. So, the *State of Nature* was a "***State Of Liberty***", where persons are free to pursue پیچھا their own interests and plans, free from interference and, because of the Law of Nature and the restrictions that it imposes مسلط upon persons, it is relatively peaceful.
- Property plays an essential role in Locke's argument for civil government and the contract that establishes it. According to Locke, private property is created when a person mixes his labour with the raw materials of nature. Given the implications مضمرات of the Law of Nature, there are limits as to how much property one can own: one is not allowed to take so more from nature than oneself can use, thereby leaving others without enough for themselves, because nature is given to all of mankind for its common subsistence روزی. One cannot take more than his own fair share. Property is the linchpin لانچ پن of Locke's argument for the social contract and civil government because it is the protection پناہ of their property, including their property in their own bodies, that men seek ڈھونڈھنا when they decide to abandon چھوڑنا the State of Nature.
- John Locke considered property in the State of Nature as insecure نامحفوظ because of three conditions; they are:-
    - Absence of established law;
    - Absence of impartial Judge; and
    - Absence of natural power to execute natural laws.
- Thus, man in the State of Nature felt محسوس need to protect their property and for the purpose of protection of their property, men entered into the "Social Contract". Under the contract, *man did not surrender ہتھیار all their rights to one single individual, but they*

surrendered only the right to preserve محفوظ */ maintain order and enforce the law of nature.* The individual retained برقرار with them the other rights, i.e., right to life, liberty and estate because these rights were considered natural and inalienable ناقابل rights of men.

- Having created a political society and government through their consent, men then gained three things which they lacked ناپیدی in the State of Nature:
  - Laws
  - Judges to adjudicate فیصلہ کرنا laws
  - The executive power necessary to enforce نافذ these laws.
- Each man therefore gives over the power to protect himself and punish transgressors حد سے تجاوز کرنے والے of the Law of Nature to the government that he has created through the compact استوار.
- According to Locke, the purpose of the Government and law is to uphold برقرار رکھنا. and protect the natural rights of men. So long as the Government fulfils this purpose, the laws given by it are valid and binding باندھنا but, when it ceases to fulfil it, then the laws would have no validity and the Government can be thrown out of power. In Locke's view, unlimited sovereignty is contrary برعکس to natural law.
- Hence, John Locke advocated the principle of "***a state of liberty; not of license***".Locke advocated a state for the general good of people. He pleaded التجا for a constitutionally آئینی طور پر limited government.

Locke, in fact made ***life***, ***liberty*** and ***property***, his three basic rights, which greatly dominated غالب and influenced متمکن the Declaration اقرار of American Independence, 1776.

THE THEORY OF SOCIAL CONTRACT BY JEAN JACQUES ROUSSEAU

Jean Jacques Rousseau was a French philosopher who gave a new interpretation تشریح to the theory of Social Contract in his work "**The Social Contract" and " Emile"**. We can understand Rousseau's point of view about social contract through following points:

- According to him, social contract is not a historical fact but a hypothetical فرضی construction of reason. Prior سابق to the Social Contract, the life in the State of Nature was happy and there was equality among men. As time passed, however, humanity faced certain changes. As the overall population increased, the means by which people could satisfy their needs had to change. People slowly began to live together in small families, and then in small communities. Divisions of labour were introduced, both within and between families, and discoveries دریافتیں and inventions ایجادات made life

easier, giving rise to leisure فرصت time. Such leisure time inevitably لامحالہ led people to make comparisons موازنہ between themselves and others, resulting in public values, leading to shame and envy رشک, pride فخر and contempt توہین. Most importantly however, according to Rousseau, was the invention of private property, which constituted the pivotal اہم moment in humanity's evolution ارتقاء out of a simple, pure state into one, characterized خصوصیت by greed لالچ, competition, vanity غرور, inequality, and vice نائب. For Rousseau the invention of property constitutes humanity's fall from grace out of the State of Nature. For this purpose, they surrendered their rights not to a single individual but to the community as a whole which Rousseau termed as "***General Will***".

- According to Rousseau, the original "***freedom, happiness, equality and liberty***" which existed in primitive اصلی societies prior سابق to the social contract was lost in the modern civilisation. Through Social Contract, a new form of social organisation ادارہ the state was formed to assure and guarantee rights, liberties freedom and equality. The essence جوہر of the Rousseau's theory of ***General Will*** is that State and Law were the product of General Will of the people. State and the Laws are made by it and if the government and laws do not conform موافقت to general will, they would be discarded مسترد.
- While the individual parts with his natural rights, in return he gets civil liberties such as freedom of speech, equality, assembly, etc.

- The "*General Will*", therefore, for all purposes, was the will of majority citizens to which blind obedience was to be given. The majority was accepted on the belief that majority view is right than minority view. Each individual is not subject to any other individual but to the general will and to obey this is to obey himself. His sovereignty is infallible ناقابل, indivisible, un representable and illimitable.
- Thus, Rousseau favoured people's sovereignty. His natural law theory is confined محدود to the freedom and liberty of the individual. For him, State, law, sovereignty, general will, etc. are interchangeable terms. Rousseau's theory inspired French and American revolutions and given impetus حوصلہ to nationalism. He based his theory of social contract on the principle of "***Man is born free, but everywhere he is in chains***".

Criticism:

The doctrine that the state originated in a contract was a favourite home of political speculation قیاس during the seventeenth and eighteenth centuries.

Historically the theory is a mere محض fiction قصہ. There is nothing in the whole range of history to show that the state has ever been deliberately جان بوجھ کر created as a result of voluntary اختیاری agreement. Primitive اصلی man did not posses that maturity of outlook which the making of social contract presupposes پیش نگوئی.

The social contract theory is unhistorical. It is merely a fiction. The social contract theory is also attacked on legal grounds. It is contended مبہم that a legally sound contract implies مطلب the prior existence of some authority and its sanction اجازت before the contract implies the contract is entered into. In the case of social contract theory there was neither the authority اختیار nor the sanction before the contract was concluded. The social contract theory is also criticised on philosophical grounds. The social contract theory is criticised تنقید as bad history, bad law and bad philosophy. It is bad philosophy, because it looks upon the state as an artificial مصنوعی contrivance and not a natural process of growth.

Q. EXPLAIN THE STATEMENT "LAW AS A NORM OF ACTION" IN THE LIGHT OF KELSEN'S PURE THEORY OF LAW.

(A2017)(S2017) (S2018) (AS2019)

EXPLAIN KELSEN'S PURE THEORY OF LAW. (A2018)

Ans:

KELSEN'S PURE THEORY OF LAW

The idea of a Pure Theory of Law was introduced by the Austrian jurist and philosopher Hans Kelsen (1881–1973). Kelsen began شروع his long career as a legal theorist نظریہ ساز at the beginning of the 20th century. Kelsen wrote two editions of the ***Pure Theory of Law***:

The first edition 1934 and The second 1960.

A key feature of the Pure Theory is a standard change of legal theory and proposing تجویز کرنا a new juridical methodology. Kelsen introduced new concepts and terms, in particular مخصوص, norm اصول, basic norm, the hierarchy of norms, legal act, etc. Kelsen stopped the scientific discussion and took over from the natural law doctrine تعلیم .

His major works on legal positivism مثبتیت were ***The General Theory of Law and State*** and "***The Pure Theory Of Law".***

Although this theory's literature began to develop before 1918, when Kelsen was examining جانچنا the Austrian Constitution (which he would later be involved in rewriting) and it continued جاری until the 1990's. Kelsen's theory of law is referred to as "*Pure Theory of law*" because he believed that any explanation وضاحت of the nature of law had to exclude خارج all other elements such as sociology, politics and other disciplines. Kelsen also excluded any possibility of morality اخلاقیات being involved in the question of legal validity جواز. It is this dual exclusion اخراج that inspired another 20th Century jurist, ***Joseph Raz***, to consider Kelsen's theory as being "***Doubly Pure***". Hence, it is possible to summarise his theory in following points:

a) The premise بنیاد of Kelsen's theory is anti-natural law. All natural law theories assume a dualism دوہرے پن of what the law is and what the law ought to be. Kelsen rejected this dualism. However, he was very concerned about law and morals and his theory had to explain these so as not to mix the two concepts.

b) Kelsen believed that law is self-defining, and it should not be described politically, sociologically etc. For Kelsen, law is free of the impurities ناپاکی of other disciplines. This is a defect that Kelsen noticed in Hart's and Austin's theory as these approaches, according to Kelsen, are non-scientific and unduly نامناسب mixed with a lot of other elements.

In short, what Kelsen tried to do for law is what the sciences do to understand nature's physical elements. Kelsen adopted an "*Objective/ Descriptive*" approach. His theory looks at the "*Science Of Law*" which would describe conduct as legal or illegal or making statements about legal rights and duties as objectively معروضی طور پر as possible. By definition, Kelsen meant what legal and illegal actions are and what they entail مبہم in the form of understanding delicts تذبذب (actions which require sanctions پابندیاں) and sanctions (ought ہونا چاہئے statements to the officials requiring them to apply sanctions). These for Kelsen were issues of effective administration of coercion جبر in a jurisdiction and did not raise issues of morality coming into it. Kelsen believed that taking this approach made sense as law is created by man, for man, and thus one has to study how law is humanly made and used. To this end, he formulated his theory as a system with several component parts linked together.

Hans Kelsan's definition of Law :

According to Kelsan legal order is the hierarchy of the norms, every norm derive its validity from the superior norm and finally there is highest norm known as grand norm.

We can better understand the theory of Kelson by dividing it into two Parts:

1. Law as a Primary Norm (or) Law as Norm of Action.\
2. Law as a System of Norms

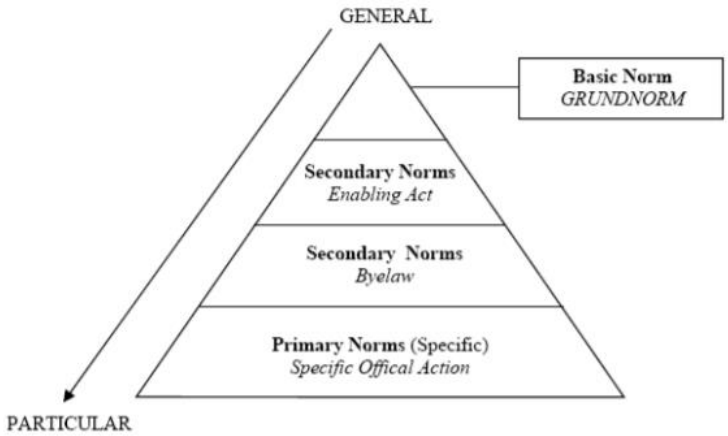
1. Law As The Primary Norm (Law as Norm of Action)

Kelsen says that, a norm is a description of law. So the question is what is a norm اصول? A norm is an "ought" statement or a statement that shows a standard which includes imperative لازم concepts which tells the officials of law that "if X happens (delict تذبذب), then Y ought to apply a (sanction)" whereby Y is the official and he or she has to apply the necessary sanction. Kelsen wrote his theory primarily بنیادی طور پر in German, and it is incorrect to assume that he used the word "ought" in the same way as the natural lawyers (writing in English) or even Austin used it. For Kelsen, norms can also take the form of permissions and authorisations اجازت such as using propositions "should", "may", "can". Every type of such propositions functions as a measure of human behaviour to determine the legal origins اصل of the actions scientifically and objectively. Hence, in Kelsen's theory, "ought" statements come from de-psychologised غیر نفسیاتی acts of will which can be objectively understood. In contrast برعکس, Austin believed that 'ought' statements come from the sovereign. Consider the example of the contrast of the ***Gunman Vs. The Taxman*** scenarios مناظر where both parties take money from a number of people. According to Hart's descriptive بیانیہ subjectivism موضوعیت they are both doing the same thing . But in their objective meaning, the gunman's actions measure against the norms of law as illegal whereas, the Tax Office has an "ought" permission to take tax money from others. The latter is a legal action as it is authorised. Hence law must be understood according to the objective meaning of commands as measured against other norms. Kelsen does not deny انکار the existence of human

commands but instead argues دلیل that one has to study norm "commands" objectively against other norms and it is the conditions under which the commands are issued that makes the command a law. In other words, what makes a particular act legal is the existence of a legal norm in respect of which the act is carried out with other norms in the background authorising and permitting اجازت other acts that make valid the required action stated in the primary norms.

2. Law As A System Of Norms

Commands become a law where laws as norms exist in a system which are self-organising in a hierarchical درجہ بندی system. Kelsen introduces his pure theory which considers law as a system of norms which are self-organising such that higher norms validate lower norms and that lower norms furthermore are assigned by higher norms. According to Kelsen, norms cannot exist by themselves in the legal system as one norm depends on another, higher authorising norm. So every norm has to be related to other legal norms which are in turn related to higher legal norms. Such chain of norms therefore creates a hierarchy of norms with the Primary Norms at the bottom of the triangular/pyramid structure. The next level of norms constitute the Dependent or Secondary Norms which give validity to the bottom of the triangle, i.e. the primary norms. Other higher Dependent Norms give validity to the lower Dependent Norms but this is not an infinite system and there is an apex end point. This apex end point is at the top of the hierarchy. It is known as the "grundnorm" or the "basic norm". The links between all the norms can be understood as validifying forces between the norms. The diagram below illustrates this hierarchy in the shape of a pyramid. From the top down. The norms become general (at the top) to specific (at the bottom). Thus the higher norms will be dealing with issues such as how law is created. And, the administration of justice at the bottom level specifies certain actions in specific cases with each norm gaining legal validity from another, higher norm.



Hence, according to Kelsen all norms originate from primary norms which derive their power from sanction while they derive their validity from higher norms. All primary norms are linked to two types of sanction:

a) Transcendental ماورائی: this is an assumed sanction whereby there is no necessarily physical or even imminent قریب or present punishment.

b) Social and Physical sanctions: this is an imminent sanction from stigmas بدنامی to other forms of punishments which are authorised by primary norms.

Primary norms are concerned with authorising bodies to apply sanctions while citizens are not directly addressed by the norms and therefore are incidental مبہم to this part of the theory. In a bid to keep his theory pure, Kelsen did not consider citizens except as subjects who may cause the official actions which require the hierarchy of legal norms to be in place. The next level is that of the dependent norms that can either take the forms of byelaws ضمنی قوانین expressing اظہار the primary norms or enabling acts that also express the primary norm. Finally, at the top of the pyramid, there is the basic norm or the Grundnorm which gives the whole system its validity while putting a logical and finite end to the hierarchy

To sum up, it is possible to note that while the validity of norms depends on higher norms, the validity of the Grundnorm depends on the effective application of the lower norms. So to establish whether the Grundnorm works, what needs to be seen is whether the directions given to the officials as per the primary norms are applied. This is where the discussion of Kelsen starts and must logically end thereby indicating the circular nature of Kelsen's arguments.

Criticisms Of Kelsen's Pure Theory

Although Kelsen's theory is a respected theory of law, it suffers from several major defects. Its reclusive مبہم emphasis تاکید on the elements of law without considering other elements such as politics, morality and questions of justice leaves a significant gap in the theory because law does not exist in a vacuum. Critiques of Kelsen believe that this theory is an exercise in logic, and that there is lack of reality in his theory date it insufficient to understand the whole implications مضمرات of legal systems and laws. Moreover, Kelsen, ignores a very important point in Hart's theory that citizens also obey the law out of a sense of duty. This is an aspect of citizens' interaction with law which Kelsen has ignored completely. Finally, the identification of the basic norm in any society is an extremely problematic پریشان exercise because its pre-supposed and transcendental ماورائی nature makes it ambiguous مبہم. However, the link between law and morality while unclear, can be said to exist especially in light of questions of justice and as equity. Morality can also be involved in citizens' "sense of obligation" to obey the law, at times, irrespective قطع نظر of sanctions.

Q.

- **WHAT DO YOU UNDERSTAND BY THE CRITICAL THEORY , EXPLAIN IT WITH REFERENCE TO ITS CRITICISM. (A 2017)**
- **EXPLAIN CRITICAL THEORY AND HIGHLIGHT ITS SALIENT FEATURES. (S2017)(A2019) (AS2019)**

Ans:

CRITICAL THEORY

Critical Theory has a narrow and a broad meaning in philosophy and in the history of the social sciences. "Critical Theory" in the narrow sense designates نامزد several generations نسلوں of German philosophers and social theorists in the Western European *Marxist* tradition known as the Frankfurt School. According to these theorists, a "critical" theory may be distinguished from a "traditional" theory according to a specific practical purpose: a theory is critical to the extent حدتک that it seeks مانگنا human "emancipation آزادی from slavery غلامی", acts as a "liberating آزاد influence", and works "to create a world which satisfies the needs and powers of" human beings (Horkheimer). Because such theories aim to explain and transform all the circumstances that enslave غلام human beings, many "critical theories" in the broader sense have been developed. They have emerged in connection with the many social movements that identify varied اختلافی dimensions of the domination غلبہ of human beings in modern societies. In both the broad and the narrow senses, however, a critical theory provides the descriptive بیانیہ and normative مبہم bases for social inquiry aimed at decreasing domination and increasing freedom in all their forms.

Critical Theory is a social theory that aims to critique تنقید and change society as a whole. Critical theories attempt to find the underlying assumptions مفروضے in social life that keep people from fully and truly understanding how the world works.

These underlying assumptions, in the view of critical theories, create a "False consciousness شعور " that actively undermines ناتواں people's progress toward a true democracy.

Critical Theory, first emerging ابھرتی from Horkheimer at the Frankfurt School, bridges its reach to ethics, political philosophy, and the philosophy of history.

Critical theorists claim that the social sciences must integrate ضم کرنا philosophy into their methods to make its findings practical to advance the moral cause of freeing humans from circumstances such as domination غلبہ and oppression ظلم (Horkheimer, 1993).

While Critical Theory is most associated with the Frankfurt School beginning with *Horkheimer* and *Adorno* and ending at *Marcuse* and *Habermas*. Critical Theory has extended to many other disciplines, such as feminism نسوانیت, critical race نسل theory, and critiques of colonialism استعماریت.

Salient Features Of Critical Theory:

- Critical theories aim to change and critique society as a whole by finding the underlying assumptions in social life that prevent people from participating in a "*True Democracy*."
- Critical Theory developed in the Frankfurt school from scholars such as *Horkheimer* and *Adorno* with an emphasis تاکید on examining and deconstructing fascism and mass media.
- Habermaas continued the tradition of Critical Theory through his notion خیال of the lifeworld and the public sphere دائرے. He theorized نظریہ that political and economic institutions had invaded حملہ آور public life, leading to a lack of nuance باریک in discourse گفتگو and preventing روک تھام people from participating in a "*Real Democracy*."
- Critical Theory morphed into critical legal theory in the latter 20th century, which eventually آخر gave rise to branches such as critical race and critical gender theory.

What is Critical Theory?

"What is 'theory'?" asked Horkheimer in the opening of his essay Traditional and Critical Theory [1937]. The discussion about method has been always a constant مستقل topic for those critical theorists who have attempted کوشش since the beginning to clarify the تخصیص of what it means to be "critical". A primary broad distinction تفریق that Horkheimer drew was that of the difference in method between social theories, scientific theories and critical social theories. While the first two categories had been treated as instances مثال of traditional theories, the latter connoted مبہم the methodology طریقہ کار the Frankfurt School adopted.

Traditional theory, whether deductive کٹوتی or analytical, has always focused on coherency سلی and on the strict distinction between theory and praxis . Along Cartesian کارتیسی lines, knowledge has been treated as grounded upon self-evident propositions تجویز or, at least, upon propositions based on self-evident truths. Accordingly, traditional theory has proceeded آگے بڑھا to explain facts by application of universal laws, that is, by assumption of a particular to a universal in order to either confirm or disconfirm this. A verification procedure of this kind was what positivism مثبتیت considered سمجھا جاتا to be the best explicatory تزکیہ account for the notion of praxis in scientific investigation. If one were to defend the view according to which scientific truths

should pass the test of empirical تجرباتی confirmation, then one would commit oneself to the idea of an objective world. Knowledge would be simply a mirror of reality. This view is firmly rejected by critical theorists.

Under several aspects, what Critical Theory wants to reject in traditional theory is precisely بالکل this "*Picture Theory*" of language and knowledge as that defined by "the first" Wittgenstein in his Tractates . According to such a view, later abandoned اجاڑ by "the second" Wittgenstein, the logical form of propositions consists in showing a possible fact and in saying whether this is true or false. For example, the proposition مسئلہ "it rains today" shows both the possibility of the fact that "it rains today" and it affirms that it is the case that "it rains today." In order to check whether something is or is not the case, one must verify empirically تجرباتی طور پر whether the stated fact occurs or not. This implies مطلب that the condition of truth and falsehood presupposes پیش نگوئی an objective structure of the world.

Horkheimer and his followers rejected the notion of objectivity in knowledge by pointing, among other things, to the fact that the object of knowledge is itself embedded شامل into a historical and social process: "The facts which our senses present to us are socially preformed in two ways: through the historical character of the object perceived متصور and through the historical character of the perceiving organ" (Horkheimer [1937] in Ingram and Simon-Ingram 1992, p. 242). Further, with a rather Marxist twist, Horkheimer noticed also that phenomenological objectivity معروضیت is a myth because it is dependent upon "*Technological Conditions*" and the latter are sensitive to the material conditions of production. Critical Theory aims thus to abandon چھوڑنا naïve conceptions of knowledge-impartiality. Since intellectuals themselves are not disembodied مجسم entities observing from a God's viewpoint, knowledge can be obtained only from a societal embedded perspective of interdependent individuals.

The Purpose of Critical Theory:

Max Horkheimer defined critical theory in the book ***Traditional and Critical Theory***. In this work, Horkheimer asserted زوردیا that a critical theory must do two important things:

It must account for society within a historical context, and it should seek ڈھونڈھنا to offer a robust سخت and holistic مجموعی critique by incorporating شامل insights بصیرت from all social sciences.

Further, Horkheimer stated that a theory can only be considered سمجھا جاتا a true critical theory if it is explanatory وضاحتی, practical, and normative مبہم. The theory must adequately مناسب explain the social problems that exist, offer practical solutions for how to respond to them, and abide رہنا by the norms of criticism established by the field.

Horkheimer condemned مبہم "traditional" theorists for producing works that fail to question power, domination غلبہ, and the status quo. He expanded توسیع on Gramsci's critique of the role of intellectuals in processes of domination.

Critical Theories of Gender

Critical theories of gender are concerned with the ways in which literature and other cultural media reinforce مضبوط کرنا or undermine کمزور the economic, political, social, and psychological oppression ظلم of people of various genders.

Critical feminist theories in particular focus on issues of power and seek to explain the organs and consequences نتائج of gender relations, particularly those that privilege استحقاق men.

They study the ways that assumptions and ideology around gender are produced, reproduced, resisted مزاحمت, and changed in and through the everyday experiences of men and women (Coakley and Pike, 2014).

Like critical theories of race, critical theories of gender see their origins in critical legal studies.

Critical Theories of Race

Racism is prevalent مروجہ in everyday life and Critical Theory scholars agree that the ideology and assumptions of racism are so ingrained راسخ in the political and legal structures of society as to be nearly unrecognizable ناقابل (Parker and Roberts, 2005).

The critical study of race and ethnicity نسلیت is put on examining the experiences of racial oppression in context سیاق in an attempt to challenge existing assumptions مفروضے about the construction of race.

Critical theories of race can also trace its roots to philosophical فلسفیانہ, historical, and sociological critiques of oppression such as Marxism, feminist theory, and post colonialism استعماریت (Parker and Roberts, 2005).

Critical Race Theory emerged ابھرا as an outgrowth اگا of the critical legal studies movement originating شروع at Harvard Law School in the early 1980s.

Law professors and students criticized how the law served to privilege استحقاق the wealthy and powerful in US society while impeding رکاوٹ the poor from using the courts as a means of writing their own wrongs (Parker and Roberts, 2005).

One of the main tenets اصول of critical race theory is that, while classical racism has subsided کم, everyday racismنسل پرستی remains alive, characterized by mundane practices and events infused with varying degrees of racism, such as “micro aggressions" and other subtle, automatic, non-verbal exchanges.

For example, an educational institution can commit a micro aggression جارحیت by creating hostile مخاصمانہ environmental encounters for African Americans, such as seeing black males engaged in black youth culture as predatory شکاری (Parker and Roberts, 2005).

Globalization

One criticism of the Frankfurt school is that it lacked a solid grounding in social reality (Kozlarek, 2001).

Kozlarek (2001) argues that Horkheimer and Adorno take an overly euro-centric stance on the world, and that Eurocentrism is a crucial اہم impediment رکاوٹ to Critical Theory, and suggests alternatives to the Eurocentric worldview in modern Critical Theory research.

Rather than philosophically constructing ideas of what should be normal and an ideal society, Kozlarek claims, one must ask where the underlying assumptions مفروضے of Critical Theory come from, and what their socio-cultural functions were and are.

Conclusion

In facing the challenges of new social facts, Critical Theory remains a vital اہم philosophical tradition in normative مبہم disciplines of social and political philosophy. Furthermore, this vitality is enhanced when it considers a range of democratic claims not discussed here, all of which equally challenge the fundamental frameworks of conceptions of democracy, justice, and their interrelationship: these include the struggles جدوجہد of aboriginal مفسدی peoples, the disabled, women, and more. One great advantage of the practical account is that it makes it easier to see why there are many different critical theories in different historical contexts, what Marx called the *"wishes and struggles of the age."* On a practical account, critical inquiry aims at creating the reflective conditions necessary for the practical verification of its inquiry, and these conditions are not confined only to democratic institutions, but wherever publics employ critical social theories and methods as the moment of inquiry of their democratic politics. As new forms of critical theory emerge related to racism, sexism, and colonialism, reflective social agents have transformed these same democratic ideals and practices in the interest of emancipation آزادی. In entrenching گھسینا new social facts, agents transform the ideals themselves as well as their institutional form.

Q

EXPLAIN LEGAL RIGHT. EXPLAIN THE ESSENTIALS OF A LEGAL RIGHT.(S2017) (A2019) (AS2019) (A2020)

EXPLAIN THE EXAMPLES OF FOLLOWING TYPES OF LEGAL RIGHTS. (A2017)

Ans:

LEGAL RIGHTS

It means that the action which is permitted اجازت by the law is called *Legal Right* or the act which is recognized or protected حفاظتی by the state is called *Legal Right*. The law protects the legal right of every citizen. Being a citizen of the country, the people are given the legal right. It is the duty of every individual to protect the rights of each individual.

The concept of legal rights of fundamental significance اہمیت in modern legal theory, because we cannot live without rights, which are recognized and enforced by law. Different jurists have attempted to define legal rights some of them are as follows.

DEFINITION OF LEGAL RIGHT

According to Holland

"A right is a capacity residing رہنے والا in one man of controlling, with the assent مبہم and the assistance of the state, the action of others. Every right gets its validity by State.

According to Sir John Salmond

"Legal right" as "an interest recognized and protected by the rule of legal justice"

According to Pollock

"Right is freedom آزادی allowed and power conferred عطا by law"

According to Austin

"A person can be said to have a right only when another or others are bound by law"

According to Allen

" Right is a legally guaranteed power to realize an interested"

According to Buckland

"A legal Right is an interest or an expectation انتظار guaranteed by law."

According to Ihering

"A legal right is a legally protected interest"

ESSENTIAL ELEMENTS OF LEGAL RIGHT

According to Salmond, every legal right has five Essential elements which are as follows:

I) The Person Of Inheritance/Subject Of The Right

The first essential element of the legal right is that there must be a person who is the owner of the Right. He is the subject of the legal right. He is sometimes described as the person of inheritance وراثت.

Example - X purchased a car for 1 million dollars. here 'X' is called subject of right.

The owner of a right need not be a determinant مبہم or fixed person. If an individual owes a duty towards Society at large, and in determinant body is the subject of inheritance. In the case of the bequest تزکیہ to an Unborn person, the owner of the right is an Unborn child who is an uncertain person.

II) The Person Of Incidence / Subject Of The Duty

A legal right occurs واقع ہوتا ہے against another person or persons who are under a corresponding متعلقہ duty to respect that right. Such a person is called the person of incidence واقعہ or the subject of the duty.

Example- If X has a particular مخصوص right against Y, X is the person of inheritance and Y the subject of incidence.

III) Subject Matter Or Contents Of Legal Rights

Another essential ضروری element of a legal right is its content or substance مادہ . Contents of the legal right deals with the subject matter of the legal rights. It relates to some act to do or not to do any act or forbearance برداشت. It obliges واجب a person to act or forbear برداشت. in favour of the person who is entitled to the rights.

IV) Object Of The Legal Rights

Another essential element of the legal right is the object of the right. The thing or an object over which the right is exercised is called *'Object of Right'*. In above example Car is the object of right.

V) Title To Right

Title is nothing but the name given to the legal right. Title is a process, by which the right is vested /conferred عطا. Purchase, gift, etc confers title on person.

CLASSIFICATION OF LEGAL RIGHTS

Legal rights can be classified into following categories:

1) Right in Rem and Right in Persona -
2) Personal and Proprietary Right –
3) Positive and Negative Rights
4) Principal and Accessory rights
5) Perfect and Imperfect Rights
6) Right in Re-proporia and Right in Re-aliena
7) Vested and Contingent Right
8) Legal and Equitable Right
9) Corporeal and Incorporeal Right
10) Primary and Sanctioning Right
11) Public and Private Rights

We can better understand the essence جوہر of all above categories through following explanation:

1) Right in Rem and Right in Persona

'Rem' means world and 'Persona' means persons. The Right in Rem is the right available against the whole world while right in Persona is the right against a particular person. Right in Persona generally arises اٹھتا ہے out of contractual obligations ذمہ داریاں for example - breach of contract. Whereas right in rem is generally outcome of law. For example - Tort, Crime. Right in Persona is generally transitory عارضی in nature, which can be transferred in right in rem. Right in rem is a final thing, whereas right in Persona is transitory in nature.

2) Personal and Proprietary Right

Personal right is in respect of person of owner of right whereas Proprietary right is in respect of property of which the person is an owner. Proprietary Rights are those, which constitute تشکیل a man's property or wealth. These are the rights, which possess some economic or monetary value and constitute the estate of the Person. Right to land, debts and Goodwill or patent rights

are all Proprietary right. Personal right includes right to safety, to repetition Personal rights are also important like Proprietary right. For example - right to reputation. Personal Rights is having no economic value. They relate to Person's well-being or status.

3) Positive and Negative Rights

Positive rights have corresponding Positive duty. Positive right therefore the right when some positive act is required to be done by the person who has the corresponding متعلقہ duty. Thus the person on whom such duty lies must do some positive act. While on the other hand negative rights are those rights when some negative act by way of omission کوتاہی is required. Negative rights correspond to negative duty, and the person on whom such negative duty lies shall omit (not to do) such act.

4) Principal and Accessory Rights

The principal right is a basic or main right vested in Persona under law. They are Vital and important Rights. While accessory تخششگی right is incidental مبہم or consequential نتیجہ خیز right. They are not essential but are apparent ظاہر to the more basic general right.

5) Perfect and Imperfect Rights

Perfect right corresponds with perfect duty. Perfect rights are recognized and also enforced by law and an action can be taken against the wrongdoer by filing a suit in Court of Law for the breach of it. While Imperfect right corresponds with Imperfect duty, which are not recognized by law and hence cannot be enforced by law.

For example 'A' advanced loan to 'B'. 'B' is bound to repay that Loan. 'A' has perfect right to recover loan from 'B' and 'B' has perfect duty to pay the amount of loan to 'A'. If 'B' failed, then 'A' can file Suit against him in court of law for recovery of loan. But if it is time barred loan, for example no suit filed within the limitation period (within 3 years) and 'A' was sleeping over his right for a pretty long time. 'A' can claim for the same as it becomes imperfect right which cannot be enforced by law.

6) Right in Re-proporia and Right in Re-aliena

Right in Re-proporia is a right in respect of one's own property. Right in Re-proporia contemplates غور absolute ownership. Thus it is the outcome of jurisprudence aspect of ownership. Whereas right in Re-aliena, is the right in respect of property of another person. Right in Realiena is the outcome of jurisprudence aspect of dominant غالب heritageورثہ and servient heritage. For example - right of easement.

7) Vested and Contingent Right

Vested and Contingent rights are depending on the relationship as to owner of right and right itself. Vested right means which is already vested in person, the person already has such right through it depends upon the happening of certain events, that event is going to happen. (See also... Vested interest) Whereas is in Contingent اتفاقی interest the right is dependent upon happening or non-happening of certain events which may or may not happen.

8) Legal and Equitable Right

Legal rights are the rights given by common law Courts of England. Common law was based on statute by way of custom, usage. Equitable مُنصِفانہ rights are the outcome of law of equity given by the court of chancellor, or equity Court based on principle of natural justice and conscience ضمیر of Lord Chancellor. By Judicature Act 1873, 1875 both systems are unified, but as per J. Snell 'Both the systems flow in one stream but their water does not mix.' After the unification اتحاد of the both these systems English law came into existence. But still there are certain principles and rights, which are classified as equitable مُنصِفانہ right and legal right.

9) Corporeal and Incorporeal Right

Here a fine distinction تفریق is made of the subject matter of the right. Corporeal rights are having physical existence. For example - I owned a book, the book has physical existence, so my right in respect of the book is Corporeal in nature. Whereas incorporeal rights are those right in respect of such subject matter having no physical existence. Example - copyright of the book or trademark. Both Corporeal Incorporeal rights are legally protected rights.

10) Primary and Sanctioning Right

Primary right is basic right. It is independent Right. These are the right ***ipso facto***. for example right in rem; right to reputation, Right to satisfy is the primary right. If right of reputation is violated then there is legal remedy. in Tort or in Crime. There is force behind it. Sanctioning rights are the consequential نتیجہ خیز rights. They are not right *ipso facto*. They are right in Persona, which originates نکلتا ہے from some wrong. Example - from violation of another right. Thus Sanctioning Right is supporting right to primary right.

11) Public and Private Rights

Legal Rights can also be classified into Public Rights and Private Rights. Public Rights are those Vested in by State. Example - Right to use High-way, right to vote etc. A private Right is one which is exercised by an individual to protect his benefit.

How Legal Right is Enforced

Ubi jus ibi remedium

which means ***where there is a right there is a remedy***. If the person's right is violated that can be approached to the court. They can get relief in the form of compensation معاوضہ. When the compensation does not satisfy the claim of the plaintiff مدعی then the court may order for the specific performance of the Contract. It is governed by the Specific Relief Act.

Duties

- When the right is given to the person then it is assumed that certain duties are also imposed on the person. The right has its correlative ناتواں duties. There are two kinds of duties when it is the obligation of the person to perform his duty when he has a legal duty but in case of moral duty he has no obligation. It is on the discretion اختیار of an individual. The duties are classified into
- Absolute and relative duty
- Positive and negative duty
- Primary and secondary duty.
-

Conclusion

We can conclude that rights and duties are co-existent. In the words of Salmond, it can be said that no right exists without the corresponding متعلقہ duty. Every duty of the person must be the duty towards some person, in whom the right is vested and conversely اس کے برعکس every right must be against some persons upon whom a duty is imposed مسلط.

Q.

- **DEFINE NATURAL LAW THEORY, EXPLAIN ITS IMPORTANT FEATURES AND CRITICISM. (S2017)**
- **WHAT DO YOU UNDERSTAND BY THE NATURAL LAW THEORY, EXPLAIN ITS SALIENT FEATURES AND ALSO ELABORATE ITS DISTINCTION WITH THE OTHER LAWS. (A2018)**
- **DEFINE NATURAL LAW THEORY, EXPLAIN ITS IMPORTANCE FEATURES AND CRITICISM.(S2018)(A2019)**

Ans:

NATURAL LAW THEORY

Natural law theory is a legal theory that recognizes law and morality as deeply connected, if not one and the same. Morality relates to what is right and wrong and what is good and bad. Natural law theorists believe that human laws are defined by morality, and not by an authority figure, like a king or a government. Therefore, we humans are guided by our human nature to figure out what the laws are, and to act in conformity موافقت with those laws.

The term *'NATURAL LAW*' is derived from the belief that human morality comes from nature. Everything in nature has a purpose, including humans. Our purpose, according to natural law theorists, is to live a good, happy life. Therefore, actions that work against that purpose - that is, actions that would prevent a fellow human from living a good, happy life - are considered *'unnatural'*, or *'immoral'*.

Laws have a purpose too: to provide justice. From a natural law perspective نقطہ نظر, a law that doesn't provide justice (an unjust law) is considered 'not a law at all.' Therefore, a law that is flawed ناقص is one that no one should follow. In short, any law that is good is moral, and any moral law is good. Legal positivism is a legal theory that is the opposite of the natural law theory. Legal positivists believe that a law can be deeply flawed, and yet still be considered a law.

DEFINITION AND MEANING OF NATURAL LAW

There is no unanimity اتحاد about the definition and exact meaning of Natural Law. In jurisprudence the term 'Natural Law' means those rules and principles which are supposed to have originated پیداہوا from some supreme source other than any political or worldly دنیاوی authority. It symbolizes Physical Law of Nature based on moral ideals which has universal applicability اطلاق at all places and terms. It has often been used either to defend a change or to maintain status quo according to needs and requirement of the time. For

example, Locke used Natural Law as an instrument of change but Hobbes used it to maintain status quo in the society.

The concepts of 'Rule of Law' in England and Pakistan and 'due process' in USA are essentially based on Natural Law. Natural Law is eternal and unalterable , as having existed from the commencement ابتدا of the world, uncreated and immutable .

Natural Law is not made by man; it is only discovered by him. Natural Law is not enforced by any external agency. Natural Law is not promulgated پروموٹ by legislation; it is an outcome of preaching of philosophers, prophets, saints etc. and thus in a sense, it is a higher form of law. Natural Law has no formal written Code. Also there is neither precise قطعی penalty for its violation خلاف ورزی nor any specific reward for abiding by its rules. Natural Law has an eternal lasting value which is immutable . Natural Law is also termed as **Divine Law, Law of Nature, Law of God,** etc. Divine Law means the command حکم of God imposed upon men.

Two Types of Natural Law Theory:

Natural Law Theory can be held and applied to human conduct by both theists and atheists. The atheist uses reason to discover the laws governing natural events and applies them to thinking about human action. Actions in accord اتفاق رائے with such natural law are morally correct. Those that go against such natural laws are morally wrong.

For the theists there is a deity دیوتا that created all of nature and created the laws as well and so obedience اطاعت to those laws and the supplement to those laws provided by the deity is the morally correct thing to do.

For atheists there is still the belief that humans have reasoning استدلال ability and with it the laws of nature are discernible مبہم . For atheists who accept this approach نقطہ نظر to act in keeping with the laws of nature is the morally correct thing to do.

What are the laws of nature that provide guidance for human actions? These would include: the law of survival بقا, the natural action for living things to maintain themselves and to reproduce, etc. It is a major problem for this theory to determine فیصلہ کرنا what exactly those laws are and how they apply to human circumstances حالات.

Development of Natural Law:

The content and purpose of this law have constant variation from time to time depending on its usage and functions. The functions and purpose of its usage along with the needs of the time and circumstances play a crucial اہم role. Therefore, the evolution and growth of natural law have been through variation over a period of time.

- Ancient Period (Stage 1)
- Medieval Period (Stage 2)
- Renaissance Period (Stage 3)
- Modern Period (Stage 4)

Natural law existed, even when it was not recognized by the government or state. Natural law theory has influenced متمکن the enactment قانون سازی of common law in England. There are various proponents حامی of the natural law like Aristotle, Plato, Hobbes, Cicero, etc.

The concept of Natural Law was developed by Greek philosophers around 4th century B.C. Heraclitus was the first Greek philosopher who pointed at the three main characteristic

Features Of Law Of Nature Namely, (i) destiny قسمت, (ii) order and (iii) reason. He stated that nature is not a scattered ابتر heap ڈھیر of things but there is a definite relation between the things and a definite order and rhythm of events. According to him, 'reason' is one of the essential elements of Natural Law.

Socrates said that like Natural Physical Law there is a Natural or Moral Law. 'Human Insight' that a man has the capacity to distinguish between good and bad and is able to appreciate تعریف the moral values. This human 'insight' is the basis to judge the law. He التجا for the necessity of Natural Law for security and stability استحکام of the country, which was one of the principal needs of the age. His pupil Plato supported the same theory. But it is in Aristotle that we find a proper and logical elaboration تجوری of the theory.

"...there is in nature a common principle of the just and unjust that all people in some way divine [i.e., discern], even if they have no association or commerce with each other." (Aristotle, 1991, On Rhetoric I:13:102)

Ancient Theories Of Greek Period

It is believed that the Greeks were the first Ancients who discovered the concept of natural law and developed its essentials. At that time in Greece, there was no political stability which made jurists think to develop new universal principals that would tackle and control the arbitrariness من مانی and tyranny ظلم. The philosophy developed by the Greek thinkers was that if there is anything universally valid, that is valid by Nature for all men irrespective قطع نظر of time and country. And nature is something which is outside the control of men.

Socrates

He was a rational thinker and an enlightened master believed in human 'insight'. He believed that moral is the higher law. According to him man has his own insight which help him to know

what is good or what is bad, thus man should act accordance with his insight. He believed that through his insight a man is able to inculcate moral values in him.

Aristotle

Aristotle is considered to be the founding father of natural law. In his logic, the whole world is the product of nature. He divides the life of man into two parts, first, that the man is the creature which is created by god and second he endowed with active reason by which he is capable of forming his will. He also says that the principal of natural justice can be discovered by this reason.

Plato

Plato's work was much inspired by subsequent speculation of natural law themes. He opined that God gave to all men an equal sense of justice and of ethical reverence so that they can preserve themselves in the struggle of life. He believed that the justice is a harmony of man's inner life and it can be achieved by reason and wisdom of man. In his ideal state each individual is given a particular role according to his capacity.

Natural Law In Medieval Period

During the middle ages, the theological and philosophical ideas of catholic church Inspired by the speculative قیاس thoughts and set up their own theory of Natural law. It was the time when there was no political stability in a world emerging from the dark ages. The struggle was beginning between the church and the state and there was the need for the church to establish its supremacy. With a view to establish قائم stability many catholic philosophers and theologians came up with their theories that were more logical and systematic. Thomas Aquinas was the most influential writer with the traditional approach to Natural law and his famous work was the Summa Theological.

Thomas Aquinas

The core concept of the theory of Thomas Aquinas was the connection between means and ends. According to him there is a relation in nature of things between a given operation and its result. There is a tendency to develop in a certain way is inherent in things. Fire burns but it does not freeze. However, the human mind can appreciate the relation between the means and ends. He can himself choose a particular end and devise means of achieving and law consist means of achieving the ends.

He defined law as "an ordinance of reason for the common good made by him who has the care of the community and promulgated". Further he divided law into four categories

- Eternal Law (Lex aeterna)
- Natural Law (Lex Naturalis)
- Divine Law (Law of Scriptures)
- Human Laws (Lex Humana)

According to him eternal law as unchangeable law, natural law was that part of eternal law which can be revealed by reason as he stated that man is a rational animal and he can decide what is good by reflecting his own impulses and nature. Divine law is eternal law revealed through scriptures and the church has the authority to interpret it. Human laws are the laws made by the state with the purpose of safety and wellbeing of the men. However, these laws must be in conformity with the natural laws.

If the human law is contradictory متضاد with natural law then it is unjust law as he gave the phrase *"Lex iniusta non est lex*" an unjust law is not a law, and such unjust laws need not to be followed. Hugo Grotius set up a new dimension مان of natural law. He states that natural law is so immutable even it cannot be changed by god that means natural law is independent from every divine force and it would exist if there were no God. According to him natural law is depend upon the nature of the man and he called human nature as the grandmother, natural law the parent and positive law the child. He also emphasised زوردیا on the sovereign authority which is formed by the individuals whose nature is to form an intellect ذہانت desire a peaceful society and from that are derived the principles of natural law.

Renaissance Theories

This period saw major changes in all aspects of knowledge, this period was marked by the emergence ابھرنا of new ideas, new branches of knowledge and discoveries of science shattered بکھراہوا the foundation of established values. Secondly, the developments in the field of commerce led to the emergence ابھرنا of new classes that wanted more protection from the states. It gave birth to the concept of nationalism قوم پرستی. All these factors together overthrew the dominance غلبہ of the church. New theories supporting the sovereignty حکمرانی of the state started coming up. The reason was the foundation بنیاد stone of all these theories. The natural law theories of this age also have some characteristics. This theory proceeds with a belief that a social contract is the basis of society.

Modern Theories

Nineteenth Century

The 19th century saw the decline ابتری of natural law, the natural law theories reflected more or less the great economic and political changes which had taken place in Europe. Reason or rationalism عقلیت پسندی was the spirit روح of the eighteenth-century thought. The problems created by the new changes and developments demanded political and concrete solutions. Individualismانفرادیت gave way to collectivistic outlook, modern sciences and political theories started preaching that there are no absolute and unchangeable principles. Many historians

rejected the social contract theory by saying that it was a myth. All these factors gave a strong blow to natural law.

Twentieth Century

During the end of the 19th century, we saw the revival of natural law theories mainly due to the following reasons:

1. It emerged ابھرا as a reaction against the legal theories which had exaggerated مبالغہ آمیز the importance of positive law.
2. It was realized that abstract اخذ کرنا thinking was not completely futile لاحاصل.
3. Positivist theories failed to solve the problems created by the changed social conditions.
4. The ideologies of Fascism فاشزم and also led to the revival احیاء of natural law theories, as at that time during the two world wars, the world witnessed great destruction of human lives and property and principles of natural law were approached in order to attain peace.

Conclusion

An exclusive study of the theories of Natural Law reveals ظاہر one thing that the concept of Natural Law has changed from time to time. It has been used to support almost every ideology whether it is absolutism ابتدیت or individualism. It has also inspired متاثر various revolutions, natural law has also influenced greatly the development of positive law. A study of law would be incomplete if it fails to meet the ends of it, Natural Law theories focused on to achieve the ends of the law. Therefore it could said that Natural law principles have been embodied مجسم in the legal system of almost every country.

Q. : EXPLAIN LEGAL POSITIVISM WITH REFERENCE IT CRITICISM. (S2017)(S2018) (A2019)

Ans:

LEGAL POSITIVISM

There's no uncertainty as to the fact that the expression 'Legal Positivism' has been used in many different senses by different scholars in their works, to the extent that sometimes mutually باہمی incompatible theses of Legal Positivism have been given. Nevertheless, essentially speaking, the word 'positivism' derives its meaning from the Latin word '*positum*', which means 'law' as it is laid down or posited. This implies مطلب that the validity of a law can be traced back to its objectively verifiable قابل تصدیق source. It is essentially similar to scientific positivism, which proposes that there is no effect from an abstract cause, accordingly, the law can only be created by people, instead of coming from a metaphysical or natural source.

For instance, the early legal theorists like Bentham and Austin argued that the law originates نکلتا ہے from the command of a sovereign. Subsequently, H.L.A. Hart conceptualized a 'rule of recognition that, according to him, distinguished ممتاز the law from other social rules. Often, however, legal positivists have claimed that there is no necessary connection between law and morals and that analysis of legal concepts should be done distinctly from other sociological and historical inquiries and critical evaluations.

This brief introduction to Legal positivism succinctly, yet not sufficiently explains what Legal Positivism in its content holds, and also provides testimony اظہار for the initial claim that the 'Legal Positivism' as a school of thought holds diverse perspectives in itself.

Dissection of Legal Positivism:

The term we call "positivism" embraces گلے لگانا two principal, related ideas: first, law is a species نوع of empirical تجرباتی fact; second, law must be distinguished ممتاز from morality - in particular, we must not confuse the law that we actually have with the law as we would like it to be. These two elements are connected by the notion that, whatever facts determine what it is to have law, they leave it an open question whether a given system of law or particular laws within it merit respect. Positivist ideas were given their first systematic development by *Jeremy Bentham* (1748-1832) and *John Austin* (1790-1859). These theorists had specific conceptions of law and morality from which later positivists have diverged .

Contemporary معاصر positivists generally reject the notion found in Bentham and Austin that law is to be understood as a set of coercive جبری commands. And some (but by no means all) later positivists seem to have regarded moral judgments as incapable نااہل of justification, thus departing from the Bentham-Austin view that sound moral principles can be identified and that

they are capable of grounding warranted مجہم criticism and reform of legal institutions. Whatever one may think of their specific theories, the foundational work of these two writers has had a profound گہرا effect on the way we think of law. The richness, originality, and rigor of their contributions set new standards for legal theory. As a consequence, their specific views have provided a point of departure for subsequent developments.

Legal positivism is a legal philosophy or theory of legal jurisprudence that does not consider the underlying merits of an applicable law (or whether the law is morally right or wrong) when evaluating whether a law governs behaviours. The legal positivist accepts approved rules and laws as law, whether or not he or she agrees with them from a moral perspective. Did you ever stop, though, to consider what exactly a law is?

Schools of legal jurisprudence (the study of law) address the question of what is law differently. Legal positivism (one model of legal jurisprudence) is most commonly contrasted with natural law, which is another legal philosophy. Questions that may come up when we consider what is law include:

- Is our law simply an end product or body of words drafted by individuals with authority?
- Is our law linked to (or even dependent on) an underlying moral standard?
- Maybe the preferred answer lies somewhere in between these two extremes?

History of Legal Positivism and its Proponents حامی

Legal positivism has ancient قدیم roots. Christians believe that the Ten Commandments have sacred and pre-eminent value in part because they were inscribed in stone by God, and delivered to Moses on Mount Sinai. When the ancient Greeks intended for a new law to have permanent validity, they inscribed it on stone or wood and displayed it in a public place for all to see. In classical Rome, Emperor Justinian (483-565 A.D.) developed an elaborate system of law that was contained in a detailed and voluminous بھاری written code.

Prior to the American Revolution, English political thinkers John Austin and Thomas Hobbes articulated the command theory of law, which stood for the proposition مسئلہ that the only legal authorities that courts should recognize are the commands of the sovereign, because only the sovereign is entrusted with the power to enforce its commands with military and police force.

Thomas Hobbes argued دلیل that "it is improbable ناگہان for any statute to be unjust". According to him, "before the names of just and unjust can take place, there must be some coercive power to compel men equally to the performance of their covenants عہد and such power there is none before the creation of the commonwealth". In this, he meant that "laws are the rules of just and unjust, nothing being reputed unjust that is not contrary to some law. For Hobbes, the sovereign is not subject to laws for having the power to make and repeal منسوخی laws for having the power to make and repeal laws; he may, when he pleases, free himself from their subjection." What he stressed is that "to the care of the sovereign belongs the making of good laws." Furthermore,

he concludes that "all that is done by such power is warranted and owned by every one of the people, and that which every man will have so, no man can say is unjust ناحق."

John Austin on the other hand, adopted some ideas of Thomas Hobbes in his legal philosophy about the nature of law. Additionally, he was known individually for his "dogma" of legal positivism which states that:

The existence جیون of law is one thing; its merit or demerit is another. Whether it be or be not is one enquiry; whether it be or be not conformable to an assumed فرضی standard, is a different enquiry. A law, which actually exists, is a law, though we happen to dislike it, or though it vary from the text, by which we regulate our approbation and disapprobation.

Austin defined law by saying that it is the "command of the sovereign". He expounds on this further by identifying the elements of the definition and distinguishing law from other concepts that are similar:

"Commands" involve an expressed wish that something be done, and "an evil" to be imposed if that wish is not complied with.

Rules are general commands (applying generally to a class), as contrasted with specific or individual commands ("drink wine today" or "John Major must drink wine").

Positive law consists of those commands laid down by a sovereign (or its agents), to be contrasted to other law-givers, like God's general commands, and the general commands of an employer to an employee.

The "sovereign" is defined as a person (or determinate body of persons) who receives habitual obedience اطاعت from the bulk of the population, but who does not habitually obey any other (earthly) person or institution. Austin thought that all independent political societies, by their nature, have a sovereign.

Positive law should also be contrasted with "laws by a close analogy" (which includes positive morality, laws of honour, international law, customary law, and constitutional law) and "laws by remote analogy" (e.g., the laws of physics).

Another famous advocate of legal positivism in America's history is probably Justice Oliver Wendell Holmes, Jr. He wrote that the "prophecies پیشن گوئیاں of what the courts will do in fact, and nothing more pretentious, are what I mean by the law". Holmes made a description of what positive law is in the realm دائرے of the courts. In making this statement, Holmes was suggesting that the meaning of any written law is determined متعین by the individual judges interpreting them, and until a judge has weighed in on a legal issue, the law is ultimately آخر little more than an exercise in trying to guess the way a judge will rule in a case.

Approaches to Legal Positivism

According to John Austin, "the existence of the law is one thing its merit or demerit is another. Whether it be or be not is one enquiry; whether it be or be not conformable to an assumed standard, is another enquiry."

The positivists do not say that the law's merits are unintelligible , unimportant, or peripheral to the philosophy of law. However, the merits of law do not determine فیصلہ کرنا whether a law or a legal system indeed exists. The existence of a legal system in a society can be inferred from the different structures of governance present, and not on the extent to which it satisfies ideals of justice, democracyجمہوریت, or rule of law. The laws which are in force in a certain system depends on what kind of social standards its officials recognize as authoritative. They may be legislative enactments قانون سازی, judicial decisions, or social customs. The fact that a policy is just, wise, efficient, or prudent is never a sufficient reason for thinking that it is actually the law; and the fact that it is unjust, unwise, inefficient or imprudent نادان is never a sufficient reason for doubting it. According to positivism, law is a matter of what has been posited.

There are many versions or interpretations of legal positivism. But perhaps, the most popular version or interpretation would be that of the *Separation Thesis*. According to Hart, a contemporary معاصر legal positivist, separation thesis is the essence of legal positivism. The main point or essence of this thesis is that, the law and morality are conceptually تصوراتی طور پر distinct.

In order to know what your legal rights are, you need to look at what laws your society has. In order to know what your moral rights are, you need to figure out what is the true morality اخلاقیات. It is possible for a person to have legal rights that the true morality says he should not have, and the society might also deny a person's legal rights that the true morality dictates حکم one must have.

However, there some conflicting views on whether there are possible legal systems with such constraints. In inclusive positivism or also known as incorporationism or soft positivism, it is possible for a society's rule of recognition to incorporate شامل moral constraints تنگی on the content of law. Contrary to this is the exclusive positivism or also called as the hard positivism, in which it denies that a legal system can incorporate moral constraints on legal validity. Some exclusive positivists subscribe to the Source Thesis. According to this, the existence and content of law can always be determined by reference to its sources without recourseسہارا to moral arguments.

Going back to Austin's legal positivism as explained by the separation thesis, according to some people who have given interpretation to this, based on the essence of the thesis, the law must be entirely free of moral notions. However, the very fact that Austin thinks that the specific content of the law considers not only an inquiry into its existenceجیون, but also a separate inquiry into its merit or demerit, implies مطلب that the laws can, and do at least sometimes, reproduce پیدا کرنا or satisfy certain demands of morality. Herbert Hart, a legal philosopher agrees with Austin. He explained that Austin did not actually

say that the norms of moral law and the precepts اصول of the natural law did not have any influence in the promulgation of rules and regulations. In addition to this, he also said that Austin did not imply that positive law is non-moral. A person may argue that positive law must conform موافقت to moral and natural law but to say that positive law is null and void simply because it is conflicting متصادم with the moral and natural law is foolish and absurd لغو.

Criticism on Legal Positivism

A well known Philosopher Sieckmann criticise this theory of legal positivism and the central claim of Robert Alexy's criticism of legal positivism is that there is a necessary connection between morality and the content of law, and that the separation thesis is thus false. In his earlier writings Alexy adduced three distinct arguments in support of the connection thesis: the argument from injustice, the argument from principles, and the argument from the necessary claim of law to correctness. He later substituted for these a more general argument from the dual nature of law. Alexy situates واقع his critique تنقید within the perspective نقطہ نظر of a participant, as distinguished from the perspective of an observer. Sieckmann maintains that Alexy changed the focus of the debate about legal positivism from an exclusive concern with questions of legal validity to a more general concern with questions of the nature of law by emphasising زور دینا that in addition to the usual classifying connections between morality, on the one hand, and legal systems, acts and norms اصول, on the other, there are also qualifying connections. Sieckmann concludes that Alexy showed legal positivism to be a not fully satisfactory theory of law for those adopting the participant's perspective.

Q. Critically evaluate the *Legal Realism Theory* with reference to Salmond and Holmes point of view. (A2017) (AS2019)

Ans:

LEGAL REALISM THEORY

Legal realism is a naturalist philosophy to law. It is of the perspective نقطہ نظر that jurisprudence should imitate نقل کرنا the natural science methodologies طریقہ کار, that is, relying بھروسہ on empirical تجرباتی evidence. Assumptions مفروضے must be put to the test by global findings. Legal realists conclude that legal science can analyse law exclusively صرف through natural science's value-free tools, rather than by metaphysical مابعدالطبیعیاتی inquiry into the essence جوہر and purpose of the law, which is different and distinct from the law. Legal realism, in fact, states that the law can not be isolated الگ تھلگ from its implementationعمل, and cannot be easily interpreted. This illustratesوضاحت the importance of recognizing the considerations present in judicial decision-making by identifying the essence of law in fields such as legal decisions issued by judges and their deference or rejection to the previous precedent مثال and the doctrine to final judgment.

Legal realism is characterized as a type of jurisprudence by its emphasis تاکید on the law as it currently appears in reality, rather than the way it works in the books. To this end, it addressed mainly the conduct of the judges and the conditions that behaviour affect judicial decision making processes.

As Karl Llewellyn states, "Judges stand behind judgements; judges are men; they have human histories as men." Therefore, the law did not reside in an abstract domain with universal laws or values, but rather inseparable لازم وملزوم from human behaviour and from the ability with judges to decide the law. To understand legal actors decisions and actions, legal realists turned to the ideas of the social sciences to understand the human relationships and behaviour that culminated اختتام پذیر ہوا in a given legal result.

As the legal-positivist position, whether Kelsenian or Hartian, became the dominant view among philosophers of law in the 20th century, there developed alongside ساتھ it an influential باثر but very different approach to thinking about law, now usually described as legal realism. The two most-important figures in this regard were the Dane Alf Ross (1899–1979) and the American Karl Llewellyn (1893–1962), though they were very different theorists. Ross was a systematic philosopher who taught سکھایا in a law faculty, Llewellyn a philosophical novice نیا but an extremely accomplished ادا and influential باثر lawyer and professor. Both kinds of realism, Scandinavian and American, were piece of the idea that written laws really explain the behaviour of judges, and both depended upon a naturalistic worldview in which reality was presumed خیال to be as the sciences described it.

Criticism on Realist Theory

The Realist theory had witnessed its heyday from the 1920s to the 1940s. Legal realism was completely replaced in the 1950s by the movement of legal processes, which considered law as a process of "reasoned elaboration تجوری" and asserted زور دیا that appeals to "legislative purpose" and some other well-established legal standards and norms اصول can provide an accurate response to the most-awaited legal questions. British law thinker HLA Hart, in his 1961 book The Concept of Law, began with what other academics viewed as a "decisive blow" to legal rationality عقلیت, challenging the statistical philosophy of law that OW Holmes has taken on from other realists. Hart points out that if a statute is simply a predictor about what courts are about to do, a judge who is evaluating the legal facts of a dispute تنازعہ before him is actually thinking, "Why am I supposed to resolve this matter?"

As Hart explains in his theory, that entirely ignores the idea that judges use legislations/laws to direct their rulings, and not as evidence to determine فیصلہ کرنا their final judgments. Many critics have argued that the realists overstated بڑھاچڑھا the extent to which statute is "riddled چھلنی" with gaps خلا, ambiguities ابہام, and so on. The fact that most legal issues have simple, clear-cut responses that no lawyer or judge would dispute is difficult to reconcile تالمیل with the bold arguments of the realists of omnipresent ہمہ گیر legal "indeterminacy نامتعینی." Many writers, including Ronald Dworkin and Lon Fuller, disappointed legal realists for their harsh effort to distinguish law and morality.

Difference Between Legal Realism And Legal Positivism

Legal positivism is a separate topic from legal realism. The discrepancies تضادات are important analytically as well as normatively اصولی طور پر. Both structures consider the rule as a human creation. Positivists, unlike the American legal realists, claim that in certain situations حالات the statute gives fairly defined instructions to their topics and judges, at least in the courts. Niklas Luhmann concludes "We may reduce کم positive law to a formula, the law is not only raised اٹھایا (that is, selected) by judgment, but is also true by decision-making power (thus dependent and variable متغیر). Positivists, though, do not say that anybody's judgment makes a law valid. According to Hart, the truth of legislation قانون is a question of court customary عادی and collective processes. As about the legal value of the statute, it is a question of universal values that both positivists and realists uphold. In this situation, "the force of judgment" has no important function, because individual judgments never serve to establish a collective norm اصول of acceptance قبولیت, so it would be implausible نامعقول to believe that moral values are thus determined متعین by somebody.

Conclusion

There are links between legal realism and legal positivism. Judicial positivists contend that all legislation is a good rule because it is socially dependent. Therefore, the rule is incomplete: there are legal issues that can not be settled by statute قانون alone. Yet legal realists tend to believe that all legislation is good, so they argue بحث that positive law under-determines judicial rulings, at least in appellate proceedings. My point is that one discrepancy تضاد resides in their respective approaches to sources of law after such logical mistakes are put aside. Positivists believe that certain branches of legislation, at least on judges, are binding. Legal realists contend that other documents are simply permissive: only domestic laws and cases sometimes provide no more jurisdiction, for example, an international law standard. This, in comparison to the more common origins of indeterminacy known by both positivists and realists, tends to understand why realists believe the rule is too poorly governing in litigation, and why issues of strategy and interest sometimes undermine it.

Important Topics for Short Note

Conventional Law ***	Customary Law *	International Law**
Physical or Scientific Law	Natural or Moral Law*	Imperative Law**(Austin's Theory)

Conventional Law

Convention means agreement. Conventional law must have an agreement between two parties- and not the force or coercion جبر of a superior. It is thus the name given to a body of rules agreed to be followed by some parties in order to regulate their conduct towards one another. These are laws because they ensure uniformity یکسانیت of conduct.

For example, the rules of cricket and other games. International law is also a species نوع of conventional law.

Such Laws may be in two types:

1). Rules enforced by the parties themselves but not recognized by the State, e.g., the rules of cricket and other games.

2). Rules recognized and enforced by the State, e.g., the articles of association of a limited company whereby the share-holders agree to be bound in certain particulars.

Customary Law

Customary law means such rules of custom as are habitually عادتا being followed by the majority of persons, subject to them, since a long time in the past and are expected to be followed in the future as well in the belief of their binding nature.

"Such laws derive نکالنا their force from the long course of past conduct resulting in the same uniformity of action in given set of circumstances".

Essentials of Customs:

i. Reasonableness معقولیت
ii. Unambiguous غیر مبہم usage observed
iii. Peacefully پرامن طور پر
iv. Continuously مسلسل
v. Since immemorial antiquity قدیم
vi. As of right
vii. In conformity موافقت with the statute قانون

International Law

International law, also known as public international law and law of nations, is the set of rules, norms, and standards generally recognized as binding between nations.

International law is a system of treaties and agreements between nations that governs how nations interact with other nations, citizens of other nations, and businesses of other nations. Since most international law is governed by treaties, it's usually up to the individual nations to enforce the law.

Public international law deals mostly with the rights and responsibilities that countries have toward each other. The rules of international law are found in treaties, conventions, declarations, agreements, customs and other sources. For example, the Kyoto Protocol is an international agreement on climate change.

International Law can be broadly divided into three types:

- Public International Law
- Private International Law
- Supranational Law

International law aims to promote the practice of stable مستحکم, consistent استوار, and organized international relations. The sources of international law include international custom (general state practice accepted as law), treaties, and general principles of law recognized by most national legal systems.

Physical or Scientific Law

A physical law, scientific law, or a law of nature is a scientific generalization based on empirical تجرباتی observations of physical behaviour. Empirical تجرباتی laws are typically conclusions based on repeated scientific experiments تجربات over many years, and which have become accepted universally within the scientific community.

A scientific law is a statement that describes an observable قابل مشاہدہ occurrence وقوع in nature that appears to always be true. It is a term used in all of the natural sciences (astronomy فلکیات, biology حیاتیات, chemistry and physics, to name a few). But what is an observable occurrence? Well, it's something that can be seen by anyone and happens with no intervention مداخلت by man.

In science, sometimes a law is called a '*principle*'. The law or principle may describe only the occurrence, or it may describe the occurrence and predict پیشن گوئی it as well. However, a law does not make explanations about the natural occurrence. Basically, scientific laws come from physics. Most laws can be represented as an equation مساوات (which is a mathematical formula). The formula can be used to predict پیشن گوئی an outcome نتیجہ. Specifically, once applied, the

formula predicts پیشن گوئی that a new observation will conform موافقت to the law. Examples of scientific law are given below:

- Newton's second law of motion.
- Newton's law of universal gravitation.
- Law of conservation of mass.
- Law of conservation of energy.

Natural or Moral Law

Natural or Moral law is also known as divine الوہی law, the law of reason, the unwritten law, the universal law, the common law and the eternal ابدی law. According to Salmond; "By natural law or moral law is meant the principles of natural right and wrong". Natural law is a system of law based on a close observationمشاہدے of human nature, and based on values intrinsic اصلی to human nature that can be deduced مغالطہ and applied independent of positive law. According to natural law theory, all people have inherent ذاتی rights, conferred عطا not by act of legislation but by "God, nature, or reason." Natural law holds that there are universal moral standards that are inherent in humankind انسان throughout all time, and these standards should form the basis of a just society. Human beings are not taught natural law, but rather we "discover" it by consistently مستقل making choices for good instead of evil.

The term 'natural law' is derived from the belief that human morality comes from nature. Therefore, a law that is flawedناقص is one that no one should follow. In short, any law that is good is moral, and any moral law is good. Legal positivism is a legal theory that is the opposite of the natural law theory.

Unlike laws enacted نافذ by governments to address specific needs or behaviours, natural law is universal, applying to everyone, everywhere, in the same way. For example, natural law assumes that everyone believes killing another person is wrong and that punishment for killing another person is right.

Imperative Law

Imperative law means law which is not optional or default law. Its complement پورا is "superlative law" meaning default rules. It comprises پر مشتمل ہے definitional law and public order rules. According to Austin, Law is a social fact and reflects منعکس کرتا ہے relations of power and obedience. This twofold view, that (1) law and morality are separate and (2) that all human made ("positive") laws can be traced سراغ back to human lawmakers, is known as legal positivism. Austin divides law into two main categories :-

- Divine Law
- Human Law.

Divine Law is law which has a transcendent ماورائی source. They are inflexible, absolute and superior to man-made laws.

Human law is of two kinds: the first one is as a "Command of the Sovereign", and the second type is formed through voluntary اختیاری associations or clubs.

Law, according to Austin, follows the Hobbesian idea of being inherently فطری طور پر coerciveجبری. He describes law as a combination of "commands and prohibitions", which dictates what to do as well as what not to do. Since there is no moral lens through which Austin views law, law is only meant to be obeyed. While on the surface this may seem as arbitrary من مانی and restrictive پابندی (which are valid criticisms), the issue is deeper. First of all, a value-neutral understanding of Law can ensure stability, peace and security in a nation.