



GS FOUNDATION BATCH FOR CSE 2024

Polity - 09 **(Right to Life and Liberty; Expanding Horizons)**

Article 21- Right to Life and Personal Liberty

Article 21 provides that no person shall be deprived of their right to life and personal liberty except as per the procedure established by law.

This term of procedure established by law has been much debated over the course of jurisprudence of India. In the *Gopalan case*, Supreme Court narrowly interpreted the term of procedure established by law and held that though this Article 21 protect so only from the arbitrary actions of the executive, legislature can create the law and prescribed for the procedure. Thereby taking away right to life and personal liberty.

This literal interpretation of the term procedure established by law could mean that judiciary was not empowered to check the reasonableness of the law and it was only to decide as per the provisions or the procedure as it is established by the law.

However, Later in **the Maneka Gandhi** case, a new doctrine which is already in forced in United States, that is **due process of law**, was applied in this context. In Maneka Gandhi case of 1978, the Supreme Court overruled its previous judgment by taking a wider interpretation of Article 21.

It ruled that right to life and personal liberty of a person can be deprived by law, **provided that the procedure prescribed by that law is reasonable fair, just and not arbitrary**

Section 10 (3) (c) of the Passport Act authorised the passport officer to impound passport if it deems necessary to do so in the interest of the sovereignty and integrity of India or security of state or a friendly relation of India with any other country or in the interest of general public. Menaka Gandhi passport was impounded by the central government under this Passport Act in the interest of **general public**. Menaka Gandhi filed a writ petition challenging the order on the grounds of violation of our fundamental rights under Article 21.

One of the major grounds of challenge was that the order impounding the passport is null and wide **and it has been made without affording her an opportunity of being heard in the defense**. The leading opinion in the Maneka Gandhi case was propounded by Justice PN Bhagwati. The court laid down a number of positions seeking to make. 21 Much more meaningful as earlier.

- First, the court retreated the proposition that Article 14 and 21 are not mutually exclusive. There is a proper Nexus which is established between these three articles. This means. That a law prescribing a procedure for depriving personal liberty has to meet the requirements of Article 14 and also the procedure established by law in Article 21 must answer the requirement of Article of 14 as well.
- Second, the expression personal liberty in Article 21 was given an expansive interpretation, the Court emphasise. What the expression

percent liberty is of widest amplitude covering variety of rights which go to constitute the personal liberty of a man.

- Third and most significant:- the creative aspect of media Gandhi is the reinterpretation by court **of the expression procedure established by law used under article. 21.** The court now gave new orientation to this expressions. Article 21 would no longer mean that law could prescribe. Semblance of procedure however arbitrary or fanciful to deprive a person of his personal liberty. **It now means that the process must satisfy certain requisites in the sense of being fair and reasonable.** The procedure cannot be arbitrary, unfair and unreasonable. Justice Iyer has said that the procedure in **Article 21 means fair and not simply the formal procedure.** **The law is reasonable law and not enacted piece simply.** This makes the word procedure established by law by and large **synonymous with that of due process of law** as being followed in USA, and this makes the right of hearing a component of natural justice.

Medical Termination of Pregnancy Act (Article 21)

Recent Spark: IN US, Supreme court overturned Roe V Wade judgment which gave the women a right to abortion.

Legislative Abortions in India: In the 1960s, in the wake of a high number of induced abortions taking place, the Union government ordered the constitution of the **Shantilal Shah Committee** to deliberate on the legalisation of abortion in the country. In order to reduce maternal mortality owing to unsafe abortions, the Medical Termination of Pregnancy (MTP) Act was brought into force in 1971.

Existing Criminal Law:

- Under Section 312 of the IPC, a person who **“voluntarily causes a woman with child to miscarry”** is liable for punishment, attracting a jail term of **up to three years or fine or both**, unless it was done in good faith where the purpose was to save the life of the pregnant woman. This section effectively makes unconditional abortion illegal in India.
- Section 313 of the IPC states that a person **who causes the miscarriage without the consent of the pregnant woman**, whether or not she is in the advanced stages of her pregnancy, shall be punished with life imprisonment or a jail term that could extend to 10 years, as well as a fine.
- This law is an exception to the Indian Penal Code (IPC) provisions of 312 and 313 and sets out the rules of how and when a medical abortion can be carried out.

Provisions of original act:

Up to 12 Weeks of Pregnancy- only 1 medical practitioner can do that

12-20 Weeks- two medical practitioners were allowed

Beyond 20 Weeks no abortions was allowed

Challenges:

Many foetal abnormalities are detected after 20 weeks.

It allowed only consent of women and her husband thus keeping pregnancy outside the wedlock unregulated, also it did not include unwanted pregnancies like victims of rape

Amendment in 2021

- Up to 20 Weeks it could be done with only 1 medical practitioner
- The pregnancy can be terminated upto 24 weeks of gestational age after the opinion of two registered medical practitioners under these conditions
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 - If the woman is either a survivor of sexual assault or rape or incest
 - If she is a minor
 - If her marital status has changed during the ongoing pregnancy (i.e. either widowhood or divorce)
 - If she has major physical disabilities or is mentally ill
 - On the grounds of foetal malformation incompatible with life or if the child is born, it would be seriously handicapped
 - Besides, if the pregnancy has to be terminated beyond the 24-week gestational age, it can only be done on the grounds of foetal abnormalities if a four-member Medical Board, as set up in each State under the Act, gives permission to do so.
- Women and husband have been replaced by women and partner.
- Section 5A of the Act contains provisions for the protection of the privacy of a woman undergoing an abortion. The registered medical practitioner cannot “reveal the name and other particulars of a woman whose pregnancy has been terminated”, except to a person authorised by the law.

Right to life- Right to Die?

Another big question under Article 21 before the Supreme Court was that **whether right to life also included right to die**. And if it included right to die, then what is the constitutionality of Section 309 of IPC which punished an attempt to suicide or even section 306 which punished abatement for attempt to suicide.

In P Rathinam versus Union of India case of 1994, the Supreme Court two judge bench held that **right to life also included right to not to live a forced life** to the detriment of the person to their disadvantage or disliking. That bench even called

for the deletion of section 309, thereby giving **recognition to write to die as to be the part of right to life itself.**

However, this judgement of Supreme Court **came under scrutiny by the larger full bench of the Supreme Court in the famous Gian Kaur versus state of Punjab case.** The question arose before the bench that whether attempt to commit suicide. If it is an unconstitutional then how could the abetment to commit suicide be made a criminal offence?

In the given case, Gyan Kaur and her husband were convicted under Section 306 of IPC for abetting the Commission of suicide by Kulwant, their daughter in law. It was argued that **if Section 309 itself is unconstitutional, then how can a person be convicted under section 306.**

The court ruled in Gian Kaur case that **Article 21 is a provision guaranteed the protection of life and personal liberty and by no stretch of imagination can ending of a life would be read to be the intrinsic part of the protection of the life.** The Court observed right to life is a natural right embodied in Article 21, but suicide is an unnaturally termination of or extinction of life, therefore incompatible and inconsistent with the concept of right to life. In this case, Supreme Court has ruled that Section 309 is not unconstitutional and accordingly Section 306 of IPC is also constitutionally. This view was further upheld in **Lokendra Singh versus state of Madhya Pradesh case.**

However, in Gian course case, the Supreme Court has distinguished between euthanasia and attempted to commit suicide. **Euthanasia, termination of life of a person who is terminally ill or in a persistent vegetative state.** In such a case, death due to termination of natural of life of the person is eminent and in order to protect the dignity of the life of the person itself. This in fact is not extinction of the life, rather accelerating the process of the end of the natural life.

Euthanasia

Euthanasia, which comes from the Greek words meaning “a good death”, refers to the practice under which an individual intentionally ends their life.

Key Terms

Active Euthanasia : The apex court, in the Aruna Shanbaug case, said that active euthanasia “entails the use of lethal substances or forces to kill a person, e.g. a lethal injection...”. This means that a terminally-ill patient is administered a lethal drug or substance intentionally in order for them to pass away peacefully, in this case, in the event of terminal illness.

Passive Euthanasia: Removal of artificial life support system.

The “living will” is a person’s **right to issue advance directive on the course of his/her treatment, including withdrawal of life support,** should such a situation arise. However, there is no way a living will provision can be made foolproof requiring no intervention of the doctor or immediate decisionmakers around a person.

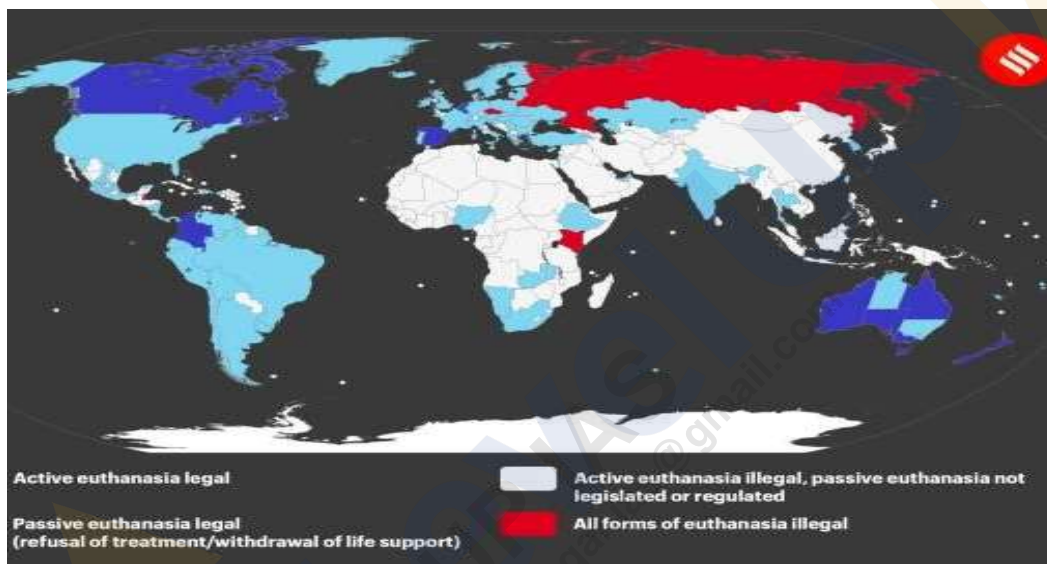
Earlier, in 2006, the Law Commission of India in its 196th Report titled 'Medical Treatment to Terminally Ill Patients (Protection of Patients and Medical Practitioners)' had said that "a doctor who obeys the instructions of a competent patient to withhold or withdraw medical treatment does not commit a breach of professional duty and the omission to treat will not be an offence."

It had also recognised the patient's decision to not receive medical treatment, and said it did not constitute an attempt to commit suicide under Section 309 IPC.

Again, in 2008, the Law Commission's '241st Report On Passive Euthanasia: A Relook' proposed legislation on 'passive euthanasia', and also prepared a draft Bill.

In 2011, the SC allowed **passive euthanasia for Aruna Shanbaug**, a nurse who had been sexually assaulted in Mumbai in 1973, and had been in a vegetative state since then. The court made a distinction between 'active' and 'passive', and allowed the latter in "certain situations".

(Aruna Ramchandra Shanbaug vs Union Of India & Ors)



NGO Common Cause Case:

Court allowed Passive Euthanasia for both a patient capable to take decision (Living Will) and also for those not capable to take decisions.

The advance medical directive (Living Will) **can only be executed by an adult who is of a sound and healthy state of mind and in a position to communicate, relate and comprehend the purpose and consequences of executing the document.**

It **must be voluntarily executed** and without any coercion or inducement or compulsion and after having full knowledge or information.

Consent of the individual is necessary and it shall be in writing "stating as to when medical treatment may be withdrawn or no specific medical treatment shall be given which will only have the effect of delaying the process of death that may otherwise cause him/her pain, anguish and suffering and further put him/her in a state of indignity.

The guidelines further directs to record and preserve the document. Signed by the executor in the presence of two attesting witnesses and countersigned by the jurisdictional Judicial Magistrate of First Class (JMFC).

Prior to Common of Cause Case	After Common Cause Case
a living will was required to be signed by an executor (the individual seeking euthanasia) in the presence of two attesting witnesses, preferably independent, and to be further countersigned by a Judicial Magistrate of First Class (JMFC).	<ul style="list-style-type: none"> • Instead of the hospital and Collector forming the two medical boards, both boards will now be formed by the hospital. • The requirement of 20 years of experience for the doctors has been relaxed to five years
the treating physician was required to constitute a board comprising three expert medical practitioners from specific but varied fields of medicine, with at least 20 years of experience, who would decide whether to carry out the living will or not. If the medical board granted permission, the will had to be forwarded to the District Collector for his approval.	<ul style="list-style-type: none"> • The requirement for the Magistrate's approval has been replaced by an intimation to the Magistrate. • The medical board must communicate its decision within 48 hours; the earlier guidelines specified no time limit.

Earlier, Collector was to then form another medical board of three expert doctors, including the Chief District Medical Officer. **Only if this second board agreed with the hospital board's findings would the decision be forwarded to the JMFC, who would then visit the patient and examine whether to accord approval.**

The 2018 guidelines required two witnesses and a signature by the Magistrate; now a notary or gazetted officer can sign the living will in the presence of two witnesses instead of the Magistrate's countersign.

In case the medical boards set up by the hospital refuses permission, it will now be open to the kin to approach the High Court which will form a fresh medical team.

Is living will practical?

- It is unlikely that a person in the prime of her life would imagine that a brutal sexual assault might render her a vegetable for decades.
- It is also not practically possible to word an advance directive even at an advanced age that foresees all treatment options that may be available in the future in a fast-paced medical world where new breakthroughs happen virtually every day.
- There is no way a living will provision can be made foolproof requiring no intervention of the doctor or immediate decisionmakers around a person — those inputs will always have to be factored into a law, so what is worth of a living will.

Right to Healthy Environment

Clean, healthy and sustainable environment a universal right: UN Human Rights Council. The right to a clean environment is rooted in the 1972 Stockholm Declaration, popularly called as the Magna Carta of human environment. Recently, the United Nations Human Rights Council (UNHRC) unanimously voted for recognising a clean, healthy, and sustainable environment as a Universal Human Right.

Further the Constitutional (42nd Amendment) Act, 1976 incorporated two significant articles viz. **Article 48-A and 51A (g)** thereby making the Indian Constitution the first in the world conferring constitutional status to the environment protection.

Article 48-A: The State shall endeavour to protect and improve the environment and to safeguard the forests and wildlife of the country.

Article 51A(g): It is a duty of every citizen to protect and preserve the environment.

Advent of PIL has played a significant role in Environmental Jurisprudence in India Post 1980, there were various judgement affirming the right to clean environment under Article 21

Municipal Council, Ratlam vs Shri Vardhichand & Ors, 1980

It was one of the first cases which contributed to the expansion of horizons of environmental protection. In this case a petition was filed by the residents of a municipality in Ratlam alleging that the municipality is not constructing proper drains resulting in stench and stink caused by the excretion by nearby slum-dwellers. It was stated by Supreme Court that Right to life includes Right to a wholesome environment and the residents have the right to exercise it against State. It acknowledged the effects on poor of deteriorating environment and compelled the municipality to build proper sanitation and drainage.

Right to environment, free of danger of disease and infection is inherent in it. Right to healthy environment is important attribute of right to live with human dignity.

The right to live in a healthy environment as part of Article 21 of the Constitution was first recognized in the case of **Rural Litigation and Entitlement Kendra vs. State, AIR 1988 SC 2187 (Popularly known as Dehradun Quarrying Case).**

It is the first case of this kind in India, involving issues relating to environment and ecological balance in which **Supreme Court directed to stop the excavation (illegal mining) under the Environment (Protection) Act, 1986.**

In **M.C. Mehta vs. Union of India, AIR 1987 SC 1086** the Supreme Court treated the **right to live in pollution free environment as a part of fundamental right to life** under Article 21 of the Constitution.

Oleum Gas leak case in Shri Ram Industries Delhi: Court laid the foundation of **Absolute Liability** and ruled if any hazardous substances escapes the premises all damages have to be borne by the owner.

The Precautionary Principle and Polluter Pays Principle: Acknowledged as Law of the Land.

Vellore Citizens' Welfare Forum v. Union of India, (1996)

The **Precautionary Principle** and **The Polluter Pays Principle** are essential features of Sustainable Development.

The Precautionary Principle, in the context of the municipal law, means: environmental measures — by the State Government and the statutory authorities — **must anticipate, prevent and eradicate the causes of environmental degradation**; where there are threats of serious and irreversible damage,

- **lack of scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation;**
- the onus of proof is on the actor or the developer/industrialist to show that his action is environmentally benign.

Right to Privacy

The matter with regard to the constitutional status of right to privacy came as early as 1963 in the famous Kharak Singh case before the Supreme Court, a question was raised whether the right to privacy could be implied from the existing fundamentalists such as Article 19(1) 1D 19 one. East and Article 21, the majority of judges participating in the decision was of the opinion that right to privacy in our Constitution does not guaranteed in terms of the constitutional guarantee, while on the other hands, the minority opinion which was given by Justice Subba Rao was in favour. That of in referring right to privacy from the expression personal liberty used in Article 21. He opened that right to personally detects in not only a right to be free from restrictions placed on the movement, but also free from any in Crouch rent in the private life. It is true that our Constitution does not expressly declares right to privacy as a fundamental right, but the said right is an essential ingredients of personal liberty. Every democratic country sanctifies domestic life and thereby privacy.

Again, an elaborate view of Right to Privacy was undertaken by Supreme Court in Govind v State of Madhya Pradesh. In this case, court has accepted a **limited fundamental right to privacy as an emancipation** from Article 19,(1)(a) 19 (1)(d) and 21. The right to privacy, **however, was not considered to be absolute, and reasonable restrictions can be placed in the public interest.**

Again in Rajagopal versus Tamil Nadu, the Supreme Court has asserted that in **recent times the privacy has acquired constitutional status and it is implicit in the right to life and liberty guaranteed to the citizens by Article 21.** It is a right to be let alone. A citizen has the right to safeguard their privacy of his own, his family, marriage, procreation, motherhood, child bearing and education, among others.

After taking a note of above mentioned case, Supreme Court categorically observed in **People's Union for Civil Liberties versus Union of India case of 1991**, in the following words "We have therefore **no hesitation in holding that right to privacy is a part of the right to life and personal liberty enshrined** under Article 21 of the Constitution. The said right cannot be curtailed except according to procedure established by law.

The matter was finally settled in the Landmark KS Putuswamy Case: (2017):- Supreme Court unanimously **declared that the right to life and personal liberty guaranteed in Article 21 also implicitly includes a right to privacy.**

Restrictions (as stated in the Judgement): The right may be restricted only by state action that passes each of the three tests:

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

Support to Right to Privacy

- Ensure the dignity of the individual as mentioned in our Preamble.
- Privacy helps to avoid unwanted and intrusive interference in an individual's personal affairs.
- Without privacy, there would be nothing to stop a Big Brother-like entity from taking control of every aspect of life.
- Rights to liberty and freedom of expression cannot survive if the right to privacy is compromised.
- Mr. Nandan Nilakeni mentions, "We need a larger privacy bill, not just for Aadhaar but also for many other things like privacy in telephone tapping and in other online systems"
- Art.12 of Universal Declaration on Human Rights and Art.17 of the International Covenant on Civil and Political Rights provide for the right of privacy.

Arguments Against

- It can hinder the implementation and performance of welfare schemes -like Aadhar and Direct Transfer of Subsidies.
- Right to Privacy will also restrict police and intelligence agencies to collect private information about accused, dead persons etc.

Concerns / Challenges

- **Lack of comprehensive law on data protection:** Just been passed yet has to be tested on various parameters of implementation.
- Huge multinationals are taking data about millions of Indians abroad.
- Privacy consciousness is rather low in India compared to western countries.
- Indian institutions like joint family, temple festivals, marriage celebrations and community life do not encourage privacy.

Journey of Data Protection Bill

The regulation of personal data usage falls under the purview of the Information Technology (IT) Act of 2000. The insufficiency of this framework in safeguarding personal data has been duly noted. In the year 2017, the central government established a Committee of Experts on Data Protection, which was led by Justice B. N. Srikrishna. The primary objective of this committee was to investigate and analyse matters pertaining to data protection within the country. The report was submitted by the Committee in July 2018.

Seven Basic Principle upon which new data protection law lies:



Lawful use of data



Only for purpose it was collected



Data Minimization



Data Accuracy- Only collect data which is required



Data should not be stored permanently



No unauthorized processing of data



Seventh principle states that “the person who decides the purpose and means of the processing of personal data should be accountable for such processing”.

Object and Applicability of the Digital Personal Data Protection Act, 2023

The primary objective of the Act is to establish a comprehensive framework for the Protection and Processing of Personal Data (as defined below).

“The Act provides for the processing of digital Personal Data in a manner that recognizes both the rights of the individuals to protect their Personal Data and the need to process such Personal Data for lawful purposes and matters connected therewith or incidental thereto”.

Definitions under the Act: (Section 2)

- “data” means a representation of information, facts, concepts, opinions or instructions in a manner suitable for communication, interpretation or processing by humans or by automated means;
- “Data Fiduciary” means any person who alone or in conjunction with other persons determines the purpose and means of processing of personal data;
- “Data Principal” means the individual to whom the personal data relates and where such individual is a child includes the parents or lawful guardian of such a child;
- “Data Processor” means any person who processes personal data on behalf of a Data Fiduciary;
- “Data Protection Officer” means an individual appointed as such by a Significant Data Fiduciary under the provisions of this Act;
- “personal data” means any data about an individual who is identifiable by or in relation to such data;
- “personal data breach” means any unauthorised processing of personal data or accidental disclosure, acquisition, sharing, use, alteration, destruction of or loss of access to personal data, that compromises the confidentiality, integrity or availability of personal data.
- “processing” in relation to personal data means an automated operation or set of operations performed on digital personal data, and may include operations such as collection, recording, organisation, structuring, storage, adaptation, alteration, retrieval, use, alignment or combination, indexing, sharing, disclosure by transmission, dissemination or otherwise making available, restriction, erasure or destruction;
- “public interest” means in the interest of any of the following:
 - (a) sovereignty and integrity of India;
 - (b) security of the State;
 - (c) friendly relations with foreign States;
 - (d) maintenance of public order;
 - (e) preventing incitement to the commission of any cognizable offence relating to the preceding sub-clauses; and
 - (f) preventing dissemination of false statements of fact

The provisions of this Act shall not apply to:

- (a) non-automated processing of personal data;
- (b) offline personal data;
- (c) personal data processed by an individual for any personal or domestic purpose; and
- (d) personal data about an individual that is contained in a record that has been in existence for at least 100 years.

Consent: It has been provided in Section 6 of the Act that Personal Data may be processed only for the specified purpose and after obtaining the consent of the Data Principal (individual). **Such consent has to be free, specific, informed, unconditional, and unambiguous with a clear affirmative action.**

Right to correction and erasure of personal data: (Section 12)

- Data Principal shall have the right to correction, completion, updating and erasure of her personal data for the processing of which she has previously given consent, A Data Fiduciary shall, upon receiving a request for correction, completion or updating from a Data Principal,— (a) correct the inaccurate or misleading personal data; (b) complete the incomplete personal data; and (c) update the personal data.
- A Data Principal shall make a request in such manner as may be prescribed to the Data Fiduciary **for erasure of her personal data, and upon receipt of such a request, the Data Fiduciary shall erase her personal data** unless retention of the same is necessary for the specified purpose or for compliance with any law for the time being in force.

Right of grievance redressal:

Right to nominate: any other individual, who shall, in the event of death or incapacity of the Data Principal, exercise the rights of the Data Principal in accordance with the provisions of this Act and the rules.

Data Principals will be duty-bound and under an obligation not to:

- (i) register a false or frivolous complaint;
- (ii) suppress any material information while providing her Personal Data; and
- (iii) furnish any false particulars or impersonate in specified cases. The breach of said duties will attract a penalty as per the Schedule to the Act.

The obligation of Data Fiduciary: The Data Fiduciary as per Section 8 of the Act, must:

- (i) process the Personal Data only for which the Data Principal has given her consent or deemed consent (when any individual does not indicate to the Data Fiduciary that she does not consent to the use of her Personal Data); or for certain legitimate uses;
- (ii) make reasonable efforts to ensure the accuracy and completeness of data,
- (iii) implement appropriate measures to protect Personal Data in its possession or under its control,
- (iv) Respond to any communication from the Data Principal for the purpose of exercise of her rights,
- (v) inform the Data Protection Board of India and affected persons in the event of personal breach, and
- (vi) erase Personal Data as soon as the purpose has been met and retention is not necessary for legal purposes (storage limitation). In the case of government entities, storage limitation and the right of the data principal to erasure will not apply.

Any breach of the said obligation is to be dealt in accordance with Section 33 of the Act read with the Schedule thereto.

Transfer of Personal Data outside India: Section 16 allows extraterritorial processing and transfer of Personal Data, except to such countries restricted by Central Govt. through notification.

Exemptions: Section 17(2), the provisions of the Act shall not apply in case of processing of Personal Data: (i) by the State or any other **instrumentality of the State** in the interest of the security and public order, and; (ii) necessary for research, archiving, or statistical purposes.

Data Protection Board of India: CG shall, establish a Data Protection Board of India (Board) **consisting of a Chairperson and other members**. The Board will exercise and perform such powers and functions, which inter alia includes (i) directing urgent remedial/mitigating measures in case of any breach of Personal Data (ii) inquiring into such breach and (iii) imposing penalties as per the Act.

The Board will be a civil court with Original jurisdiction to entertain the complaints/matters pertaining to the Act and any other civil court will be barred under Section 39 to entertain any Suit or proceeding in respect of any matter for which the Board is empowered to adjudicate upon under the Act.

Appeals: The Appeals against the decisions of the Board shall, lie with the **Telecommunications Dispute Settlement and Appellate Tribunal (TDSAT)** established under the Telecom Regulatory Authority of India Act, 1997 (TRAI Act). Limitation to prefer such an **Appeal is sixty (60) days** from the date of receipt of the Board's decision. **Further, the Orders passed by TDSAT shall be appealable before the Hon'ble Supreme Court as per Section 18 of the TRAI Act.**

Same Sex Marriage

The Supreme Court of India began hearing petitions seeking the legalisation of same-sex marriage on April 18, 2023 and it has now reserved its judgement.

Whether Supreme Court, or Parliament, will pave the way for same-sex marriage in the coming days will be seen, but the question that has come up for the debate on marriage equality is whether same sex marriage is an 'urban elitist concept' or integral right in comparison to other rights enshrined in the Indian Constitution.

Why are we even debating this?

In a landmark decision in 2018, i.e. (Navtej Singh Johar Case) the Supreme Court of India decriminalised homosexuality by **striking down Section 377 of the Indian Penal Code**.

Only those portion of Section 377 **which criminalised consensual homogenous sex has been struck down as violative of article 14.**

Despite the 2018 verdict, members of India's lesbian, gay, bisexual, transgender queer and more (LGBTQ+) community **worry about societal rejection and**

discrimination against LGBTQ+ individuals. Legal rights for LGBTQ individuals in India have grown over the last decade, with the **majority of these developments brought about by the Supreme Court's intervention.**

WHAT IS CENTRE'S ARGUMENT ON SAME-SEX MARRIAGE?

- The union government is of the opinion that "is same-sex marriage is not recognised in Indian traditions, ethos, culture, or societal conceptions of the institution of marriage"
- Also, government says that such a decision belongs to Parliament and not the judiciary and that the petition represented urban elitist attitudes and would not be supported by the majority of people.
- Marriage, is a sacrament between a biological male and a biological female to make a holy union in order to have children. As a result, it is contended that Parliament, rather than the Court, is the appropriate institution to debate and decide whether same-sex marriages should be legalised.

Solicitor general argued that the **state has a legitimate interest in regulating marriages, citing factors such as the age of consent, prohibition of bigamy, prescription of prohibited degrees of marriage (Sapinda relationship- which means one cannot marry their lineal ascendants, such as parents or grandparents), judicial separation, and divorce.** Mehta also foresaw a future in which arguments about sexual orientation freedom and autonomy could be used to challenge the law on incest.

Centres says hat the right to personal autonomy does not include the right to have same-sex marriage recognised.'

As per the Union Government, The Transgender Persons (Protection of Rights) Act, 2019, has already safeguarded fundamental rights such as the right to privacy and the right to choose one's sexual orientation. The establishment of additional rights, the acknowledgment of relationships, and the provision of legal legitimacy for said relationships can only be carried out by a competent legislative body rather than through judicial decision-making.

Marriage is widely regarded as a crucial component of a nation's social policy on a global scale. The responsibility of defining, recognising, and regulating same-sex marriage falls within the jurisdiction of the appropriate legislature, which is composed of elected representatives of the people. The decision not to recognise same-sex marriage is merely a reflection of legislative policy.

Views of Activists:

- Activists from the community claims that **by denying marriage between homosexual government is creating inequality and violating article 14.**
- An overwhelming 99% of same-sex couples want to tie the knot. They believe tying the knot will give their relationship significance, direction, and a distinct sense of self
- According to senior advocate Menaka Guruswamy, the notion of same-sex marriage is not limited to the elite. It also addresses numerous small towns. Marriage is a highly sought-after goal among youth in that region, and the plea is to spare them the ordeal.

- During the court proceedings, it was emphasised that individuals who identify as **LGBTQ+ make up approximately 7-8% of the country's population**. Petitioners have highlighted that LGBTQ+ citizens **are not afforded legal protection under approximately 15 laws that guarantee rights such as wages, gratuities, adoption, surrogacy, and more**

How Supreme Court Responded on Same-Sex Marriage

The Supreme Court reserved its decision on a slew of petitions seeking the right to marriage for members of the LGBTQ+ community under the Special Marriage Act of 1954.

According to the Supreme Court of India, same-sex marriages cannot be considered an urban elitist concept simply because more people from cities are coming out of the closet.

CJI Chandrachud said the matter might be tackled on three levels:

- One, the government **could easily make administrative modifications**.
- Two, **by modifying subordinate legislation such as rules and regulations, which were also within the purview of the government**.
- Three, **by enacting substantial legislative changes to formally recognise the right of same-sex couples to marry by gender neutralizing the Special Marriage Act**.

Right to marry as a right in the constitution: **Lata Singh v. State of Uttar Pradesh, a 2006** case involving an inter-caste marriage, was one of the first to address this problem. The Supreme Court ruled that because the petitioner was a major, she had the right to marry **whoever she wanted and that there was no statute prohibiting an inter-caste marriage**.

In 2014, a supreme court judgment later specifically ruled that, "An intrinsic part of Article 21 of the Constitution would be the freedom of choice in marriage,". Again in 2021, SC held that **Intimacies of marriage lie within a core zone of privacy, which is inviolable and even matters of faith would have the least effect on them**. The right to marry a person of choice was held to be integral to Article 21 of the Constitution of India. **(Laxmibai Chandaragi B. v State of Karnataka(2021))**

The Human Rights Charter says that the right to get married is part of the right to start a family.

Since same-sex weddings are not supported by law, **many couples say they have had to deal with a lot of problems. Indian law makes it hard for LGBTQ+ people to own or transfer property**.

Gay and lesbian couples are not allowed to use an Indian surrogate mother to have children. Only option they have try to adopt as single parents.

Arguments Against:

Marriages in India are governed by a complicated legal structure with a religious foundation

Going against natural law would threaten both the institution of marriage and the family's role in keeping society together.

According to Sara McLanahan, who was a sociologist at Princeton University, **homosexuality could raise a class of children who live apart from their mother or father.**

A similar concept is expressed in **David Popenoe's** book '**Life Without Father**'. If same-sex civil marriage becomes more popular, lesbian couples are more likely to end up with children, it argues, elaborating that **fathers are effective at reducing antisocial behaviour and delinquency in boys and sexual activity in females.**

The National Commission for Protection of Child Rights (NCPCR) stated that same-sex marriage would violate the terms of the Juvenile Justice Act. The Juvenile Justice Act of 2015 makes it illegal for a single male, let alone two men, to adopt a girl child. The NCPCR cited a study from the Catholic University of America that found that **children of same-sex couples had twice as many emotional issues than children of heterogeneous parents.** It argued that a proper legislative system regarding same-sex couples must be adopted.

Right to Education: Article 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.
- This provision was added by the 86th Constitutional Amendment Act of 2002.
- aim to achieve 'Education for All'.
- Even before this amendment, the Constitution contained a provision for free and compulsory education for children under Article 45 in Part IV. However, being a directive principle, it was not enforceable by the courts.

Right to Education Act, 2009

The act aims towards providing free and compulsory elementary education to kids between the age group of 6 years to 14 years.

This Act implements Right to education under article 21A and RTE came to effect from 1 April 2010.

Main Features of the Act:

- Free and compulsory education to all children of India in the 6 to 14 age group.
- **No child shall be held back**, expelled or required to pass a board examination until the completion of elementary education.
- If a child above 6 years of age has not been admitted in any school or could not complete his or her elementary education, **then he or she shall be admitted in a class appropriate to his or her age.** However, if a case may

be where a child is directly admitted in the class appropriate to his or her age, then, in order to be at par with others, **he or she shall have a right to receive special training within such time limits as may be prescribed.** Provided further that a child so admitted to elementary education shall be entitled to free education till the completion of elementary education even after 14 years.

- **Pupil Teacher Ratio:** At **primary level the PTR should be 30:1 and at the upper primary level it should be 35:1.** The Rashtriya Madhyamik Shiksha Abhiyan (RMSA) framework stipulates that the **PTR at secondary level should be 30:1**
- **Twenty-five per cent reservation for economically disadvantaged communities in admission to Class I in all private schools is to be done.**
- Improvement in the quality of education is important.
- School teachers will need adequate professional degree within five years or else will lose job.
- School infrastructure (where there is a problem) need to be improved in every 3 years, else recognition will be cancelled.
- **Financial burden will be shared between the state and the central government.**

Failures:

- **Discrimination** towards parents and students who belong to the economically weaker sections (**EWS**) and disadvantaged groups (DG).
- Students have a hard time blending in with other students.
- **Lack of confidence in government schools**
- **Local authorities cannot keep track of children who can benefit from the RTE Act 2009 Section 12(1)(c),** and therefore they cannot seek out children for admission.
- Private schools deny admissions as they do not get reimbursed on time.
- Some parents were asked to pay for the application or donate money for the admissions.
- Delays in the admissions process result in students dropping out of the program or not getting admission on time

Achievement of RTE

Achievements: ASER Report 2022 reveals that: **almost all (98.4%) students in the age bracket of 6-14 years are now enrolled in schools**

Tough there is **increase in enrolment but there has been a decline in the learning outcomes:**

- Nationally, 69.6% of Class VIII students can read at least basic text in 2022, falling from 73% in 2018.
- For Class V, students who can do division has also fallen from 27.9% in 2018 to 25.6% in 2022.
- Rural India has been reporting an uptick in Class I-VIII paid tuition classes and it has moved up from 26.4% in 2018 to 30.5% in 2022.

Right Against Exploitation (Article 23 and 24)

Article 23 : Prohibit human trafficking for Begar(free Labour) and other forms of forced labour.

- Against Individuals as well as against state
- Also forbids immoral traffic in women and children, including prostitution

Article 24: Prohibits employment of Child labor(Below 14 years).

- In 1996 SC directed establishment of child labour welfare fund in which fines collected from violator of child labour will be deposited.
- In 2006 Govt. banned employment of children as domestic servant, or worker in Dhaba, hotels etc.
- Child and Adolescent labour Act 2016:

Child Labour in India

As per the data of 2011 Census, **India had 10.13 million child labourers, between the age of 5-14.**

- higher prevalence of child labour than others, examples being **Uttar Pradesh, Bihar, Rajasthan, Maharashtra, and Madhya Pradesh** - which together constitute nearly 55% of the total population of working children in India.

In India the law addressing child labour is known as **the Child Labour Amendment (Prohibition and Regulation) Act, 2016.**

This law regulates the employment of children and does not allow children below the age of 14 to work except as a child artist (Except circus or street performance) and in a family business- but only after school hours and during vacations.

- It is lawful **to children between 14 and 18, as long as the places are not dangerous** The term used in the law for children between 14 and 18 is 'adolescents'.
- Any person who employs a child below 14 or a child between 14 and 18 in a hazardous occupation or process **can be punished with jail time of between six months and two years and/or fine between Rs. 20,000 and Rs. 50,000.**

Right to Freedom of Religion: Article 25

Subject to: " Public Order, Morality, Health and other Fundamental Rights: Every Person

- Right of Conscience
- Right to profess
- Right to practice
- Right to propagate

Religion of His or Her choice

Right to propagate doesn't include that of converting someone. (Forcible conversion is not allowed) – It depends on the choice of other person

Powers of Government : Can regulate economic, financial, political and secular affairs of religion.

Provide for social welfare, reform or throwing open Hindu religious institutions of a public character to all classes and section of Hindus.

Indian Young Lawyers Association V. State of Kerala (2018) (Sabrimala)

Right to practice Religion is equally available to both Men and Women and persons of all age groups professing same religion.

Carrying of Kirpans : **allowed for Sikhs but it can be regulated.**

Article 26: Collective Right

- Every Religious denomination
- Right to establish and maintain institution for religious and charitable purpose.
- Right to manage its affairs.
- Right to own and acquire movable/immovable property.

Article 27: Exemption from Taxation

- No person shall be compelled to pay taxes for promotion or maintenance of any particular religion.
- Government should not spend public money collected by the way of tax for the promotion of any one religion.
- Fee can be charged at religious places: that is to provide certain services or security.

Protection from attending mandatory religious instructions:

NO religious instructions shall be provided in any educational institutions wholly or partially maintained out of state funds:

Institutions Wholly Maintained out of state funds:	(Completely prohibited)
Administered by state but established under any trust	(can be permitted)
Institution recognized by state.	(voluntary)
Institutions receiving aid from state.	(voluntary)

Cultural and Educational Rights

Article 29:

- Any section of Citizens, having distinct language, script, or culture shall have the right to conserve the same.
- No citizen shall be denied admission in any education institution only on the basis of religion, race, caste or language if maintained out of state funds.
- Protects linguistic as well as religious minorities.
- Provided to other section of citizens (use of word section of citizen in article).
- Right to conserve language: Political speeches or promises based on language does not amount to corrupt practices during election.

Article 30

Whether religious or linguistic.

Only to minorities.

Right to establish an educational institution.

In giving aid, state shall not discriminate against any institution managed by minorities.

This right includes managing, choosing governing body, appointment of teaching or non-teaching staff, fee structure.

Government can check if any maladministration.