Additional reading material for Polity Classes

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Faculty: Jatin Gupta

The main object of Article 21 is that before a person is deprived of his life or personal liberty by the State, the procedure established by law must be strictly followed.

- The scope of Article 21 was a bit narrow till Maneka Gandhi case as it was held by the Supreme Court in ***A. K. Gopalan vs. State of Madras Case 1950*** that there was no guarantee in our Constitution against arbitrary legislation encroaching upon personal liberty. Hence if a competent legislature makes a law providing that a person may be deprived of his liberty in certain circumstances, the validity of law could not be challenged in a court of law on the ground that the law is unreasonable, unjust, and unfair. *Thus, in Gopalan case, the majority at Supreme Court propounded the view that by adopting the expression 'procedure established by law', article 21 has embodied the English concept of personal liberty in preference to that of American 'Due Process'*.

- In Gopalan case the arguments made by the petitioners were as follows:

  a) The word 'law' in Art. 21 does not mean merely enacted law but incorporates principles of natural justice so that a law to deprive a person of his life or personal liberty cannot be valid unless it incorporates these principles in the procedure laid down by it.
  b) The reasonableness of the law of preventive detention ought to be judged under Art. 19
  c) The expression 'procedure established by law' introduces into India the American concept of procedural due process which enables the Courts to see whether the law fulfils the requisite elements of a reasonable procedure. Thus, in Gopalan, an attempt was made to win for a detenu better procedural safeguards than were available to him under the relevant detention law and Art. 22. But the attempt failed as the Supreme Court rejected all these arguments.

- The ruling thus meant that to deprive a person of his life or personal liberty:
  (1) there must be a law;
  (2) it should lay down a procedure; and
  (3) the executive should follow this procedure while depriving a person of his life or personal liberty

- The majority judgement in Gopalan case was, however, overturned in ***Maneka Gandhi v. Union of India Case 1978***. *Maneka Gandhi v. Union of India* is a landmark case of the post-emergency period. This case shows how liberal tendencies have influenced the Supreme Court in the matter of interpreting Fundamental Rights, particularly, Art. 21. A great transformation has come about in the judicial attitude towards the protection of personal liberty after the traumatic experiences of the emergency during 1975-77

when personal liberty had reached its nadir. This case showed that Art. 21 as interpreted in Gopalan could not play any role in providing any protection against any harsh law seeking to deprive a person of his life or personal liberty

- In Maneka Gandhi, the fact situation was as follows: S. 10(3)(c) of the Passport Act authorises the passport authority to impound a passport if it deems it necessary to do so in the interest of the sovereignty and integrity of India, the security of India, friendly relations of India with any foreign country, or in the interest of the general public. Maneka's passport was impounded by the Central Government under the Passport Act in the interest of the general public. Maneka filed a writ petition challenging the order on the ground of violation of her Fundamental Rights under Art. 21. One of the major grounds of challenge was that the order impounding the passport was null and void as it had been made without affording her an opportunity of being heard in her defence.

- The Court laid down the proposition that Arts. 14, 19 and 21 are not mutually exclusive. A nexus has been established between these three Articles. This means that a law prescribing a procedure for depriving a person of 'personal liberty' has to meet the requirements of Art. 19. Also, the procedure established by law in Art. 21 must answer the requirement of Art. 14 as well Art 19 and 21 are not water-tight compartments. On the other hand, the expression of 'personal liberty' in Art 21 is of the widest amplitude, covering a variety of rights of which some have been included in Art 19 and given additional protection. Hence, there may be some overlapping between Art 19 and 21.

- The expression 'personal liberty' in Art. 21 was given an expansive interpretation. The Court emphasized that the expression 'personal liberty' is of the "widest amplitude" covering a variety of rights "which go to constitute the personal liberty of man". Some of these attributes have been raised to the status of distinct Fundamental Rights and given additional protection under Art. 19. The expression 'personal liberty' ought not to be read in a narrow and restricted sense so as to exclude those attributes of personal liberty which are specifically dealt with in Art. 19. "The attempt of the Court should be to expand the reach and ambit of the Fundamental Rights rather than attenuate their meaning and content by a process of judicial construction." The right to travel abroad falls under Art. 21

- Article 21 would no longer mean that law could prescribe some semblance of procedure, however arbitrary or fanciful, to deprive a person of his personal liberty. It now means that the procedure must satisfy certain requisites in the sense of being fair and reasonable. The procedure "cannot be arbitrary, unfair or unreasonable". The concept of reasonableness must be projected in the procedure contemplated by Art. 21. The Court has now assumed the power to adjudge the fairness and justness of procedure established by law to deprive a person of his personal liberty.

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.**Article 21 and expanding scope**

The expanded scope of Article 21 has been explained by the Apex Court which has provided the list of some of the rights covered under Article 21 on the basis of earlier pronouncements and some of them are listed below:

1. The right to go abroad.
2. The right to privacy.
3. The right to shelter.
4. The right to social justice and economic empowerment.
5. The right against solitary confinement.
6. The right against hand cuffing.
7. The right against delayed execution.
8. The right against custodial death.
9. The right against public hanging.
10. Doctors assistance
11. Protection of cultural heritage.
12. Right of every child to a full development.
13. Right to pollution free water and air

Right to life also means right to take one's own life?

Suicide law in India: Under Section 309 of the Indian Penal Code, an attempt to commit suicide is punishable with simple imprisonment up to one year and/or a fine.

The Supreme Court in 1994 not only decriminalised the attempt to suicide but also observed that the 'right to life' includes the 'right to die.' The court observed that all fundamental rights have positive connotations as well as negative connotations. Thus,

- the fundamental right to freedom of speech and expression can be said to include the right not to speak.
- freedom of movement and association includes the freedom not to move or join an association.
- freedom to do business includes freedom not to do any business.

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A five-judge bench headed by Justice J.S. Verma in Gian Kaur case (1996) made 'right to die' unconstitutional. The Court held that the right to life under Article 21 does not include the right to die.

In 2008, the Law Commission recommended that the suicide bids be decriminalized. It suggested that the intention to commit suicide should be seen as a manifestation of a diseased condition of mind, requiring care and treatment, not punishment. It also pointed out that only a handful of nations like Pakistan, Bangladesh, Malaysia, Singapore and India have persisted with this undesirable.

Arguments against decriminalizing suicide

- It is argued that no individual has complete autonomy with respect to life. His family does have a claim over him.
- A person may be the sole bread winner of his family and if he commits suicide, his family would certainly be driven to destitution.
- But the counter argument is that decriminalization of suicide (Section 309 of IPC) will also decriminalize the abetment to the commission of suicide (Section 306 of IPC). This is more technical as how can abetment of something which is not a crime can be termed as crime. This may enhance the abuse of law after deletion of section 309 of IPC, particularly in cases of dowry death, honour death and by child in case of elderly parents. However, this technical issue can be dealt with by proper amendments.
- Based on individualistic tradition of life as opposed to community way of life
- Govt has responsibility to stop violence even if it is self-inflicted

Arguments in favour of decriminalizing suicide

- It is unfortunate that this is the only law which penalises for not being successful in committing an offence
- Anyone committing suicide certainly needs soft words and wise counselling, not stony dealing by a jailor following harsh treatment meted out by a heartless prosecutor.
- Some people argue that life is given by god and thus should also be taken by him and thus right to die is against religious values. Even by citing examples from mythology of Lord Rama taking Jal Samadhi in the Sarayu to Buddha and Mahavira achieving death by seeking it, suicide could not be termed an irreligious act.
- Questions are also raised over rights of those persons who are terminally ill and want to die with dignity

Euthanasia and right to life

The word 'euthanasia', which originated in Greece, literary means a good death but in this context, it means mercy killing. Euthanasia encompasses various dimensions, from ***active*** (introducing something to cause death) to ***passive*** (withholding treatment or supportive measures); ***voluntary*** (consent) to ***involuntary*** (consent from guardian) and ***physician***

assisted (where physicians prescribe the medicine and patient or the ***third party administers*** the medication to cause death).

Request for premature ending of life has contributed to the debate about the role of such practices in contemporary health care. This debate cuts across complex and dynamic aspects such as ***legal, ethical, human rights, religious, economic, social and cultural aspects*** of the civilised society. In our day to day life, we often come across terminally ill patients that are bedridden and are totally dependent on others. It actually hurts their sentiments. Looking at them we would say that death will be a better option for them rather than living such a painful life. But if on the other hand we look at the *Netherlands* where euthanasia is made legal, we will see that how it is abused there. So following its example no one wants euthanasia to be legalized in India. But the question that lies before us is which will be a better option.

What is Passive Euthanasia?

- Passive euthanasia is a condition where there is withdrawal of medical treatment with the deliberate intention to hasten the death of a terminally-ill patient.
- The 241st report of the Law Commission states that passive euthanasia should be allowed with certain safeguards and there is a proposed law Medical Treatment of Terminally Ill Patient (Protection of Patients and Medical Practitioners) Bill, 2006 in this regard.
- Passive euthanasia entails a patient being allowed to die by limiting medical intervention, not escalating already aggressive treatment, withholding or withdrawing artificial life support in cases that are judged to be medically futile.

Country	Euthanasia	Physician Assisted Suicide
Netherlands, Belgium	Legal	Legal
Germany	Illegal	Legal
Australia, Canada, Israel, Italy, India	Illegal	Illegal

In 2011, the Supreme Court, while hearing the case of Aruna Shanbaug, who was in a vegetative state for more than 40 years, had legalised passive euthanasia partially. A nurse at KEM Hospital in Mumbai, Shanbaug was in a vegetative state since 1973 after a brutal sodomisation and strangling with a dog-chain during a sexual assault. She died in 2015 while on a ventilator for several days after suffering from pneumonia. SC gave patients living in a vegetative state the right to have treatment or food withdrawn and laid down guidelines to process passive euthanasia in the case of incompetent patients. The guidelines included seeking a declaration from a high court, after getting clearance from a medical board and state government.

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The Supreme Court ruled in 2018 that individuals have a right to die with dignity, in a verdict that permits the removal of life-support systems for the terminally ill or those in incurable comas. The court also permitted individuals to decide against artificial life support, should the need arise, by creating a "living will". SC was hearing a plea by NGO Common Cause to declare 'right to die with dignity' as a fundamental right within the fold of right to live with dignity, which is guaranteed under Article 21 of the Constitution.

Arguments against euthanasia

1. Against the constitution of India: 'Right to life' is a natural right embodied in Article 21 but euthanasia/suicide is an unnatural termination or extinction of life and, therefore, incompatible and inconsistent with the concept of 'right to life'. It is the duty of the State to protect life and the physician's duty to provide care and not to harm patients. Supreme Court in Gian Kaur Case 1996 has held that the right to life under Article 21 does not include the right to die.

2. Neglect of Healthcare by State: If euthanasia is legalised, then there is a grave apprehension that the State may refuse to invest in health (working towards Right to life). Legalised euthanasia has led to a severe decline in the quality of care for terminally-ill patients in Holland.

3. May be misused: In the era of declining morality and justice, there is a possibility of misusing euthanasia by family members or relatives for inheriting the property of the patient. The Supreme Court has also raised this issue in the Aruna Shabaug judgement.

4. Lead to commercialisation of health care: Passive euthanasia occurs in majority of the hospitals across the county, where poor patients and their family members refuse or withdraw treatment because of the huge cost involved in keeping them alive. If euthanasia is legalised, then commercial health sector will serve death sentence to many disabled and elderly citizens of India for meagre amount of money. This has been highlighted in the Aruna Shabaug Judgement.

Arguments in favour of euthanasia

1. Right to die with dignity: 'Right to die' supporters argue that people who have an incurable, degenerative, disabling or debilitating condition should be allowed to die with dignity.

2. Care-givers burden: The caregiver's burden is huge and cuts across various domains such as financial, emotional, temporal, physical, mental and social.

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3. Right to refuse care: Right to refuse medical treatment is well recognised in law, including medical treatment that sustains or prolongs life.

SC turned down a friend's plea for mercy killing of vegetative Aruna Shanbaug saying that only hospital could make such a request. The judgment of SC is based on the following logic:

1. If we leave it solely to friends and relatives, there is always a chance that this may be misused by some unscrupulous elements who wish to inherit or grab patients' property.

2. If euthanasia is legalised, then commercial health sector will serve death sentence to many disabled and elderly citizens of India for meagre amount of money

What is a Living Will?

- Living will is a written document that allows a patient to give explicit instructions in advance about the medical treatment to be administered when he or she is terminally-ill or no longer able to express informed consent.
- A Living Will is a healthcare directive, in which people can state their wishes for their end-of-life care, in case they are not in a position to make that decision.

What it should contain?

- The circumstances in which medical treatment should be withheld or withdrawn
- It should specify that the Will can be revoked any time
- It should give the name of the "guardian or close relative" who will give the go-ahead for starting the procedure of passive euthanasia
- If there is more than one Living will, the latest one will be valid.
- It should say that the patient has understood the consequences of executing such a document.

Transgenders and their rights

NALSA judgment

- The Supreme Court in 2014 recognized transgenders as the third gender in a landmark ruling, saying it was addressing a "human rights issue". The court stated that recognition of transgenders as a third gender is not a social or medical issue but a human rights issue.
- PIL was filed by National Legal Services Authority (Nalsa) demanding equal rights.
- The judgements said that non-recognition of gender identity amounts to discrimination under Article 15, which prohibits discrimination on the basis of sex.
- The spirit of the constitution is to provide equal opportunity to every citizen to grow and attain their potential, irrespective of caste, religion or gender
- Self-identification as man or woman, irrespective of sexual reassignment surgery, was now protected by law.

- The judges said rights such as the right to vote, own property, marry and to "claim a formal identity" would be made available "more meaningfully" to the transgender community as a result of the ruling.
- Gender identity refers to each person's deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body which may involve a freely chosen, modification of bodily appearance or functions by medical, surgical or other means and other expressions of gender, including dress, speech and mannerisms. Gender identity, therefore, refers to an individual's self-identification as a man, woman, transgender or other identified category."

The Transgender Persons (Protection of Rights) Bill, 2019 was passed by Parliament on November 26, 2019. Some of the important provisions have been mentioned below:

- **Definition of a transgender person:** The Bill defines a transgender person as one whose gender does not match the gender assigned at birth. It includes transmen and trans-women, persons with intersex variations, gender-queers, and persons with socio-cultural identities, such as *kinnar* and *hijra.*
- **Certificate of identity:** A transgender person may make an application to the District Magistrate for a certificate of identity, indicating the gender as 'transgender'.
- **Prohibition against discrimination:** The Bill prohibits discrimination against a transgender person, including denial of service or unfair treatment in relation to:
  - Education, employment, healthcare.
  - Access to or enjoyment of goods, facilities, opportunities available to the public.
  - Right to movement, right to reside, rent, or otherwise occupy property.
  - Opportunity to hold public or private office.
  - Access to a government or private establishment in whose care or custody a transgender person is.
- **Health care**
  - The Bill also seeks to provide rights of health facilities to transgender persons including separate HIV surveillance centres, and sex reassignment surgeries.
  - It also states that the government shall review medical curriculum to address health issues of transgender persons, and provide comprehensive medical insurance schemes for them.
- It calls for establishing a **National Council for Transgender persons (NCT).**
- **Punishment:** It states that the offences against transgender persons will attract imprisonment between six months and two years, in addition to a fine.

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Section 377

377. Unnatural offences*: Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal shall be punished with imprisonment for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.* ***Explanation****: Penetration is sufficient to constitute the carnal intercourse necessary to the offence described in this section*

- A series of applications for refugee status were filed by members of India's LGBT community living abroad in the years leading up to the Supreme Court's 2018 judgment on Section 377 of the Indian Penal Code
- Courts in Britain and Australia took evidence on whether those from the community faced a real risk of persecution if they returned to India.
- Portions of the section were first struck down as unconstitutional with respect to gay sex by the Delhi High Court in July 2009. That judgement was overturned by the Supreme Court of India (SC) on 11 December 2013 in Suresh Kumar Koushal vs. Naz Foundation. The Court held that amending or repealing section 377 should be a matter left to Parliament, not the judiciary. On 6 February 2016, a three-member bench of the Court reviewed curative petitions submitted by the Naz Foundation and others, and decided that they would be reviewed by a five-member constitutional bench.
- On 24 August 2017, the Supreme Court upheld the right to privacy as a fundamental right under the Constitution in the landmark Puttaswamy judgement. The Court also called for equality and condemned discrimination, stated that the protection of sexual orientation lies at the core of the fundamental rights and that the rights of the LGBT population are real and founded on constitutional doctrine. This judgement was believed to imply the unconstitutionality of section 377.
- In January 2018, the Supreme Court agreed to hear a petition to revisit the 2013 Naz Foundation judgment. On 6 September 2018, the Court ruled unanimously in **Navtej Singh Johar v. Union of India** that Section 377 was unconstitutional "in so far as it criminalises consensual sexual conduct between adults of the same sex". The judgment was given by a five judges bench comprising.
- This decision thus overturned the 2013 ruling in **Suresh Kumar Koushal v. Naz Foundation** in which the court had upheld the law. However, that being said, other portions of Section 377 relating to sex with minors, non-consensual sexual acts, and bestiality remain in force.

SC's decision on Section 377

- Supreme Court declared Section 377 unconstitutional to the extent that it criminalises consensual sexual activity between adults in private.
- However, Section 377 – together with the social prejudices that silently accompany it – continues to live an afterlife.

SC did not strike down Section 377 in its entirety

- In some respects, Section 377 could present a wider range of enforcement challenges. This is because unlike Section 66A, the SC did not strike down Section 377 in its entirety.
- Instead, it chose to strike it down only to the extent that it applies to consensual sexual activity between adults in private.
- Non-consensual sexual activity, as well as sexual activity involving children, can continue to be prosecuted.
- Therefore, the briefing to the lowest levels of enforcement needs to convey the nuanced message that Section 377 may be enforced in some ways, but not others.

Right to privacy

Two Constitution Bench judgments — Sharma (1954), an eight-judge decision, and Kharak Singh (1962), a six-judge judgment — held that the Right to Privacy was not a fundamental right. A Committee of Experts was constituted under Justice A P Shah to study the privacy laws & make suggestions on proposed draft Bill on Privacy 2011

Why right to Privacy is so important?

- The right to dignity which inheres in each individual as a human being is incomplete without the right to privacy and reputation.
- The ability to make choices and decisions autonomously depend on the preservation of the “private sphere".
- The right to personal liberty of human is unsubstantial without adequate protection for right to privacy
- The advent of modern tech tools has made the invasion of privacy easier. Also, several national programmes and schemes are using computerised data collected from citizens which is vulnerable to theft and misuse.

Three years ago, in August 2017, a nine-judge bench of the Supreme Court in ***Justice K. S. Puttaswamy (Retd) Vs Union of India*** unanimously held that Indians have a constitutionally protected **fundamental right to privacy** that is **an intrinsic part of life and liberty under Article 21.**

It held that **privacy is a natural right** that inheres in all-natural persons, and that the right may be restricted only by state action that passes each of the three tests:

- First, such state action must have a legislative mandate;
- Second, it must be pursuing a legitimate state purpose; and
- Third, it must be proportionate i.e., such state action — both in its nature and extent, must be necessary in a democratic society and the action ought to be the least intrusive of the available alternatives to accomplish the ends.

Observations made by some of the judges in Right to Privacy Case

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- Privacy is a constitutionally protected right which emerges primarily from the guarantee of life and personal liberty in Article 21 of the Constitution.
- Privacy includes at its core the preservation of personal intimacies, the sanctity of family life, marriage, procreation, the home and sexual orientation.
- Privacy protects heterogeneity and recognises the plurality and diversity of our culture.
- Informational privacy is a facet of the right to privacy.
- A woman's freedom of choice whether to bear a child or abort her pregnancy are areas which fall in the realm of privacy.
- Telephone tappings and internet hacking by State, of personal data is another area which falls within the realm of privacy.
- The privacy of the home must protect the family, marriage, procreation and sexual orientation which are all important aspects of dignity.

Privacy Judgement's importance

- This landmark judgement fundamentally changed the way in which the government viewed its citizens' privacy, both in practice and prescription.
- It demands from the authorities to demonstrate great care and sensitivity in dealing with personal information of its citizens.
- Expands the individual's fundamental rights – by guaranteeing it in Article 21 and including freedom from intrusion into one's home, the right to choose food, freedom of association etc.
- Ensures dignity as it is not possible for citizens to exercise liberty and dignity without privacy
- Etches firmer boundaries for the state. Now right to privacy cannot be curtailed or abrogated only by enacting a statute but can be done only by a constitutional amendment
- Increase responsibility of state to protect data as any data breach in national programmes involving collection of personal data would have to be compensated unlike in a police state.

Concerns arising from judgement

- Bearing on government's welfare schemes & other cases – such as Adhaar, Section 377, WhatsApp privacy policy, restriction on eating practices etc.

- Bearing on RTI - A fine balance is difficult to be maintained between right to privacy & right to information such that disclosure of information does not encroach upon someone's personal privacy
- Possible misuse by accused in investigations by accused – on using personal information by law enforcement agencies
- Contours of privacy cannot be defined as it pervades all other fundamental rights. It is a cluster of rights including surveillance, search and seizure, telephone tapping, abortion, transgender rights etc.
- Undermines Separation of Power – as it is not the job of court to amend fundamental rights. Inclusion or exclusion of fundamental rights is only the proviso of Parliament