

Weekly Update for Law optional UPSC

A mix of Conceptual, Current/Contemporary Topics

Date: 01st - 6th April 2024

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1. Competition in Digital Market

[Relevant Topic: Competition law in Contemporary Legal Development]

On February 6, 2023, the Ministry of Corporate Affairs established the Committee on Digital Competition Law to review the adequacy of the Competition Act, 2002, in addressing the unique challenges posed by the digital economy and to consider the necessity of a new regulatory framework specifically for digital markets.

After examining the digital market's dynamics, including significant network effects and the tendency towards market dominance by a few, the Committee, in its report released on March 12, 2024, proposes the introduction of a Digital Competition Act. This new legislation aims to proactively regulate digital enterprises to ensure a competitive, fair, and transparent digital market environment.

The Committee's insights were partly influenced by the 53rd Parliamentary Standing Committee Report, which highlighted the prevalence of anti-competitive practices among large digital enterprises and suggested that existing laws were insufficient for the rapidly evolving digital markets. It advocated for ex-ante regulation to prevent, rather than just remedy, anti-competitive behaviours.

To specifically address these issues, the Committee recommends the creation of a Digital Competition Act that includes provisions for:

- **Ex-Ante Regulation:** To allow the Competition Commission of India (CCI) to intervene before anti-competitive practices occur.
- **Systemically Significant Digital Enterprises (SSDEs):** Identifying digital enterprises with significant influence in the Indian market through financial strength and service spread, requiring them to self-evaluate and report to the CCI.
- **Associate Digital Enterprises (ADEs):** To ensure compliance from enterprises that are related to or directly provide core digital services with SSDEs.

- **Obligations for SSDEs:** Prohibiting unfair data practices, restrictions on business communications, and compulsory bundling of services or products.
- **Penalties:** Implementing fines up to 10% of global turnover for non-compliance, aligning with the current penalty framework under the Competition Act.

This proposed framework is informed by a comprehensive review of both domestic policies and international approaches to digital market regulation, aiming to foster innovation while preventing market monopolisation.

2. 50% ceiling in Nndira Sawhney case not always mandatory, J.Bhushan

[Relevant topic: Fundamental Right, Constitutional Law]

A five-judge Constitution Bench pronounced the judgment in the Maratha Reservation case (Jaishri Laxmanrao Patil v Union of India). The matter dealt with the Socially and Educationally Backward Classes Act, 2018 ('SEBC Act'), which provided reservations for the Maratha community in higher education and public employment. The Court was hearing an appeal against the Bombay High Court's judgement which approved the validity of the Act.

Four opinions were delivered. J Ashok Bhushan wrote for himself and J Abdul Nazeer. Justices Nageswara Rao, Hemant Gupta and Ravindra Bhat wrote for themselves. The Bench unanimously held that the 50% limit on reservations was good law, and need not be revisited. Further, the SEBC Act did not fall within the exceptions to this rule.

Justice Bhushan reviewed the principles established in Indra Sawhney, affirming that a consensus among the judges set a 50% cap on reservations, applicable in 'exceptional circumstances'. He emphasized that this threshold is derived from constitutional mandates for equality, ensuring a balance that prevents societal dominance by any single caste. The rationale is to foster a society not governed by caste but by equal opportunity, suggesting alternatives like skill development for upliftment.

Bhushan dismissed the need to reconsider this limit, despite subsequent amendments and judgments like TMA Pai, which dealt with minority education quotas under different constitutional provisions. He clarified that Directive Principles cannot supersede Fundamental Rights, maintaining that the 50% cap remains legally binding, rooted in the constitution's intent for limited reservations to ensure equality.

On Maratha reservations, Bhushan critiqued the Gaikwad Commission's justification for exceeding the 50% limit, noting it misunderstood the criteria for 'extraordinary circumstances' as simply needing 'quantifiable data'.

He pointed out analytical flaws in the Commission's report, such as disproportionate representation being insufficient for reservations without considering adequacy and existing reservation impacts. Bhushan stressed the importance of current data in evaluating a community's social advancement, suggesting that political dominance could indicate a community's forward status, as in the case of Marathas.

3. Amendment to Indian patent System

[Relevant topic: IPR in Contemporary Legal Development]

The Ministry of Commerce and Industry introduced significant updates to the Indian patent system with the Patents (Amendment) Rules, 2024, effective from March 15, 2024. These amendments alter timelines and procedures to streamline the patent application process, aiming to enhance efficiency and reduce the burden on applicants. Key changes include:

1. **Reduced Timeline for Request for Examination (RFE):** The period for filing the RFE has been shortened from 48 to 31 months from the priority date or the application filing date, whichever is earlier. This change applies only to applications filed after the introduction of the Amended Rules.
2. **Section 8 Compliance Timelines Adjusted:**
 - Updated Information Submission: Now required within three months after receiving the First Examination Report (FER), with a possible three-month extension.
 - Controller's Use of Databases: The controller is encouraged to consult accessible databases for information on foreign applications, potentially requesting updated statements from the applicant if necessary.
3. **Extended Time for Application Order:** The period for responding to the examination report is more flexible, allowing extension requests within nine months from the issuance of the FER.
4. **Expanded Power to Extend Time or Condone Delays:** Rule 138 now permits the Controller to extend deadlines or forgive delays for up to six months, offering more flexibility in managing patent application requirements.
5. **Working Statements (Form 27) Frequency Reduced:** A statement of working is required once every three years instead of annually, with the first statement due six months after the third financial year.

These amendments aim to simplify patent procedures, accommodate applicants' needs better, and ensure the timely handling of patent applications in India.

4. Protecting children in time of war

[Relevant Topic: International Human right Law, International law]

Painting a grim landscape of the world's war zones, **Virginia Gamba**, the **UN Secretary-General's Special Representative for Children and Armed Conflict**, briefed ambassadors, citing grave concerns, from war-torn Gaza to gang-ravaged Haiti, where famine looms amid rampant violence and displacement.

International law provides a comprehensive framework aimed at protecting children in war and armed conflict scenarios, recognizing them as particularly vulnerable and requiring specific protections.

This body of law is built on various international treaties, conventions, and customary international law principles. Among the most pivotal are the Geneva Conventions, the Convention on the Rights of the Child (CRC), and its Optional Protocols.

Geneva Conventions and Additional Protocols

The Geneva Conventions of 1949 and their Additional Protocols are key instruments in international humanitarian law that provide for the protection of civilians, including children, during times of war. The Fourth Geneva Convention specifically protects women and children against indecent assault, and children are to receive additional aid and care. The Additional Protocols further enhance these protections, particularly Protocol I, which emphasizes the protection of children, prohibiting their participation in hostilities, and ensuring their education and care.

Convention on the Rights of the Child (CRC)

The CRC, adopted in 1989, is the most comprehensive international treaty on children's rights, including specific provisions related to children in armed conflict. Article 38 of the CRC obligates state parties to respect and ensure that children under 15 do not take a direct part in hostilities. It also requires states to provide protection and care to children affected by armed conflict. The CRC's Optional Protocol on the Involvement of Children in Armed Conflict goes further, raising the minimum age for direct participation in hostilities and compulsory recruitment to 18.

The Paris Principles

The Paris Principles, adopted in 2007, provide guidelines for protecting children from unlawful recruitment or use by armed forces or armed groups and for assisting the disarmed children's reintegration. Though not a legally binding document, it has been influential in shaping policies and measures to protect children associated with armed forces.

Enforcement Mechanisms

The enforcement of international laws protecting children in conflict zones involves a variety of mechanisms:

- The UN Security Council's Working Group on Children and Armed Conflict, which monitors compliance with international standards and can recommend actions against violators.
- The International Criminal Court (ICC), which has jurisdiction over war crimes, including the conscription, enlistment, or use of child soldiers.
- Committee on the Rights of the Child, which oversees the implementation of the CRC and its Optional Protocols, including receiving reports from states on their compliance.

5. Case of the Week

Asylum Case (Colombia v Peru)

ICJ Rep 1950 266, International Court of Justice

The Asylum Case between Colombia and Peru, adjudicated by the International Court of Justice (ICJ) in 1950, presents a significant examination of the concept of diplomatic asylum under international law, particularly in the context of regional or local customs.

Colombia argued that a local custom existed within Latin American states that allowed for the granting of political asylum, which, in this case, involved a Peruvian rebel leader seeking refuge in the Colombian Embassy in Lima following an unsuccessful coup.

Key Points from the Asylum Case:

1. **Claim of Local Custom:** Colombia's argument was predicated on the existence of a local custom exclusive to Latin American states, which purportedly permitted a state to grant diplomatic asylum and required the territorial state to respect this by allowing the safe passage of the asylum seeker out of the country.
2. **Burden of Proof:** The ICJ emphasized that for a party to successfully argue the existence of a custom, it must demonstrate that this custom is recognized as law, evidenced through consistent and uniform practice by the states concerned, and that such practice is acknowledged as a legal obligation (duty) rather than merely a matter of convenience or political expediency.
3. **Evidence Considered:** In its deliberations, the Court considered treaties, diplomatic correspondence, and instances of past asylum grants as evidence. However, the Court found that the evidence provided by Colombia did not establish a consistent and uniform practice accepted as law. The evidence showed considerable variability in how diplomatic asylum was granted and respected, indicating that any practice was not obligatory but rather influenced by political considerations.
4. **Conclusion:** The Court concluded that Colombia had not sufficiently proven the existence of a local custom that would oblige Peru to recognize the diplomatic asylum granted by Colombia and allow safe conduct for the asylum seeker. Moreover, the Court noted that even if such a custom existed among some Latin American states, it could not be applied against Peru, which had explicitly rejected such norms by not ratifying relevant conventions.

Implications and International Law:

1. **Existence of Local Custom:** While the Court did not find in favor of a local custom in the Asylum Case, it did not rule out the possibility that local customs could exist under international law. This was later affirmed in the Rights of Passage over Indian Territory Case, where the Court acknowledged that a long-standing practice between two states could establish mutual rights and obligations.
2. **Legal Framework for Diplomatic Asylum:** The case underscores the complexity of diplomatic asylum under international law and highlights the necessity for clear, consistent practices and legal frameworks to govern such situations, especially in regions where political asylum is sought frequently.
3. **Regional vs. Universal Norms:** The decision illustrates the challenges in reconciling regional practices with universal principles of international law, particularly when such practices are not uniformly accepted or codified in international agreements.

6. Repeated PYQ

Q.: Define partnership and discuss the mode of determining its existence.

A partnership is delineated as the relationship between individuals who have mutually agreed to share the profits of a business carried out by all or any of them acting on behalf of all. This definition, as per Section 4 of the Act, underscores the fundamental aspect of profit-sharing in partnership. Additionally, the English Partnership Act of 1890 emphasises the collaboration of individuals in conducting a business with a profit motive, affirming the centrality of profit-sharing in the partnership construct.

Mode of Determining Partnership Existence:

- **Agreement to Carry on Business:** A pivotal element in establishing a partnership is the existence of an agreement between the involved parties to engage in business operations. This agreement, whether oral or written, must encompass the intention to conduct a trade, occupation, or profession as defined in Section 2, Clause (b).
- **Intent to Share Profits (and Losses):** The essence of partnership is further solidified by the intention of the partners to share the profits generated by the business. Typically, this profit-sharing aspect extends to encompass the sharing of losses as well, unless explicitly stipulated otherwise in the partnership agreement.
- **Business Purpose:** Integral to the partnership agreement is the objective of conducting a business venture. This distinguishes a partnership from other forms of associations or co-ownership arrangements. Entities such as charitable societies or religious associations, lacking the business motive, do not qualify as partnerships under the Act.
- **Unlimited Liability:** Partners in a partnership assume personal liability for the debts incurred by the business. This implies that their personal assets are at risk in the event of the partnership's inability to meet its financial obligations, highlighting the substantial commitment involved in partnership.

Distinctive Characteristics for Partnership Determination:

It's essential to delineate certain characteristics to ascertain the existence of a partnership accurately. While profit-sharing is a vital element, it alone does not suffice to establish a partnership. Other crucial factors include mutual agency, where each partner acts as an agent for the firm and others, and the agreement to conduct business, ensuring a comprehensive understanding among the partners regarding their roles and responsibilities.

This progressive approach, while occasionally contentious, has undeniably contributed to the deepening of democracy in India. It reflects a judicial philosophy that prioritises the essence of justice over procedural technicalities, embodying the spirit of the Constitution in its quest to secure to all its citizens the promises of equality, freedom, justice, and dignity.