

Weekly Update for Law optional UPSC

A mix of Conceptual, Current/Contemporary Topics

Date: 4th June - 10th June 2023

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1. Supreme Court and LGBT Rights

The Supreme Court of India has played a pivotal role in safeguarding the rights of the LGBT (Lesbian, Gay, Bisexual, and Transgender) community over the years. Its judgments have significantly influenced societal norms and legal frameworks surrounding sexuality, gender identity, and the rights of sexual minorities.

In 2009, the Delhi High Court ruled in the case of Naz Foundation v. Govt. of NCT of Delhi that Section 377 of the Indian Penal Code, which criminalized sexual activities "against the order of nature," was unconstitutional with regard to consensual homosexual sex between adults. However, in 2013, in a regressive move, the Supreme Court in the case of Suresh Kumar Koushal v. Naz Foundation overturned the Delhi High Court's judgment, recriminalizing consensual homosexual activities.

The Supreme Court's stance on LGBT rights showed signs of evolution in 2014 when it delivered a landmark judgment in the **National Legal Services Authority v. Union of India case** (NALSA case). The court recognized transgender people as a 'third gender' and affirmed their fundamental rights to equality, non-discrimination, and life with dignity, thereby offering much-needed legal recognition and protection to the transgender community.

Further evolution was witnessed in 2017 with the landmark **Right to Privacy judgment (Justice K.S. Puttaswamy (Retd.) v. Union of India)** where the Supreme Court unequivocally stated that sexual orientation is an essential attribute of privacy, thereby indirectly questioning the constitutional validity of Section 377.

Finally, in 2018, the Supreme Court in the case of **Navtej Singh Johar v. Union of India** decriminalized homosexuality by reading down Section 377. The court held that LGBT individuals have the same constitutional rights as other citizens, including the rights to equality and non-discrimination, the right to

express one's identity, and the right to life with dignity. This was a watershed moment in the legal history of India and a monumental victory for the LGBT community.

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These rulings, however, are just the beginning. Although they are major strides towards equality, much remains to be done. Issues like same-sex marriage, adoption rights for same-sex couples, and further protections against discrimination are still to be comprehensively addressed by Indian law and society. The Supreme Court's evolving jurisprudence provides a strong foundation for future advocacy and litigation to ensure the full realization of the rights of the LGBT community in India.

2. Anti exclusion Principle : New Dimension to Article - 14

'Anti-exclusion principle' is a principle that has evolved through various court rulings to interpret

Article 14. It embodies the concept that while differentiation is allowed, discrimination is not.

The 'anti-exclusion principle' posits that a law that excludes an individual or a group from the rights or benefits that others enjoy without a reasonable and justifiable basis is in violation of Article 14. The principle, therefore, prevents arbitrary exclusion by ensuring that all exclusions must satisfy the test of reasonableness and justifiability.

Article 14 of the Indian Constitution provides for 'equality before the law' and 'equal protection of the laws'. This forms the cornerstone of the fundamental rights provided to Indian citizens and others, aiming to establish a legal system where every individual is treated fairly without any discrimination.

- Article 14 reads: "The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India."
- However, Article 14 does not imply absolute equality. It incorporates a concept of 'intelligible differentia', which means that there can be reasonable classifications among different groups of people, as long as there is a reasonable basis for those classifications, and they are related to the objective that the law seeks to achieve.

In essence, the 'anti-exclusion principle' under Article 14 of the Indian Constitution enshrines a significant tenet of social justice, aiming to prevent the arbitrary or unjust exclusion of certain individuals or groups from the rights, benefits, and protections offered by the law to others. It ensures that exclusions or classifications are not arbitrary and are based on a reasonable and justifiable rationale.

3. The Competition act needs revision with the Digital Competition act.

The rapid advancement of the digital economy has necessitated changes in competition laws worldwide. Regulatory bodies are struggling to manage the unique operational differences of digital markets compared to traditional ones. This is because current competition law principles are based on decades of experience in traditional markets and aren't applicable to the complexities of digital markets. Accordingly, there are worldwide deliberations to revamp competition law frameworks or introduce separate legislations to discipline dominant players in the digital marketplace.

The Competition Commission of India (CCI) has faced similar challenges. It has initiated inquiries, imposed penalties, and ordered corrective actions in many cases. However, questions have arisen about the effectiveness of these actions and their impact on consumer welfare, market regulation, and correction. There are ongoing discussions about amendments needed in the Competition Act, 2002.

The Parliamentary Standing Committee on Finance has advocated for an ex-ante (preemptive) approach to regulating digital markets, as opposed to an ex-post (reactive) approach. They believe that by the time the regulator steps in, it may be too late to mitigate any harm. The Committee, having consulted with big tech companies and various ministries, recommends following an approach similar to the European Union's Digital Markets Act (DMA). This involves designating dominant digital market players as 'Systematically Important Digital Intermediaries' (SIDIs) and imposing mandatory compliance obligations.

The Digital Competition Act

The Committee recommends the creation of a separate legislation, the Digital Competition Act, to regulate anti-competitive conduct in the digital markets. It also suggests establishing a specialized Digital Market Unit within the CCI to monitor SIDIs. They've focused on ten areas of anti-competitive practices that need to be addressed and have proposed recommendations accordingly.

- However, the Committee's recommendations and the proposed changes in the Competition Act might not be sufficient on their own. Several other simultaneous regulations, such as the Indian Telecommunications Bill 2022 and the Digital Personal Data Protection Bill, 2022, are being introduced which may add to the compliance requirements for businesses and risk stifling innovation.
- In addition, the proposed Digital Competition Act could take time to implement due to its wide-ranging implications. Therefore, it is suggested that immediate focus should be given to finalizing the Competition (Amendment) Bill, while the Digital Competition Act should continue to be a "work in progress".

4. Right to Travel Abroad: Maneka Gandhi and Beyond

The right to travel abroad has been recognized as part of the fundamental right to personal liberty under Article 21 of the Indian Constitution (**Maneka Gandhi Case**). This has been affirmed by courts in line with the Universal Declaration of Human Rights, viewing it as a basic human right that fosters individual independence and enriches one's experiences.

In the context of an accused person, the Supreme Court has ruled that the right to travel is intrinsic to the Right to Dignity under Article 21 and cannot be unduly limited to ensure the accused's presence in court. This applies even when an FIR is registered against the individual, and their right to travel should not be entirely curtailed.

However, this right is not absolute and can be subjected to reasonable restrictions based on the court's judgment or any established legal procedure. In some cases, this right can be restrictive, needing court approval for a valid reason, with the accused having the responsibility to provide and substantiate this reason.

The primary concern for courts is to ensure the successful execution of proceedings, meaning the accused's presence must be assured and their liberty not misused to obstruct justice. When granting this right along with bail, courts must assess the risks and determine appropriate conditions balancing the accused's rights and the enforcement of criminal justice.

The conditions of bail could allow for unrestricted or limited travel based on the accused's needs. The courts must exercise care while restricting the right to travel, with the possibility of modifying bail orders to meet the accused's requirements.

Not an Absolute Right

The right of an accused to travel abroad is not absolute. The court can restrict the right to travel if it is satisfied that the accused is likely to abscond or interfere with the investigation.

- The court will consider the following factors when deciding whether to restrict the right to travel:
 - The nature of the charges against the accused.
 - The strength of the evidence against the accused.
 - The accused's ties to India.
 - The accused's criminal history.
 - The accused's financial resources.
- The accused can apply to the court for permission to travel abroad.
- The court will consider the following factors when deciding whether to grant permission:
 - The purpose of the travel.
 - The length of the travel.
 - The accused's ties to India.
 - The accused's criminal history.
 - The accused's financial resources.

State of Maharashtra v. Anil Ramrao Naik (2014): In this case, the Supreme Court of India held that the right of an accused to travel abroad is not absolute and can be restricted by the court if it is satisfied that the accused is likely to abscond or interfere with the investigation.

State of Gujarat v. Amit Shah (2010): In this case, the Supreme Court of India held that the court should balance the right of an accused to travel abroad with the need to ensure that the accused does not abscond or interfere with the investigation.

State of Kerala v. K. Muraleedharan (2006): In this case, the Supreme Court of India held that the court can grant permission to an accused to travel abroad if it is satisfied that the accused will not abscond or interfere with the investigation.

A balancing Act

The right of an accused to travel abroad is a balancing act between the accused's right to freedom and the need to ensure that the accused does not abscond or interfere with the investigation.

Here are some additional thoughts on the right of an accused to travel abroad:

- The right of an accused to travel abroad is an important right that should be protected. However, the right is not absolute and can be restricted by the court if it is necessary to ensure that the accused does not abscond or interfere with the investigation.
- The court should balance the right of an accused to travel abroad with the need to ensure that the accused does not abscond or interfere with the investigation. The court should consider all the relevant factors, including the nature of the charges against the accused, the strength of the evidence against the accused, the accused's ties to India, the accused's criminal history, and the accused's financial resources.
- The accused should be given the opportunity to make representations to the court before the court makes a decision on whether to restrict the right to travel abroad.

5. Consent of victim in rape and Marriage promise

Rape is a heinous crime that violates the dignity and bodily integrity of a woman. It is defined under Section 375 of the Indian Penal Code (IPC) as sexual intercourse with a woman against her will, without her consent, or by obtaining her consent by fraud or coercion.

One of the situations where consent is obtained by fraud is when the accused makes a false promise of marriage to the woman and induces her to have sexual intercourse with him. This is considered as a misconception of fact that vitiates the consent of the woman and amounts to rape under Section 375 IPC.

Every Promise Vitiates consent?

However, not every promise of marriage that is not fulfilled can be treated as a false promise at the inception. The court has to examine the intention of the accused at the time of making the promise and whether he had any malafide motive to deceive the woman. The court also has to consider the circumstances of the case, such as the duration of the relationship, the nature of the interactions, the conduct of the parties, and the evidence of communication between them.

The Supreme Court in **Sonu v. State of U.P.** quashed an FIR under Section 376 IPC between former lovers inter alia on the ground that "there is no allegation that the promise to marry given to the second respondent (prosecutrix) was false at the inception". The court cited Pramod Suryabhan Pawar v. State of Maharashtra wherein it laid down the following test to govern such matters:

"Where the promise to marry is false and the intention of the maker at the time of making the promise itself was not to abide by it but to deceive the woman to convince her to engage in sexual relations, there is a "misconception of fact" that vitiates the woman's "consent"."

Yedla Srinivasa Rao v. State of Andhra Pradesh: In this case, the Supreme Court emphasized that the consent of a woman given on the false promise of marriage is vitiated, and if the man knows that he will not marry her, it amounts to rape.

Deepak Gulati v. State of Haryana: The Supreme Court, in this case, reiterated that consent obtained on the false promise of marriage does not amount to valid consent. It stated that if a man establishes a physical relationship with a woman by promising to marry her, but later fails to fulfill the promise, it amounts to rape.

On the other hand, if the promise to marry is made in good faith and with a genuine intention to marry, but later due to some circumstances, it is not fulfilled, then it cannot be said that there was a misconception of fact or that the consent was vitiated. The court in such cases has to look into whether there was any undue influence, coercion, or threat involved in obtaining the consent.

Need for Reform

SC recently emphasised the need for an amendment to legislation, clearly defining what constitutes sexual intercourse on the pretext of a false promise of marriage. The court observed that in the present scenario, the law on this matter lacks clarity for conviction of the accused. The court also said that "the plight of the victim and the probability of the accused tarnishing the dignity of the victim and her family need to be looked at while deliberating on the question of bail".

Thus, it can be concluded that consent obtained by false promise of marriage can negate the offence of rape only if it is proved that the promise was made with a dishonest intention and with no intention to marry at all. However, if there is any doubt or ambiguity regarding this aspect, then it is a matter of trial and evidence and cannot be decided at a preliminary stage.

6. Case of the week: Google V. Competition Commission Of India

The Competition Commission of India ("CCI") had on October 20, 2022, passed an order against Google LLC and Google India Private Limited ("Google") directing Google to refrain from indulging in anti-competitive practices that were found to be in contravention of the provisions of the Competition Act, 2002 ("Competition Act") and also imposed on Google a penalty to the tune of INR 1337.76 Crores.

- Google was found to have abused its dominant position in the online search market in India.
- Google was ordered to stop forcing Original Equipment Manufacturers (OEMs) to pre-install a bouquet of applications, offer any monetary or other incentives to OEMs for ensuring exclusivity for its search services, and restrict the uninstallation of its pre-installed apps by the users.
- The ruling highlights the ongoing debate surrounding anti-competitive practices and market dominance in the technology industry.
- The ruling serves as a reminder to tech giants that market dominance comes with a responsibility to operate fairly and to avoid engaging in anti-competitive practices that restrict competition and harm consumers.

Here are some additional thoughts on the ruling:

- The ruling is a significant victory for competition law in India. It sends a strong message to tech giants that they will not be allowed to abuse their market power.
- The ruling is also a positive development for consumers in India. It will help to ensure that they have access to a wider range of search engines and other apps.

- The ruling is likely to have a ripple effect across the technology industry. It could lead to more scrutiny of tech giants' business practices and could encourage other countries to take action against anti-competitive behavior.

Overall, the NCLAT ruling is a positive development for competition, innovation, and consumer protection in India. It is a reminder that tech giants must operate fairly and that market dominance comes with a responsibility.

7. Repeated PYQ Model Answer of the Week

How is the rule of 'absolute liability' different from 'strict liability'? Cite the relevant judgements.

Absolute liability and strict liability are two legal principles that impose liability on a person or an entity for causing harm or damage, regardless of their intention or negligence. However, there are some key differences between them, as explained below.

Strict Liability

Strict liability is a rule that was established in the case of **Rylands v. Fletcher (1868)**, where the House of Lords held that a person who brings on his land and collects and keeps there anything likely to do mischief if it escapes, must keep it at his peril, and if he does not do so, is prima facie answerable for all the damage which is the natural consequence of its escape. This rule applies to dangerous substances or activities that pose an inherent risk of harm to others or the environment. For example, storing explosives, toxic gases, electricity, etc.

However, strict liability is subject to several exceptions or defenses that can exonerate the defendant from liability. These include:

- **Act of God:** An unforeseeable natural event that could not have been prevented by human care or foresight. For example, a flood, earthquake, storm, etc.
- **Act of a third party:** An unauthorized act of a third party who is not under the control or direction of the defendant. For example, a trespasser, a thief, a saboteur, etc.
- **Consent of the plaintiff:** The plaintiff's voluntary and informed consent to the presence and use of the dangerous thing or activity on the defendant's land. For example, a visitor who enters a zoo and agrees to the risk of animal attacks.
- **Statutory authority:** The defendant's compliance with a statutory provision or regulation that authorizes or permits the use of the dangerous thing or activity on his land. For example, a license to store explosives issued by the government.
- **Default of the plaintiff:** The plaintiff's own negligence or fault that contributes to the escape or damage. For example, a plaintiff who leaves his window open and allows toxic gas to enter his house.

Absolute Liability

Absolute liability is a rule that was developed by the Supreme Court of India in the case of **M.C. Mehta v. Union of India (1987)**, where the court held that an enterprise engaged in a hazardous or inherently dangerous activity for commercial purposes is absolutely liable to compensate all those who are affected by

an accident arising from such activity, and such liability is not subject to any of the exceptions applicable to strict liability.

This rule applies to enterprises that have a social responsibility and public duty to ensure that no harm results to anyone on account of their activity. For example, chemical plants, nuclear plants, oil refineries, etc.

Why this Principle?

The rationale behind absolute liability is to deter enterprises from engaging in hazardous activities without taking adequate safety measures and precautions, and to ensure that victims of such accidents are adequately compensated without having to prove negligence or fault on the part of the enterprise. The court also held that the amount of compensation should be proportional to the magnitude and capacity of the enterprise, and should have a deterrent effect on them.

The rule of absolute liability was further affirmed by the Supreme Court of India in the case of Bhopal Gas Leak Disaster (1989), where the court held that the Union Carbide Corporation was absolutely liable for the leakage of methyl isocyanate gas from its plant in Bhopal that killed thousands of people and injured many more.

Both Based on Same Principle

Absolute liability and strict liability are both forms of no-fault liability that impose responsibility on a person or an entity for causing harm or damage by their dangerous substances or activities.

However, absolute liability is more stringent and comprehensive than strict liability, as it does not allow any exceptions or defenses, and imposes higher compensation on enterprises engaged in hazardous or inherently dangerous activities for commercial purposes.

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