

Weekly Update for Law optional UPSC

A mix of Conceptual, Current/Contemporary Topics

Date: 23rd - 30th July 2023

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1. 'Cruelty' in Context of IPC Section 300 Exception 4

(Relevant Topic: Law of Crime, Offence against Women)

The Supreme Court in **L/Nk Gursewak Singh vs Union of India** stated that the term 'cruel' as used in exception 4 of Section 300 of the Indian Penal Code (IPC) is a relative term, and should not be taken in its ordinary meaning. The court observed that if the standard meaning of 'cruel' was used, exception 4 could never be applied, as the act of killing itself is generally considered cruel.

- This judgement was delivered by a bench comprising Justices Abhay S. Oka and Sanjay Karol, in a case where a Lance Naik from the Indian Army was convicted under Section 302 of the IPC and Section 69 of the Army Act, 1950. The defendant argued that his actions fell under exception 4 to Section 300 of the IPC, claiming that the incident resulted from a sudden fight, and that he acted in the heat of passion.

The Union of India opposed this interpretation, arguing that the situation did not involve a sudden fight, and that the accused had acted cruelly. After examining the evidence, the bench determined that the accused's actions did not represent a level of cruelty that would preclude the application of exception 4 to Section 300 of the IPC.

The court partly allowed the appeal, reducing the charge from murder to culpable homicide not amounting to murder, under the first part of Section 304 of IPC. The Court also considered the conduct of the appellant as a mitigating factor for determining the sentence, and reduced his term to the duration he had already served.

2. Voting Rights and Democracy in Constitution

(Relevant Topic: Consti, Election Commission, Fundamental Right)

The Supreme Court in **Bhim Rao Baswanth Rao Patil V. K. Madan Mohan Rao & Ors** highlighted a paradox in the Indian Constitution, observing that although democracy is considered an essential feature of the Constitution, the right to vote is not recognized as a fundamental right. It is, instead, classified as a "mere" statutory right.

- The observations were made by a bench comprising Justices S Ravindra Bhat and Aravind Kumar, during the **Bhim Rao Baswanth Rao Patil V. K. Madan Mohan Rao & Ors** case, which involved an appeal against the Telangana High Court's refusal to dismiss an election petition at an initial stage.
- The bench also made notable comments regarding voters' rights to be fully informed about a candidate's background. The court stated, "The right to vote, based on an informed choice, is a crucial component of the essence of democracy... This right is precious and was the result of a long and arduous fight for freedom, for Swaraj, where the citizen has an inalienable right to exercise her or his right to franchise."

It's worth noting that in a recent case related to the appointment of Election Commissioners, a Constitution Bench of the Supreme Court by a 4:1 majority ruled that the right to vote is a Constitutional right. However, Justice Ajay Rastogi dissented, asserting that the right to vote is part of fundamental rights.

3. Arbitral Awards and the Fundamental Policy of Indian Law

(Relevant Topic: ADR, CLD and Contract Act)

The Delhi High Court in **National Highways Authority of India vs GVK Jaipur Expressway Private Limited** has recently ruled that an arbitral tribunal's failure to consider a clause from an agreement between disputing parties does not necessarily constitute an error opposed to the fundamental policy of Indian law. Nor would such a failure render an arbitral award patently illegal, provided the arbitrator's viewpoint is plausible.

This ruling was made by Chief Justice Satish Chandra Sharma and Justice Subramonium Prasad in relation to an arbitral award challenged on the basis that the Arbitrator overlooked a pertinent clause of the Concession Agreement in delivering the award.

The case involved the National Highways Authority of India (NHAI) and GVK Jaipur Expressway Pvt Ltd, who entered into a Concession Agreement for the construction of Toll Plazas. A dispute emerged between the parties, leading to arbitration. The Arbitral Tribunal, by majority award, rejected the respondent's claim for compensation for the construction of additional toll lanes, ruling it as within the awarded scope of work. This decision was challenged and the Single Judge of the Delhi High Court set it aside on the grounds of it being contradictory to the terms of the contract.

NHAI appealed this decision under Section 37 of the Arbitration and Conciliation Act, 1996 (A&C Act), arguing that the Single Judge had set aside the arbitral award despite acknowledging the plausibility of the Arbitral Tribunal's interpretation.

The High Court bench stated that in the exercise of its appellate powers under Section 37, it could not re-appreciate evidence or delve into the merits of an arbitral award. The court's role was solely to adjudicate on whether the Section 34 court had exceeded its jurisdiction or not.

Citing various Supreme Court rulings, the bench defined the "fundamental policy of Indian law" as the contravention of a law protecting national interest or the disregard of orders from a superior court. A mere contravention of a statute, unless it impacts the protection of national interest, would not constitute a violation of this fundamental policy.

The court also clarified that an erroneous application of law doesn't constitute patent illegality. Patent illegality means an illegality that affects the essence of the matter, such as an arbitral tribunal making an impossible claim, wrongly interpreting a contract clause, making a jurisdictional error, or providing no reason for its decision.

In conclusion, the court stated that the arbitral tribunal's failure to consider Clause 18.4 of the Concession Agreement did not constitute an error that would go against the fundamental policy of Indian law or create a patent illegality. The court stressed that a concession agreement is neither a statute nor a law safeguarding national interests, and a tribunal's failure to consider a clause within it wouldn't necessarily contravene the fundamental policy of Indian law.

4. State Immunity and War Crime Reparations

(Relevant Topic: International Law, ICC , ICJ and IHL)

The Italian Constitutional Court recently issued a decision concerning the state immunity of Germany, in relation to reparations for atrocities committed during WWII. This comes in the wake of a pending case between Germany and Italy at the International Court of Justice (ICJ).

The decision underscores the tension between the principle of state immunity and the pursuit of justice for victims of war crimes and crimes against humanity. The Italian Court, in its 2004 Ferrini case, made the precedent-setting ruling that states do not enjoy immunity from lawsuits for compensation for war crimes.

This 'humanitarian exception' to the immunity rule was further affirmed by subsequent Italian tribunal decisions. However, Germany opposed this stance and brought a case against Italy before the ICJ (Germany v. Italy No. 1), leading to the ICJ's ruling in 2012 that Italy had violated customary law on sovereign immunity. To resolve this, Italy then introduced a Decree-Law in 2022 establishing a fund for reparations for war crimes and crimes against humanity committed by the Third Reich's armed forces on Italian territory or against Italian citizens. This law prevents new enforcement proceedings over German assets and automatically extinguishes existing ones.

The Constitutional Court has now ruled that the 2022 law is constitutional, arguing that it does not interfere with victims' access to justice. The Court argued that by transferring the economic burden from Germany to Italy, the law strikes a reasonable balance between the constitutional principles of access to justice and respect for international treaties and obligations.

However, from an international law perspective, the situation remains complicated. The new law essentially protects Germany from further claims, but it does not resolve the disputed issue of state immunity.

Also, non-Italian applicants like Greeks, who have been excluded from both seizing German properties and accessing the fund, might have to either establish a similar fund, reach an agreement with Germany on a joint fund, or challenge the Italian law through a new proceeding.

While the decision may bring closure to the Germany vs Italy case at the ICJ, it might have far-reaching implications, potentially affecting other international disputes concerning state immunity and reparations for human rights violations.

5. National Green Tribunal Ordered Compensation

(Relevant Topic: Consti, Election Commission, Fundamental Right)

The Southern Bench of the National Green Tribunal (NGT) in **N.G. Soman v. Bharat Petroleum Co Ltd, Kochi & Ors.** India has imposed an environmental compensation of ₹2 crores (approximately \$267,000 USD) on Bharat Petroleum Corporation Ltd.'s (BPCL) Kochi Refinery. The penalty is for the "unscientific green belt" that was developed around its Propylene Derivative Petrochemical Project (PDDP) unit.

The tribunal has instructed the management of BPCL to pay this compensation to the Kerala State Pollution Control Board (PCB) within two months. The PCB is expected to use this money to enhance the greenery around the factory and in nearby residential areas. Should BPCL fail to pay the compensation, the PCB is authorised to take steps to recover the amount in accordance with the law.

The tribunal's directives come in response to a petition filed by residents' associations located near the refinery, which claimed that the company was not following environmental norms, leading to air and noise pollution.

Additionally, the NGT has ordered BPCL to maintain the greenbelt along the factory's boundaries as far as possible, and to plant species that will not interfere with safety measures for the existing plants, according to guidelines provided by various departments. The PCB has also been tasked with proposing methods to reduce noise pollution.

Furthermore, BPCL has been directed to increase the density of the tree cover in areas already designated for greenbelts, in consultation with the state's forest department.

The NGT has given regulatory authorities the power to take appropriate action against BPCL if it does not comply with conditions set in the environmental clearance and other permissions granted. It also mandated the Union Ministry of Environment and Forests to ensure that, if BPCL applies for any expansion within the industrial complex in the future, a carrying capacity study must be conducted.

6. Case of the Week: North Sea Continental Shelf Case

The North Sea Continental Shelf Cases (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands) (1969)

Background:

The North Sea Continental Shelf cases are a set of two cases that were heard by the International Court of Justice (ICJ) in 1969. The issue in question was a dispute between Germany, Denmark, and the Netherlands regarding the delimitation, or setting of boundaries, of sections of the continental shelf in the North Sea. The continental shelf refers to the extended perimeter of each country's natural land territory, where the seabed and the subsoil of the submarine areas are potentially rich in mineral and other resources. The importance of the case lay in the unprecedented nature of the dispute, and the absence of an established principle in international law for the division of a continental shelf among countries.

Legal Issues:

1. Determination of the principle or principles of international law which should be applied for the delimitation of the areas of continental shelf between the countries involved.
2. Whether the equidistance principle, stipulated in the 1958 Geneva Convention on the Law of the Sea, could be applied between the states, even though only Denmark and the Netherlands had ratified the convention, while Germany had not.

Decision:

The ICJ rejected the use of the equidistance principle as a mandatory rule of customary international law. The court observed that the provisions of the Geneva Convention could not be applied to Germany, as it was not a party to the Convention. The ICJ held that the delimitation was to be effected by an agreement in accordance with equitable principles, and taking into account all the relevant circumstances, so as to leave each country with an equitable share.

Significance:

The North Sea Continental Shelf cases played a significant role in the development of the international law of the sea. The cases established that the fundamental principle to be used in delimitation disputes is equity, which implies a just and fair solution, taking into account all relevant factors and circumstances.

The case also reinforced the importance of consent in treaty law. The court affirmed that treaty provisions become binding on a third state (a state not party to that treaty) as a matter of customary international law only when it could be shown that the provision has been so widely accepted in the international community that it can be presumed to be a universally accepted principle of law.

7. Repeated Previous Year Question Answer

Question- Is “Commercial advertisement” covered within the ambit of “freedom of speech and expression”? Discuss with reference to leading cases.

Freedom of speech and expression is a fundamental right protected under Article 19(1)(a) of the Indian Constitution. This right allows individuals to express their opinions and thoughts freely without undue interference. However, the scope and interpretation of this right have evolved over time through various landmark judgments rendered by the Indian courts.

Commercial Advertisements

In the early years of interpreting the Constitution, commercial speech was not regarded as an aspect of Article 19(1)(a). However, with societal progression, the Supreme Court of India recognized commercial advertisements as an essential component of freedom of speech and expression in its landmark judgment of *Tata Press Ltd. v. MTNL* (AIR 1995 SC 2438).

In this case, the Supreme Court noted that the commercial speech cannot be denied the protection of Article 19(1)(a) merely because the same are issued by businessmen. The court held that the public at large is benefitted by the information made available through the advertisements. In a democratic economy, free flow of commercial information is indispensable, and therefore such commercial speech falls within the ambit of Article 19(1)(a).

Restrictions

While the Indian courts have recognized commercial advertisements as an extension of the freedom of speech and expression, it is crucial to note that this right is not absolute. Article 19(2) of the Indian Constitution provides for reasonable restrictions on the exercise of the right to freedom of speech and expression in the interest of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence.

In *Hamdard Dawakhana v. Union of India* (AIR 1960 SC 554), the Supreme Court held that deceptive or misleading advertisements can be restricted as they adversely affect the public and can disrupt the market economy. In this case, the court upheld the constitutional validity of a legislative act that banned advertisements promoting drugs with unsubstantiated claims of curing certain diseases and conditions.

Thus, the question of whether commercial advertisement falls under the ambit of 'freedom of speech and expression' has been unequivocally answered in the affirmative by Indian courts. However, this recognition does not confer an absolute right on advertisers. The restrictions under Article 19(2) ensure that commercial advertisements uphold the principles of fairness, honesty, and consumer protection, thus balancing individual rights with the broader societal interests. It is this balance that truly exemplifies the ethos of the Indian Constitution and its commitment to uphold fundamental rights while promoting the welfare of society at large.

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