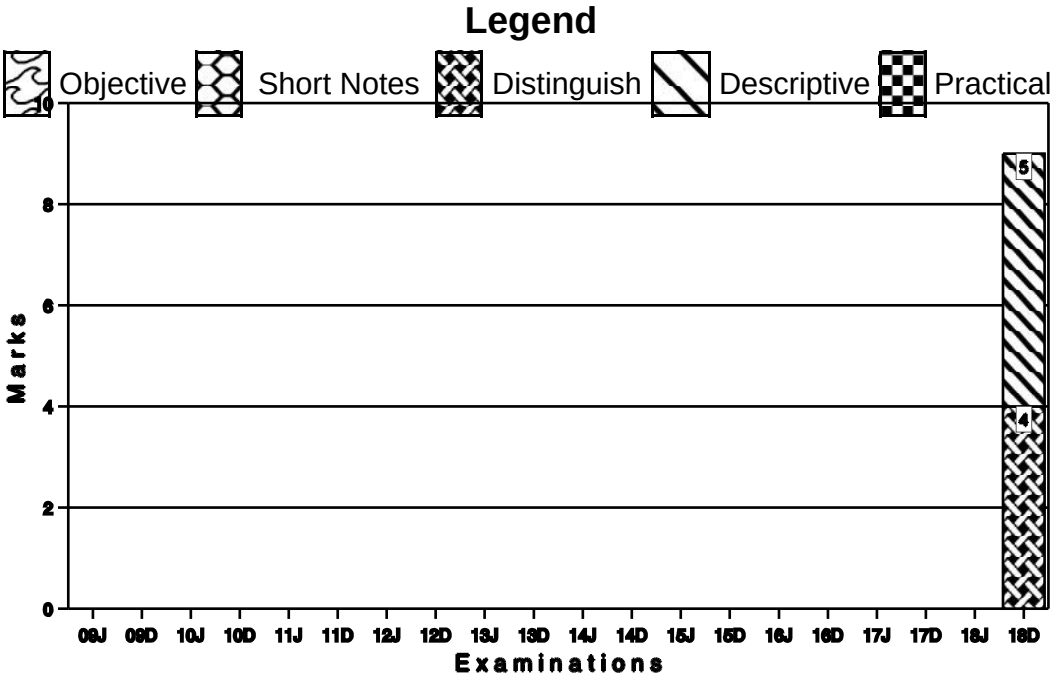
1 SOURCES OF LAW

THIS CHAPTER INCLUDES

- Nature of Law
- Significance of Law
- Relevance of Law to Modern Society
- Source of Indian Law
- Mercantile or Commercial Law
- Jurisprudence

Marks of Objective, Short Notes, Distinguish Between, Descriptive & Practical Questions



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CHAPTER AT A GLANCE

Topic	Important Highlight
Types of laws	**Mandatory, prohibitive or permissive**
Law	Law is the order or scheme of functioning deriving from the order of the sovereign or principal authority of the land. It is a means of regulating or controlling human behavior in various spheres of life –social, political, commercial etc.
Characteristics of Law	All laws are framed within the structure of a State, which authorizes the making of rules of governance. These rules or laws carry the weightage of State sanction and are made to achieve definite objectives.
Mandatory Laws	Mandatory laws are those that require something to be compulsorily done or observed. For example, taxes have to be paid; corporate Annual Returns have to be filed etc.
Prohibitive laws	Prohibitive laws bar certain conduct, something that harms public property, human, animal or plant life, or the environment, etc.
Permissive laws	Permissive laws are those which neither necessitate nor bar certain acts, rather allow the individual to act in a particular way if he so desires. For example, the requirements of a passport and a visa for travel to another country are the procedure required by law in case a person wants to travel; the law does not bar travel, but rather prescribes a procedure to do so.

Legal Customs	These are customs enforceable by law. The courts give them sanctity and recognition and hence they form a part of the law of the land.
Local Customs	These are customs specific to a particular area or locality.
General Customs	These are prevalent throughout a particular country and are seen as law of the land. For example, the Common Law in England is seen as representing their way of life, and embodies the general customs of the land.
Conventional Customs	These are derived from usance; they gain validity because people have been using them for a long time.
Precedents	Precedents mean established guidelines for future conduct.
Original Precedent	An original precedent is one that brings into existence a new rule of law.
Declaratory Precedent	A declaratory precedent is one that merely applies a rule of law already established. In this case, it is done because the rule is already a law.
Persuasive Precedents	These are precedents that are convincing because they have the support of historical value. The judges are not obliged to follow these, but good precedents are generally followed and emulated.
Absolutely Authoritative Precedents	These are precedents that judges have to follow whether or not they are of the same opinion, since these are seen as valid sources of law.

Conditionally Authoritative Precedents	Such a precedent is usually accepted and followed unless there exist certain conditions that bar this. Usually it happens when the decision is a wrong one, i.e., contrary to law, prudence and public policy.
Mercantile Law	Mercantile Law is related to the commercial activities of the people of the society. It is that branch of law which is applicable to or concerned with trade and commerce in connection with various trade or business transactions.
Legal theory	Legal theory or jurisprudence is the study of how law operates. It is the theory behind any law, the why and wherefore of it.
Stare Decisis	This doctrine implies that a court decision is usually taken to be a precedent, the validity of which is respected and which is followed in similar cases. Literally, it means “to adhere to the decision and to not unsettle established facts”.
Ratio Decidendi	These are the principles derived from a particular case, which underlie any judicial decision. These principles act as guidelines for future similar cases and are extremely helpful to judges.
Obiter Dicta	Literally it means that which is “said by the way”. It covers within its ambit all that the judges have said while delivering a particular judgment.
Personal law	It is the law that is applicable to a particular person or class of persons only. For example, Hindu law, Mohammedan law, etc. It is different from territorial law, which is applicable to all persons equally, whoever is within that particular geographical territory. The sources of such law are usually the holy books of each community.

Command	It is an order given by a person in authority, capable of directing other people to do or to abstain from doing something. It requires two parties – the one giving the command, and the other to whom the command is being given.
Sovereign	This term is used in Austin's theory. As per his theory, a sovereign is a political superior. A sovereign is one who is obeyed by others but who himself is not under anyone's orders. As per Austin's theory, the sovereign is the source of all laws, and his dictums are to be followed as such.
Sanction	It is a punishment or penalty for something not being done as per law. As per Austin's theory, unless a law is backed by sanction, the sovereign's sayings cannot really be termed as law.
Norm	As per Kelsen, 'norm' is a precedence of behavior prescribed by certain rules. He distinguished between moral and legal norm, prescribing moral norms as things that 'ought' to be done, although violations of these do not result in penalties. Legal norms are those the violations of which necessitate penalties.

DISTINGUISH BETWEEN

2018 - Dec [2] (a) Distinguish between 'Ratio Decidendi' and 'Obiter Dicta' in a judgement by a Court. **(4 marks)**

DESCRIPTIVE QUESTION

2018 - Dec [1] (a) Critically examine the statement by Austin that "Law is the command of sovereign". **(5 marks)**

TOPIC NOT YET ASKED BUT EQUALLY IMPORTANT FOR EXAMINATION

SHORT NOTES

Q1: Short notes

(i) Customs or customary law.
(ii) Judicial precedents.
(iii) Doctrine of Stare Decisis
(iv) Ratio Decidendi
(v) Obiter dicta

Answer:

(i) **Customs or customary law:** Conventions, traditions and social mores are the oldest sources of law, since that is where the concept of a standard and acceptable way of behaviour arose. Now, with most of it being replaced with specifically made laws and court precedents, the importance of this source is waning. Traditionally, customs are rules that arose spontaneously according to the needs of situations and the surrounding circumstances in societies. Customs become fixed when a large part of the populace adopts a particular way of doing things which is deemed to be more convenient or acceptable than any other. Repetitive doing of things in a particular way results in customs being formed. For example, the way the Hindu marriage rituals are performed has altered to some extent today, incorporating some elements of the popular culture as seen in the current society. Hindu Law is mainly derived from customs, and is contained in the Smritis, like in the Manu Smriti.

Types of customs

Customs are of two types:

(A) **Customs with sanction:** These are those the enforcement of which is a State responsibility. These are again of two types:

(i) **Legal Customs:** These are enforceable by law. The courts give them sanctity and recognition and hence they form a part of the law of the land. They can further be segregated into two types -

(a) **Local Customs:** These are customs specific to a particular area or locality. They may be specific to that area only or specific to a particular group of people, a sect, a community or a sub-caste. Thus, local customs may also be segregated into two:

- Geographical Local Customs – customs particular to a specified area.
- Personal Local Customs – customs specific to a particular group originating from a particular area; they take these customs wherever they go. For example, the nomads of Rajasthan have a particular way of life that is seen as law amongst them; whoever breaks those rules has to face repercussions. It does not matter whether they are currently living in M.P. or U.P.

(b) **General Customs:** These are prevalent throughout a particular country and are seen as law of the land. For example, the Common Law in England is seen as representing their way of life, and embodies the general customs of the land.

(ii) **Conventional Customs:** These are derived from usance. They carry a binding factor because they derive from an agreement or understanding between the parties; by themselves, they do not have any legal sanction behind them as represented by a law. For this to happen, however, they must satisfy the following conditions:

- The convention should be clearly established and fully known to both/all the contracting parties. However, there is no standard period prescribed for a convection to be followed before it becomes obligatory.
- It cannot, though, modify the general law of the land.
- It must be rational, realistic and practicable.

Conventional customs may also be categorized as:

- General customs are those that are applicable everywhere.
- Local customs are limited in scope, either to a particular locality or to a particular type of business or profession or transaction.

(B) **Customs without sanction –** These are the customs that are followed because of a fear of public opinion. These are also known as "positive morality".

(ii) **Judicial Decisions or Precedents:** Precedents mean established guidelines for future conduct. The Courts use previous decisions as benchmarks for guidance, in order to aid them in judging future cases. Judicial precedents are those that lay down a new rule or principle, or establish a new code of conduct. They supplement the established law and are seen at par with it. Once set, they help in deciding future cases which are the same as the case in which these precedents were formed. At the base of this practice is the belief that judicial precedents can safely be assumed to be true

The reason why a precedent is recognised is that a judicial decision is presumed to be accurate and generally beyond reproach. This practice helps the people litigating under a particular law to gain confidence since the law appears certain and not arbitrary.

Precedents can be of the following types:

(i) **Declaratory and Original Precedents:** A declaratory precedent is one that merely applies a rule of law already established. In this case, it is done because the rule is already a law. Declaratory precedents are important sources of law, since they might be the founding stones of the future law.

An original precedent is one that brings into existence a new rule of law. This type of precedent will become law for the future. These help in improving the legal situation of the country.

As far as legal authority is concerned, both carry equal weightage. The legal authority of both is exactly the same.

(ii) **Persuasive Precedents:** These are precedents that are convincing because they have the support of historical value. The judges are not obliged to follow these, but good precedents are generally followed and emulated. In the Indian context, the judgments of one High Court are only persuasive precedents for the other High Courts. Similarly, obiter dicta also have only persuasive value.

(iii) **Absolutely Authoritative Precedents:** These are precedents that judges have to follow whether or not they are of the same opinion, since these are seen as valid sources of law. For example, courts in India are bound by the decisions of their superior courts.

(iv) **Conditionally Authoritative Precedents:** Such a precedent is usually accepted and followed unless there exist certain conditions that bar this. Usually it happens when the decision is a wrong one, i.e., contrary to law, prudence and public policy.

(iii) **Doctrine of Stare Decisis:** This doctrine implies that a court decision is usually taken to be a precedent, the validity of which is respected and which is followed in similar cases. Literally, it means “to adhere to the decision and to not unsettle established facts”. This is used to avoid arbitrariness in law. Under this doctrine, any principle of law that has been followed in a number of cases gains the status of a binding rule and is generally followed in later similar cases unless its usefulness is put to question on grounds of dissimilarity of case. This doctrine also aids in making matters faster for the courts and the litigants. It is not absolutely inviolable though.

(iv) **Ratio Decidendi:** These are the principles derived from a particular case, which underlie any judicial decision. These principles act as guidelines for future similar cases and are extremely helpful to judges. Moreover, the ratio decidendi carry authoritative weightage. The ratio is the extraction of law derived from the decision or judgment.

Such extractions or principles can be applied to other similar cases, thus saving on judicial time and ensuring uniformity. The judge has the right to decide upon the ratio decidendi and to apply it on any given case.

(v) **Obiter Dicta:** Literally it means that which is "said by the way". It covers within its ambit all that the judges have said while delivering a particular judgment. These statements might not be critical to the judgment or decision of the particular issue raised, as they usually go above and beyond the requirement of a particular case. Thus, they just carry the force of persuasive precedents and do not bind the judges. They are however, free to take them as an aid to decision making. It sometimes becomes difficult for lawyers and the Court to determine whether something said by the judges is obiter dicta or ratio decidendi. Hence, judges have the authority to go against such obiter dicta.

Space to write important points for revision

Q2: Write short notes on –

(i) Austin's Command Theory of Law
(ii) Roscoe Pound's Sociological Jurisprudence
(iii) John William Salmond's views on jurisprudence and law
(iv) Hans Kelsen's 'Pure Theory of Law'
(v) Jeremy Bentham and analytical jurisprudence

Answer:

(i) **John Austin** is known for the Command Theory of law. Austin was a positivist, meaning that he concerned himself with what the law was instead of what it should be like. According to him, law is the command of sovereign that is backed by sanction. Austin was of the view that law creates commands which impose duties; failure to fulfill the duties is met with sanctions (punishment).

Thus Law has three main features:

1. It enjoins people to perform certain duties, like a command.
2. It is given by a sovereign authority.
3. There are punishments or sanctions behind non performance of the duties.

Command - It is a direction given to another person to do or to refrain from doing something. If the command is not followed, sanctions are inevitable.

Sovereign - In Austin's theory, the sovereign is an authority that is the source of all laws. It is from here that all laws are propagated and derive authority from.

Sanction – It is the consequence that follows on non- compliance of the commands.

Criticism of Austin's Command Theory of law

1. Welfare states have quite a number of social legislations that do not order the people to do something; rather, they confer rights and benefits upon them. Such laws are not covered under the command theory.
2. As per this theory, the sovereign does not have to obey anyone but the modern states have to comply with national and international laws and norms. For example, the Government of India cannot make laws that go against the Constitution of India.
3. This theory does not consider judge-made laws. He said that judges work under the tacit command of the sovereign but in reality judges have the authority to bring into being positive laws as well.
4. Since the presence of a sovereign is a pre-requisite for a proposition to be called law, Austin's theory does not cover international laws because they are not backed by any sovereign as such.

(ii) **Roscoe Pound** a distinguished American legal scholar was a leading jurist and the biggest supporter of sociological jurisprudence. This theory says that social facts should be taken into consideration in the making, interpretation and application of laws. The goal of Roscoe Pound's theory of social engineering was to build such a structure of society where the satisfaction of maximum wants was achieved with minimum friction and waste. Such a society could be termed as an 'efficient' society. At the base of such a social structure would be a sound balancing of competing interests. Interests here could be

termed as claims or wants or desires which men have, about which law must do something, if organised societies are to last. For any legal order to be successful in organising an efficient society there has to be:

1. Recognition of individual, public and social interests.
2. Defining the limits within which such interest will be legally recognized and given effect to.
3. Securing those interests within limits.

According to Roscoe Pound, for deciding upon the scope and the subject matter of the legal system, the following five steps are required:

1. Listing out the various interests.
2. Choosing which interests to be legally recognized.
3. Defining the limits of the interest so selected.
4. Deciding upon the means to be used to secure these interests, and
5. Determining how the interests are to be valued.

Roscoe Pound's classification of interests are as follows:

1. **Individual interest:** These are demands determined from an individual viewpoint. They are-
   (i) **Interest of personality:** This includes physical integrity, freedom of will, honor and reputation, privacy and freedom of conscience.
   (ii) **Interest in domestic relations:** This includes relationships of parents, children, husbands and wives.
   (iii) **Interest of substance:** This includes interests of property, freedom of association, freedom of industry and contract, continuity of employment, inheritance and testamentary succession.
2. **Public interest:** These interests are claimed by individuals from the standpoint of political life. They are:
   (i) Interests of the state as a juristic person: It includes integrity, freedom of action and honour of the state's personality, claims of the politically organized society as a corporation to property acquired and held for corporate purposes.
   (ii) Interests of the state as guardian of social interest.

3. **Social interests:** These are claims of the social group. They have the angle of protecting the general interest of all members of the society. Social interests include-
   (i) Social interest in the general security. This includes general safety, peace and order, general health, security of acquisition and transaction.
   (ii) Social interest in the security of social institutions such as domestic, religious, political and economic institutions.
   (iii) Social interest in general morals like laws dealing with prostitution, gambling, bigamy, drunkenness.
   (iv) Social interest in the conservation of social resources like the natural and human resource.
   (v) Social interest in general progress. It has three aspects- economic, political and cultural.
   (vi) Social interest in individual life. It involves self-assertion, opportunity and conditions of life. Society is interested in individual life because individuals are its building blocks.

Criticism of Roscoe Pound's theory of law

1. Pound's proposition that interests pre-exist laws hence the function of legal system should be to achieve a balance between competing interests does not really stand, as a lot of interests today are a creation of laws.
2. The theory does not provide a yardstick for the evaluation of interest. Which interest to retain, which to remove can only be decided on the basis of such a yardstick.
3. Pound's theory gives more importance to judiciary in comparison to the legislature, as the balancing of interests can be done most effectively by judges, not the legislature.
4. Pound's distinction between the various interests is not very clear.
5. The recognition of a new interest is a matter of policy; the theory does not specify this policy.

(iii) **John William Salmond** was a law professor in New Zealand as also a judge of the Supreme Court of New Zealand. He claimed that the purpose of law was ensuring justice to people. However, he also

necessitated the presence of the state for implementation of laws just like Bentham and Austin. He gave an interesting distinction though, between 'a law' and 'the law' and said that the former refers to the concrete and the latter to the abstract. In its abstract application we speak of civil law, the law of defamation, criminal law etc. Similarly we use the phrases law and order, law and justice, courts of law. In its concrete sense, on the other hand, we talk about specific laws like the Indian Penal Code or the Right to Information Act.

According to Salmond law is a body of principles that is given recognition by the state and applied in the administration of justice. 'Law' in this definition is used in its abstract sense. As per Salmond, the constituent elements of which the law is made up are not laws but rules of law or legal principles.

Moreover, he believed that if a just society is to be maintained, it is necessary to add compulsion so as to compel the people to walk on the desired path. Two things provide this control – one is the compulsion created by law, i.e. the fear of being penalized if they do not follow the law. Secondly, the same function is performed by the fear of public opinion.

He also believed that the chief function of a State is to administer the laws. Laws by themselves are secondary.

Criticism of Salmond's theory.

1. Salmond's assertion that justice is the end and law is only a medium to realize it can be questioned in the light of certain laws that have been accused of being 'unjust'. For example, the SARFAESI Act.
2. The pursuit of justice is not the sole purpose of law; the purpose evolves over time and can even change.
3. There is a contradiction in the theory itself – on the one hand, Salmond says that the purpose of law is the administration of justice, but limits 'jurisprudence' to the study of a national legal system. Since justice per se is a universal concept, the analysis of law should not be constrained by national boundaries.

(iv) **Hans Kelson** was an Austrian philosopher and jurist who gave the 'Pure Theory of Law'. Kelsen believed that the contemporary study and theories of law were impure as they drew upon various other fields like religion and morality to explain legal concepts. Kelson was also a positivist, in that he wanted to focus solely on what the law was, not on what it could be, thus removing any moral, ideal or ethical elements from law. He discarded the presupposition of justice as an essential element of law because many laws may still continue as law despite being unjust.

He described law as a "normative science'. He also considered sanction as an essential element of law but he preferred to call it 'norm'. He believed, 'law is a primary norm which stipulates sanction'. According to Kelsen, 'norm (sanction) is rules forbidding or prescribing a certain behaviour'

Thus, Kelsen's pure theory of law is based on pyramidal structure of hierarchy of norms which derive their validity from the basic norm. Grundnorm is said to be the basic norm, which determines the content and gives validity to other norms derived from it. This Grundnorm is the result of social, economic, political and other conditions and it is supposed to be valid by itself.

For example, In India a statue or law is valid because it derives its legal authority from being duly passed by the Parliament and receiving the accent of the President, the Parliament and the President deriving their authority from a basic norm i.e., the Constitution. As to the question from where does the Constitution derive its validity there is no answer and, therefore, it is the Grundnorm, according to Kelsen's conception of pure theory of law.

Criticism of Kelsen's Pure Theory

1. It is difficult to trace 'Grundnorm' in every legal system. Also, there is no rule or yardstick to measure its effectiveness.
2. The validity of anything is a matter to be determined in the context of a given point of time and depends on what judges are prepared to accept at that moment as imparting law quality.

3. The moment one tries to analyse the Grundnorm, the theory ceases to be 'pure' because then one will have to draw upon subjects other than law like sociology, history and morality.
4. Kelsen advocated a monist view that the grundnorm of the international system postulated the primacy of international law. Although in reality, most of the countries of the world give primacy to municipal laws over international laws.

(v) **Jeremy Bentham** was the pioneer of analytical jurisprudence in Britain. According to him 'a law' is conceived or adopted by a sovereign in a state, and it relates to the conduct to be observed in a certain case by a certain person or a class of persons, who in the case in question are or are supposed to be subject to his power. Thus, Bentham's concept of law can be said to be an imperative one. He believed that nature has placed man under the command of two authorities - pain and pleasure. 'Pleasure' here implies altruistic and obligatory conduct, the 'principle of benevolence', anything promoting pleasure. The function of laws should be to bring about the maximum happiness of each individual for the happiness of each will result in the happiness of all. He opined that laws are to work for the common happiness and hence the power of making laws should be wielded, not to guarantee the selfish desires of individuals, but consciously to secure the common good.

Bentham said that every law may be considered in eight different aspects:

1. **Source:** The source of a law is the will of the sovereign, who may be any person or assemblage according to whose will a whole political community is supposed to be pay obeisance in preference to the will of any other person.
2. **Subjects:** These may be persons or things.
3. **Objects:** The goals or purposes of a given law are its objects.
4. **Extent:** This refers to the coverage of the act.
5. **Aspects:** The four aspects of the sovereign will are command, prohibition, non-prohibition and non-command and the whole range of laws are covered under it.

6. **Force:** The motivation to obey a law is generated by the force behind the law.
7. **Remedial rules:** These are a set of subsidiary laws addressed to the judges through which the judges remove, stop or prevent the wrong targeted by the Act.
8. **Expression:** A law is an expression of a sovereign's will.

If a law does not cover a specific situation that it might have wanted to cover while being enacted, it is deemed to be incomplete in design.

Criticism of Bentham's theory of law

1. Due to the supposition that all laws have to be either command or permission, it does not take proper account of laws conferring power like the power to make contracts, create title, transfer property etc.
2. Bentham did not give proper consideration to custom as a source of law.
3. Bentham's theory did not allow for judge made laws and hoped that such laws would be gradually eliminated by having 'complete laws' in order to replace these supposedly inferior ones.
4. The theory proposes to judge an action according to the pleasure-pain criterion, which makes it subjective. The theory did not provide how a subjective criterion can be changed into an objective one.
5. It is not always true that an increase in the happiness of a certain group or part of society will lead to an increase in the overall happiness level. It might be just the opposite too – the happiness of one group coming at the cost of the happiness of another.

Space to write important points for revision

DESCRIPTIVE QUESTIONS

Q1: What are the main characteristics that constitute law?

Answer:

The following elements characterize law:

- Before a law is made, there must be a law-making body; hence the presumption of a state.

- It is this state that is the law-making body; it also has the authority to give recognition to rules arising from various sources and to sanctify them as law.
- In order to make the laws universally applicable and acceptable, they are backed by approvals.
- All laws require a purpose, a raison detre or an objective or objectives. For example, the tax laws are aimed at generating revenue for the state and ensuring a measure of public welfare.

Space to write important points for revision

Q2: What are the different types of laws that can exist in a state?
Answer:
Laws may be of three types - mandatory, prohibitive or permissive.

- Mandatory laws are those that require something to be compulsorily done or observed. For example, taxes have to be paid; corporate Annual Returns have to be filed etc.
- Prohibitive laws bar certain conduct, something that harms public property, human, animal or plant life, or the environment, etc.
- Permissive laws are those which neither necessitate nor bar certain acts, rather allow the individual to act in a particular way if he so desires. For example, the requirements of a passport and a visa for travel to another country are the procedure required by law in case a person wants to travel; the law does not bar travel, but rather prescribes a procedure to do so.

Space to write important points for revision

Q3: Explain the significance of law.
Answer:
Significance of law
The requirement of law permeates all of society. It is required at various levels in order to keep the functioning of various elements of the State working properly. Its significance can be understood with the help of the following points –

- Law changes to reflect the changes taking place in society. For example, the Sarda Act was earlier installed to prevent child marriage, but as society has progressed, child marriage is no longer a norm in most levels of society; hence, it was altered in 1978, to raise the legal age of marriage for girls from 15 to 18 years of age, and of boys from 18 to 21 years. So we can say that the laws of a country reflect upon its society as it stands then.
- With the changes in science and technology, people's lifestyles too have altered to become more materialistic and competitive. These alterations have caused vast changes in laws too, which are needed in order to keep a check on the effects of such changes on society and the development of the nation. For example, the changes seen in Intellectual Property Rights make it apparent that with the advent of new technology, new Acts and Rules also have to be brought in, as these help in curbing the ill-effects of these changes. Another example could be that of the Information Technology Act, which was not there earlier, as there were no frequent technology based transactions. Now, however, e-commerce being the trend rather than the exception, such a law becomes even more relevant.
- Laws help maintain socio-economic balances (the various slabs for tax rates specified in taxation) and help ensure social justice (the Rights enshrined in the Indian Constitution).
- Laws prescribe certain codes of conduct to be observed by the populace that helps in maintaining a measure of predictability, order and peace within the State.

Space to write important points for revision

Q.4: Comment on the authority of the High Courts and the Supreme Court.
Answer:
High Courts

- The High Courts have appellate jurisdiction over the lower courts – the District Courts and the Sessions Courts. Their judgements are binding over all lower courts and tribunals that are covered in its jurisdiction.

- As far as two High Courts are concerned, the decisions of one have only a persuasive value in the other court. The High Courts are said to be the Courts of co-ordinate jurisdiction. Therefore, the decision of one High Court is not binding on the other High Courts and has persuasive value only.
- In case of any conflict between the decisions of co-equal Benches, generally the decision later in time, i.e. the more recent one is to be followed.
- In a High Court, a single judge constitutes the smallest Bench. A Bench of two judges is known as Division Bench. Three or more judges constitute a Full Bench. A decision of a higher Bench is binding on a smaller Bench.
- A Bench of the same High Court cannot take a view contrary to the decision already given by another coordinate Bench of that High Court. Even though a decision of a Division Bench is wrong, it would still hold over the decision of a single judge of the same High Court. If they have reason to differ from it, the proper course is to refer the question for decision by a Full Bench.

Supreme Court

The Supreme Court has quite a lot of powers. It is not bound by its own decisions. However, for practical reasons, the Supreme Court has observed that the earlier decisions of the Court cannot be departed from except for extraordinary or special reasons. This is generally done if the earlier decision is found flawed and is thus is thus seen as deleterious to the general welfare of the public. In such a case, the Supreme Court will not hesitate in departing from it.

Space to write important points for revision

Q.5: Explain the requisites of a valid custom.

Answer: Requisites of a Valid Custom

For any custom to be valid and binding, it has to satisfy the following criteria -

(i) **Historical or Immemorial:** It must have continued from ancient times, for example, the Hindu marriage rights are said to have continued from the earlier times, and have hence acquired the status of custom.

(ii) **Certainty:** There must not be any ambiguity in the custom or its application.

(iii) **Reasonableness:** Besides fulfilling a purpose, the custom must not be something as to cause unnecessary hardship to the people following it. It will be followed and upheld only till the point it has usefulness to society. It will likely be dropped if it is opposed to the general principles of equity, justice and prudence.

(iv) **Compulsory Observance:** In order to be universally acceptable, a custom has to have been observed or followed for a long time. It should, in fact, have become more like a rule of conduct or behaviour or a way of life.

(v) **Compliance with Law and Public Morality:** It should be compliant with the general ideas of public morality and policy, as anything against that would not only be unconstitutional, but also unacceptable to the people.

(vi) **Generally acceptable:** Anything applicable universally can be said to be a custom; if left to personal choice, it loses that status.

(vii) **Quiet Enjoyment:** There should not be a court dispute or a contradiction that hampers the enjoyment of the custom.

(viii) **Consistency:** There should not be a hindrance caused to other laws, and this custom should be followed consistently down the times, and by all people.

Space to write important points for revision

Q.6: What are the various types of precedents?

Answer: Kinds of Precedents

Precedents can be of the following types -

(i) **Declaratory and Original Precedents:** A declaratory precedent is one that merely applies a rule of law already established. In this case, it is done because the rule is already a law. Declaratory precedents are important sources of law, since they might be the founding stones of the future law.

An original precedent is one that brings into existence a new rule of law. This type of precedent will become law for the future. These help in improving the legal situation of the country.

As far as legal authority is concerned, both carry equal weightage. The legal authority of both is exactly the same.

(ii) **Persuasive Precedents:** These are precedents that are convincing because they have the support of historical value. The judges are not obliged to follow these, but good precedents are generally followed and emulated. In the Indian context, the judgments of one High Court are only persuasive precedents for the other High Courts. Similarly, obiter dicta also have only persuasive value.

(iii) **Absolutely Authoritative Precedents:** These are precedents that judges have to follow whether or not they are of the same opinion, since these are seen as valid sources of law. For example, courts in India are bound by the decisions of their superior courts.

(iv) **Conditionally Authoritative Precedents:** Such a precedent is usually accepted and followed unless there exist certain conditions that bar this. Usually it happens when the decision is a wrong one, i.e., contrary to law, prudence and public policy.

Space to write important points for revision

Q.7: What do you understand by legal theory? Differentiate between positive and normative legal theory.

Answer:

Legal Theory

Legal theory or jurisprudence is the study of how law operates. It is the theory behind any law, the why and wherefore of it. It helps the litigants and the legal professionals both.

There exist two most prominent schools of legal theory –

- the normative legal theory - what the law ought to be, or what ought to be done according to a particular school of thought; this differs according to the value system being used.

- the positive legal theory - what the law is and why it is that way, and how laws affect the world. This is the study of the actual effect of laws as they stand right now, seeing their practical effects in various terms.

Space to write important points for revision

Q.8: What are the sources of Indian Mercantile Law?
Answer:.
Mercantile or commercial law: Mercantile Law is related to the commercial activities of the people of the society. It is that branch of law which is applicable to or concerned with trade and commerce in connection with various trade or business transactions. All commercial transactions require a valid agreement, whether it is express or implied, between the parties concerned. The Mercantile Law or Law Merchant or Lex Mercatorla is the name given to that part of law which grew up from the customs and usages of merchants or traders in England which eventually became a part of Common Law of England. The Indian mercantile law derives its existence from it.
Mercantile Law in India: Prior to 1872, mercantile transactions were regulated by the personal laws of the parties to the suit (i.e., Hindu Law, Mohammedan Law etc.) In 1872, it was sought to make uniform rules of mercantile law when the Indian Contract Act, 1872 was enacted. That was just the precursor; since then, many Acts have been formulated to regulate commercial transactions regarding partnership, sale of goods, negotiable instruments, etc.
Sources of Indian Mercantile Law
The main sources of Indian Mercantile Law are:

(i) **English Mercantile Law:** Although the Indian Mercantile Law is mainly adapted from the English Mercantile Law, certain aspects have been modified to provide for local customs and usages of trade and to suit Indian conditions. Its dependence on English Mercantile Law can be understood by the fact that even now, when provisions relating to any matter are not there in the Indian Law, we look to the English law as a recourse.

(ii) **Statute Law:** These are the laws formulated by the Indian legislature, and comprise –
- The Indian Contract Act, 1872,
- The Sale of Goods Act, 1930,
- The Indian Partnership Act, 1932,
- The Negotiable Instruments Act, 1881,
- The Arbitration and Conciliation Act, 1996,
- The Insurance Act, 1938, etc.

(iii) **Judicial Decisions:** These are resorted to when the Act is silent on a particular point. In such a situation, the judge has to decide the case according to the principles of justice, equity and good conscience. Generally, it is expected that cases which are identical in their facts, should also be identical in their decisions. This principle ensures justice for the individual claimant and lessens ambiguity the application of the law itself.

(iv) **Customs and Trade Usages:** Most of the Indian Mercantile Law has been derived from customs or usages of trade. These are recognised and given legal effect to by courts of law in India.

Space to write important points for revision

Q.9: Define the nature and meaning of 'Law' under various schools of thought.

Answer:

Various definitions of law have been given by various theorists, that have focused on the different facets of law. As per these differentiations, there exist many different schools of thought –

(i) **Natural School –** This school covers most of the earliest definitions of law, as given by Roman and other ancient Jurists.

Cicero said that Law is "the highest reason implanted in nature." **Justinian's Digest** defines Law as "the standard of what is just and unjust."

In these ancient definitions, 'justice' is the chief tenet of law.

In India, the ancient Hindu view was that 'law' is the embodiment of all commands deriving from God and not from any king or political

sovereign. All the people, including the sovereign are secondary to it and have to follow it and be bound by it. Thus, 'law' is a part of 'Dharma' or the social mores.

Salmond, the prominent modern natural law thinker, defines law as "the body of principles recognised and applied by the State in the administration of justice."

Hence two main facets of law emerge -

- First, in order to understand law, its purpose or object should be known:
- Second, in order to establish the true nature of law, i.e. to seek its interpretation, one should approach the courts and not the legislature, which is the law-making body; the interpretation of it lies with the courts.

(ii) **Positivistic Definition of Law**

Under this school of thought, the definition given by John Austin clarifies that, "Law is the aggregate of rules set by man as politically superior, or sovereign, to men as political subject." In other words, law is the "command of the sovereign". It places upon the common man a certain course of behaviour or conduct. In a way, it imposes a duty and is backed by authorization given by a sovereign power. Thus, the directive, the duty and the authorization are the three chief elements of law.

Kelsen gave a 'pure theory of law'. As per him, law is necessarily a 'normative science'.

(iii) Historical Definition of Law - Savigny founded the Historical School of Jurisprudence. His theory of law can be summarised as follows:

- Law is essentially a matter of unconscious and natural or organic growth. It is up to man to find law, not to make it.
- There is no one universal law. It varies with people and age and place.
- In designing law, one cannot ignore custom, which precedes legislation and is hence superior to it. Law that recognises custom is acceptable to the populace.

- Law derives from the common consciousness (Volkgeist) of the people.
- Under this theory, the lawyer or the jurist is more important than the legislator.

(iv) **Sociological Definition of Law**

Duguit defines law as "essentially and exclusively as social fact."

There are three main elements of this definition:

- Law is seen as only a means of social control.
- Law exists to serve a social purpose.
- It is essentially coercive in nature.

Roscoe Pound was of the view that law works like a social institution to satisfy social wants – it helps in regulating the societal claims and demands and in ensuring they are met in judicious ways.

(v) **Realist Definition of Law**

The Realists refer to law as a judicial process. According to Holmes, "Law is a statement of the circumstances in which public force will be brought to bear upon through courts."

Hence it can be concluded that law is a mechanism for regulating how people behave in society so that everyone can live together peacefully and harmoniously. This in turn helps the society to progress as a whole.

Space to write important points for revision

Q.10: Comment on the principal sources of Indian Law.

Answer:

Principle sources of Indian law

(i) Customs or customary law – Conventions, traditions and social mores are the oldest sources of law, since that is where the concept of a standard and acceptable way of behaviour arose. Now, with most of it being replaced with specifically made laws and court precedents, the importance of this source is waning. Traditionally, customs are rules that arose spontaneously according to the needs of situations and the surrounding circumstances in societies. Customs become fixed when a large part of the populace adopts a particular way of doing things

which is deemed to be more convenient or acceptable than any other. Repetitive doing of things in a particular way results in customs being formed. For example, the way the Hindu marriage rituals are performed has altered to some extent today, incorporating some elements of the popular culture as seen in the current society. Hindu Law is mainly derived from customs, and is contained in the Smritis, like in the Manu Smriti.

Types of customs-

Customs are of two types:

(I) **Customs with sanction –** These are those the enforcement of which is a State responsibility. These are again of two types:

(i) Legal Customs: These are enforceable by law. The courts give them sanctity and recognition and hence they form a part of the law of the land. They can further be segregated into two types-

(a) Local Customs: These are customs specific to a particular area or locality. They may be specific to that area only or specific to a particular group of people, a sect, a community or a sub-caste. Thus, local customs may also be segregated into two:

– Geographical Local Customs – customs particular to a specified area.

– Personal Local Customs – customs specific to a particular group originating from a particular area; they take these customs wherever they go. For example, the nomads of Rajasthan have a particular way of life that is seen as law amongst them; whoever breaks those rules has to face repercussions. It does not matter whether they are currently living in M.P. or U.P.

(b) General Customs: These are prevalent throughout a particular country and are seen as law of the land. For example, the Common Law in England is seen as representing their way of life, and embodies the general customs of the land.

(ii) **Conventional Customs:** These are derived from usance. They carry a binding factor because they derive from an agreement or understanding between the parties; by themselves, they do not have any legal sanction behind them as represented by a law. For this to happen, however, they must satisfy the following conditions:

- The convention should be clearly established and fully known to both/all the contracting parties. However, there is no standard period prescribed for a convection to be followed before it becomes obligatory.
- It cannot, though, modify the general law of the land.
- It must be rational, realistic and practicable.

Conventional customs may also be categorized as:

- General customs are those that are applicable everywhere.
- Local customs are limited in scope, either to a particular locality or to a particular type of business or profession or transaction.

(II) **Customs without sanction –** These are the customs that are followed because of a fear of public opinion. These are also known as "positive morality".

(ii) **Judicial Decisions or Precedents**

Precedents mean established guidelines for future conduct. The Courts use previous decisions as benchmarks for guidance, in order to aid them in judging future cases. Judicial precedents are those that lay down a new rule or principle, or establish a new code of conduct. They supplement the established law and are seen at par with it. Once set, they help in deciding future cases which are the same as the case in which these precedents were formed. At the base of this practice is the belief that judicial precedents can safely be assumed to be true

The reason why a precedent is recognised is that a judicial decision is presumed to be accurate and generally beyond reproach. This practice helps the people litigating under a particular law to gain confidence since the law appears certain and not arbitrary.

Precedents can be of the following types -

i. **Declaratory and Original Precedents:** A declaratory precedent is one that merely applies a rule of law already established. In this case, it is done because the rule is already a law. Declaratory precedents are important sources of law, since they might be the founding stones of the future law.

   An original precedent is one that brings into existence a new rule of law. This type of precedent will become law for the future. These help in improving the legal situation of the country.

   As far as legal authority is concerned, both carry equal weightage. The legal authority of both is exactly the same.

ii. **Persuasive Precedents:** These are precedents that are convincing because they have the support of historical value. The judges are not obliged to follow these, but good precedents are generally followed and emulated. In the Indian context, the judgments of one High Court are only persuasive precedents for the other High Courts. Similarly, obiter dicta also have only persuasive value.

iii. **Absolutely Authoritative Precedents:** These are precedents that judges have to follow whether or not they are of the same opinion, since these are seen as valid sources of law. For example, courts in India are bound by the decisions of their superior courts.

iv. **Conditionally Authoritative Precedents:** Such a precedent is usually accepted and followed unless there exist certain conditions that bar this. Usually it happens when the decision is a wrong one, i.e., contrary to law, prudence and public policy.

   Stare Decisis

   This doctrine implies that a court decision is usually taken to be a precedent, the validity of which is respected and which is followed in similar cases. Literally, it means “to

adhere to the decision and to not unsettle established facts". This is used to avoid arbitrariness in law. Under this doctrine, any principle of law that has been followed in a number of cases gains the status of a binding rule and is generally followed in later similar cases unless its usefulness is put to question on grounds of dissimilarity of case. This doctrine also aids in making matters faster for the courts and the litigants. It is not absolutely inviolable though.

Ratio Decidendi

These are the principles derived from a particular case, which underlie any judicial decision. These principles act as guidelines for future similar cases and are extremely helpful to judges. Moreover, the ratio decidendi carry authoritative weightage. The ratio is the extraction of law derived from the decision or judgment.

Such extractions or principles can be applied to other similar cases, thus saving on judicial time and ensuring uniformity. The judge has the right to decide upon the ratio decidendi and to apply it on any given case.

Obiter Dicta

Literally it means that which is "said by the way". It covers within its ambit all that the judges have said while delivering a particular judgment. These statements might not be critical to the judgment or decision of the particular issue raised, as they usually go above and beyond the requirement of a particular case. Thus, they just carry the force of persuasive precedents and do not bind the judges. They are however, free to take them as an aid to decision making. It sometimes becomes difficult for lawyers and the Court to determine whether something said by the judges is obiter dicta or ratio decidendi. Hence, judges have the authority to go against such obiter dicta.

(iii) **Statutes or Legislation**

Legislation is the source of law for regulations already made. Also known as Jus scriptum (written law),

It can be contrasted with the customary law or customs of the land or jus non-scriptum (unwritten law). Salmond refers to it as "enacted law". Examples of these are Acts formulated, passed or promulgated by the Parliament or by the State Legislature. Legislation can be either supreme or subordinate (delegated). Supreme Legislation is that which proceeds from the primary, main or sovereign power in the State or which derives its power directly from the Constitution. Such a statute cannot be repealed, annulled or controlled by any other legislative authority or body.

Subordinate Legislation is that which proceeds from any authority other than the main one or from the sovereign power of the land. It derives its existence and validity from a higher authority. The Parliament of India has the authority of supreme legislation whereas the Executive, whose main function is to enforce the law can formulate rules and procedures n certain cases. These are termed as subordinate, executive or delegated legislation. In India, the Acts made by the Parliament and the Ordinances and other laws promulgated by the President and Governors are examples of supreme legislation while the laws made by various authorities like Corporations, Municipalities, etc. under the authority of the supreme legislation are examples of subordinate legislation.

(iv) **Personal Law**

Certain situations require that the personal law of the litigants or the parties to a case be used, where the point at issue is not covered by any statutory law or custom. For example, the Hindu personal law is enshrined in:

(a) The **Shrutis** i.e. the four Vedas.

(b) The **'Smritis'** which are recollections handed down by the Rishi's or ancient teachings and precepts of God plus the

commentaries written by various ancient authors on these **Smritis.** There are three main **Smritis;** the Codes of **Manu, Yajnavalkya and Narada.**

As such, Hindus are governed by their personal law as altered by statute law and custom in all matters relating to inheritance, succession, marriage, adoption, Joint Hindu Family matters, guardianship, maintenance, religious and charitable endowments etc.

The personal law of Mohammedans is to be found in:

(a) The holy Koran.

(b) The actions, precepts and sayings of the Prophet Mohammed which are known as **Hadis.**

(c) **Ijmas,** i.e., opinions of the companions of the Prophet and his disciples.

(d) **Kiyas** are analogical deductions derived from a comparison of the Koran, Hadis and Ijmas when none of these apply individually to a particular case.

(e) Commentaries on Mohammedan law, the most important and famous of them being the

Hedaya, which was composed in the 12th century and the Fatawa Alamgiri, which was compiled under the Mughal Emperor Aurangzeb Alamgiri.

Mohammedans are governed by their personal law as modified by statute law and custom in all matters relating to inheritance, wills, succession, legacies, marriage, dowry, divorce, gifts, waqfs, guardianship and rights of preemption.

Space to write important points for revision

Q.12: What are the secondary sources of Indian Law.

Answer:

Secondary source of Indian law

(i) **Justice, Equity and Good Conscience**

Generally, in case of personal law disputes, the courts are required to apply the personal law of the defendant if the point at issue does not

come under any statute or custom. If even that is not applicable, then the courts apply to the case what is known as 'justice, equity and good conscience'.

Justice, equity and good conscience mean the rules of English law on a similar matter as modified to accommodate the Indian conditions and circumstances. The Supreme Court has stated that it is now well established that in the absence of any rule of Hindu Law, the courts have authority to decide cases on the basis of these principles, unless doing so goes against any doctrine or theory of Hindu Law.

(ii) **Sources of English Law –** These are important because most of Indian law derives from the English Law. Hence, we study here the sources of English law too.

The chief sources of English law are:

(i) **Common Law:** The Common Law refers to the principles developed by judges in dealing with cases. These principles have grown cumulatively over a number of years, so much so that most of them form a complete statement of the law in particular legal fields. At the base of these stand the customs.

(ii) **Mercantile law:** Mercantile Law is the sum total of those customs and usages which are binding on traders in their dealings with each other. For a custom to have the backing of law, it must be proven to be ancient as well as command general and universal compliance. If that is not the case, it needs to be proven by the party claiming it.

(iii) **Principle of Equity:** The principle of equity is essentially based on good conscience and has gained practice through a number of maxims e.g.,

1. "He who seeks equity must do equity",
2. "He who comes to equity must come with clean hands".

Some of the important principles and remedies that come under this principle are recognition of the right of beneficiary to trust property, remedy of specific performance of contracts, equity of redemption in case of mortgages, bailments etc.

(iv) **Statute Law:** Statute law implies law developed by the legislation or by an enactment of Parliament or by the subordinate and delegated legislative bodies. A written or statute law always overrides unwritten law - both Common Law and Equity.

Space to write important points for revision

Q.13: What do you mean by jurisprudence?

Answer:

Jurisprudence

Literally, it means a combination of the words 'juris' meaning law and 'prudence' meaning knowledge.

Jurisprudence is the study of the science of law. It does not imply the study of a particular statute or a rule but of law in general, its concepts, its principles and the philosophies that birthed it.

According to B.E. King, jurisprudence is not concerned with the exposition of law but with disquisitions about law. Jurisprudence studies rights, duties and obligations. It draws upon insights from other fields of study, thus making law all the richer. The primary duty of jurisprudence is to throw light on the nature of law.

However, different people have defined law in different ways. As per the various definitions it can be seen that law has a two-fold aspect:

- It is an abstract body of rules and
- Social machinery for securing order in the community.

Usually, the various schools of jurisprudence, instead of recognizing both these aspects, emphasize on one or the other. The various interpretations are as under –

- Analytical jurisprudence is the abstract theory of law, which tries to discover the elements of pure science in order to make jurisprudence a universally applicable truth. According to this theory, it is better to base it not on the shifting sands of individual preference, of particular ethical or sociological views, but on sound principles that are universally acceptable.

- Sociological jurisprudence brings to fore the limitations of pure science as related to law. It propounds instead that since law is made to solve certain problems, it is better to understand these problems in order to understand law better.
- The teleological school of jurisprudence focuses more on the purpose that a law is made with, since it believes that just collecting facts does not help. Since law is designed by human intellect to solve certain issues, it is better to have an understanding of those, in order to understand a law properly.

Different authors hold the following differing views regarding jurisprudence–

- According to Salmond, jurisprudence means the science of law. He said that jurisprudence in this sense can be further divided into three streams: civil jurisprudence, international jurisprudence, and natural jurisprudence. In a slightly narrower sense, the term jurisprudence applies to the study of the science of civil law.
- English jurist Jeremy Bentham had used 'jurisprudence' in two senses- one as 'law' referring to the substance and interpretive history of a given legal norm, consisting of case laws, precedents, and other legal commentary and the other as 'theory' or the study of general theoretical questions about the nature of laws and legal systems.
- Prof. Julius Stone defined 'jurisprudence' as the lawyer's examination of the precepts, ideals and techniques of the law in the light of knowledge derived from disciplines other than the law.
- According to Prof. G.W. Paton, jurisprudence is founded on the effort to create a science that explains the relationship between law, its concepts, and the life of society.

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