FUNDAMENTAL RIGHTS

ARTICLE 28: FREEDOM FROM ATTENDING RELIGIOUS INSTRUCTION

- Articles 12-35 under Part III of the Constitution deal with provisions related to Fundamental Rights:

INTRODUCTION TO FUNDAMENTAL RIGHTS	
Right to Equality (Article 14-18)	
Article 14	Equality before Law
Article 15	Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth.
Article 16	Equality of opportunity in matters of public employment.
Article 17	Abolition of Untouchability.
Article 18	Abolition of titles.
Right to Freedom (Article 19-22)	
Article 19	Protection of rights regarding freedom of speech, etc.
Article 20	Protection in respect of conviction for offences.
Article 21	Protection of life and personal liberty.
Article 22	Protection against arrest and detention in certain cases.

Right against Exploitation (Article 23-24)	
Article 23	Prohibition of traffic in human beings and forced labour.
Article 24	Prohibition of employment of children in factories, etc.
Right to Freedom of Religion (Article 25-28)	
Article 25	Freedom of conscience and free profession, practice and propagation of religion.
Article 26	Freedom to manage religious affairs.
Article 27	Freedom as to payment of taxes for promotion of any particular religion.
Article 28	Freedom as to attendance at religious instruction or religious worship in certain educational institutions.
Cultural and Educational Rights (Article 29-30)	
Article 29	Protection of interests of minorities.
Article 30	Right of minorities to establish and administer educational institutions.
Saving of Certain Laws	
Article 31A	Saving of Laws providing for acquisition of estates, etc.
Article 31B	Validation of certain Acts and Regulations.
Article 31C	Saving of laws giving effect to certain directive principles
Article 31D	[*Repealed.*]
Right to Constitutional Remedies (Article 32)	
Article 32	Remedies for enforcement of rights conferred by this
Article 33	Power of Parliament to modify the rights conferred by this Part in their application to Forces, etc.
Article 34	Restriction on rights conferred by this Part while martial law is in force in any area.
Article 35	Legislation to give effect to the provisions of this Part.

The development of constitutionally guaranteed fundamental human rights in India was inspired by historical examples such as England's Bill of Rights (1689), the United States Bill of Rights (approved on September 17 1787, final ratification on December 15, 1791) and France's Declaration of the Rights of Man (created during the revolution of 1789, and ratified on August 26, 1789) Under the educational system of British Raj, students were exposed to ideas of democracy, human rights and European political history.

In 1928, the Nehru Commission composing of representatives of Indian political parties proposed constitutional reforms for India that apart from calling for dominion status for India and elections under universal suffrage, would guarantee rights deemed fundamental, representation for religious and ethnic minorities, and limit the powers of the government.

In 1931, the Indian National Congress (the largest Indian political party of the time) adopted resolutions committing itself to the defense of fundamental civil rights, as well as socio-economic rights such as the minimum wage and the abolition of untouchability and serfdom.[3] Committing themselves to socialism in 1936, the Congress leaders took examples from the constitution of the erstwhile USSR, which inspired the fundamental duties of citizens as a means of collective patriotic responsibility for national interests and challenges.

When India obtained independence on 15 August, 1947, the task of developing a constitution for the nation was undertaken by the Constituent Assembly of India. A notable development during that period having significant effect on the Indian constitution took place on 10 December, 1948 when the United Nations General Assembly adopted the Universal Declaration of Human Rights and called upon all member states to adopt these rights in their respective constitutions.

In fact, Fundamental Rights serve as the foundation of the Rule of Law by acting as a check on the arbitrary action of the state. Further, an independent judiciary, with the power of judicial review, acts as a protector of the Fundamental Rights as well as a guardian and guarantor of the Rule of Law.

VARIOUS TYPE OF RIGHTS

- **Natural Rights:** These are available to the individual by the virtue of his birth as a human being. They are supposed to be given by nature or GOD to human beings and thereby, are intrinsic to human lives. They are not conferred by law but only enforced by law. For example, Right to Life.
- **Human Rights:** These are supposed to be a secular version of natural rights. These are available to all individuals by virtue of being born as human beings. In that sense, these are supposed to be universal in nature regardless of nationality, race, re ligion, gender etc.
- **Civil Rights:** These are those rights, which are available to the citizens of a country and are conferred to them either by law of the land or the constitution itself. For example, Right to Freedom
- **Legal rights:** These are those civil rights, which are conferred by the statutes enacted by the legislature.
- **Constitutional Rights:** These are the rights enshrined in the constitution. Some are given special status like
- **Fundamental Rights**, while others enjoy ordinary status only. For instance, at present, right to property is merely a constitutional right under the Indian Constitution.
- Fundamental Rights: These are a branch of constitutional rights and are given a special status by virtue of their importance and being directly enforced by the Supreme Court.

MEANING AND SIGNIFICANCE

- Fundamental Rights are meant for promoting the ideal of political democracy. They prevent the establishment of an authoritarian and despotic rule in the country and protect the liberties and freedoms of the people against the invasion by the State. They operate as limitations on the tyranny of the executive and arbitrary laws of the legislature. In short, they aim at establishing ‘a government of laws and not of men’.
- Fundamental Rights are named so because they are guaranteed and protected by the Constitution, which is the fundamental law of the land. They are ‘fundamental’ also in the sense that they are most essential for the all-round development of the individuals.
- Dr Ambedkar spelt out the objects of FRs being two- fold:
- a) every citizen must be in a position to claim those rights.
- b) these rights must be binding upon every authority that has got the power to make laws.

FEATURES OF FUNDAMENTAL RIGHTS

- Some of them are available only to the citizens while others are available to all persons whether citizens, foreigners or legal persons like corporations or companies.
- They are not absolute but qualified. The state can impose reasonable restrictions on them. Some of the grounds on which reasonable restrictions can be imposed are:
- 1. Advancement of any socially and educationally backward classes of citizens or the Scheduled Castes and the Scheduled Tribes.
- 2. In the interest of general public, public order, decency or morality,
- 3. Sovereignty and integrity of India;
- 4. Security of the state;
- 5. Friendly relations with Foreign States, etc.
- Most of them are available against the arbitrary action of the State, with a few exceptions like those against actions of private individuals.
- Most of them are negative in character, that is, place limitations on the authority of the State, while others are positive in nature.
- They are justiciable, allowing persons to move the courts for their enforcement, if and when they are violated. They are defended and guaranteed by the Supreme Court.
- They are not sacrosanct or permanent. The Parliament can curtail or repeal them but only by a constitutional amendment act, without affecting ‘basic structure’ of the Constitution.
- They can be suspended during National Emergency except the rights guaranteed by Articles 20 and 21. Further, the six rights guaranteed by Article 19 are suspended only when emergency is declared on grounds of war or external aggression.
- Most of them are self-executory while a few of them can be enforced only on the basis of a law made for giving effect to them made only by the Parliament.

ARTICLE 12: DEFINITION OF STATE

- Since most Fundamental Rights are available against State actions, it is important to define what “state” is, which is done by Article 12. The State¨ includes the Government and Parliament of India and the Government and the Legislature of each of the States and all local or other authorities within the territory of India or under the control of the Government of India. The word "State" has different meanings depending upon the context in which it is used. The expression "The State" when used in Parts III & IV of the Constitution is not confined to only the federating States or the Union of India or even to both. According to it, “State” includes:
- Government and Parliament of India, that is, executive and legislative organs of the Union government.
- Government and legislature of states, that is, executive and legislative organs of state governments.
- All local authorities, that is, municipalities, panchayats, district boards, improvement trusts, etc.
- All authorities which serve as instrumentalities or agencies of the State, that is, statutory or non-statutory authorities like LIC, ONGC, SAIL, etc.

ARTICLE 13: LAWS INCONSISTENT WITH FUNDAMENTAL RIGHTS

- Article 13 declares that all laws that are inconsistent with or in derogation of any of the fundamental rights shall be void.
- Since the power to declare this inconsistency rests with the higher judiciary, Article 13 provides for Judicial Review.
- **Effect on pre-constitution laws**: All laws in force in India immediately *before the commencement of Constitution*, so far as they are inconsistent with Fundamental Rights, shall be void to the extent of inconsistency. i.e. **Article 13(1)** provides for doctrine of eclipse.

Doctrine of Eclipse: it is based on principle that an existing law which violates fundamental rights is not null or void *ab initio* but is only *unenforceable*. It is over-shadowed by the fundamental rights and remains dormant, but it is not dead.

Effect on post-constitution laws: The State *shall not make any law* which takes away or abridges fundamental rights. Any law made in contravention of these shall be, to the extent of contravention, void. **(Article 13(2))**

- The term 'law' in **Article 13(3)** has been given a wide connotation so as to include the following:
- Permanent laws enacted by Parliament or state legislatures;
- Temporary laws like ordinances issued by the president or state governors;
- Delegated or executive legislation like orders, bye- laws, rules, regulations or notifications; and
- Non-legislative sources of law, that is, custom or usage having the force of law.
- Further, Article 13 declares that a constitutional amendment is not a law and hence cannot be challenged on account of Article 13. However, Supreme Court held in Kesavananda Bharati case (1973) that even a Constitutional amendment violating a fundamental right can be challenged on the ground that it violates the 'basic structure' of Constitution.
- **Doctrine of Severability**: It is not the whole Act which would be held invalid for being inconsistent with Part III of the Constitution but only such provisions of it which are violative of the fundamental rights, *provided* that the part which violates the fundamental rights is separable from that which does not violate them. But if the

Circumstances under which Fundamental Rights can be curtailed or sus pended:

- Parliament can restrict or abrogate by law the fundamental rights in their application to members of Armed Forces with a view to ensure proper discharge of their duties and maintenance of discipline among them. (**Article 33**).
- Fundamental Rights can be curtailed or restricted when Martial Law is in force in any area (**Article 34**).
- During National Emergency (on grounds of war or external aggression), the rights conferred by Article 19 are suspended (**Article 358**).
- Also, where a proclamation of emergency is in operation President may declare that *the right to move any court* for enforcement of some or all fundamental rights (except Articles 20 & 21) shall be suspended for a period during which emergency is in force. (**Article 359**).
- All or any of the fundamental rights can be curtailed, suspended or modified by an amendment of the Constitution itself under **Article 368**. (but not to the extent of violating the “basic structure” of the Constitution)

Judicial review and the fundamental rights:

- Judicial review ***(Emerged in USA as an implied power of judiciary in Marbury v/s Madison case, 1803)*** is the power of courts (Supreme Court and the High Courts) to declare a law unconstitutional and void if it is inconsistent with any of the provisions of the Constitution to the extent of its inconsistency. So far as the contravention of the Fundamental Rights is concerned, this power is specially enjoined upon the courts by the Constitution, in Art 13.
- It is the power of the judiciary to declare any act of Parliament and State Legislature as “null & void” (particular law or a part of it not valid) or “ultra-vires” (doesn’t have authority).
- The power of judicial review is available to the courts not only against the legislature but against the executive as well.

Amenability of fundamental rights

- The Supreme Court starting from **Shankari Prasad V. Union of India (1952) to Sajjan Singh V. State of Rajasthan (1965),** held in a number of cases that the word "law" as found in Art.13 (2) should be taken to mean `rules or regulations made in exercise of ordinary legislative power' and not to `Amendments to the Constitution made in exercise of constituent power' of the Parliament. The Supreme Court, therefore, was of the view that the Parliament by exercising its amending power under Art.368 conferred on it by the Constitution can amend any part of the Constitution including Part III.
- But in **Golaknath V. State of Punjab (1967)** the Supreme Court overruled its earlier decisions and held that the Fundamental Rights embodied in Part III, had been given a `transcendental position' by the Constitution, including the Parliament exercising its amending power under Art.368 was not competent to amend the Fundamental Rights. The court was of the view that the word "law" in Article 13(2) included amendment to the Constitution as well. But by the 24th Amendment Act 1971, the Parliament amended Arts.13 and 368 to make it clear that the Parliament has the power to amend any part of the Constitution including Part III of the **Constitution and the word** "law" as used in Art.13 does not include a Constitutional Amendment Act.
- The Parliament passed the 24th amendment, 1971 which empowered the Parliament to amend the Constitution including the Fundamental Rights in accordance with the procedure laid down in Article 368 and further it ousted the jurisdiction of the Supreme Court to set aside any Constitutional amendment in future.
- The Parliament passed the 25th amendment, 1971, which authorized the Parliament to amend or modify Fundamental Rights for giving effect to Directive Principles of State Policy and for the attainment of the objectives set out in the Preamble of the Constitution. (For this a new article, viz. Article 31-C was incorporated into the Constitution, which provided that the laws relating to the implementation of the Directive Principles of State Policy as enunciate under Article 39 (b) and (c) are to be accorded preference over Fundamental Rights as enunciated under Article 14 and 19.)
- The 24th Amendment Act was challenged before the Supreme Court in the Kesavananda Bharati V. State of Kerala case in 1973. The Court in that case held that the Parliament has the power, under Art. 368, to amend any provision of the Constitution, including the fundamental rights enshrined in Part III of the Constitution. However, the Court held that the Parliament's amending power is subject to the basic structure of the Constitution. The concept of basic structure of the Constitution is nowhere found in the Constitution. It is a judicial innovation and was given its shape by the Supreme Court in the Kesavananda Bharati V. State of Kerala case (1973).

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- Through various verdicts the judiciary has enunciated the following, among others, as basic features of the Constitution:
- Supremacy of the Constitution
- Republican and Democratic form of government
- Secular character
- Separation of Powers
- Judicial Review
- Sovereignty etc.....

- In Minerva Mills case (1980) the Supreme Court held that to abrogate the Fundamental Rights while purporting to give effect to the Directive Principles is to destroy one of the basic features of the Constitution. At the same time, the validity of the substantive part of Article 31-C as originally enacted was left untouched.
- To sum up, the fundamental rights are also subject to the amending power of the Parliament, provided such an amendment does not destroy the basic structure of the Constitution.

ARTICLE 14

- *Article 14: The State shall not deny to **any person** equality before the law or the equal protection of the laws within the territory of India.*
- The word 'person' ***includes legal persons***, viz, statutory corporations, companies, registered societies or any other type of legal person, as well as friendly aliens.
- *This right has 2 dimensions, both aiming at establishing equality of legal status, opportunity and justice:*

"Equality before law": Negative concept from Britain

- absence of any special privileges in favour of any person,
- the equal subjection of all persons to the ordinary law of the land administered by ordinary law courts
- no person (whether rich or poor, high or low, official or non official) is above the law.
- The concept is a subset of the notion of **"RULE OF LAW" by AV Dicey** which says:
  - Absence of arbitrary power, that is, no man can be punished except for a breach of law.
  - Equality before the law, that is, equal subjection of all citizens to the ordinary law of the land administered by the ordinary law courts.
  - The primacy of rights of the individual, that is, the constitution is the result of the rights of the individual as defined and enforced by the courts of law rather than the constitution being the source of the individual rights.

The first and the second notion apply in India but not the third. In the Indian system, the Constitution is the source of individual rights. The Supreme Court has stated that Rule of Law is a basic feature of our Constitution.

Equal Protection of Laws: Positive concept from USA

- the *equality of treatment under equal circumstances*, both in the privileges conferred and liabilities imposed by the laws
- the similar application of the same laws to all persons who are similarly situated
- The like should be treated alike without any discrimination, and the unlike should not be treated alike.
- Thus, right to equality guaranteed by this article or part is not absolute. Rather, it provides for "reasonable classification".
- For a classification to be reasonable,
- (a) it must be based on at least some intelligible differential, and
- (b) the classification must have some rational nexus with the object sought to be achieved by the legislation or executive action.

Exceptions:

- Article 361: President or Governor is not answerable to any court for the exercise and performance of powers and duties of their office. No criminal proceedings shall be instituted or continued against the President or the Governor in any court during their term of office. No process for arrest or imprisonment of President or Governor shall be issued from any court during their term.
- Art 361A : No person shall be liable to any civil or criminal proceedings in any court in respect of the publication in a newspaper (or by radio or television) of a substantially true report of any proceedings of either House of Parliament or either House of the Legislature of a State
- Article 31-C provides that the laws made by the state for implementing the Directive Principles contained 39(b) or 39(c) cannot be challenged on the ground that they are violative of Article 14 (or 19 and 21). Supreme Court held that “where Article 31-C comes in, Article 14 goes out”.
- The foreign sovereigns (rulers), ambassadors and diplomats enjoy immunity from criminal and civil proceedings.
- The UNO and its agencies enjoy the diplomatic immunity.
- Art.14 ensures quality among equals, its aim is to protect persons similarly placed against discriminatory treatment.
- Art.14, therefore does not forbid classification (of people.) However in order to be valid classification must not be arbitrary but must be rational thus the Legislature may
- (i) exempt certain classes of property from taxation such as charities libraries, Act
- (ii) impose different specific taxes upon different trades and professions.
- (iii) Taxes income and property of individuals in different manner etc.

ARTICLE 15

- **Article 15(1)** prohibits discrimination by the state on the grounds of religion, caste, sex, race and place of birth. Discrimination is prohibited on these grounds only and the state can discriminate on other grounds.
- **Article 15(2)** No citizen shall, on grounds only of religion, race, caste, sex, place of birth or any of them, be subject to any disability, liability, restriction or condition with regard to—
- (a) access to shops, public restaurants, hotels and places of public entertainment; or
- (b) the use of wells, tanks, bathing ghats, roads and places of public resort maintained wholly or partly out of State funds or dedicated to the use of the general public.
- **Article 15(3)** Nothing in this article shall prevent the State from making any special provision for women and children.
- **Article 15(4)** was added by the 1 st Constitutional Amendment Act and provides for affirmative action for socially and economically backward sections of society or for SC/STs. Article 29(2) states that the State will not discriminate in admission to educational institutions on the basis of religion, race, caste, sex or place of birth.
- a) Affirmative action was held violative of this provision in Champakam Dorairajan case (1951).
- b) In the Champakam Dorairajan case for the first time, dispute between FRs and DPSPs arose.
- c) Articles, which were questioned in this case, were Article 46 (Promotion of educational and economic interests of SCs/STs/and other weaker sections), which was found to be in violation of Article 14 and 15. Hence, the first constitutional amendment was enacted.

Article 15(5)

- provides for affirmative action for socially and economically weaker sections of society in educational institutions whether aided or unaided. While Article 15(4) is general in nature, Article 15(5) is specific and pertains to education. Article 15(5) was added by the 93rd Constitutional Amendment Act (2005). Minority educational institutions are an exception to the clause.
- a) The Supreme Court upheld the validity of 93rd Constitutional Amendment Act and gave the concept of creamy layer, according to which the well off in backward sections are to be treated at par with the forward sections of society and not given any reservation.
- b) **Ashok Kumar Thakur vs. Union of India case:** upheld the validity of 93rd amendment and Central Educational Institutions Act, 2006. The status of quota in private unaided institutions was left open to be decided in the future.
- c) **Society for unaided private schools for Rajasthan vs. Union of India case 2013** upheld the validity of introduction to quota under Right to Education Act, 2009 even in private unaided institutions. Arguments given by Supreme Court:
- i) Education cannot be treated as a purely commercial enterprise.
- ii) Article 21A is an obligation on the State.
- Iii) Right to Education is a child centred act rather than an institution centred act.

- Recently **Parliament amended the Constitution of India (103rd Amendment) Act, 2019** to provide for a 10% reservation in education and government jobs in India for a section of the General category candidates.
- The amendment introduced economic reservation by amending Articles 15 and 16. It inserted **Article 15 (6) and Article 16 (6)** in the Constitution to allow reservation for the economically backward in the unreserved category.
- **Article 15(6):** Up to 10% of seats may be reserved for EWS for admission in educational institutions. Such reservations will not apply to minority educational institutions.
- The reservation of up to 10% for the EWS will be in addition to the existing reservation cap of 50% reservation for SC, ST and OBCs and the central government will notify the EWS of citizens on the basis of family income and other indicators of economic disadvantage.
- The Supreme Court in the 9-bench Indira Sawhney case of 1992 had capped all quotas at 50%, to allow the rest to be filled from merit.
- The EWS quota was challenged. Petitions were filed by Janhit Abhiyan and Youth For Equality and 33 others anti-reservation activists and also students and job seekers of other categories sought directions to quash the Constitution 103rdAmendment Act, 2019, contending that such quotas for the poor would eat into their share of quotas.

Arguments favouring EWS quota:

- The economically weaker sections have not reaped the benefits of higher educational institutions and public employment due to their financial incapacity. The 10% quota is progressive and could address the issues of educational and income inequality in India.
- The reservation criteria should be economic because there are many classes other than backward classes who are living under abysmal conditions but cannot avail reservation and its intended benefits.
- In Ram Singh v. Union of India (2015), SC asserted that social deficiencies may exist beyond the concept of caste (e.g. economic status/gender identity as in transgenders).
- The “quota-for-poor” policy is symptomatic of a larger failure. It replaces the principle that welfare should be the basic raison d’être of public policy, it hides the colossal failure of the state in handling questions of poverty and deprivation and, at the same time, it indicates a dead-end in policy-making itself.

Arguments against EWS quota:

- Reservation based entirely on economic criteria is not an all-in-one solution, though family income can be one of the parameters.
- Determining economic backwardness is a major challenge as there are concerns regarding the inclusion and exclusion of persons under the criteria.
- In M. Nagaraj v. Union of India (2006), a Constitution Bench ruled that equality is part of the basic structure of the Constitution. The 50 per cent ceiling is a constitutional requirement without which the structure of equality of opportunity would collapse.
- The implementation of the quota is a challenge in itself as the states do not have the finances to enforce even the present and constitutionally mandated reservations.
- It washes away the constitutionally permitted gatekeeping mechanism of social and educational backwardness and makes reservation available to everyone irrespective of social backwardness.
- Reservation has also become synonymous with anti-merit, with the extension of reservation, this opinion might get further ingrained in the public psyche.

ARTICLE 16

- *Constitutional Provisions:* Equality of opportunity in matters of public employment.
- **Article 16(1)** There shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State.
- **Article 16(2)** No citizen shall, on grounds only of religion, race, caste, sex, descent, place of birth, residence or any of them, be ineligible for, or discriminated against in respect of, any employment or office under the State.
- **Article 16(3)** Nothing in this article shall prevent Parliament from making any law prescribing, in regard to a class or classes of employment or appointment to an office under the Government of, or any local or other authority within, a State or Union territory, any requirement as to residence within that S tate or Union territory prior to such employment or appointment.
- **Article 16(4)** Nothing in this article shall prevent the State from making any provision for the reservation of appointments or posts in favour of any backward class of citizens which, in the opinion of the State, is not adequately represented in the services under the State.

Nothing in this article shall prevent the State from making any provision for reservation in matters of promotion, with consequential seniority, to any class or classes of posts in th e services under the State in favour of the Scheduled Castes and the Scheduled Tribes which, in the opinion of the State, are not adequately represented in the services under the State.

Nothing in this article shall prevent the State from considering any unfilled vacancies of a year which are reserved for being filled up in that year in accordance with any provision for reservation made under clause (4) or clause (4A) as a separate class of vacancies to be filled up in any succeeding year or years and such class of vacancies shall not be considered together with the vacancies of the year in which they are being filled up for determining the ceiling of fifty per cent reservation on total number of vacancies of that year.

Article 16(5) Nothing in this article shall affect t he operation of any law which provides that the incumbent of an office in connection with the affairs of any religious or denominational institution or any member of the governing body thereof shall be a person professing a particular religion or belonging to a particular denomination.

Article 16(6) It permits the government to reserve up to 10% of all government posts for the Economically weaker sections.

Mandal commission:

- The Mandal Commission was appointed in 1979 under Article 340 to investigate the conditions of socially and educationally backward sections of population and to suggest measures for their advancement. The Commission identified nearly 52% of the population as backward.
- In 1990,the V.P. Singh government gave 27% reservation in government jobs to OBCs.
- In 1991, the Narsimha Rao government introduced the concept of most backward classes within the backward classes. Also, 10% reservation was provided to poorer sections of upper castes.
- Indira Sawhney vs. Union of India in this verdict, SC upheld the government's policy of providing reservation for backward classes. It is popularly known as the Mandal case.
- In this, the Court overruled its earlier judgment in Balaji v/s State of Mysore case, 1963 in which it held that caste can't be the main criteria. Instead, poverty should be treated as the main criteria.
- Caste was considered as the sole criteria for reservation because in India, caste is intricately related to class. It also introduced the creamy layer concept.
- Reservation of upper castes on the basis of economic backwardness was rejected because they do not suffer from social backwardness despite being poor.
- Reservation would be given only at entry level and not at promotion level.
- In one year, reservation shall not be more than 50%.
- It directed the government to constitute a statutory body (National Commission for Backward Classes) to decide on the criteria of inclusion and exclusion of a caste from reservation.

ISSUE OF RESERVATION IN PROMOTIONS

- 77th Amendment Act, 1995 introduced Article 16(4A), which provided reservation in promotion to SC/ST's. Thus, this annuls an important criterion laid down by the Supreme Court in Indira the Sawhney case, that is, reservation should be applicable only at the entry level and not for promotion.
- **85th Amendment Act, 2001 (Issue on consequential seniority)** To negate the catch up rule directed by Supreme Court. It introduced promotion with consequential seniority. This act was brought with retrospective effect from 1995.
- Nagaraj case: In this case, the validity of 85 th Amendment was questioned. SC held that the amendment didn't violate the basic structure of the Constitution.
- SC has given 3 more guidelines:
- The class for which reservation in promotion is sought is not adequately represented.
- Govt. must provide verifiable data.
- It shouldn't impact the efficiency of administration services.

ARTICLE 17: ABOLITION OF UNTOUCHABILITY

- Art 17: Untouchability is abolished and its practice in any form is forbidden, and is punishable in accordance with law
- The enforcement of any disability arising out of untouchability is to be an offense punishable in accordance with law. It does not stop with a mere declaration out announces that this forbidden "Untouchability" is not to be henceforth practiced in any form. If it is so practiced it shall be dealt with as an offense punishable in accordance with the law.
- The Constitution, nowhere, defines what is untouchability, nor the Acts passed by the Parliament. But the judiciary has, however, held that it clearly means any social practice among the Hindus, which looks down upon a certain class of people on account of their birth and makes discrimination against them on this ground.
- In exercise of the powers conferred by Art. 35, Parliament has enacted the Untouchability (Offense) Act, 1955. This Act prescribes punishment for the practice of untouchability. This Act has been amended by the Untouchability (Offenses) Amendment Act, 1976, in order to make the laws more stringent to remove untouchability from the society. Further the name of the Original Act has been changed to Civil Rights, (Protection) Act 1976.
- Recently, **SC has upheld a 2018 amendmen**t which barred persons accused of committing atrocities against those belonging to the Scheduled Castes and the Scheduled Tribes from getting anticipatory bail.

HISTORY OF SCHEDULED CASTE AND SCHEDULED TRIBE (PREVENTION OF ATROCITIES) ACT' IN 1989:

- **Salient Features:**
- Creation of new types of offences not in the Indian Penal Code (IPC) or in the Protection of Civil Rights Act 1955.
- It punishes crimes against people belonging to Scheduled Castes and Tribes.
- It gives special protections and rights to victims.
- It sets up courts for fast completion of cases.
- Commission of offences only by specified persons (by non-SC on SC's and non-ST's on ST's).
- Punishment for neglect of duties for public servant
- Denial of anticipatory bail
- Provides compensation, relief and rehabilitation for victims of atrocities or their legal heirs.
- Creation of Special Courts and special public prosecutor
- Mandatory, periodic monitoring system at District, State and National level
- Identification of atrocity prone areas

Prevention of Atrocities (Amendment) Act, 2015

- The Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Amendment Act, 2015 to ensure more stringent provisions for prevention of Atrocities against Scheduled Castes and the Scheduled Tribes

Salient Features: (New offence of atrocities are added)

- Establishment of Exclusive Special Courts and specification of Exclusive Special Public Prosecutors also, to exclusively try the offences under the PoA Act to enable speedy and expeditious disposal of cases.
- Power of Special Courts and Exclusive Special Courts, to take direct cognizance of offence and as far as possible, completion of trial of the case within two months, from the date of filing of the charge sheet.
- Defining clearly the term ‘wilful negligence’ of public servants at all levels, starting from the registration of complaint, and covering aspects of dereliction of duty under this Act.
- If the accused was acquainted with the victim or his family, the court will presume that the accused was aware of the caste or tribal identity of the victim unless proved otherwise.

SC JUDGMENT ON SC/ST ACT, 2018:

- In SubhashKashinath Mahajan vs The State of Maharashtra (Review of SC/ST Prevention of Atrocities Act) Case, Supreme Court opined that SC/ST Prevention of Atrocities Act (PoA act) is being misused and checks are needed to prevent such misuse.
- Apex court also observe that the act has become a tool to persecute innocents and public servants for political and personal gains.
- This claim has been validated by Parliamentary Standing Committee report, which has sought an inbuilt provision in the PoA act to safeguard those who are falsely accused.

Key guidelines:

- The bar on anticipatory bail under the Act need not prevent courts from granting advance bail if there is no merit in a complaint
- There can be an arrest only if the appointing authority (in the case of public servants) or the district superintendent of police (in the case of others) approves such arrest
- No FIR should be registered against government servants without the approval of the appointing authority.

Issues with Judgment:

- The SC has only directed to prevent the misuse of PoA act but it is perceived as dilution of PoA act.
- Many law experts are of the view that this judgment is without considering the socio-cultural realities of caste atrocities.
- Many critics argue that SC judgment mayhelp to introduce a norms to prevent quick action on complaints. It is argued that it will further delay the investigation
- NCRB data shows that under SC/ST (PoA) Act, 1989 the conviction rate was only 15.4% while the charge sheeting rate is 77%. This indicate that it’s not the misuse of act but poor implementation of Act which failed to create a deterrence
- With the perceived upward mobility of SCs, there has been a growing demand among dominant and upper castes to dilute PoA act. This judgment can be used as a plank by these castes to further their agenda.

SC/ST AMENDMENT ACT, 2018

- Recently, Cabinet has approved the SC/ST (PoA) Amendment Bill 2018, which restores the original provisions to prevent atrocities against the SCs/STs.

Key features

- The amendment bill seeks to restore the power of the investigating officer to arrest an accused who is alleged to have committed atrocities against SCs/STs.
- It rules out any provision for anticipatory bail for the accused
- It provides that no preliminary enquiry will be required for registering a criminal case (FIR) and an arrest under this law would not be subject to any approval

Reason for amendment

- Alleged potential of misuse would not deserve to be considered as a valid, justifiable or permissible ground for reading down stringent provisions of the PoA (Prevention of Atrocities) Act, 1989.
- In the face of growing atrocities against SCs/STs, aggrieved persons may now think twice before registering a complaint, as the process is backed by checks which prevent the automatic arrest of an accused.
- The changes focus on protecting the liberty of the accused and can dilute the rights of the complainant.

Key Issues

- Two key issue with PoA Act is misuse of provision and weak implementation, critics argue that restoring the original provision would not solve either of the issue with PoA Act
- As per Report, Government is planning to bring the SC/ST act under ninth schedule of constitution which bars the court from review. Critics argue that it would stop the judicial respite for individual who suffered due to misuse of PoA act
- It is being argued that government bring amendment to the bill due to pressure from various corner rather than on merit of the Act

ARTICLE 18: ABOLITION OF TITLES

- Art18 prohibits the State to confer titles on anybody whether a citizen or a non-citizen. Military and academic distinctions are, however, exempted.
- Clause (2) prohibits a citizen of India from accepting any title from a foreign State. Clause (3) provides that a foreigner holding any office of profit or trust under the State cannot accept any title from any foreign State without the consent of the President. This is to ensure loyalty to the Government he serves for the time being and to shut out all foreign influence in Government affairs, or administration. Clause (4) provides that no person holding any office of profit or trust under the State is to accept without the consent of the President any present, emoluments or office of any kind from or under any foreign State. It is to be noted that there is no penalty prescribed for infringement of the above prohibition. Art. 18 is merely directory. It is, however, open to Parliament to make a law for dealing with such person who accepts a title in violation of the prohibition prescribed in Art. 18.

RIGHT TO FREEDOM

ARTICLE 19: THE SIX LIBERTIES

- Article 19 (1) lists various freedoms that are available to Indian citizens:
- Right to freedom of speech and expression.
- Right to assemble peaceably and without arms.
- Right to form associations or unions or cooperative societies.
- Right to move freely throughout the territory of India.
- Right to reside and settle in any part of territory of India.
- (g) Right to practice any profession or to carry on any occupation, trade or business.
- These freedoms are not absolute, but are qualified. Article 19(2) - 19(6) contains various restrictions as to the exercise of these freedoms:

Freedom	Grounds of Restriction
19(1)(a): Speech etc	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
19(1)(b): Assembly	sovereignty and integrity of India or public order
19(1)(c): Association	sovereignty and integrity of India or public order or morality
19(1)(d): Movement 19(1)(e): Residence	interests of the general public or for the protection of the interests of any Scheduled Tribe
19(1)(g): Profession	interests of general public; professional or technical qualifications necessary for practising; state monopoly
Freedom	**Grounds of Restriction**
19(1)(a): Speech etc	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

Not available to non- citizens and Legal Persons

- Article 19(1)(f) was Right to property which was deleted from this Part by 44th Amendment Act 1978 and made a legal constitutional right under Article 300A.

Right to freedom of speech and expression includes:

- Freedom of Speech and Expression is indispensable in a democracy. It means the right to express one's own conviction and opinion freely by words of mouth, writing, printing, pictures or any other mode. It includes the expression of one's ideas through any communicable medium or visible representation such as gestures, banners, signs and the like.
- The freedom of speech and expression thus includes the freedom of the press as well. The Constitution nowhere mentions in explicit term the freedom of the press. But, it is implicit in the freedom of speed and expression. The freedom of the press is considered essential to political liberty and proper functioning of democracy.
- Various FR's implicitly included in Article 19(1)(a)
- Right to telecast,
- Right against bundh
- Right to Information
- Freedom of silence.
- Right to demonstration or picketing but not right to strike.
- Freedom of press
- Right to have political opinions of your own etc.

Right to information legal right under RTI act, 2005:

- It is a citizen centric law that guarantees access to information from the government unless such information threatens the security of the country. Information is to be provided by the concerned department in a time bound manner.
- The act also provides for an institutional mechanism of Information Commissioners who can look into a citizen's complaint if he does not receive the information that he has sought.
- Second ARC considered this act as "master key for good governance". Experts believe that it marks the emergence of second stage of democracy in India.
- It marks a big transformation from Official Secrets Act, 1923 to a situation where only limited information would be held in secrecy. Further, the government departments are encouraged to provide information suo moto and proactively.
- Certain organizations are kept out of the scope of the act in the interest of sovereignty, territorial integrity and other reasons also.
- Information can be asked in regional languages also and no reasons need to be given as to why the information is being sought.
- Information can be sought from public authority and not from a private body. However, information can be asked from a private body also if its functions are public in nature in substantial means.
- Public authority means constitutional bodies, statutory bodies, any non government organization receiving substantial government financing and any other body being substantially financed by the government.

Recent Issue related to CJI and Right to Information:

- The Supreme Court ruled that the office of the Chief Justice of India (CJI) is a public authority under the Right to Information (RTI) Act.
- The case was related to:
- The judgment pertained to three cases based on requests for information filed by Delhi-based RTI activist Subhash Agarwal.
- All of these cases eventually reached the Supreme Court.
- Two of the three issues were stuck down.
- The matter the Supreme Court wanted to address was the question whether or not the office of the CJI is under the RTI Act.
- Request – In one of the three cases, Agarwal had asked whether all SC judges had declared their assets and liabilities to the CJI following a resolution passed in 1997.
- He had not requested for copies of the declarations, but only the status of judges' compliance.
- [The 1997 resolution requires judges to declare to the CJI the assets held by them - own name, spouse's name and in any person dependent on them.]
- CPIO - The CPIO (Central Public Information Officer) of the Supreme Court said the office of the CJI was not a public authority under the RTI Act.
- CIC - The matter reached the Chief Information Commissioner (CIC).
- There, a full Bench, headed by then CIC Wajahat Habibullah, in January 2009, directed disclosure of information.

- Delhi HC - The Supreme Court approached the Delhi High Court against the CIC order.
- The High Court held that the office of the CJI was a public authority under the RTI Act and was covered by its provisions.
- Larger Bench - The Supreme Court then approached a larger Bench.
- The larger Bench held that the earlier judgment of the HC (Justice Ravindra Bhatt) was “both proper and valid and needs no interference”.
- SC plea to SC - The Supreme Court in 2010 petitioned itself challenging the Delhi High Court order.
- The matter was placed before a Division Bench, which decided that it should be heard by a Constitution Bench.
- As the setting up of the Constitution Bench remained pending, Agarwal filed another RTI application.
- The Supreme Court told him on June 2, 2011 that orders for constituting the Bench “are awaited”.
- Finally, in 2018, CJI Ranjan Gogoi constituted the Bench, which has now pronounced its judgement.

What is the SC ruling?

- A five-judge Constitution Bench of the Supreme Court upheld the Delhi High Court ruling of 2010.
- It thus dismissed three appeals filed by the Secretary General and the Central Public Information Officer (CPIO) of the Supreme Court.
- The SC held that the office of the CJI is a public authority.
- However, it held that RTI could not be used as a tool of surveillance.
- It said that judicial independence had to be kept in mind while dealing with transparency.
- However, Right to Privacy is an important aspect and has to be balanced with transparency while deciding to give out information from the office of the Chief Justice of India.
- RTI cannot be used as a tool of surveillance and that judicial independence has to be kept in mind while dealing with transparency.

What does the order mean?

- The outcome of the ruling is that the office of the CJI will now entertain RTI applications.
- It enables the disclosure of information such as the judges' personal assets.
- The Bench unanimously argued that the right to know under the RTI Act was not absolute and this had to be balanced with the right of privacy of judges.
- The key take-away from the judgment is that disclosure of details of serving judges' personal assets was not a violation of their right to privacy.
- The verdict underlines the balance Supreme Court needs between transparency and protecting its independence.
- The move opens the doors to RTI requests that will test the frontiers of what has been a rather opaque system.
- However, what new limitations are drawn would decide how effective the move would get to be.

What is the significance?

- The RTI Act is instrumental in enhancing accountability, citizen activism and, consequently, participative democracy.
- The Supreme Court judgment paves the way for greater transparency.
- It could now impinge upon issues such as disclosure, under the RTI Act, by other institutions such as registered political parties, etc.

Article 19 (2)(b) Right to assemble peacefully; without arms:

- Guarantees to all citizens of India right to assemble peacefully and without arms. This right is, however, subject to the following restrictions: (i) The assembly must be peaceable. (ii) It must be unarmed. (iii) Reasonable restrictions can be imposed. The right of assembly is implied in the very idea of democratic Government. The right of assembly thus includes right to hold meetings and to take out processions. This right, like other individual rights, is not absolute but relative. The assembly must be non-violent and must not cause any breach of public peace. If the assembly is disorderly or riotous then it is not protected under Art. 19(1) (b) and reasonable restrictions may be imposed under clause (3) of Art. 19.
- Under Section 144 of CrPC (1973), a magistrate can restrain an assembly, meeting or procession if there is a risk of obstruction, annoyance or danger to human life, health or safety or a disturbance of the public tranquillity or a riot.
- Under Section 141 of IPC: assembly of five or more persons becomes unlawful if the object is: to resist the execution of any law or legal process o to forcibly occupy the property of some person o to commit any mischief or criminal trespass o to force some person to do an illegal act o to threaten the government or its officials on exercising lawful powers.

Article 19(1)(c) Right to form associations:

- covers the negative right of not to form or join an association or union
- The Supreme Court held that *the trade unions have no guaranteed right to effective bargaining or right to strike or right to declare a lock-out*. The right to strike can be controlled by an appropriate industrial law.
- **Hartals and Bandhs** Freedom of speech does not include calling for forced bandhs. The Supreme Court in 1997 opined that Bandh and Hartal mean essentially the same, making bandhs illegal. The essence of the judicial position is this: people cannot be made to participate in bandhs under duress and that organisers of bandh trample upon the rights of the Citizens protected by the Constitution
- **Right of Association and Armed Forces** The Constitution empowers the Parliament, under Art. 33 to modify the rights conferred by Part III of the Constitution in their application to members of the Armed Forces or other forces engaged with the maintenance of public order. Exercising this power, the Parliament has banned the formation of trade unions to the members of the Armed Forces, Police etc. This ban, according to the Supreme Court can be made applicable even to civilians who are working in such establishments.

Article 19(1)(d) Right to move freely in the territory of India:

- Art. 19(1) (d) guarantees to citizens the right to move freely throughout the territory of India. The right to move means the right of locomotion and the expression “freely”, connotes that the freedom to move is to move wherever one likes and however one likes, subject to reasonable restrictions imposed by the State on grounds of interests of the general public or for the protection of the interests of the Scheduled Tribes.

Article 19(1)(e) freedom of residence:

- The right to move freely throughout the territory of India and the right to reside and settle in any part of the territory of India arise out of basic concept of unity and integrity of India. India is one integrated country and its citizens have the freedom to move throughout the territory of India and to reside and settle anywhere, in India. Broadly speaking these two rights are part of the same right. Freedom of movement is not merely freedom of locomotion but also freedom to change one’s residence. Freedom of residence is subject to reasonable restrictions in the interests of general public or for the protection of any Scheduled Tribe.

Article 19(1)(g) freedom of trade and occupation:

- Art. 19(1) (g) of the Constitution guarantees that all citizens have the right to practice any profession or to carry on any occupation or trade or business. The freedom is not uncontrolled, for clause (6) of the Article authorities legislation, which (i) imposes reasonable restrictions on this right in the interests of the general public; (ii) prescribe professional or technical qualifications necessary for carrying on any profession, trade or business to the exclusion of private citizens, wholly or partially. The right to carry on a business would include the right to close down or relinquish or sell the business.

ARTICLE 20: PROTECTION IN RESPECT OF CONVICTION

- Protection against arbitrary and excessive punishment to an accused person, ***whether citizen or foreigner or legal person*** like a company or a corporation.
- It has three provisions:

(a) **No *ex-post-facto* law**:

- One can be punished only for violation of a law in force at the time of the commission of the act, and
- Not subjected to a penalty greater than that prescribed by the law in force at the time of the commission of the act.
- This limitation is imposed ***only on criminal laws and not on civil laws or tax laws***.

(b) **No double jeopardy**:

- No person can be punished for same offence twice. However, it is available only ***in proceedings before a court of law or a judicial tribunal.***
- NOT AVAILABLE in proceedings before departmental or administrative authorities as they are not of judicial nature.

(c) **No self-incrimination:**

- No person can be compelled to be a witness against himself.
- It extends to both oral evidence and documentary evidence.
- DOES NOT extend to compulsory production of material objects or compulsion to give thumb impression, signature, blood specimens, or compulsory exhibition of body.
- Extends ***only to criminal proceedings***

ARTICLE 21: PROTECTION OF LIFE AND PERSONAL LIBERTY

- ***Art 21: No person shall be deprived of his life or personal liberty except according to procedure established by law.***
- Art. 21 as interpreted by the Supreme Court in its earlier decisions, was intended to be a limitation upon the powers of the Executive but not the Legislature and only safeguarded the individual against arbitrary or illegal action on the part of the Executive**.**

Procedure Established by Law

- It means that a law that is duly enacted by the legislature or the concerned body is valid if it has followed the correct procedure. Following this doctrine means that, a person can be deprived of his life or personal liberty according to the procedure established by law.
- So, if Parliament passes a law, then the life or personal liberty of a person can be taken off according to the provisions and procedures of that law.

This doctrine has a major flaw. What is it?

- It does not seek whether the laws made by Parliament is fair, just and not arbitrary.
- “Procedure established by law” means a law duly enacted is valid even if it’s contrary to principles of justice and equity. The strict following of the procedure established by law may raise the risk of compromise to life and personal liberty of individuals due to unjust laws made by the law-making authorities. It is to avoid this situation, SC stressed the importance of the due process of law.

Due Process of Law

- Due process of law doctrine not only checks if there is a law to deprive the life and personal liberty of a person but also see if the law made is fair, just and not arbitrary.
- If SC finds that any law as not fair, it will declare it as null and void. This doctrine provides for more fair treatment of individual rights.
- Under due process, it is the legal requirement that the state must respect all of the legal rights that are owed to a person and laws that states enact must conform to the laws of the land like – fairness, fundamental rights, liberty etc. It also gives the judiciary to access fundamental fairness, justice, and liberty of any legislation.

Judicial cases related to Article 21:

Gopalan case(1950):

- Narrow interpretation of Article 21 'established by law': SC held that the protection under Article 21 is available only against arbitrary executive action and not for procedure on arbitrary legislative action.
- This means that the State can deprive the right to life and personal liberty of a person based on a law.

Maneka Gandhi case(1978):

- In this SC overruled Gopalan judgement.
- Wider interpretation of the Article 21: American ‘due process of law’
- Held that the right to life and personal liberty of a person can be deprived by a law provided the procedure prescribed by that law is reasonable, fair and just.
- Francis Coralie Mullin vs. Union Territory of Delhi (1981): In this case, the court held that any procedure for the deprivation of life or liberty of a person must be reasonable, fair and just and not arbitrary, whimsical or fanciful.
- Olga Tellis vs. Bombay Municipal Corporation (1985): This case reiterated the stand taken earlier that any procedure that would deprive a person’s fundamental rights should conform to the norms of fair play and justice.
- Unni Krishnan vs. State of Andhra Pradesh (1993): In this case, the SC upheld the expanded interpretation of the right to life. The Court gave a list of rights that Article 21 covers based on earlier judgements. Some of them are:
- 1. Right to privacy
- 2. Right to go abroad
- 3. Right to shelter
- 4. Right against solitary confinement
- 5. Right to social justice and economic empowerment

- 6. Right against handcuffing
- 7. Right against custodial death
- 8. Right against delayed execution
- 9. Doctors’ assistance
- 10. Right against public hanging
- 11. Protection of cultural heritage
- 12. Right to pollution-free water and air
- 13. Right of every child to a full development
- 14. Right to health and medical aid
- 15. Protection of under-trials

Right to Life and Suicide

- Section 309 of the Indian Penal Code (IPC) makes attempted suicide a criminal offence which is punishable with imprisonment and fine.
- There were many debates on whether this should continue since mental health experts have argued that people who attempt suicide need adequate counselling and not punishment.
- The Mental Healthcare Act, 2017 was passed by the Parliament and the law came into force in 2018. This Act is meant to provide “for mental healthcare and services for persons with mental illness and to protect, promote and fulfill the rights of such persons during delivery of mental healthcare and services.”
- This law decriminalizes suicide in India.
- The law states, “Notwithstanding anything contained in section 309 of the Indian Penal Code, any person who attempts to commit suicide shall be presumed, unless proved otherwise, to have severe stress and shall not be tried and punished under the said Code”.

Arguments against decriminalizing suicide:

- No person has a complete autonomy with respect to his/her life. He/she has a duty with respect to his family. In many cases, a person's suicide could lead to a family being destitute.
- Decriminalizing suicide might lead to decriminalizing the abatement to suicide. The counterargument to this point is that suicide alone can be decriminalized by having the necessary amendments or legal provisions to cover abatement to suicide.

Arguments in favor of decriminalizing suicide:

- This is the only case where an attempt to a crime is punishable and not the crime itself (because a person becomes beyond the reach of law if suicide is complete).
- Suicide is committed/attempted by people who are depressed and under severe stress. People who attempt suicide need counselling and medical help, not a jail warden's severe authority.
- Decriminalising an attempt to suicide is different from conferring the 'right to die'.

Right to Life and Euthanasia

- There are many debates on whether the right to life also extends to the right to die, especially to die with dignity. Euthanasia is a topic that is frequently seen in the news. Many countries have legalised euthanasia (the Netherlands, Belgium, Colombia, Luxembourg).
- Euthanasia is the practice of intentionally ending life in order to relieve suffering and pain. It is also called 'mercy killing'.

There are various types of euthanasia: Passive and Active.

- **Passive Euthanasia:** This is where treatment for the terminally ill person is withdrawn, i.e., conditions necessary for the continuance of life are withdrawn.
- **Active Euthanasia:** This is where a doctor intentionally intervenes to end someone's life with the use of lethal substances.
- This is different from physician-assisted suicide where the patient himself administers the lethal drugs to himself. In active euthanasia, it is a doctor who administers the drugs.
- **Voluntary euthanasia:** Under this, euthanasia is carried out with the patient's consent.
- **Non-voluntary euthanasia:** Under this, patients are unable to give consent (coma or severely brain-damaged), and another person takes this decision on behalf of the patient.
- **Involuntary euthanasia:** Euthanasia is done against the will of the patient, and this is considered murder.

International Position on Euthanasia:

- In the Netherlands and Belgium, both euthanasia and physician-assisted suicide are legal.
- In Germany, euthanasia is illegal while physician-assisted suicide is legal.
- Both euthanasia and physician-assisted suicide are illegal in India, Australia, Israel, Canada and Italy.

Euthanasia in India

- Passive euthanasia has been made legal in India.
- In 2018, the SC legalised passive euthanasia by means of the withdrawal of life support to patients in a permanent vegetative state.
- This decision was made as a part of the verdict in the famous case involving Aruna Shanbaug, who had been living in a vegetative state for more than 4 decades until her death in 2015.
- The court rejected active euthanasia by means of lethal injection. Active euthanasia is illegal in India.
- As there is no law regulating euthanasia in the country, the court stated that its decision becomes the law of the land until the Indian parliament enacts a suitable law.
- Passive euthanasia is legal under strict guidelines.
- For this, patients must give consent through a living will, and should either be in a vegetative state or terminally ill.
- Living Will: It is a legal document in which a person specifies what actions should be taken for their health if they are no longer able to make such decisions for themselves due to illness or incapacity.
- When the executor (of the living will) becomes terminally ill with no hope of a recovery, the doctor will set up a hospital medical board after informing the patient and/or his guardians.

Right to Privacy:

- The right to privacy is widely considered one of the basic human rights and the same is explicitly stated under Article 12 of the 1948 Universal Declaration of Human Rights: “No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honor and reputation. Everyone has the right to the protection of the law against such interference or attacks.”
- Most nations in the West have a robust framework of laws regarding privacy and a need for the same in India has been felt for a very long time now. The Supreme Court had already made strong observations on the matter in various judgements which include:
- M.P. Sharma v Satish Chandra
- Maneka Gandhi v Union of India
- Kharak Singh v State of UP, and
- Peoples Union for Civil Liberties v Union of India.
- Puttaswamy Judgement: The right to privacy of an individual was again brought to the fore by the issuance of Aadhar Cards. Retired Justice Puttaswamy challenged the constitutionality of Aadhar before the Supreme Court by filing a writ petition. The petitioner contended that with regard to all the previous apex court judgements, the Right to Privacy is a fundamental right and the Aadhar procedure violated this right.

Issues before the Court:

- The issue before the Court was whether Right to Privacy was a fundamental right despite it not being expressly provided for by the Constitution.
- The question that also arose was that since the Court had stopped short of declaring the right to privacy an absolute fundamental right in some of the above-mentioned judgements, the petitioner wanted the Court to clarify whether the view expressed in these previous judgements was the correct constitutional position.
- Puttaswamy Case Judgement: The Court in its judgement stressed upon the following points:
- It was held that privacy concerns in this day and age of technology can arise from both the state as well as non-state entities and as such, a claim of violation of privacy lies against both of them.
- The Court also held that informational privacy in the age of the internet is not an absolute right and when an individual exercises his right to control over his data, it may lead to the violation of his privacy to a considerable extent.
- It was also laid down that the ambit of Article 21 is ever-expanding due to the agreement over the years among the Supreme Court judges as a result of which a plethora of rights has been included within Article 21.

- The judgement in this landmark case was finally pronounced by a 9-judge bench of the Supreme Court on 24th August 2017 upholding the fundamental right to privacy emanating from Article 21. The court stated that Right to Privacy is an inherent and integral part of Part III of the Constitution that guarantees fundamental rights. The conflict in this area mainly arises between an individual's right to privacy and the legitimate aim of the government to implement its policies and a balance needs to be maintained while doing the same.
- The SC also declared that the right to privacy is not an absolute right and any incursion of privacy by state or non-state actors must satisfy the following triple test:
  - Legitimate Aim
  - Proportionality
  - Legality
- The decision of all the nine judges also held the following:
- The decision given in M.P. Sharma v Satish Chandra, which held that the Right to Privacy is not protected by the Constitution of India, stands over-ruled.
- The decision in Kharak Singh, to the degree it holds that Right to Privacy is not guaranteed by Part III, also stands over-ruled.
- The right to privacy of an individual is not only protected by the Constitution under Article 21 but is also an intrinsic part of the scheme of Part III which guarantees fundamental rights.

Analysis of the Judgement

- Critics believe that this judgement is another chapter in the long list of instances of judicial overreach by the Court. The Supreme Court has time and again interpreted the Constitution on issues that are not expressly mentioned therein. It is, however, pertinent to mention that the principle of interpreting fundamental rights is particularly well-settled and as such calling this verdict judicial overreach is far-fetched. As Justice Chandrachud pointed out, this judgement cannot be termed as a constitutional amendment brought by a judicial decision and in all fairness, there is immense merit in this line of argument.
- The Court has also been criticised for arguing in favour of a consent-based privacy framework which may not be appropriate for the modern data-based disruptive technological setup. The Court is basically recommending a framework that is well beyond its terms of reference and the details of which are left for the executive to decide. But considering that the whole idea of privacy invasion immensely benefits the state, it does not make much sense.

Supreme Court Verdict on Section 377

- "Whoever voluntarily has carnal inter-course 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."
- Section 377 creates a class of criminals, consisting of individuals who engage in consensual sexual activity.
- It typecasts Lesbian, Gay, Bisexual, and Transgender, Queer (LGBTQ) individuals as sex-offenders.
- It categorised their consensual conduct on par with sexual offences like rape and child molestation.
- This has led to stigmatisation and condemnation of LGBTQ individuals in society.
- It was a cause for institutional discrimination faced by the LGBTQ community in health care, which even led to ineffective HIV prevention and treatment.

What was the judgment?

- The Bench unanimously held that criminalisation of private consensual sexual conduct between adults of the same sex was clearly unconstitutional.
- The court, however, held that the Section 377 would apply to “unnatural” sexual acts like bestiality.
- Sexual act without consent would also continue to be a crime under Section 377.

What was SC’s rationale?

- Individual- Bodily autonomy is individualistic as it is a matter of choice and is part of dignity.
- Sexual orientation is biological and innate, as an individual has no control over who they get attracted to.
- Any repression of this by the state will be a violation of free expression.
- Rights- Homosexuals, as individuals, have a fundamental right to live with dignity and possess full range of constitutional rights.
- These include sexual orientation, partner choice, equal citizenship and equal protection of laws.
- The State cannot decide the boundaries between what is permissible and not.
- Society- Section 377 is based on deep-rooted gender stereotypes ingrained in the society.
- It is a majoritarian impulse to subjugate a sexual minority to live in silence.
- But the societal morality cannot override constitutional morality and fundamental rights.
- Nature- The verdict noted that homosexuality was documented in 1,500 species and was not unique to humans.
- This firmly dispels the prejudice that homosexuality is "against the order of nature".

- Right to love- Section 377 speaks not just about non-procreative sex but also about forms of intimacy.
- This, the court has acknowledged as the 'right to love'.
- But the social order finds some of these ‘disturbing’.
- It is the result of limits imposed by structures such as gender, caste, class, religion and community.
- These limits affect the “right to love” of not just the LGBTQ individuals, but of couples who make relationships across caste and community lines.
- Perception- The recent parliamentary re-enactment of the Mental Healthcare Act of 2017 was mentioned.
- The present definition in the Act makes it clear that homosexuality is not considered to be a mental illness.
- It is reaffirmed that mental illness shall not be determined on the basis of non-conformity with moral, social, cultural, religious beliefs.
- Awareness- The Centre was urged to take all measures to ensure that the judgment is given wide publicity.
- Government was instructed to initiate programmes to reduce and eliminate the stigma against homosexuality.
- Government officials and police will have to be given periodic sensitisation campaigns.

What are the shortcomings?

- How the judgment operates on the ground is yet to be seen as recent orders on triple divorce and lynching have not had visible impact.
- The judgment has opened up grey areas, and new guidelines will be needed.
- e.g Say, a gay individual withdraws “consent” and lodges a complaint against their partner.
- India’s laws on sexual assault do not recognise men as victims of rape. Police will now have to establish the principle of consent.
- Impact of Decriminalising Homosexuality:
- Sexual minorities in India are one step closer to living with dignity.
- LGBTQ Community will be able to come out in the open with their sexual preferences.
- Discrimination faced by them in accessing health and their harassment by Police will cease.
- Decriminalisation has also been associated with more self-acceptance as well as psychological and emotional security among LGBTQ Community.
- This judgement will spur LGBTQ Community to demand more progressive laws like Gay marriage laws, right to form partnerships, inheritance, employment equality, protection from gender-identity-based discrimination among others.
- The judgment has opened up grey areas, and guidelines will be needed to deal with cases where, say, a gay individual withdraws “consent” and lodges a complaint against the partner. India’s laws on sexual assault do not recognise men as victims of rape.

Death Penalty/Capital Punishment

- While global trend is in favor of abolishment of death penalty, India continues to find itself in mix of countries such as China, Iran, Pakistan, USA where it has not been completely abolished.
- The proponents of death penalty hail it for its deterrent capacity. Further, there are some crimes, which are so heinous that nothing short of d eath penalty meets the ends of justice. In cases like terrorism, if terrorists are not executed then they continue to pose a grave threat to national security.
- However following arguments are made in favor of abolishing death penalty.
  - No sufficient data to support the deterrent logic.
  - Study conducted in USA shows that the state abolishing death penalty had witnessed the fall in murders.
  - The principle of revenge (eye for an eye) cannot be the basis of justice in any civilized society
  - The purpose of punishment should be to reform rather than to punish
  - In Bachan Singh case, the Supreme Court sought to strike a balance. It proclaimed that death penalty is an exception not a rule. It proclaimed the doctrine of “rarest of the rare”.
  - There is also possibility of error in judgment as admitted by the SC in 2009 in “Santosh Kumar v/s State of Maharastra case”. It admitted that there are at least 13 cases in which death penalty was awarded, the doctrine of “rarest of the rare” was not applied.
  - Out of these, 2 persons have already been executed.
  - United Nation’s Declaration on Human Rights also expects the state to abolish torturous punishments and death penalty.
  - It is argued that for heinous crimes such as rape and murder, life imprisonment can be a better option.

Environmental and Ecological rights:

- The greatest contribution if any, been made to the society by the Supreme Court by expanding the horizons of right to life, has been the deduction of some of the most valuable environmental and ecological rights for the mankind. This has led the salutary development of a kind of environmental jurisprudence in the country at the behest of the Apex Court.
- On this front, the court has been able to establish a close relationship between ecology and right to life under Art 21 by pointing out that since the right to life connotes the concept of "quality of life" which can only be possible if has the necessary conditions for the enjoyment of this life under the conditions of a pollution free environment covering pollution free drinking water, pollution free air and a noise free ambience. Therefore, any disturbance by any means or sources of these basic environment elements namely, air, water or soil would not only be hazardous for life, but also disturbs the quality of life and hence amounts to a violation of right to life.
- Keeping this into consideration, the Court has introduced the concept of what it refers to as doctrine of public trust. This doctrine essentially rests on the premise that certain natural resources like Air, water, soil etc being a gift of the nature are meant for general use and thus cannot be restricted to private ownership. As such, the state as a trustee thereof is duty bound to protect them by resorting to sustainable development plan. This is the reason that in the recent past keeping in view the ever rising pollution in the national capital which was rightly compared to a gas chamber, the Court not only justified the imposition of green tax on the vehicles entering Delhi, but also directed that the vehicles especially, load carriers which have not their destination in Delhi, better follow different routes.
- The Court even did not shy away from imposing a ban on the sale of SUVs above 2000 CC in the national capital as the rich cannot pollute the environment while roaming around in their SUVs. Undoubtedly thus, hygienic environment is an integral facet of healthy life, for a right to live with human dignity certainly becomes illusory in the absence of humane and healthy environment. In this context, the Court has had always held that the word environment has a broad spectrum so as to carry within its ambit both hygienic atmosphere and ecological balance.

ARTICLE 21 A: RTE

- Changes made by **86th Constitutional Amendment Act, 2002**
- **Art 21A**: State shall provide free and compulsory education to all children of the age of six to fourteen years in such a manner as the State may determine.
- **Art 45 (DPSP)** now reads—'The state shall endeavour to provide early childhood care and education for all children until they complete the age of six years.'
- **Article 51A** – New FD that reads—'It shall be the duty of every citizen of India to provide opportunities for education to his child or ward between the age of 6 & 14 years'.

Salient Features of RTE

- All children between the ages of six and 14 years shall have the right to free and compulsory elementary education in a neighbourhood school
- Even those who have been deprived of this opportunity, this act provides for 8 years of schooling.
- Those who have missed i.e. non-admitted children will be admitted to the class appropriate to their age. Kendriya Vidyalayas, Navodaya Vidyalayas, Sainik Schools, and unaided schools shall admit at least 25% of students from disadvantaged and economically weaker groups. Schools may not screen applicants during admission or charge capitation fees
- All schools to follow the norms of teacher qualification within 5 years. A fixed teacher to pupil ratio of 1:30 is to be achieved.
- All schools except for those private unaided, will constitute School Management Committees. 75% of its members would be parents or guardians.
- National Commission for the Protection of Child Rights will act as watchdog. States to constitute similar state bodies at the state level.
- Central and state government to share the funding:
- Center may ask the Finance Commission to allocate additional resources to states
- Funding gaps can be arranged in partnership with civil society
- Curriculum development in accordance with the constitutional rights

Evaluation of RTE

- There are no specific penalties if the authorities fail to provide the right to elementary education
- Both the state government and the local authority have the duty to provide free and compulsory elementary education. Sharing of this duty may lead to neither government being held accountable.
- The Bill provides for the right to schooling and physical infrastructure but does not guarantee that children learn. It exempts government schools from any consequences if they do not meet the specified norms.
- The Bill legitimises the practice of multi-grade teaching. The number of teachers shall be basedon the number of students rather than by grade.
- Enrolment has reached universal levels but the problem of dropouts and absenteeism continues
- The act doesn’t provide for those who cannot go to school
- Bulk of the schools fail to meet the targets of improving infrastructure
- There is a big deficit in the country with respect to the availability of untrained teachers
- Some people believe that not failing a child is not a good option as it relieves the teachers from responsibility.

ARTICLE 22: PROTECTION AGAINST DETENTION AND ARREST

- **Constitutional text:** Protection against arrest and detention in certain cases.
- 1) No person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest nor shall he be denied the right to consult, and to be defended by, a legal practitioner of his choice.
- 2) Every person who is arrested and detained in custody shall be produced before the nearest magistrate within a period of twenty-four hours of such arrest excluding the time necessary for the journey from the place of arrest to the court of the magistrate and no such person shall be detained in custody beyond the said period without the authority of a magistrate.
- 3) Nothing in clauses (1) and (2) shall apply—a) to any person who for the time being is an enemy alien; or b) to any person who is arrested or detained under any law providing for preventive detention.
- 4) No law providing for preventive detention shall authorize the detention of a person for a longer period than three months unless—a) an Advisory Board consisting of persons who are, or have been, or are qualified to be appointed as, Judges of a High Court has reported before the expiration of the said period of three months that there is in its opinion sufficient cause for such detention:

- Provided that nothing in this sub-clause shall authorise the detention of any person beyond the maximum period prescribed by any law made by Parliament under sub-clause (b) of clause (7); orb) such person is detained in accordance with the provisions of any law made by Parliament under sub-clauses (a) and (b) of clause (7).
- 5) When any person is detained in pursuance of an order made under any law providing for preventive detention, the authority making the order shall, as soon as may be, communicate to such person the grounds on which the order has been made and shall afford him the earliest opportunity of making a (b) to any person who is arrested or detained under any law providing for preventive detention. 6) Nothing in clause (5) shall require the authority making any such order as is referred to in that clause to disclose facts which such authority considers to be against the public interest to disclose.
- Art. 22 provides procedural safeguards against arbitrary arrest and detention. Art. 22 states that
- No person who is arrested shall be detained in custody without being informed of the grounds for such arrest;
- Every person who is arrested and detained in custody shall be produced before the nearest magistrate with a period of twenty-four hours of arrest; and
- No such person shall be detained in custody beyond the said period without the authority of a magistrate.
- The above safeguards are not, however, available to (a) an enemy alien, (b) a person arrested or detained under a law providing for preventive detention.

Preventive Detention and Art. 22

- Preventive detention means detention of a person without trial. It is different from ordinary or punitive detention. The object of punitive detention is to punish for what he has done.
- Preventive detention differs from punitive detention both in respect of its purpose and its justification. The object of preventive detention is not to punish a man for having done something but to intercept his before he does it and to prevent him from doing it.
- In preventive detention no offence is proved nor any charge is formulated. Further, the justification of such a detention is suspicion or reasonable probability of the impending commission of one prejudicial Act.
- The Constitution authorizes the Legislature to make laws providing for preventive detention. The Parliament as well as some of the State Legislatures have enacted laws providing for preventive detention for reasons connected with the security of the State, foreign affairs, maintenance of public order, maintenance of supplies and services essential to the community etc.

Some of the preventive detention acts enacted by the Parliament are:

- Preventive Detention Act 1950 repealed in 1969,
- The maintenance of internal security act (MISA), 1971 repealed in 1978 Conservation of Foreign Exchange and Prevention of Smuggling Activities Act (COFEPOSA) 1974,
- National Security Act 1980,
- Terrorist and Disruptive activities (Prevention) Act (TADA), 1985 later repealed in 1995 Prevention of terrorism ordinance (POTO), 2001, 2002 Etc.
- However, a preventive detention must satisfy the following conditions set out in Art. 22(4) as amended by the 44th Amendment Act 1978: -
- The Government is entitled to detain an individual under preventive detention only for two months. It seeks to detain the arrested person for more than 2 months, it most obtain a report from an Advisory Board— that will examine the papers submitted by the Government any by the accused, — as to when the detention is justified.
- The person so detained shall, as soon as possible may be informed of the ground of his detention accepting facts, which the detaining authority considers to be against the public interest to disclose. The person detained must have the earliest opportunity of making a representation against the order of detention.

RIGHT AGAINST EXPLOITATION

- **ARTICLE 23: (Prohibition of Human Trafficking, Beggar etc.)**
- **Traffic in human beings include** selling and buying of men, women and children like goods; immoral traffic in women and children, including prostitution; *devadasis;* slavery.
- Parliament has enacted laws to give effect to this provision:
- Immoral Traffic (Prevention) Act, 1956; Bonded Labour (Abolition) Act, 1976; the Minimum Wages Act, 1948; Contract Labour Act, 1970; Equal Remuneration Act, 1976.
- **Exception:**
- It permits the State to impose compulsory service for public purposes, as for example, military service or social service, for which it is not bound to pay. But, State is NOT permitted to make any discrimination on **grounds only of religion, race, caste or class** in this matter.

ARTICLE 24: PROHIBITION OF CHILD LABOUR

- *Art 24: No child below the age of fourteen years shall be employed to work in any factory or mine or engaged in any other hazardous employment.*
- 2006: Government banned the employment of children as domestic servants or workers in business establishments like hotels, dhabas, restaurants, shops, factories, resorts, spas, tea-shops and so on. It warned that anyone employing children below 14 years of age would be liable for prosecution and penal action.
- **Child and Adolescent Labour (Prohibition) Act** was passed by both houses of Parliament in 2016 giving more teeth to older Child Labour Act 1986.
- **Provisions of the Amended Bill**
- **a)** The Bill seeks to amend the Child Labour (Prohibition and Regulation) Act, 1986, which prohibits the engagement of children in certain types of occupations and regulates the condition of work of children in other occupations
- b) The earlier Act prohibits employment of children below 14 years in certain occupations such as automobile workshops, bidi-making, carpet weaving, handloom and power loom industry, mines and domestic work.

- c) In light of the Right of Children to Free and Compulsory Education Act, 2009, the Bill proposes a blanket ban on employment of children below 14 years in all occupations except in “own account enterprises” i.e. family business and in entertainment industry provided education of child does not get hampered
- d) The Bill adds a new category of persons called “adolescent”. An adolescent means a person-between 14 and 18 years of age. The amended Act prohibits employment of adolescents in hazardous occupations as specified (mines, inflammable substance and hazardous processes).
- e) The central government may add or omit any hazardous occupation from the list included in the Bill
- f) The Bill enhances the punishment for employing any child in an occupation. It also includes penalty for employing an adolescent in a hazardous occupation. The punishment for those employers, employing children for the first time, the fine has been increased from 20000 to 50000 Rs and 6months to 2 years imprisonment. For repeat offenders the offence is cognizable (i.e. arrest can be made without warrant) and proposes a punishment of 1-3 year
- g) The Bill proposes relaxed penal provisions for parents. In case of parents being repeat offenders, it proposes a fine of 10000 rupees.
- h) The government may confer powers on a District Magistrate to ensure that the provisions of the law are properly carried out.
- i) The Bill empowers the government to make periodic inspection of places at which employment of children and adolescents are prohibited.
- j) It also sets up a Child and Adolescent Labour Rehabilitation Fund to be set up under the Act for rehabilitation of children and adolescent employed

Criticism of the Amended Act:

- Firstly, it has slashed the list of hazardous occupations for children from 83 to include just mining, explosives, and occupations mentioned in the Factory Act. This means that work in chemical mixing units, cotton farms, battery recycling units, and brick kilns, among others, have been allowed. Further, even the ones listed as hazardous can be removed, according to Section 4— not by Parliament but by government authorities at their own discretion.
- Secondly, section 3 in Clause 5 allows child labour in "family or family enterprises" or allows the child to be "an artist in an audio-visual entertainment industry". Since most of India's child labour is caste-based work, with poor families trapped in intergenerational debt bondage, this refers to most of the country's child labourers. The clause is also dangerous as it does not define the hours of work, it simply states that children may work after school hours or during vacations.
- They also contravene the International Labour Organization's (ILO) Minimum Age Convention and UNICEF's Convention on the Rights of the Child, to which India is a signatory. According to UNICEF, a child is involved in child labour if he or she is between 5 and 11 years, does at least one hour of economic activity, or at least 28 hours of domestic work in a week.
- One-fifth of the child labourers rescued worked with their families. If the new law was in place they wouldn't be rescued.
- Regulation is going to be a big challenge, as it will be difficult to determine whether a particular family is running an enterprise, or whether some faceless owner has employed a single family to circumvent the law. The fallout will be a higher dropout rate. They may go to school for some years, concurrently work with their families, and graduate to being full-time adolescent workers, without completing elementary education
- According to UN Convention on Rights of Child (CRC) every child has a right to be heard. In the International Working Group on Child Labour which came up with Kundapura declaration stated that children be consulted, their products recognized, work be regulated and made safe, education, health and security be provided. Unfortunately, this has not been the case in the current legislation. The Act follows the least resistance path which will open a pandora's box

RIGHT TO FREEDOM OF RELIGION

- **ARTICLE 25: FREEDOM OF CONSCIENCE AND RELIGION**
- Art 25: (1) Subject to public order, morality and health and other provisions of this Part, all persons are equally entitled to freedom of conscience and the right freely to profess, practise and propagate religion (2) Nothing in this article shall affect the operation of any existing law or prevent the State from making any law
- regulating or restricting any economic, financial, political or other secular activity which may be associated with religious practice;
- providing for social welfare and reform or the throwing open of Hindu religious institutions of a public character to all classes and sections of Hindus

- Explanation: Reference to Hindus shall be construed as including a reference to persons professing the Sikh, Jaina or Buddhist religion
- ***Freedom of conscience****:* Inner freedom of an individual to mould his relation with God or Creatures in whatever way he desires. It is the absolute inner freedom of the citizen to mold his own relation with God in whatever manner the likes. When this freedom is expressed in outward form it is “to profess and practice religion.”
- ***Right to profess****:* Declaration of one’s religious beliefs and faith openly and freely. He has the right to practice his belief by practical expression in any manner he believes.
- ***Right to practice****:* Performance of religious worship, rituals, ceremonies and exhibition of beliefs and ideas.
- ***Right to propagate:*** Transmission and dissemination of one’s religious beliefs to others or exposition of the tenets of one’s religion. But, it *does not include a right to convert another person* to one’s own religion. Forcible conversions impinge on the ‘freedom of conscience’ guaranteed to all the persons alike.

Important Judgments

- Jagadishwaranand case, 1984: The Supreme Court held that the Anand Margi practice of dancing with skulls is not essential to its religion and could be reasonably restricted. Similarly, cow slaughter is not considered essential to Islam on Bakrid Day. Thus, the state can regulate what constitutes the essential religious practices and what does not and outlaw the latter if it is anti-social.
- **Stainislau v/s State of MP, 1977:** Constitution bench of the Supreme Court ruled that Article 25(1) doesn't give the right to convert but only the right to spread tenets of one's own religion.
- Thus, only voluntary conversions are valid in India. In fact, some states have passed anti conversion laws prohibiting forced conversions.

Triple Talaq Judgement

- What is Talaq-e-bidat (Triple Talaq)?
- a) If a man belonging to the religion of Islam pronounces talaq thrice either orally or in written form to his wife, then the divorce is considered immediate and irrevocable.
- b) The only way to reconcile the marriage is through the practice of ‘nikah halala’ which requires the woman to get remarried, consummate the second marriage, get divorced, observe the three-month iddat period and return to her husband
- c) Recently, the Parliament has passed the Muslim Women (Protection of Rights on Marriage) Bill, 2019, thereby criminalizing the practice of instant Triple Talaq.
- d) The Supreme Court in the Shayara Bano case (2017) had declared the practice of Triple Talaq (talaq-e-bidat) as unconstitutional.
- e) However, the penal provision of the bill i.e. a Muslim husband declaring instant Triple Talaq can be imprisoned for up to three years is alleged to be disproportionate for a civil offense.

Key features of the Triple Talaq Bill

- Applicable in the whole of India including the union territory J&K after the de-operationalization of Article 370.
- Any pronouncement of “talaq” by a Muslim husband to his wife in any manner, spoken or written, will be void and illegal.
- Any Muslim husband who communicates the “talaq” orally or in writing may face punishment up to three years in jail. The punishment may also be extended.
- If a Muslim man pronounces “talaq” to his wife, then the woman and her children are entitled to receive an allowance for subsistence. Such an amount can be determined by a Judicial Magistrate of the First Class.
- A Muslim woman is entitled to the custody of her minor children even if her husband has pronounced “talaq” to her.
- The offense is also compoundable (i.e. the parties may arrive at a compromise), if the Muslim woman insists for the same and the Magistrates allow certain terms and conditions which he may determine.
- A person accused of this offense cannot be granted bail unless an application is filed by the accused after a hearing in the presence of the Muslim woman (on whom talaq is pronounced) is conducted and the Magistrate is satisfied with the reasonable grounds for granting bail.

Issues Related to Triple Talaq Bill?

- Divorce is a civil matter and making Triple Talaq a criminal offence is disproportionate to criminal jurisprudence.
- The Supreme Court declared Triple Talaq as invalid and did not ask the government to make it a penal offence.
- The Supreme Court by holding that Triple Talaq is unconstitutional implied that mere utterance of Talaq thrice does not result in the dissolution of marriage, rather it remains intact.
- However, by criminalising Triple Talaq the law presumes marriage has ended and for that Muslim man shall be punished.
- Thereby criminalizing the Triple Talaq goes against the spirit of the Supreme Court judgement.
- If the husband is imprisoned, how he can pay maintenance allowance to wives and children.
- Also similar to misuse of Indian Penal Code section 498A (Dowry Harassment) which led to harassment of the affected men, the penal provision in Triple Talaq can be subject to such harassment

Why did the government criminalize the Triple Talaq?

- The Triple Talaq was held to be violative of Article 14 (the right to equality), which is held by the Supreme Court from Shah Bano case 1986 to Shayara Bano case in 2017.
- The Government held that 473 cases of Triple Talaq have taken place even after two years of judgement pronounced by the Supreme Court.
- The law has been placed as a deterrent to eradicate social evils. For example:
- Untouchability was abolished by the Constitution, but the continued practise of untouchability forced Parliament to enact the Untouchability (Offences) Act in 1955 and later renaming it as Protection of Civil Rights Act in 1976.
- To eliminate atrocities faced by women in domestic space parliament enacted:
- 1. The Dowry Prohibition Act in 1961
- 2. Prevention of domestic violence Act 2005

ARTICLE 26: FREEDOM TO MANAGE RELIGIOUS AFFAIRS

- **Rights of Religious Denominations:**
- (a)Right to establish and maintain institutions for religious and charitable purposes;
- (b)Right to manage its own affairs in matters of religion;
- (c)Right to own and acquire movable and immovable property; and
- (d)Right to administer such property in accordance with law
- **Religious denomination must satisfy three conditions:** It should be a collection of individuals who have a *system of beliefs (doctrines*) which they regard as conducive to their spiritual well-being; It should have a *common organisation*; and It should be designated by a ***distinctive name***.
- ***'Ramakrishna Mission' and 'Ananda Marga'*** are religious denominations within Hinduism. Aurobindo Society is NOT a religious denomination.

ARTICLE 27: FREEDOM FROM TAXATION FOR RELIGION

- The State should not spend the public money collected by way of tax for the promotion or maintenance of any particular religion.
- This article prohibits only levy of a tax and not a fee.
- A fee can be levied on pilgrims to provide them some special service or safety measures or on religious endowments for meeting the regulation expenditure. This provision prohibits only levy of a tax and not a fee. This is because the purpose of a fee is to control secular administration of religious institutions and not to promote or maintain religion. Thus a fee can be levied on pilgrims to provide them some special service or safety measures. Similarly, a fee can be levied on religious endowments for meeting the regulation expenditure.

ARTICLE 28: FREEDOM FROM ATTENDING RELIGIOUS INSTRUCTION

- According to Art. 28 no religious instruction shall be imparted in any educational institution wholly maintained out of State fund.
- But this clause shall not apply to an educational institution, which is administered by the State but has been established under any endowment or trust, which requires that religious instruction shall be imparted in such institution.
- Further, no person attending any educational institution recognized by the State of receiving aid out of State funds shall be required to take part in any religious instruction that may be imparted in such institutions or to attend any religious worship that may be conducted in such institution or to any premises attached there to unless such person or if such person is a minor his guardian has given his consent thereto.
- Thus Art. 28 mentions four types of educational institutions.
- Institutions wholly maintained by the State.
- Institutions recognized by the State.
- Institutions funded by the state
- Institutions that administered by the State- but are established under any trust or endowment.
- In the institutions of (a) type no religious instructions can be imparted. In (b) and (c) types of institutions religious instructions may be imparted only the consent of the individuals. In (d) type institutions, there is no restriction on religious instructions.

Cultural and Educational Rights

ARTICLE 29: PROTECTION OF INTERESTS OF MINORITIES

- Art 29: “Section of citizens”, having a distinct language, script or culture of its own, shall have the right to conserve the same. Further, no citizen shall be denied admission into any educational institution maintained by the State or receiving aid out of State funds on grounds only of religion, race, caste, or language.
- Thus, it gives protection to both religious minorities as well as linguistic minorities
- Political speeches or promises made for the conservation of the language of a section of the citizens does not amount to corrupt practice under Representation of People Act, 1951.

ART 30: MINORITY RIGHTS

- It grants the following rights to minorities, whether religious or linguistic:
- Right to establish and administer educational institutions of their choice. ***44th Amendment:*** compensation amount fixed by the State for the compulsory acquisition of any property of a minority educational institution shall not restrict or abrogate the right guaranteed to them.
- Non-discrimination against any educational institution managed by a minority wrt to granting of aid.
- Article 30 is confined only to minorities (religious or linguistic) and does not extend to any section of citizens (as under Article 29).
- 'Minority' has not been defined anywhere in the Constitution.

Minority educational institutions are of three types:

- Those that seek recognition as well as aid from the State;
- Those that seek only recognition and not aid; and
- Those that neither seek recognition nor aid from the State.
- They are free to administer their affairs but subject to operation of general laws like contract law, labour law, industrial law, tax law, economic regulations, and so on.

Important judgments

- **a) St. Stephens v/s University of Delhi, 1992:** The Supreme Court ruled that minority institutions should make available at least 50% of their annual admission intake for other communities. The admission of other communities should be done purely on the basis of merit.

b) Unnikrishnan v/s State of Andhra Pradesh, 1993: Supreme Court ordered for the introduction of three types of seats:

- i) 15% seats are management seats and fee is not limited.
- ii) 35% seats, wherein State government fixed fees
- iii) 50% are free seats based on merit established by a common entrance examination

c) TMA Pai Foundation and others v/s State of Karnataka, 2002

- Following are the essential features of the landmark judgment:
- i) All citizens have the rights to establish and administer educational institutions
- ii) The right to administer MEI (Minority Educat ional Institution) is not absolute. The State can apply regulations to unaided MEIs also to achieve educational excellence
- iii) Percentage of non minority students to be admitted to an aided MEI to be decided by the state or university.
- iv) Fees to be charged by un aided MEIs can't be regulated, but no institution can charge capitation fee

d) Islamic Academy of education v/s State of Karnataka, 2003: In this case, the Supreme Court clarified its judgment in TMA Pai case. The ruling says that Article 30 confers on linguistic and religious minorities the unqualified right to establish educational institutions, but the government could exercise control and regulation on them for maintaining good standards.

Exceptions to Fundamental Rights

Article 31A: Saving of Laws for Acquisition of Estates

- Article 31A saves five categories of laws from being challenged and invalidated on the ground of contravention of the fundamental rights conferred by Article 14 and 19. They are related to agricultural land reforms, industry and commerce.
- Notwithstanding anything contained in article 13, no law providing for-
  - The acquisition by the State of any estate or of any rights therein or the extinguishment or modification of any such rights, or
  - The taking over of the management of any property by the State for a limited period either in the public interest or in order to secure the proper management of the property, or
  - The amalgamation of two or more corporations either in the public interest or in order to secure the proper management of any of the corporations, or
  - The extinguishment or modification of any rights of managing agents, secretaries and treasurers, managing directors, directors or managers of corporations, or of any voting rights of shareholders thereof, or

- The extinguishment or modification of any rights accruing by virtue of any agreement, lease or license for the purpose of searching for, or winning, any mineral or mineral oil, or the premature termination or cancellation of any such agreement, lease or license, Shall be deemed to be void on the ground that it is inconsistent with, or takes away or abridges any of the rights conferred by article 14 or article 19:

- Provided that where such law is a law made by the Legislature of a State, the provisions of this article shall not apply thereto unless such law, having been reserved for the consideration of the President, has received his assent:
- Provided further that where any law makes any provision for the acquisition by the State of any estate and where any land comprised therein is held by a person under his personal cultivation, it shall not be lawful for the State to acquire any portion of such land as is within the ceiling limit applicable to him under any law for the time being in force or any building or structure standing thereon or appurtenant thereto, unless the law relating to the acquisition of such land, building or structure, provides for payment of compensation at a rate which shall

In this article

- (a) The expression estate¨ shall, in relation to any local area, have the same meaning as that expression or its local equivalent has in the existing law relating to land tenures in force in that area and shall also include-
- Any jagir, inam or muafi or other similar grant and in the States of Tamil Nadu and Kerala, any janmam right;
- Any land held under ryotwari settlement;
- Any land held or let for purposes of agriculture or for purposes ancillary thereto, including waste land, forest land, land for pasture or sites of buildings and other structures occupied by cultivators of land, agricultural labourers and village artisans;
- (b) The expression rights¨, in relation to an estate, shall include any rights vesting in a proprietor, sub-proprietor, under-proprietor, tenure holder, raiyat, under-raiyat or other intermediary and any rights or privileges in respect of land revenue.

Article 31B: Validation of Certain Acts and Regulations

- Article 31B saves the acts and regulations included in **Ninth Schedule** from being challenged and invalidated on the ground of contravention of any of the fundamental rights.
- However, in a significant judgement (**COELHO CASE**) delivered in January 2007, the Supreme Court ruled that there could not be any blanket immunity from judicial review of laws included in Ninth Schedule. The court held that judicial review is a 'basic feature' of the constitution and it could not be taken away by putting a law under the Ninth Schedule. It said that the laws placed under the Ninth Schedule after April 24, 1973 (Kesavananda date), are open to challenge in court if they violated fundamentals rights.

Article 31C: Saving of Laws giving effect to some DPSPs

- Article 31C, as inserted by 25th Amendment Act of 1971, contained the following two provisions:
- No law that seeks to implement the socialistic directive principles specified in Article 39(b) or (c) shall be void on the ground of contravention of the fundamental rights conferred by Article 14 or 19.
- No law containing a declaration that it is for giving effect to such policy shall be questioned in any court on the ground that it does not give effect to such a policy.
- In the Kesavananda Bharati case (1973), the Supreme Court declared the above second provision of Article 31C as unconstitutional and invalid on the ground that judicial review is a basic feature of the Constitution and hence, cannot be taken away.
- The 42nd Amendment Act (1976) extended the scope of the above first provision of Article 31C by including within its protection any law to implement *any* of the directive principles in Part IV of the Constitution and not merely in Article 39 (b) or (c). However, this extention was declared as unconstitutional and invalid by the Supreme Court in the Minerva Mills case (1980).

ART 32: RIGHT TO CONSTITUTIONAL REMEDIES

- This allows citizens to move court if they believe that any of their Fundamental Rights have been violated by the State.
- Dr Ambedkar called Article 32 as the most important article of the Constitution—'an Article without which this constitution would be a nullity. It is the very soul of the Constitution and the very heart of it'.
- The right to ***move Supreme Court by appropriate proceedings*** for the enforcement of the Fundamental Rights is guaranteed.
- Supreme Court shall have power to issue directions or orders or writs for the enforcement of any of the fundamental rights. The writs issued may include *habeas corpus, mandamus,* prohibition, *certiorari* and *quo-warranto.*
- Parliament can empower any other court to issue directions, orders and writs of all kinds. However, this can be done without prejudice to the above powers conferred on the Supreme Court. ***Any other court here does not include high courts because Article 226 has already conferred these powers on the high courts***.

- The right to move the Supreme Court shall ***not be suspended except as otherwise provided for by the Constitution.***
- **Art 359:** the President can suspend the right to move any court for the enforcement of the fundamental rights during a national emergency
- Enforcement of Fundamental Rights: ***the jurisdiction of the Supreme Court is original but not exclusive***. It is concurrent with jurisdiction of high courts under Art 226.
- **<u>Writ jurisdiction: SC v/s HC</u>**
- SC can issue writs only for the enforcement of FRs; HC can issue writs for any other purpose, along with FRs. Thus, t***he writ jurisdiction of the SC is narrower than that of HC***.
- SC can issue writs against a person or government throughout the *territory of India;* HC can issue writs against a person residing or against a government or authority located within its territorial jurisdiction only (outside its territorial jurisdiction only if the cause of action arises within its territorial jurisdiction)**.**
- Article 32 is in itself a FR: it implies that SC cannot refuse to exercise its writ jurisdiction. Article 226 is discretionary which implies that HC may refuse to exercise its writ jurisdiction.

ARTICLE 33: ARMED FORCES & FRS

- It empowers the Parliament to restrict or abrogate the FRs of the members of armed forces, para-military forces, police forces, intelligence agencies and analogous forces with a view to ensure proper discharge of their duties and maintenance of discipline among them.
- Various laws in relation to armed forces impose restrictions on their: freedom of speech, right to form associations, right to be members of trade unions or political associations, right to communicate with the press, right to attend public meetings or demonstrations, etc. These also exclude the court Martials (tribunals established under the military law) from the writ jurisdiction of the Supreme Court.

ARTICLE 34: MARTIAL LAW & FRS

- The concept of Martial Law or Military Rule is derived from English common law; it is not defined in Constitution.
- Article 34 empowers Parliament to indemnify any government servant or any other person for any act done by him in connection with the maintenance or restoration of order in any area where martial law was in force.
- The Supreme Court held that the declaration of martial law does not ipso facto result in the suspension of the writ of habeas corpus

MARTIAL LAW	EMERGENCY
It affects only Fundamental Rights	Also effects ***Centre–state relations***, distribution of revenues and legislative powers between centre and states and may extend the tenure of the Parliament
It suspends the government and ordinary law courts	It continues the government and ordinary law courts.
It is imposed to restore the breakdown of law and order due to any reason	It can be imposed only on three grounds—war, external aggression or armed rebellion.
It is imposed in some specific area of the country	It is imposed either in whole country or in any part of it.
It has no specific provision in Constitution. It is implicit.	It has specific and detailed provision in the Constitution. It is explicit.

ARTICLE 35: SPECIFIES WHAT LAWS PARLIAMENT CAN MAKE AND STATE LEGISLATURES CANNOT

- Article 35 extends the competence of the Parliament to make a law on the matters specified in Articles 16, 32, 33 & 34, even though some of those matters may fall within the sphere of the state legislatures (i.e., State List).
- Any law in force immediately before the commencement of Constitution in India with respect to any of the matters shall, subject to any adaptations and modifications that may be made therein under Article 372, continue in force until altered or repealed or amended by Parliament.

CONSTITUTIONAL RIGHTS OUTSIDE PART III

- No tax shall be levied or collected except by authority of law (Article 265 in Part XII).
- No person shall be deprived of his property save by authority of law (Article 300-A in Part XII).
- Trade, commerce and intercourse throughout the territory of India shall be free (Article 301 in Part XIII).
- The elections to the Lok Sabha and the State Legislative Assembly shall be on the basis of adult suffrage (Article 326 in Part XV).

NCRWC RECOMMENDATIONS ON FUNDAMENTAL RIGHTS:

- The National Commission to review the working of the Constitution has made the following recommendations with regard to the fundamental rights:
- The scope of prohibition against discrimination (under Articles 15 and 16) should be extended to include 'ethnic or social origin, political or other opinion, property or birth'.
- The freedom of speech and expression (under Article 19) should be expanded to include explicitly 'the freedom of the press and other media, the freedom to hold opinions and to seek, receive and impart information and ideas'.
- The following should be added as new Fundamental Rights:
- Right against torture, cruelty and inhuman treatment or punishment.
- Right to compensation if a person is illegally deprived of his right to life or liberty.
- Right to leave and to return to India.
- Right to privacy and family life.
- Right to rural wage employment for a minimum of 85 days in a year.
- Right to access to courts and tribunals and speedy justice.
- Right to equal justice and free legal aid (at present, it is a Directive Principle).
- Right to care and assistance and protection (in case of children).
- Right to safe drinking water, prevention of pollution, conservation of ecology and sustainable development.

- The right to education (under Article 21 A) should be enlarged to read as: ‘Every child shall have the right to free education until he completes the age of fourteen years; and in the case of girls and members of the SCs and STs until they complete the age of eighteen years.
- Two changes should be made with respect to preventive detention (under Article 22), namely, (i) the maximum period of preventive detention should be six months; and (ii) the advisory board should consist of a chairman and two other members and they should be serving judges of any high court.
- Sikhism, Jainism and Buddhism should be treated as religions separate from Hinduism and the provisions grouping them together (under Article 25) should be deleted.
- The protection from judicial review afforded by Article 31 b to the Acts and Regulations specified in the Ninth Schedule should be restricted to only those which relate to (i) agrarian reforms, (ii) reservations, and (iii) the implementation of Directive Principles specified in clause (b) or (c) of Article 39.
- No suspension of the enforcement of the Fundamental Rights under Articles 17, 23, 24, 25, and 32 in addition to those under Articles 20 and 21 during the operation of a national emergency (under Article 352).

WRITS

Habeas Corpus 'to have the body of'.	• **issued by the court to a person(Public authority/Private individual) who detains another person** • **bulwark of individual liberty against arbitrary detention.**	**NOT issued where the** **a) detention is lawful** **b) the proceeding is for contempt of legislature/court** **c) detention is by a competent court** **d) detention is outside the jurisdiction of the court.**
Mandamus 'we command'.	• by the court to a public official asking him to perform his official duties that he has failed or refused to perform. • against any public body, a corporation, an inferior court, a tribunal or government	NOT issued : a) against private individual/body; b) to enforce departmental instruction that does not possess statutory force; c) when the duty is discretionary and not mandatory; d) to enforce a contractual obligation e) against the president/governors; f) against the CJ of HC acting in judicial capacity.
Prohibition 'to forbid'.	• issued by a higher court to a lower court or tribunal • to prevent the latter from exceeding its jurisdiction or usurping a jurisdiction that it does not possess • ONLY against judicial and quasi judicial authorities.	It is not available against • administrative authorities • legislative bodies • private individuals or bodies.

Certiorari **'to be certified' or 'to be informed'.**	**issued by a higher court to a lower court or tribunal:** **to transfer a case pending with the latter to itself to squash the order of the latter in a case. preventive as well as curative. Judicial and quasi-judicial** **administrative authorities affecting rights of individuals. [SC ,1991]**	**not available against** • **legislative bodies** • **private individuals or bodies.**
Quo-Warranto 'by what authority or warrant'	• Issued by the court to enquire into the legality of claim of a person to a public office. • ONLY in case of: a substantive constitutional/statutory public office of a permanent character • prevents illegal usurpation of public office	NOT issued • ministerial office • private office. Unlike the other four writs, this can be sought by any interested person and not necessarily by the aggrieved person.
Certiorari 'to be certified' or 'to be informed'.	issued by a higher court to a lower court or tribunal: to transfer a case pending with the latter to itself to squash the order of the latter in a case. preventive as well as curative. Judicial and quasi-judicial administrative authorities affecting rights of individuals. [SC ,1991]	not available against • legislative bodies • private individuals or bodies.