

Weekly Update for Law Optional UPSC

A mix of Conceptual, Current/Contemporary Topics

14th Oct - 20th Oct 2024

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1. Can Fundamental Rights be Waived?

Initially, in *Behram v. State of Maharashtra*, it was suggested that certain Fundamental Rights, especially those benefiting individuals, could be waived. However, this view was rejected by the majority, emphasizing that Fundamental Rights exist not only for individual benefit but as a matter of public policy.

In *Basheshar Nath v. Income Tax Commissioner*, the Supreme Court firmly established that Fundamental Rights cannot be waived. The Court held that rights like equality under Article 14 are imposed on the State as a matter of public policy, and no individual can relieve the State of its constitutional obligations. Furthermore, the Court made no distinction between rights benefiting individuals and those meant for public interest, asserting that all Fundamental Rights are mandatory on the State.

This doctrine of non-waiver was reaffirmed in cases like *Olga Tellis* and *Nar Singh Pal v. Union of India*, where the Court ruled that individuals cannot forfeit their constitutional protections, even if they voluntarily agree to do so. The judiciary recognized that allowing such waiver could lead to individuals, particularly vulnerable sections, being coerced into surrendering their rights.

Thus, it is now well-settled that under Indian law, Fundamental Rights cannot be waived or compromised, ensuring their protection for both individual and public welfare. Interestingly, this stands in contrast to the U.S.A., where waiver of certain rights is permissible.

2. Difference Between Partnership and LLP

Partnership is prevailed by 'The Indian Partnership Act, 1932' and various Rules made there under. It is created by contract. Limited Liability Partnership is prevailed by 'The Limited Liability Partnership Act, 2009' and various Rules made there under. LLP is created by law.

Basis	Partnership	Limited Liability Partnership (LLP)
Legal Entity	Not a separate legal entity. Partners have joint ownership.	A separate legal entity under the LLP Act, 2009.
Registration	Optional.	Mandatory with Registrar of LLP.
Liability of Partners	Unlimited. Partners are jointly and severally liable.	Limited to the extent of their contribution.
Ownership of Assets	Partners have joint ownership of assets.	The LLP, independent of partners, owns its assets.
Perpetual Succession	Does not have perpetual succession; depends on partners.	Has perpetual succession, partners can come and go.
Number of Members	Minimum 2, maximum 20 partners.	Minimum 2 partners, no limit on maximum number of partners.
Managerial Personnel	No requirement of any managerial personnel; partners themselves administer the business	'Designated Partners' are responsible for managing the day to day business and other statutory compliances.

3. Doctrine of Proportionality in International Humanitarian Law (IHL)

The **Doctrine of Proportionality** is a fundamental principle in International Humanitarian Law (IHL), designed to limit the harm caused to civilians and civilian objects during armed conflicts. As codified in **Additional Protocol I** to the Geneva Conventions, particularly **Article 51(5)(b)**, it prohibits attacks that may cause incidental civilian casualties or damage to civilian objects if such harm is excessive in relation to the concrete and direct military advantage anticipated.

This principle acknowledges that attacks on military objectives may inevitably result in some incidental civilian harm, but such harm must not outweigh the anticipated military gain.

The **principle of proportionality** has evolved from customary international law into a codified treaty obligation. A violation of this principle constitutes a war crime under the **Rome Statute of the International Criminal Court (ICC)**. The principle places a **restriction on attacks** in addition to the requirement that they be limited to military objectives and combatants.

For instance, an attack on a legitimate military target, such as an ammunition factory, may lead to unavoidable incidental damage to nearby civilian property. The attack is considered lawful if the incidental harm is not excessive relative to the military advantage gained. However, if the civilian damage is disproportionate to the military benefit, the attack is prohibited under IHL.

Precautionary measures are an integral aspect of implementing proportionality, as outlined in **Articles 57 and 58** of Additional Protocol I.

These provisions mandate that all feasible precautions must be taken to spare civilians and civilian objects from harm. Before launching an attack, military planners must ensure that the intended target is a legitimate military objective and that civilians or civilian objects are not mistakenly targeted. This includes thorough reconnaissance and intelligence gathering to verify the military nature of the objective.

Moreover, the choice of means and methods of attack is crucial to minimizing incidental civilian harm. Commanders must carefully select the weapons and tactics that will achieve their military objectives while avoiding unnecessary harm to civilians. This aspect of the doctrine directly connects to the principles of distinction and proportionality, which require distinguishing between military objectives and civilian entities and ensuring that the harm inflicted on civilians is minimized.

4. SC Issues guidelines to combat child marriage

The Supreme Court of India has issued comprehensive guidelines to prevent and combat child marriages in the country. The Supreme Court emphasized a multi-sectoral, community-driven approach to effectively tackle the deep-rooted issue of child marriage in India, prioritizing prevention and protection over penalization.

Legal and Enforcement Measures

- Appoint dedicated Child Marriage Prohibition Officers (CMPOs) at the district level, focused exclusively on preventing child marriages.
- District Collectors and Superintendents of Police are responsible for actively preventing child marriages in their districts.
- Establish specialized police units to handle child marriage cases.
- Set up fast-track courts exclusively for child marriage cases.
- Prosecute those who facilitate, solemnize, assist or promote child marriages.

Prevention and Awareness

- Integrate comprehensive sexuality education into school curricula across all states.
- Conduct widespread awareness campaigns about child marriage and its legal consequences.
- Develop community-driven strategies tailored to local cultural contexts.
- Launch a 'Child Marriage Free Village' initiative similar to 'Open Defecation Free Village' program.

Support for Victims

- Declare children whose marriages are fixed as "minors in need of care and protection" under juvenile justice laws.
- Provide free legal aid to victims of child marriages.
- Initiate compensation schemes for girls opting out of child marriages.

Monitoring and Accountability

- Conduct quarterly performance reviews of implementation efforts.
- Take administrative action against officials who fail to prevent child marriages.
- Establish online portals for reporting child marriages.

Weekly Focus

Case of the week: Bimbadhar Pradhan v. State of Orissa (AIR 1954 SC 469),

In the landmark case of *Bimbadhar Pradhan v. State of Orissa (AIR 1954 SC 469)*, the Supreme Court of India made an important observation regarding the conviction of individuals for criminal conspiracy. The Court held that it is not necessary for more than one person to be convicted of conspiracy for the charge to stand.

This judgment pertains to, particularly in the interpretation and application of Section 120B of the Indian Penal Code, which deals with criminal conspiracy

The case arose from a situation where the appellant, Bimbadhar Pradhan, was the only person convicted of conspiracy among several accused. The Court's decision affirmed that such a conviction could stand, provided there was evidence of involvement of other parties in the conspiracy.

Key Points of the Judgment

1. **Conviction of a Single Person:** The Supreme Court ruled that one person alone can be convicted for the offense of criminal conspiracy, even if other alleged co-conspirators are acquitted or not prosecuted¹.
2. **Proof of Involvement:** The Court emphasized that it is sufficient if the prosecution can prove that two or more persons were actually involved in the conspiracy, regardless of whether all of them are convicted
3. **Evidence Requirement:** The judgment suggests that the court must be in a position to find evidence of the involvement of multiple persons in the conspiracy, even if only one person is ultimately convicted

Implications of the Ruling: This decision has significant implications for the prosecution of conspiracy cases :

1. It allows for the conviction of a single defendant in cases where there is clear evidence of a conspiracy, but insufficient evidence to convict other participants.
2. The ruling emphasizes the importance of proving the existence of an agreement or plan between multiple parties, even if not all parties are brought to trial or convicted.
3. It provides flexibility to the courts in dealing with complex conspiracy cases where evidence against different accused may vary in strength.

PYQ Solution

Discuss the relevance of the 'safe harbour' clause under the Information Technology Act 2000. Comment on the need to make the intermediaries liable for transmitting the posts and communications of third parties.(15 Marks, 2024)

The Information Technology Act, 2000 (IT Act), which governs cyber activities in India, introduced the concept of "safe harbour" for intermediaries through Section 79. This clause exempts intermediaries from liability for content posted by third parties, provided they fulfill certain conditions.

The "safe harbour" provision plays a crucial role in defining the legal obligations and protections for intermediaries such as social media platforms, messaging services, e-commerce platforms, and internet service providers.

Understanding the "Safe Harbour" Clause

This exemption, however, is conditional. For an intermediary to claim immunity under the safe harbour clause, it must meet the following conditions:

- **Due Diligence:** The intermediary must follow prescribed due diligence guidelines, such as having grievance redressal mechanisms, publishing privacy policies, and not knowingly hosting unlawful content.
- **No Knowledge or Control Over Content:** The intermediary should not initiate the transmission, select the receiver of the transmission, or modify the information contained in the transmission. This ensures that intermediaries act as passive conduits rather than active participants in the content.
- **Expeditious Removal of Unlawful Content:** Upon receiving actual knowledge or being notified by a government agency or a court about any unlawful content, the intermediary is required to remove or disable access to that content.

Concerns Regarding the Safe Harbour Protection: While safe harbour provisions are essential for protecting intermediaries, critics argue that they have sometimes allowed platforms to escape responsibility for harmful or illegal content.

There are growing concerns that the present framework gives intermediaries excessive leeway, allowing them to avoid accountability for the transmission of objectionable content, including:

1. Misinformation and Fake News
2. Hate Speech
3. Defamatory Content
4. Terrorist Propaganda

The "safe harbour" clause under the Information Technology Act, 2000 has been instrumental in allowing the growth of intermediaries by protecting them from liability for third-party content, fostering innovation, and preserving free speech online.

Balanced Approach: There is a need for a balanced regulatory approach that protects intermediaries from excessive legal liabilities but also ensures accountability, particularly for illegal or harmful content. Imposing reasonable due diligence obligations, encouraging proactive monitoring in specific contexts, and making intermediaries liable for failure to act after gaining knowledge of unlawful content can create a more accountable and safer online ecosystem without stifling free speech or innovation.

[Law Optional and GS Papers overlap](#)

Law optional and GS - II: Attorney General of India or Government of India?

The **Attorney General of India (AG)** is the highest law officer in the country and acts as the chief legal advisor to the government. His role is, straddling both the political and legal spheres, and his independence is crucial to the functioning of the Indian constitutional framework.

Over the decades, the role of the AG has become increasingly significant as India's legal and political landscape has grown more complex. The AG is now seen not only as a legal advisor but also as a protector of the Constitution and the rule of law. However, as the country has moved towards becoming a rights-oriented society, with citizens increasingly turning to the courts for the resolution of socio-economic issues, the AG's role has expanded to encompass a broader range of public interest cases

Constitutional Role of the Attorney General: The role of the Attorney General is enshrined in **Article 76** of the **Constitution of India**, which outlines the AG's appointment, duties, and functions.

The AG is appointed by the President of India and must be qualified to be a judge of the Supreme Court. He is expected to provide legal advice to the government on matters referred to him and represent the Union in legal proceedings before the courts, including cases of constitutional importance. Article 76(2) stipulates that:

“It shall be the duty of the Attorney-General to give advice to the Government of India upon such legal matters, and to perform such other duties of a legal character, as may from time to time be referred or assigned to him by the President.”

The AG is not a member of the government but serves as its advisor and defender in legal matters, representing the interests of the state in court. The office, however, does not provide the AG with fixed tenure; he holds office during the pleasure of the President. This provision, while creating flexibility, raises concerns about the independence of the AG, especially in politically charged cases.

Independence of the Attorney General: The office of the Attorney General, although constitutionally mandated, faces challenges concerning its independence, particularly due to the doctrine of "pleasure" under which the AG serves. The **Law Officer (Conditions of Service) Rules, 1987** outline the remunerations, duties, and other terms of the AG, but they do not explicitly guarantee the AG's autonomy from political influence.

This implies that the AG, although expected to act independently, can be removed if his actions do not align with the political interests of the government. This raises critical questions about the extent to which the AG can freely exercise his discretion, particularly in cases involving government actions or policies.

Duties and Functions of the Attorney General

The duties of the AG are multifaceted, combining both advisory and representational roles. The AG is required to give legal opinions on matters referred by the President, defend the government in key cases, and play a pivotal role in the resolution of constitutional disputes. In addition to these roles, the AG has the right of audience in all courts in India, including the Supreme Court, as per Article 76(3). The office also involves other important functions, such as:

1. **Legal Advice to the Government:** The AG advises the government on legal matters, interpreting statutes, and defending policies. In situations involving constitutional or legal disputes, the AG's advice is crucial for guiding governmental actions.
2. **Representation in Courts:** The AG represents the government in cases before the **Supreme Court** and **High Courts**. His role in defending the constitutionality of legislation, policies, and executive actions ensures that the government's legal position is presented effectively.

3. **Consultation on International Matters:** The AG also represents India in international legal disputes, ensuring that India's international commitments and obligations are upheld in courts or arbitration tribunals.
4. **Public Interest Guardian:** While the AG serves as the government's lawyer, he also holds the responsibility of defending public interest, ensuring that justice is served even in cases where the government might be on trial.

Independence vs. Political Influence

While the AG is entrusted with the responsibility of being the government's chief legal advisor, there have been instances where the independence of the office has been questioned. The role of the AG as the government's representative places him at the confluence of legal and political interests, often leading to debates about the extent of his autonomy.

One such instance is the **Taj Corridor case** where the Attorney General's advice not to prosecute certain individuals despite compelling evidence created a stir. The **Supreme Court of India** questioned the AG's decision, asserting that it was influenced by political considerations rather than legal merit. The Court expressed its dissatisfaction, stating:

"When all members of the investigating team opined that it is a fit case for prosecution, it was nothing but a charade performance by the CBI director to seek the closure of the case"

This case illustrates the potential conflicts of interest that can arise when the AG is caught between political pressures and the need to uphold the law impartially.

Prosecution and the Shawcross Doctrine

A vital aspect of the AG's role is deciding whether or not to prosecute individuals. In making such decisions, the AG must balance legal principles with considerations of public interest, which can be a complex task. In this regard, the **Shawcross Doctrine** becomes relevant. This doctrine, originating in the UK, holds that while the AG can consult with other government ministers regarding public interest implications of legal decisions, the final decision must rest solely with the AG and should not be subject to government pressure.

The **Shawcross Doctrine** emphasizes that prosecutorial decisions should be based on legal grounds, free from any political influence:

"The Attorney General is free to consult with Ministers of the President about the public interest implications of legal decisions, provided that he does not take direction from those ministers or the Cabinet"

This principle, though developed in the British context, is crucial in ensuring the impartiality of the AG's prosecutorial powers. However, in India, while the AG is theoretically independent, the close ties to the government through the doctrine of pleasure and the nature of political appointments challenge this independence.

Politicization of the Office: One of the significant concerns about the office of the Attorney General in India is the potential for politicization. Since the AG holds office during the pleasure of the President, who acts on the advice of the government, there is a risk that the AG may be removed if his actions or advice are not in alignment with the political objectives of the ruling party. This has led to calls for greater safeguards to ensure the AG's independence, similar to those that exist for judges.

Law Optional and GS - IV: Environment and Ecological Ethics

Ecological ethics is the philosophical study of how humans should interact with their environment, considering the intrinsic value of all life forms and ecosystems, and recognizing the responsibilities humans hold towards future generations.

The concept pushes for a shift away from an anthropocentric approach, which primarily views the environment in terms of human benefits, to a more inclusive understanding of the intrinsic worth of all living and non-living components of the biosphere.

The Indian Supreme Court, over the years, has played a crucial role in upholding and promoting ecological ethics through various landmark judgments, integrating constitutional mandates and principles of sustainable development.

1. Principle of Sustainable Development: Sustainable development requires that current generations meet their needs without compromising the ability of future generations to meet theirs. This idea involves living within the planet's regenerative, assimilative, and carrying capacities.

The Supreme Court, in *Vellore Citizens' Welfare Forum v. Union of India*, delivered one of the most significant rulings on environmental issues in India. The case revolved around pollution caused by the discharge of untreated effluents from tanneries in Tamil Nadu, which had a severe ecological impact on groundwater and agricultural lands.

2. Moral Responsibility to Future Generations: The text on ecological ethics emphasizes the need for fairness to future generations and highlights that current generations have anticipatory obligations towards them..

3. Intrinsic Value of Ecosystems and Biodiversity: A key feature of ecological ethics is the recognition of the intrinsic value of ecosystems, beyond their instrumental value to humans. The idea here is that ecosystems and species deserve moral consideration not just because they serve human interests, but because they have value in and of themselves.

The Supreme Court's judgment in the *Godavarman case (Forest Conservation Case, 1996)*, which dealt with forest conservation, reflected an eco-centric approach. By recognizing forests as intrinsic values to be preserved, the Court echoed ecological ethics' principles, especially the emphasis on the interconnectedness and intrinsic worth of all life forms.

4. Precautionary Principle and Ethics: Ecological ethics argues that ethical considerations should be integrated across all fields, including business, law, and economics.

In *Narmada Bachao Andolan v. Union of India (2000)* case, the Court was faced with a difficult choice between development (the construction of a dam) and the environmental and social costs (displacement and ecological damage). The judgment reflected a balance, acknowledging both the need for development and the precautionary measures required to safeguard the environment.

"While the necessity for a dam is undeniable for the economic growth of the country, this should not be at the cost of destroying the environment and displacing people without adequate rehabilitation. Development cannot be a blind march forward without considering the environmental and human cost."