I. Write short answers (approximately 50-60 words) within the space provided for each of the following 10 topics [5 x 10 = 50 Marks].

1. Indian Constitution as a Federal Constitution

   A Federal Constitution divides the powers and functions between the central government and governments of the units.

   Features –

   - **Dual government**
   - **Written Constitution,** hence a controlled constitution [*Gopalan v State of Madras*[1]]
   - **Rigidity of the Constitution –** as most amendments require special majority [Article 368].
   - **Supremacy of the Constitution**
   - **Impartial judiciary**
   - **Bicameralism**

2. Judicial activism

   Judicial activism is when the judiciary goes beyond the strict contours of its mandate. This is justified to achieve social justice and uphold the rights of the individuals. Failure on part of the legislative and executive wings of the Government to provide 'good governance' makes judicial activism an imperative. For instance *Golak Nath Case*[2], *Keshavananda Bharti Case*[3] *etc.*

3. Mens Rea

   Mens rea or mental state is essential to constitute an offence along with actus rea. Under Indian Penal Code (IPC) instead of this term, 'knowingly', 'intentionally', 'fraudulently' etc. has been used. Mens rea under IPC can mean –

   - Intention – when the person wants to bring a consequence e.g. Clause (1) of Section 300.
   - Knowledge – when a person is aware of the the consequence of his action e.g. Clause (4) of Section 300.
   - Negligence – is a case of inadvertence e.g. Section 304A.

[1] AIR 1950 SC 27
[2] 1967 AIR 1643.
[3] AIR 1973 SC 1461

4. Contract of indemnity

   As given under Section 124 of the Indian Contract Act, it is promise to save the person from loss caused to that person by the promisor or by another person. The Section covers only loss caused by human agency. Such a contract may arise by an express promise or operation of law.

5. Oppenheim on International Law

   Oppenheim considered international law as a body of customary and conventional rules, which are considered legally binding by civilised states in their intercourse with each other. The problem with this definition is that it ignores the dynamic nature of international law as well as important actors other than the states.

6. Continental Shelf

   It is the natural prolongation or continuation of the land territory or domain or land sovereignty of the coastal state into and under the High Seas, as recognised by the III Conference on the Law of the Sea. It is up to 200 nautical mile from the baselines from which the breadth of the territorial sea is measured (Article 76 of UNCLOS).

7. Geographical Indication (GI)

   GI are those, which identify a good as originating in a place where a given quality, reputation, or other characteristic of the good is essentially attributable to its geographical origin e.g. champagne of France and Darjeeling tea from India. The Geographical Indications of Goods (Registration and Protection) Act, 1999 provides for the registration of a GI and the 'authorized user' thereof.

8. Separation of powers

   First enunciated by Montesquieu, it means division of powers among judiciary, executive and legislative. Most jurisdictions follow a modern interpretation of the theory rather than the strict, original one, wherein a distinction is drawn between essential and incidental powers of an organ, and organs are not allowed to usurp or encroach upon the essential functions, but may exercise some incidental functions thereof.

9. Rights Thesis of Dworkin

   According to it, in hard cases i.e. where decision cannot be made by directly applying a given rule, judges must use rights as opposed to utilitarian goals and policies. This is because decision on policies is made by legislature, which is a democratic body as opposed to judges. The thesis is based on doctrine of political responsibility.

10. Law as Volksgeist

    In historical school of jurisprudence, volksgesit means spirit of the people including beliefs, traditions etc., which is the source of law. Since traditions and beliefs are dynamic in nature, this school opposes codification of laws. Codification makes the the manifestation of the spirit of people difficult and also inhibits it from taking its natural course.

II. Write an Essay on ANY ONE of the following (1 x 50 = 50 Marks)

1. Equality is antithetic to arbitrariness.

In ***EP Royappa v State of Tamil Nadu***[4], Justice Bhagwati for the first time introduced this new approach under Right to Equality (Article 14). He stated - "*Equality is a dynamic concept with many aspects and dimensions, and it cannot be cribbed, cabined or confined within traditional and doctrinaire limit.* ***From a positivistic point of view, equality is antithetic to arbitrariness***. *In fact, equality and arbitrariness are sworn enemies; one belongs to the rule of law in a republic while the other, to the whim and caprice of an absolute monarch*."

In ***RD Shetty*** **v** ***Airport Authority of India (AAI)***[5]**, then in** ***Kasturi Lal v State of Uttar Pradesh***[6]**, and finally** ***Ajay Hasia v Khalid Mujib***[7]**,** Justice Bhagwati through a Constitution bench unanimously stamped the new approach and said "*It must therefore now be taken to*

[4] 1974 AIR 555
[5] 1979 AIR 1628
[6] 1965 AIR 1039
[7] 1981 AIR 487

be well settled that what Article 14 strikes at arbitrariness because any action that is arbitrary, must necessarily involve negation of equality."

Scope and judicial interpretation

a. Applicability to both legislative and executive actions

- Wherever there is arbitrariness in State action, whether it be of the legislature, or the executive, or of "authority" under Article 12, Article 14 immediately springs into action and strikes down such State action.

- The Triple Talaq case (***Shayara Bano v Union of India***[8]) upheld test of arbitrariness. The standard of arbitrariness requires that if a law was "disproportionate, excessive or otherwise manifestly unreasonable", then it would be struck down under Article 14.

- The doctrine of classification is merely a judicial formula for determining whether the legislative or executive action in question is arbitrary and therefore constituting denial of equality.
- If the classification is not reasonable, the impugned action would plainly be arbitrary and the guarantee of equality under Article 14 would be breached.

- In *Royappa case*, the arbitrariness test arose out of a justified judicial dissatisfaction with the formalism and emptiness of the *traditional classification test* under Article 14. The deeper point is that at bottom, the classification test is circular – any classification can be defended by producing some purpose with which it bears a rational nexus.
- Therefore, all that it achieves is to prevent governmental opacity – the State has to produce some justification, and the very requirement of making its reasons public will.
- The arbitrariness test goes beyond this. It seeks to scrutinise the action itself.

b. Deference in matters of policy/contracts

[8] 2017 SCC OnLine SC 963

- The courts would not enforce the terms of a contract qua contract. However, if the action of the State is arbitrary or discriminatory and violates Article 14, a writ would be issued.

- More power is conceded to the state authorities in matters of awarding contract unless the award is malicious and is misuse of statutory power of the state.[9] In these matters, interference of the court is very limited.

c. Appointments

- It was held in *Bedanga Talukdar v Saifudaullah Khan*[10] that appointments to public office have to be made in conformity with Article 14. There should be no undue favour.

- Relaxation of any condition in advertisement without due consideration would be contrary to the mandate of equality under Article 14 and 16.

d. Criticism

- The problem is that the Court never really advanced upon what is 'arbitrary'; ironically enough, one of the most egregious applications of the arbitrariness test was in ***Air India v. Nargesh Mirza***[11], where the Court held that compulsory termination upon first pregnancy was "arbitrary", but upon the third pregnancy was not.

e. Conclusion

The arbitrariness test is a step forward in achieving the mandate of Article 14. However, there is ambiguity regarding its contours.

[9] Michigan Rubber India Lts v State of Karnataka (2012) 8 SCC 216
[10] (2011) 12 SCC 85
[11] 1981 AIR 1829

2. Basis of International Law

Different schools of thought has given their own reasoning to explain the basis of international law.

a. Natural Law

The basis of international law is that it is part of a larger 'law of nature' [*jus natural*]. While the law of nature was initially linked with religion, it was given a secular interpretation by Grotius. He said *natural law was the dictate of right reason* and that humans followed it, as they were reasonable beings. International Law is part of natural law and has no independent existence. Naturalists are also known as deniers of law of nations.

Criticism: Nature and definition of law of nature is itself very unclear and ambiguous. It is aloof of the actual realities of international law and there is lack of emphasis on the actual practice followed by states in their mutual relations.

b. Positivism

International law is valid and has binding force as long as it stems from an appropriate legislative authority. As per this school, treaties and customs are valid as they emanate from the will of the States. This may be express (like in conventions) or implied (as in customs). Anzelloti argues that international law is valid due to the maxim *pacta sunt servanda* or agreements must be kept in one way or another. International law consist of rules, which states have accepted by a process of voluntary self-restriction.

c. Pure Theory of Law

Hans Kelsen gives the 'pure theory of law' according to which legal rules derive their validity from a prior norm and this continues until one reaches the *basic norm (grundnorm)* of the whole system. One of the prime rules of this category is *pacta sunt servanda* declaring that agreements must be carried out in good faith.

- Criticism
  - The concept of basic norm relies upon non-legal issues.

- For Kelsen, international law is primitive legal order. Here basic norm is customary international law. The basic norm is the rule that identifies custom as the source of law, or stipulates that '*the states ought to behave as they customarily behaved'*.
- The problem with Kelsen's formulation of the basic norm of international law is that it appears to be **tautological**: it merely repeats that states, which obey rules, ought to obey those rules. It seems to leave no room for the progressive development of international law by new practices accepted as law, for that involves states behaving differently from the way they have been behaving. Above all, it fails to answer the question as to why custom is binding.
  - It fails to explain how a new state, which has not given its consent, is bound by international law from its inception.
  - There are examples of treaties having incidence upon states without any form of consent expressed or attributable to them.

d. Common Consent

The prevalent view now is that the basis of international law in the existence of a political community, the common consent of whose members is that there will be a body of law to govern their conduct. In this sense, States follow international law because it is in their interests to do so. Nations follow law because of:

a) Self interest
b) Sense of moral obligation
c) Habit

Criticism: It fails to explain how international law is binding upon all nations irrespective of theory consent and if the states can opt out of international law.

e. Sociological School

It developed because of sociological movement by **Karl Llewellyn and Roscoe Pound**. It says that international law emanates from interactions of leaders trying to solve concrete problems.

f. Critical Legal Studies [CLS]

The critical legal studies movement notes that the traditional approach to international law has in essence involved the transposition of 'liberal' principles of domestic systems onto the international scene, and this has led to further problems. Specifically, liberalism tries constantly to balance individual freedom and social order and, it is argued, inevitably ends up siding with either one or other of those propositions.

They say that while analysing international law, **political factors must be taken into account**.

Conclusion

Different schools of thought explain basis of international law from their perspective. In conclusion it can be said that international law cannot be explained by reference to one particular school of thought due it dynamic nature.