

## Weekly Update for Law Optional UPSC

A mix of Conceptual, Current/Contemporary Topics

**07th October - 13th October 2024**

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### 1. Difference between Article 226 and 227 of Constitution

Articles 226 and 227 of the Indian Constitution provide distinct yet sometimes overlapping powers to the High Courts in India.

- Article 226 empowers the High Courts to issue writs, primarily for the enforcement of fundamental rights, but also for any other purpose.
- On the other hand, Article 227 grants the High Courts supervisory jurisdiction over all subordinate courts and tribunals within its territorial jurisdiction.

Despite the differences in scope, these two articles often create confusion, particularly when the writ of certiorari is involved.

In *Surya Dev Rai v. Ram Chander Rai*, the Supreme Court of India comprehensively addressed the distinction between the powers exercised under Articles 226 and 227, particularly in the context of the writ of certiorari. The Court highlighted the following key differences:

1. The proceedings under Article 226 are original in nature, while those under Article 227 are revisional.
2. Under Article 226, the High Court is primarily concerned with the legality of the order passed by a subordinate court or tribunal, while under Article 227, the High Court exercises supervisory jurisdiction to ensure that the subordinate court acts within its jurisdiction.
3. The powers under Article 227 are much wider and include the power to not only quash an order but also issue directions and substitute its own decision, if necessary, for ensuring that justice is done.

The Court also emphasized that the power of judicial review under Article 226 is exercised when a legal or fundamental right is violated, while Article 227 is invoked to correct errors of jurisdiction, procedural irregularities, and gross miscarriages of justice.

## 2. Supreme Court Quashes Abetment of Suicide Case against Hindustan Lever Officers

The Supreme Court in *Nipun Aneja & Ors. v. The State of Uttar Pradesh*, quashed criminal proceedings against three senior officers of Hindustan Lever Limited (HLL) who were accused of abetment of suicide under Section 306 of the Indian Penal Code (IPC).

Rajeev Jain, a 23-year employee of HLL, committed suicide in 2006 following a meeting in which it was alleged that he was harassed by senior officials of the company.

The court referred to the decision of earlier supreme Court decision in case of *Netai Dutta v. State of West Bengal*, reported in (2005) 2 SCC 659, an employee of a company was transferred from one place to another. However, he failed to join. Thereafter, he sent a letter of resignation expressing his grievance against stagnancy to salary and unpleasant situation.

The court further referred to, *M. Arjunan v. State*, represented by its Inspector of Police reported in (2019) 3 SCC 315, while explaining the necessary ingredients of Section 306 of the IPC in detail, observed as under:-

“7. The essential ingredients of the offence under Section 306 I.P.C. are:

1. (i) the abetment;
2. (ii) the intention of the accused to aid or instigate or abet the deceased to commit suicide.

The act of the accused, however, insulting the deceased by using abusive language will not, by itself, constitute the abetment of suicide. There should be evidence capable of suggesting that the accused intended by such act to instigate the deceased to commit suicide. Unless the ingredients of instigation/abetment to commit suicide are satisfied, accused cannot be convicted under Section 306 IPC.”

In its final judgment, the Supreme Court quashed the criminal proceedings against the three accused officers of HLL, stating that there was no prima facie case of abetment of suicide.

## 3. Journey of a UN security Council Resolution

The process of adopting a Security Council resolution is a multi-stage procedure that emphasizes negotiation, compromise, and consensus among the 15 members of the Council. The key steps are as follows:

1. **Drafting the Initial Proposal:** A draft resolution is first introduced by one or more Council members, known as the "penholders." This draft is often formulated after consultations with relevant stakeholders, including regional groups, the country of concern, and other UN Member States.

2. **Zero Draft Circulation:** The initial draft, referred to as the "zero draft," is then circulated to Council members for comments. At this stage, the draft is a working document subject to significant revisions based on feedback from other members.
3. **Negotiation and Amendments:** Council members engage in negotiations, which can occur both formally and informally. These discussions often involve resolving disagreements over specific language, such as the use of terms like "ceasefire" or "cessation of hostilities." Input may also come from the capitals of Council members' home countries.
4. **Finalization and "In Blue" Draft:** After incorporating revisions, the final draft is circulated "in blue," signaling that it is ready for a formal vote. This step traditionally involves the formatting of the document and its distribution to all Council members.
5. **Vote and Veto:** In a formal session, the draft is put to a vote. A minimum of nine affirmative votes is required for adoption, but any of the five permanent members (China, France, Russia, the UK, or the US) can veto the resolution, blocking its passage.
6. **Final Publication:** If adopted, the resolution becomes a legally binding document for all 193 UN Member States, translated into the UN's six official languages. Both adopted and rejected drafts are archived and made accessible for future reference.

#### 4. Principle of Non-Refoulement and Its Applicability in India

One of the fundamental principles of international refugee law is non-refoulement, which prohibits the return of refugees to a place where they would face persecution or threats to their life or freedom.

Articles 32 and 33 of the 1951 Refugee Convention establish this principle, which has gained the status of customary international law and is widely recognized as binding on all states, regardless of treaty ratification.

India has largely adhered to the principle of non-refoulement in practice, albeit without formal recognition in its domestic legal framework.

The judiciary has played an important role in upholding this principle. In the *National Human Rights Commission vs. State of Arunachal Pradesh (1996)*, the Supreme Court protected the rights of Chakma refugees from being forcibly returned.

The Court ruled that the right to life and personal liberty under Article 21 of the Indian Constitution extends to all individuals within Indian territory, including refugees. However, this adherence has faced challenges in recent years, especially regarding the Rohingya refugees.

- The Indian Supreme Court's decision in 2021 to permit the deportation of Rohingya refugees to Myanmar, despite ongoing violence and persecution, drew criticism for its departure from the principle of non-refoulement. The decision was based on the argument that the government had the sovereign right to address security concerns and regulate the entry of foreigners. This judgment demonstrates the tension between security considerations and humanitarian obligations, underscoring the need for a clear legal framework to navigate such conflicts.

#### Constitutional and Legal Framework

India's legal landscape concerning refugees is complex and fragmented. While the country lacks a dedicated refugee law, several constitutional provisions and statutes govern the status and treatment of refugees.

- Article 21 – Right to Life and Personal Liberty: Article 21 of the Indian Constitution guarantees the right to life and personal liberty to all individuals, including non-citizens.

This provision has been interpreted expansively by the judiciary to include the rights of refugees, ensuring they are not arbitrarily detained or deported without due process.

- Foreigners Act, 1946: The Foreigners Act primarily regulates the entry, stay, and exit of all foreigners in India. It empowers the government to detect, detain, and deport illegal immigrants.

However, it does not distinguish between refugees fleeing persecution and other categories of immigrants, leading to arbitrary enforcement and a lack of clarity on refugee rights.

- Citizenship Amendment Act, 2019 (CAA): The CAA amended India's citizenship law to provide a pathway to citizenship for religious minorities (Hindus, Sikhs, Buddhists, Jains, Parsis, and Christians) from Afghanistan, Bangladesh, and Pakistan who entered India before December 31, 2014.

The exclusion of Muslims, particularly Rohingyas, has led to allegations of discrimination and contravenes the non-discrimination principle of refugee law. This law has created ambiguity regarding the treatment of refugees, particularly Muslim refugees, and has fueled debates on secularism, citizenship, and minority rights in India.

- Standard Operating Procedures (SOPs) and Ad Hoc Policies: In the absence of a uniform refugee law, India's refugee policies are guided by standard operating procedures (SOPs) issued by the Ministry of Home Affairs and ad hoc decisions based on geopolitical and security considerations.

### Weekly Focus

#### **Case of the week: United India Insurance Co. Ltd. v. Antique Arts Exports (P) Ltd**

In *United India Insurance Co. Ltd. v. Antique Arts Exports (P) Ltd.*, (2019) 5 SCC 262, the Supreme Court addressed a significant issue concerning the nature of the court's power in appointing arbitrators under Section 11 of the Arbitration and Conciliation Act, 1996.

#### **Facts of the Case**

The dispute arose from an insurance claim made by Antique Arts Exports (P) Ltd. for damages caused by fire. United India Insurance Co. Ltd. rejected the claim, leading to a dispute between the parties. Subsequently, Antique Arts Exports invoked the arbitration clause in the insurance policy and applied for the appointment of an arbitrator, as the insurance company refused to appoint one.

In arriving at this conclusion, the Court emphasized the following points:

1. **Role of Section 11 of the Arbitration Act:** The Court highlighted that Section 11 confers the power on the court to appoint arbitrators when the parties are unable to agree upon one. However, the Court noted that this power is not merely administrative.

Instead, it involves the examination of the arbitration agreement, determining the validity of the arbitration clause, and resolving disputes about the qualifications of the arbitrator. These

functions require the application of legal principles and are thus judicial in nature.

2. **Nature of Judicial Power:** A judicial function requires the application of law to facts, as well as a reasoned decision-making process, which are hallmarks of a court's role when appointing arbitrators under Section 11.

The Court found that even though the primary role of courts in arbitration is to facilitate the arbitral process, the act of appointing an arbitrator is inherently judicial because it affects the rights of the parties.

## PYQ Solution

**Q.6(a). Peaceful settlement of International disputes has been developed on the principles of International Law concerning friendly relations and cooperations among States . Explain. (20 Marks, 2024)**

The legal basis for the peaceful settlement of international disputes is primarily found in Chapter VI of the United Nations Charter, which is devoted to the "Pacific Settlement of Disputes." Article 2(3) of the Charter explicitly requires all UN member states to resolve their disputes by peaceful means.

### UN Charter Provisions (Chapter VI)

- Article 2(3): States that all members of the United Nations "shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered."
- Article 33: Enumerates the methods available for peaceful dispute resolution, including negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, and resort to regional agencies or arrangements.
- Article 36: Empowers the UN Security Council to recommend appropriate procedures or methods for the settlement of disputes.

In addition to these provisions, the Friendly Relations Declaration of 1970 further developed the principle of peaceful dispute settlement.

### Principles Governing the Peaceful Settlement of Disputes

Several key principles form the foundation of the peaceful settlement of international disputes. These principles emphasize diplomacy, cooperation, and adherence to international norms.

**1. Non-Use of Force:** The principle of non-use of force is one of the most fundamental tenets of international law. Under Article 2(4) of the UN Charter, states are prohibited from using force in their international relations, except in self-defense (Article 51) or when authorized by the UN Security Council.

*The Nicaragua v. United States (1986)* case, decided by the International Court of Justice, reaffirmed the principle of non-use of force. The Court ruled that the U.S. had violated international law by supporting armed rebel groups in Nicaragua, emphasizing the obligation of states to resolve disputes peacefully and without resort to force.

**2. Sovereign Equality of States:** The principle of sovereign equality implies that all states, regardless of size or power, have equal rights and duties under international law. This includes the equal right to resolve disputes peacefully, without coercion or domination by more powerful states.

**3. Respect for Territorial Integrity and Political Independence:** States are required to respect each other's territorial integrity and political independence while settling disputes. This principle implies that no state should attempt to impose a solution on another through threats, coercion, or violation of territorial sovereignty.

**4. Principle of Good Faith:** The principle of good faith obliges states to act sincerely in the negotiation and resolution of disputes. This means that states must engage constructively in peaceful settlement processes without ulterior motives or bad faith attempts to stall or manipulate outcomes.

### Law Optional and GS Papers overlap

## Law optional and GS - II: Relationship between the President and the Council of Ministers

The relationship between the President and the Council of Ministers in India is designed to reflect the country's parliamentary democracy, where real executive power lies with the elected representatives of the people.

The President, though the ceremonial head, is bound by the advice of the Council of Ministers under Article 74. The President's role is largely symbolic and advisory, with decision-making authority vested in the Prime Minister and the Council of Ministers, who remain accountable to Parliament.

### Constitutional Provisions Defining the Relationship

- 1. Article 74(1): Council of Ministers to Aid and Advise the President:** Article 74(1) of the Constitution establishes that there shall be a Council of Ministers with the Prime Minister at its head to aid and advise the President in the exercise of their functions. The President is bound by this advice. In the **Shamsher Singh v. State of Punjab** (1974) case, the Supreme Court held that the President is a constitutional head and is bound by the advice of the Council of Ministers, reflecting the real functioning of the executive in a parliamentary democracy.
- 2. Article 75(1): Appointment of the Prime Minister:** Under Article 75(1), the Prime Minister is appointed by the President. However, this appointment is not at the President's discretion. The President must appoint the leader of the party or coalition that commands a majority in the Lok Sabha (Lower House of Parliament). The President exercises this power as a formality in line with parliamentary norms.
- 3. Article 75(2): Ministers Hold Office at the President's Pleasure:** While the ministers technically hold office at the pleasure of the President, in practice, they remain in office as long as they enjoy the confidence of the Lok Sabha. This is a constitutional requirement that ensures the functioning of a parliamentary democracy, where the executive is accountable to the legislature.
- 4. Article 75(3): Collective Responsibility of the Council of Ministers:** Article 75(3) introduces the concept of **collective responsibility**, stating that the Council of Ministers is collectively responsible to the Lok Sabha. This means the entire Council must resign if it loses the confidence of the Lok Sabha, even if it is just one minister who faces a no-confidence motion.
- 5. Article 78: Duties of the Prime Minister in Relation to the President:** Article 78 stipulates that the Prime Minister must:

- a. Communicate to the President all decisions of the Council of Ministers relating to the administration of the Union and proposals for legislation.
- b. Provide information on government affairs to the President whenever required.
- c. Submit for consideration any matter on which the President may request the Council's advice, even if it was not considered by the Council of Ministers.

### Ceremonial vs. Real Power

The Constitution envisions a **parliamentary system of government**, wherein the President acts on the advice of the Council of Ministers in all matters, exercising powers nominally but relying on the real decision-making authority of the Council. This model contrasts with a **presidential system**, where the head of state and the head of government are the same, and the President holds significant independent power.

1. **Executive Powers:** The President formally exercises all executive powers of the Union (Article 53), but these powers are exercised on the aid and advice of the Council of Ministers. In practice, the Council of Ministers led by the Prime Minister makes all policy decisions and executive actions.

**Ram Jawaya Kapoor v. State of Punjab (1955):** The Supreme Court ruled that the executive power of the Union is vested in the President, but this power is exercised by the Council of Ministers. The Court observed that the President is the formal head of the executive, but the real decision-making power lies with the elected representatives of the people, i.e., the Council of Ministers.

2. **Legislative Powers:** The President summons and prorogues Parliament, addresses its joint sessions, and gives assent to bills passed by Parliament. However, even here, the President acts on the advice of the Council of Ministers. While the President may return a bill for reconsideration under Article 111, if the bill is passed again by Parliament, the President must give assent.
3. **Judicial Powers:** The President has the power to grant pardons, reprieves, and respites under Article 72. Even in exercising these judicial powers, the President does so based on the advice of the Council of Ministers. In **Kehar Singh v. Union of India (1989)**, the Supreme Court held that the President must act on the advice of the Council of Ministers when exercising clemency powers.
4. **Discretionary Powers:** While the President generally acts on the advice of the Council of Ministers, there are a few situations where the President can act independently:
  - When no party commands a majority in the Lok Sabha after a general election, the President has the discretion to invite the leader of the largest party or coalition to form the government.
  - In cases of a hung Parliament or no-confidence motions, the President may exercise discretion in deciding whether to dissolve the Lok Sabha.

However, these discretionary powers are exercised rarely and cautiously, as the President must ultimately respect the parliamentary system's principle of executive accountability to the legislature.

### Law Optional and GS - IV: Compliance of law and ethics

While the law provides a framework for behavior and decision-making, ethical sensibility is the compass that guides individuals, particularly those in public service, to navigate the moral dilemmas and gray areas that arise in the discharge of their duties.

Laws, by their very nature, are often rigid, designed to maintain order, fairness, and justice in society. However, they cannot foresee every unique situation or moral conflict that may arise. Ethical reasoning,

which often stems from principles like fairness, justice, integrity, and compassion, helps to fill the gaps that laws leave. For a public servant, merely following the letter of the law may not always lead to the best outcome for society or uphold the true spirit of public service. Ethical sensibility, therefore, acts as an additional layer of judgment to ensure that decisions are not only lawful but also just, fair, and morally defensible.

### **Ethically Right but Not Legally Permissible**

Consider the case of whistleblowing by a public servant. In many jurisdictions, public servants are bound by confidentiality clauses and legal obligations not to disclose sensitive information, particularly related to national security, internal investigations, or other classified matters. However, what happens when a public servant discovers evidence of gross corruption, a violation of fundamental rights, or actions that are causing harm to the public?

The case of **Edward Snowden** is a well-known international example of this type of ethical-legal conflict. Snowden, a former NSA contractor, disclosed classified information about the extent of U.S. government surveillance programs. From an ethical perspective, Snowden justified his actions by arguing that the public had a right to know the extent to which their privacy was being invaded. However, legally, he broke numerous U.S. laws, including the Espionage Act, and was charged with theft of government property and unauthorized communication of national defense information.

### **Legally Right but Ethically Questionable**

Conversely, there are instances where actions may be legally permissible but ethically problematic. In such cases, the law may allow certain conduct that, while not illegal, is viewed by society or certain groups as morally dubious. Public servants must be cautious in these situations, as legal compliance alone may not justify their actions in the eyes of the public or their own conscience.

The 2000 Supreme Court case of **Olga Tellis v. Bombay Municipal Corporation** is relevant here. The Bombay Municipal Corporation decided to evict slum dwellers and pavement dwellers from public lands in the city of Bombay (now Mumbai)..

The Supreme Court, while recognizing the legality of the municipality's actions, held that the right to livelihood is an integral part of the right to life under Article 21. The Court ruled that adequate provisions for resettlement must be made before eviction, striking a balance between the legality of the eviction and the ethical need to protect vulnerable communities from being rendered homeless.

In this case, while the legal framework supported the eviction, ethical considerations such as human dignity, fairness, and social justice led the Court to insist on a more humane approach. The law, in its rigidity, might have allowed for the displacement of thousands of people without addressing their broader social needs. However, ethical reasoning prompted the need for resettlement plans and welfare provisions to mitigate the harm caused by the eviction.