

Weekly Update for Law optional UPSC

A mix of Conceptual, Current/Contemporary Topics

Date: 18th June - 24th June 2023

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1. Meaning of Consent under 'Rape'

Understanding and defining consent in the context of sexual offenses is a crucial aspect of law, especially when it comes to protecting victims and ensuring justice. The traditional definition of consent has evolved over time, moving towards an 'affirmative and ongoing' model, which requires clear and continuous consent throughout a sexual interaction.

In India, consent in the context of sexual offenses is defined under Section 375 of the Indian Penal Code (IPC). However, interpretations and understandings of consent have evolved through various judicial pronouncements.

1. State of Maharashtra v. Madhukar Narayan Mardikar (1991): The Supreme Court held that even a woman of 'easy virtue' has the right to refuse to submit herself to sexual intercourse to anyone, and no one can force her to have sex against her will.

2. Tuka Ram And Anr vs State Of Maharashtra (1979 - Mathura rape case): This is one of the most famous cases that led to a significant shift in the way consent is understood. In this case, the court ruled in favor of the accused policemen based on the victim's lack of physical resistance, implying passive consent. This judgment received widespread criticism and resulted in major amendments in rape laws in India, leading to the introduction of Section 114A in the Indian Evidence Act which presumes no consent in situations where the woman states in her evidence that she did not consent.

3. Justice Verma Committee Report (2013): After the 2012 Delhi gang rape, the Justice Verma Committee was constituted to propose amendments to criminal law dealing with sexual offenses. The committee's report emphasized the importance of an 'affirmative model' of consent, stating that consent must be understood to mean an 'unequivocal voluntary agreement' when the woman by words, gestures, or any form of non-verbal communication, communicates a willingness to participate in a specific sexual act.

4. Independent Thought vs Union of India (2017): While the case primarily dealt with child marriages, it emphasized the importance of 'willing' and 'enthusiastic' consent, stating that consent given under a certain 'age' and 'maturity' may not qualify as consent.

5. Mahmood Farooqui v State (Govt. of NCT of Delhi) (2017): This judgment was controversial because it appeared to suggest a 'feeble no' could imply consent, especially in the context of past intimacy. This interpretation was widely criticized for going against the principle of affirmative consent.

The conversations and understandings of consent are complex and are continuously evolving. Courts and lawmakers are increasingly recognizing that consent must be affirmative, voluntary, and ongoing for any sexual act. However, the need for a clearer, more comprehensive definition of consent in the law remains, to ensure better protection of victims' rights and delivery of justice.

2. Understanding 'uncooperative federalism'

The Supreme Court's recent judgment in *Union of India & Anr. versus M/s Mohit Minerals Pvt. Ltd.* Through Director has introduced the concept of "uncooperative federalism" into the Indian political lexicon. The court has held that when the Constitution itself provides equal powers to union and state governments, the same cannot be bypassed in deciding important policy matters. This means that states cannot simply ignore the recommendations of the Union Government, but must instead engage in a process of discussion and negotiation in order to reach a consensus.

The court's judgment is significant for a number of reasons.

1. First, it provides a much-needed reminder that federalism is not simply about cooperation between the different levels of government. It is also about ensuring that each level of government has the power to make its own decisions.
2. Second, the judgment sends a strong message to states that they cannot simply ignore the recommendations of the Union Government. They must instead engage in a process of discussion and negotiation in order to reach a consensus.
3. Finally, the judgment provides a framework for resolving disputes between the different levels of government. In the past, such disputes have often been resolved through litigation. However, the court's judgment suggests that a more cooperative approach is preferable.

The concept of "**uncooperative federalism**" is likely to have a significant impact on the way in which the Indian government functions in the years to come. It will force states to take a more active role in decision-making, and it will encourage the different levels of government to work together more closely. This is likely to lead to a more efficient and effective government, and it will ultimately benefit the people of India.

Here are some of the key points from the judgment:

- The Constitution provides for a system of cooperative federalism, in which the different levels of government are supposed to work together to achieve common goals.
- However, this does not mean that the different levels of government are equal. The Union Government has certain powers that are not shared with the states.
- States cannot simply ignore the recommendations of the Union Government. They must instead engage in a process of discussion and negotiation in order to reach a consensus.
- The court's judgment provides a framework for resolving disputes between the different levels of government.

The concept of "uncooperative federalism" is a new one, and it remains to be seen how it will be implemented in practice. However, the court's judgment is a significant step towards a more democratic and effective system of government in India.

3. Passive Euthanasia in India: A Legal Perspective

Passive euthanasia, the act of withdrawing or withholding medical treatment to allow a terminally ill or permanently vegetative patient to die naturally, has been a contentious issue globally. In India, it has raised profound questions about the sanctity of life, individual autonomy, and the obligations of medical practitioners.

The legal status of passive euthanasia in India has evolved significantly over the past decade. The landmark Supreme Court judgment in **Aruna Shanbaug vs Union of India (2011)** and **Common Cause (A Regd. Society) vs Union of India (2018)** have provided important legal precedents.

In the **Aruna Shanbaug case**, passive euthanasia was first recognized by the Indian judiciary. The court distinguished between active euthanasia, which involves administering lethal substances to cause death and remains illegal in India, and passive euthanasia. The court ruled that while active euthanasia was unquestionably illegal, passive euthanasia could be allowed in certain circumstances.

However, the process was fraught with legal challenges, and the court suggested that decisions should be made on a case-by-case basis. The court held that such decisions should involve high court oversight, and input from a team of doctors and close relatives.

The 2018 Common Cause judgment further refined India's stance on passive euthanasia. The Supreme Court not only affirmed the legality of passive euthanasia but also legalized 'Advance Medical Directives' or 'Living Wills'.

Living Wills

A Living Will is a document that a person, when in a sound state of mind, can draft to specify their wish not to be put on life support in case they slip into a condition where they can't express their wishes. The court outlined rigorous procedural safeguards to prevent misuse, including the involvement of a team of medical experts, a waiting period for revoking the decision, and the option for the patient's relatives to challenge the Living Will.

Despite these judgments, euthanasia remains a complex issue in India. These Supreme Court decisions provide a pathway for passive euthanasia, but they also highlight the need for a detailed legislative framework to prevent misuse. It's important to consult with legal and medical experts to navigate these intricate procedures.

4. Supreme Court's recognition of the 'third gender'

The landmark judgement of the **National Legal Services Authority (NALSA) v. Union of India** by the Supreme Court of India in April 2014 was indeed a milestone in the recognition and advancement of transgender rights in the country.

Fundamental right Violated

In this ruling, the Supreme Court recognised transgender people as a 'third gender' that is distinct from the binary categories of male and female. The court stated that discrimination on the grounds of sexual orientation or gender identity violated India's Constitution, specifically, the fundamental right to equality (Article 14), the prohibition of discrimination (Article 15), and the right to life and personal liberty (Article 21).

Furthermore, the Supreme Court held that the fundamental right to life and personal liberty includes the right to live with dignity and the right to autonomy and self-identification of one's gender as male, female or third-gender. This principle represented a radical departure from traditional norms and paved the way for a broader interpretation of constitutional rights.

The judgement had far-reaching impacts on Indian society and law. It mandated the government to provide transgender people with quotas in jobs and education, akin to other marginalized communities, and to provide necessary health care, social welfare, and other amenities. The court also called upon the government to raise public awareness to reduce the social stigma associated with transgender individuals.

- The judgement led to the passing of the **Transgender Persons (Protection of Rights) Act in 2019**. Though it was meant to cement the rights established by the NALSA judgement, it received mixed responses, with criticism focusing on its perceived failure to adequately protect transgender persons from discrimination and to fully recognise their right to self-identify their gender.

While the NALSA judgment is a significant step towards securing the rights of transgender people, it's clear that further work is needed to ensure the full and effective realization of these rights in all aspects of life. This includes not only legal and policy measures, but also broader societal change to address stigma, discrimination, and violence against transgender people.

5. Deceptive Similarity under Trademark Act

"Deceptive similarity" is a legal term used in Intellectual Property Rights (IPR) laws to address issues related to trademarks and copyright. It is a critical component of the Trade Marks Act, 1999 in India. According to Section 2(1)(h) of this Act, a mark is deemed to be deceptively similar to another mark if it so nearly resembles that other mark as to be likely to deceive or cause confusion.

According to Indian trademark law, when a trademark is applied for registration, it should not be similar or deceptively similar to any existing registered trademark. If it is, the registration may be denied. The basic intent behind this provision is to avoid confusion among the public about the origin of goods or services.

Deceptive similarity is determined by:

1. The overall structure and phonetic similarity of the trademarks in question.
2. The nature of the goods or services for which they are used.
3. The class of customers likely to buy these goods or use these services.

4. The overall impression the mark creates in the mind of an average consumer with imperfect recollection.

If two marks are found to be deceptively similar, it can lead to infringement proceedings. The holder of the original trademark can sue the infringer for damages, and the courts can order the infringer to cease using the deceptive mark.

In order to be successful in a claim of deceptive similarity, the claimant must show that the alleged infringing mark is likely to deceive or cause confusion for the public. The actual occurrence of deception or confusion is not necessary; the likelihood is sufficient.

A landmark case highlighting deceptive similarity is "**Cadila Healthcare Ltd. vs Cadila Pharmaceuticals Ltd.**" (2001 PTC (21) 583). The Supreme Court laid down certain key factors to determine whether one product is deceptively similar to another. They include the nature of the marks—whether the marks are word marks, label marks or composite marks, the degree of resemblance—whether phonetic, visual or in the basic idea, and the likelihood of confusion.

The Court noted that the "possibility of an unwary purchaser getting confused between the two, will have to be considered." This case set significant precedents for determining deceptive similarity in Indian trademark disputes.

In a case of deceptive similarity, the holder of the original trademark can sue the infringer for damages under Section 29 of the Trade Marks Act. It's important to note that in order to be successful in a claim of deceptive similarity, the claimant must prove that the alleged infringing mark is likely to deceive or cause confusion among the public. Actual deception or confusion is not a prerequisite; a likelihood is sufficient.

6. Case of the week: Kehar Singh v. Union of India :

Background: This case arose from the assassination of former Prime Minister Indira Gandhi. Kehar Singh, one of the accused in the assassination case, was convicted and sentenced to death by the trial court. His plea for clemency was rejected by the President of India.

Issue: The key issue before the Supreme Court was the scope and extent of the President's pardoning power under Article 72 of the Constitution.

Key Decision: The Supreme Court, in this case, upheld the constitutional validity of the President's power to grant pardon, reprieve, respite, or remission of punishment.

The Court clarified that the President's power was not absolute or immune from judicial review. It stated that the President's decision must be based on valid and relevant considerations and could be subject to judicial review on the grounds of malafide, arbitrariness, or violation of the Constitution.

Rationale: The Court recognized that the power of pardon is an integral part of the criminal justice system and acts as a check against any errors, injustice, or undue severity. It held that the President's power should be exercised with due care and caution, keeping in mind the principles of fairness, justice, and public interest.

Impact: The Kehar Singh case established the principle that the President's power of pardon is subject to judicial review and must conform to constitutional norms. It reaffirmed the importance of fairness and due process in the exercise of this power, ensuring that it is not misused or arbitrarily applied.

It is worth noting that the pardoning power of the President is a significant constitutional authority that has been further clarified and interpreted in subsequent cases and legal discussions. The Kehar Singh case stands as a pivotal decision in understanding the nature, scope, and limitations of the President's power to grant pardons in India.

7. Repeated PYQ Model Answer of the Week

“The ‘Right of Reputation’ is acknowledged as an inherent personal right of every person.” Discuss the statement in the light of Law of Defamation in India.

The right of reputation is recognized as an inherent personal right of every person in India. It is a right that is good against all persons in the world and protects one's character, fame or reputation from being injured by false and malicious statements. Defamation is the act of making such statements that harm the reputation of another person. Defamation can be both a civil and a criminal offence in India.

Defamation and Tort Law

Defamation as a civil offence is governed by the law of torts, which imposes liability on the person who makes the defamatory statement and awards damages to the person who suffers from it. The essential elements of civil defamation are:

1. - The statement must be defamatory, i.e., it must lower the esteem of the person in the eyes of others or expose him to hatred, contempt or ridicule.
2. - The statement must refer to the plaintiff, i.e., it must identify him either expressly or impliedly.
3. - The statement must be published, i.e., it must be communicated to at least one person other than the plaintiff.

Defamation as a criminal offence

It is codified under sections 499 and 500 of the Indian Penal Code, 1860 (IPC), which prescribe imprisonment or fine or both as punishment for defamation. The essential elements of criminal defamation are:

1. - The statement must be defamatory as defined above.
2. - The statement must refer to the plaintiff as defined above.
3. - The statement must be made with an intention to harm or with knowledge or reason to believe that it will harm the reputation of the plaintiff.
4. - The statement must be made without any lawful justification or excuse.

There are two forms of defamation: libel and slander. Libel is defamation in a permanent and visible form, such as writing, printing, pictures or effigies. Slander is defamation in a transient form, such as spoken words or gestures. Libel is actionable per se, i.e., without proof of actual damage, whereas slander is actionable only on proof of actual damage, except in certain cases where slander is deemed to be

actionable per se, such as imputing unchastity to a woman or accusing a person of having a loathsome disease.

Defenses in Defamation

The law of defamation in India also recognizes certain defences that can be pleaded by the defendant to escape liability. These are:

- **Truth:** If the defendant can prove that the statement made by him was true and was made for public good, he will not be liable for defamation.

- **Fair comment:** If the defendant can prove that the statement made by him was an expression of opinion on a matter of public interest and was based on true facts, he will not be liable for defamation.

- **Privilege:** If the defendant can prove that the statement made by him was under certain circumstances that gave him immunity from liability, he will not be liable for defamation. Privilege can be absolute or qualified. Absolute privilege applies to statements made in Parliament, courts of justice, etc., whereas qualified privilege applies to statements made in good faith on occasions where there is a duty or interest to make them, such as reports of public proceedings, fair criticism, etc.

Defamation and Constitution

The law of defamation in India has to be balanced with the right to freedom of speech and expression guaranteed by Article 19(1)(a) of the Constitution of India. The Supreme Court has held that defamation is a reasonable restriction on this right under Article 19(2) as it protects the dignity and reputation of individuals. However, the court has also cautioned that defamation should not be used as a tool to stifle legitimate criticism or dissent.

Some landmark cases on defamation law in India are:

- **R. Rajagopal v. State of Tamil Nadu (1994):** The Supreme Court held that public officials cannot sue for defamation for any publication relating to their official acts unless they can prove malice.

- **Subramanian Swamy v. Union of India (2016):** The Supreme Court upheld the constitutional validity of sections 499 and 500 of IPC but read down some of its explanations and exceptions to make them compatible with Article 19(1)(a).

Thus, the law of defamation in India aims to protect the right of reputation of every person while also respecting the right to freedom of speech and expression.

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