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E-Mail:- blindfoldjournal@gmail.com

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Human burials and cremations: The Rights of the deceased

Author: Kriti Srivastava

“The highest tribute to the dead is not grief but gratitude”

-Thornton Wilder

ABSTRACT

Death and life are two entangled truths of presence. One who bears children must pass on. This can be a painful truth for oneself while being the best truth of life for the other. It is based on a unique methodology. People's greatest concern is the fear of death and eternal conflict. This conflict was an unavoidable reality during the Corona virus outbreak. The saddest aspect of the ongoing scenario is the loss of relatives, companions, family members, or anyone close to you. One would think that this is the end of it, that there is nothing more wrong that can happen other than the death of loved ones. Floating human corpses, constant denial of last religious sacraments, the only one you love fades away like an optical illusion from your emergence without a final farewell, it's frightening to think that if you die, your family won't let you see your dead body, taking advantage of the family of a deceased person in the name of religious sacraments is another inhuman treatment that borders on exploitation.¹ Think of those destitute family who won't have money for the proper disposal of their mother, brother, sister or kids². No place left for their burial, no woods for cremation. Removing identity and dumping more than 2000 dead body in the holy river Ganga is a matter of urgent action³. Floating half burnt and decomposed bodies, some without even stitching the post-mortem operation openings were thrown into River Ganges is a horrific

¹ Bar and Bench, Article 21 includes the right to a decent burial/ last rites: Plea in Calcutta HC to hand over dead bodies of COVID-19 patients to family, <https://www.barandbench.com/news/litigation/plea-in-calcutta-hc-to-hand-over-dead-bodies-of-covid-19-patients-to-family> (Jan 11, 2022)

² Piyush Rai, Soaring cost of cremation sings families of dead, The Times of India, https://timesofindia.indiatimes.com/india/soaring-cost-of-cremation-singes-families-of-dead/articleshow/82136043.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cpst (Jan 10, 2022)

³ V.Geetha, The Floating Dead, The Wire, <https://thewire.in/rights/the-floating-dead-dignity-inequality> (Jan 10, 2022)

situation for everyone⁴. In the face of all these situations, our inner conscience asks if it has the right against this brutality and whether a dead person is protected by law.

I. INTRODUCTION

In India, there is no explicit law protecting the rights of the dead. However, the courts have repeatedly stated that the dead's dignity and rights must be respected. In the historic decision of *Parmanand Katara v. Union of India*⁵ in 1989, the Supreme Court of India recognised that the right to life, fair treatment, and dignity extends not just to a living individual but also to his deceased body. These rights are taken from Article 21 of the Indian Constitution. Furthermore, the acknowledgment of posthumous legal rights confers important moral standing on the dead inside our legal system. The law also attempts to honour and defend a decedent's intentions and interests. It is the role of the state to defend the rights of the deceased person and deter wrongdoing over the dead corpse in both natural and unnatural deaths (accident, suicide, homicide, etc.). It is also a prerequisite that the states/UTs develop a SOP in consultation with all stakeholders to ensure the dignity of the dead and the protection of their rights. Hospital Management, Police, Forensic Medicine personnel, Local Authority, Municipality, Civil Society Organizations, etc., are among the stakeholders, as are the residents of the country⁶.

II. THE CONSTITUTIONAL RIGHTS AND LAWS FOR THE DECEASED

Furthermost legal doctrines do not propose any right to deceased person⁷. On the other hand, a number of legal institutions are trying to protect the rights of the deceased. Even if they conflict with the wishes of the living, most testamentary payouts, burial requests, and organ donation

⁴ Vikash Chandra and Ouddu Baba v. The Union of India & Ors.: (2008) 2 PLJR 127, <https://www.legitquest.com/case/vineet-ruia-v-the-principal-secretary-ministry-of-healthfamily-welfare-and-ors/1CD31E> (Jan 11, 2022)

⁵ Pt. Parmanand Katara vs Union Of India & Ors 1989 AIR 2039.

⁶ NHRC Advisory for Upholding Dignity & Protecting the Rights of Dead, F. No. R-18/18/2020- PRP&P (RU-1), <https://nhrc.nic.in/sites/default/files/NHRC%20Advisory%20for%20Upholding%20Dignity%20%26%20Protecting%20the%20Rights%20of%20Dead.pdf> (Jan 11, 2022)

⁷ Craig S. Smith, Posthumous marriage is legal in France with governmental approval, Paris Journal: A Love That Transcends Death Is Blessed by the State, N.Y. TIMES

declarations are considered lawful⁸.

In *Ramji Singh and Mujeeb Bhai Vs. State of U.P. & Ors*⁹, the Allahabad high court contended that, “a person’s right to life includes the right of the dead body to be treated with the same respect that he would have deserved if he were alive. It is imperative for the state to treat the corpse with dignity, and must only resort to postmortem if it is a necessity,”

The fundamental rights under Article 21 of the Indian Constitution provide a larger notion of life and personal liberty, which includes the right to die with dignity and the right to a dignified burial.¹⁰ In *Francis Coralie v. Union Territory of Delhi*, AIR 1981 SC 746, the apex court noted “If any act or omission which damages or injures or interferes with the use of any limb or faculty of a person, either permanently or temporarily, would be within the inhibition of Article 21”.¹¹

The landmark case of *Parmanand Katara v Union of India* (1989) which recognised, “the right to life, fair treatment and dignity, derived from Article 21, extend not only to a living person but also to his dead body. Recognition of posthumous legal rights, the commission said, gives the dead significant moral standing within our legal system.” The law also strives to honour a decedent’s wishes and to protect his interests, it added.¹²

Article 25 of the Indian Constitution guarantees the right to religion, which includes the right to perform the deceased's burial rites. Articles 21 and 25 of the Indian Constitution guarantee the rights of the departed in such a way that it does not limit the right to human dignity and fair treatment to living humans only, but also extends it to those who have died. The term "life" in

⁸ Kirsten Rabe Smolensky, RIGHTS OF THE DEAD, https://law.hofstra.edu/pdf/academics/journals/lawreview/lrv_issues_v37n03_cc4_smolensky_final.pdf (Jan 10, 2022)

⁹ *Ramji Singh and Mujeeb Bhai Vs. State of U.P. & Ors* (PIL) No. 38985 of 2004

¹⁰ Bar and Bench, Article 21 includes the right to a decent burial/ last rites: Plea in Calcutta HC to hand over dead bodies of COVID-19 patients to family, <https://www.barandbench.com/news/litigation/plea-in-calcutta-hc-to-hand-over-deadbodies-of-covid-19-patients-to-family> (Jan 11, 2022)

¹¹ *Francis Coralie v. Union Territory of Delhi*, AIR 1981 SC 746

¹² *Pt. Parmanand Katara vs Union Of India & Ors*, 1989 SCR (3) 997

Article 21, "life of dignity," refers to more than only animal existence.¹³

In *P. Rathinam v. Union of India*, the ambit of Article 21 was widened to include the dignity of a person. It emphasised that the right to life means a meaningful life and not merely animal existence. Further, this right to dignity was also expanded to a dead person.¹⁴

In the case of *S. Sethu Raja v. Chief Secretary*, the Madras high court directed the government authorities to bring the dead body of a person (who was murdered and whose body was kept at a mortuary in Malaysia), so that burial can take place at home according to traditions and customs of his family.¹⁵

Whenever 'right to decent burial' is violated, it can be said that 'right to death with dignity' is infringed too. On 9th March 2018, a 5-Judge Bench of the Supreme Court in the celebrated case of *Common Cause v. Union of India*¹⁶, Set the stage for recognition of the constitutionally protected right to die with dignity while dealing with the euthanasia case. The right to die with dignity, it was argued, is an integral and inextricable part of the right to live with dignity. The Judges noted that, in the case of a dying man in a chronic vegetative condition, his natural death process had already begun, and that, because death is impending and definite, he has the right to die with dignity. The Court determined that the right to die with dignity is a fundamental right and hence a part of Art. 21. The right to a dignified existence extends all the way to death, including the dignified death procedure. And, if we understand this as a 'dignified procedure of death,' it will also include a dignified disposition of the deceased, as the Court has done in previous cases. The right to die without pain and suffering was deemed essential to one's bodily autonomy and integrity in this case, and the right to a respectful burial is also a key feature of Article 21 of the Constitution.

In the recent case of *Pradeep Gandhi vs. State of Maharashtra*, a Division Bench of the Bombay

¹³ Budhadev Karmaskar vs. State of West Bengal AIR 2011 SC 2636

¹⁴ P.Rathinam vs Union Of India, AIR 1844, 1994 SCC (3) 394

¹⁵ W.P.(MD)No.3888 of 2007

¹⁶ WRIT PETITION (CIVIL) NO. 215 OF 2005

High Court addressed the issue of burial and last rites of a Covid-19 patient's dead body. The Court observed,

*“We find little reason to deprive the dead of the last right, i.e., a decent burial according to his/her religious rites, on the face of there being no evidence, at least at this stage, that Covid-19 infection may spread to living human beings from the cadaver of any suspected/confirmed Covid-19 infected individual.”*¹⁷

In *Vineet Ruia Vs the Principal Secretary, MOHFW, Govt. Of West Bengal* the Calcutta High Court has ruled that Article 21 of the Constitution is available to a living person and dead bodies. The court further held that doing so concerning tradition and culture is also an Fundamental Right that can be traced under Article 25.¹⁸

Furthermore, the Telangana High Court in the case of *R. Sameer Ahmed v. State of Telangana & Ors* remarked that: *“Even in death, human bodies are not being treated with the dignity they deserve”* and directed the state government to let the court know if the dead bodies are being cremated/buried in a dignified manner or not.¹⁹

A dead corpse deserves dignity in the same way as a living person would, according to his or her tradition, culture, and religion. The departed should not be subjected to any form of humiliation by society. Furthermore, with special reference to homeless persons, it was stated that everyone has the right to a decent burial as per their respective faith as identified prior to death.²⁰ A Supreme Court division bench recently stated that the civic's circular was in accordance with the law, and that the corporation had full authority and jurisdiction to select burial grounds and cemeteries.²¹ The VII schedule grants power to the state to make laws regarding public health care, burial and

¹⁷ SPECIAL LEAVE PETITION (CIVIL) Diary No. 11081/2020

¹⁸ W.P. No.5479 (W) of 2020

¹⁹ WP(PIL) Nos. 56 and 59 of 2020

²⁰ Ashray Adhikar Abhiyan v. Union of India, 2002 WCP 143 of 2001

²¹ The Economic Times, Coronavirus: Right to decent burial facet of right to life, says Bombay High Court, <https://economictimes.indiatimes.com/news/politics-and-nation/virus-right-to-decent-burial-facet-of-right-to-life-says-hc/articleshow/75900298.cms> (Jan 11, 2022)

cremation grounds in the purview of this power several states passed laws and regulations. In addition to these laws, the Ministry of Health and Family Welfare has also adopted similar regulations for the management of deceased.

III. RIGHTS OF DECEASED RECOGNIZED IN INDIAN PENAL CODE

Indian criminal law recognises several of the rights of the deceased person in sections 297, 404, 499, and 503. Trespassing on grave grounds is a crime punishable under Indian Criminal Code Section 297. This section protects burial grounds from anybody who knows or willfully encourages people to harm or violate religious beliefs or sensibilities, and it also forbids trespassing at funeral homes or areas where dead bodies are kept. Under this provision, everyone who causes any injustice to a body through whatever conduct is equally guilty. The maximum penalty for such behaviour is one year in prison or a fine plus a fine. In *Jamuna das Paras Ram v. State of Madhya Pradesh*²², The high court of MP recognised that the term "person" encompasses the human body and that it is entitled to rights regardless of whether it is living or dead. As a result, the right to a respectful burial is protected in the IPC.

In India, sexual offences against corpses are on the rise. The body of a 26-year-old woman who was gang-raped in Ghaziabad, Uttar Pradesh, is one recent example. The assaulters dug her body out of her grave and discovered her naked twenty feet away from it. The serial killings in Noida in 2006 are another example of this. In this case, a wealthy businessman and his accomplice sexually assaulted the bodies of several women and children.

Despite all of these heinous cases, India lacks a formal law on the subject. Although perpetrators are charged under Indian Penal Code Sections 297 (trespassing on corpses) and 377 (Unnatural Sex).

Section 404 of the Indian Penal Code prohibits dishonest misappropriation of a deceased person's

²² *Jamuna das Paras Ram v. State of Madhya Pradesh* AIR 1963 MP 106.

property; those who commit this crime face a maximum term of three years in jail, with the penalty increasing to seven years if the perpetrator works as a clerk or servant.

The Indian Penal Code's section 499, which deals with defamation, also states that libel or slander directed towards a deceased person contributes to the offence of defamation.

In *Mrs. Pat Sharpe v. Dwijendra Nath Bose*, the court held that, *“Even if Netaji is dead, it is defamation because the imputation would have harmed his reputation if alive and the imputation must be said to have been intended to be hurtful to the feelings of his family or other near relatives”*. Thus, in any view of the matter the words used do amount to defamation²³.

One of the best comments on the issue of the right to reputation of dead persons was given by Justice Ajay Bhanot in *Sumpurnanand vs State of U.P. And others*²⁴,

“A system of law is to be judged not merely by the manner it treats the living, but also by the regard, it gives to the dead. Reputation is indivisible. Indivisibility is an essential attribute of reputation. There is no distinction between the reputation of the dead and the living. This is the quintessence of the concept of reputation. Any bifurcation like the reputation of the dead and the reputation of the living would deprive the reputation of its content and deny it any meaning. Death shows the insignificance of life. Reputation testifies to the significance of life. If the reputation of the dead is not protected, the reputation of the living is not safe. If the reputation of the dead is not valued, the reputation of the living has little worth.”

The right to suitable burial facilities, to be buried with dignity, and the right not to be dug from the grave for any cause other than those listed in the law for any criminal investigation or for the sake of society are all included in the disposition of remains. Necrophilia (sexual contact with or fascination to corpses), which is a crime under Section 377 (Unnatural Offenses) of the Indian Penal Code, is the most serious offence that can be perpetrated against them. Though The Hon'ble Supreme Court of India in the landmark case of *Navtej Singh Johar v. Union of India*²⁵, ruled that

²³ *Mrs Pat Sharpe v. Dwijendra Nath Bose*, 1964 CriLJ 367

²⁴ Criminal Miscellaneous Appeal No. 191 Of 2008

²⁵ *Navtej Singh Johar v. Union of India* AIR 2018 SC 4321

the application of Section 377 to consensual homosexual intercourse was unconstitutional, this Section remains in force and continues to criminalize voluntarily having carnal intercourse against the order of the nature.

In the recent case of Bombay High court²⁶, the division bench handed down its decision on the bodies of Covid 19 patients. At the outset of this case, the Mumbai municipal corporation ordered that all patient bodies, regardless of religion, be disposed of. The patient's friends and relatives cannot be refused a last visit, so that they can make last burial rites for their dear ones based on their religious traditions, according to the court. On the same day, the civic authority gave its approval for burial rites to be held in the city, with the condition that the sites be large enough to avoid disease spread. The petitioner took the matter to court, but the Bombay high court affirmed the previous verdict, holding that the right to cremation is covered by the fundamental right to religion. The court stated that, at this juncture, disposal of the corpse of any suspicious or proved Covid 19 infected people will endanger the living.

Deceased rights over their body under the Transplantation of Human Organs Act, 1994

This act protects a deceased person's human organs or tissue, or both, from being harvested without his or her agreement or the approval of close relatives.

A person has the right to have his or her dead body protected from any sort of mutilation, and only with the consent of that person when he or she was alive can their waste or any of their organs be removed. In the absence of such permission, the rights normally pass to the spouse, and if the spouse is not present, the rights pass to his or her kith and kin or, if the body is unclaimed, the state. The state must protect the rights of the diseased person and prevent offence over the dead body. In the case of *Radomer Russ-Pol Unterstizund G Verein Vs Posner*, it was held that if a married person dies the storey of his/her remain and burial or cremation lies with the spouse²⁷.

Apart from that, it has been observed that in the aftermath of natural or biological calamities, when

²⁶ Pradeep Gandhi Vs State of Maharashtra”, 2020 SCC OnLine Bom 662

²⁷ Radomer Russ-Pol Unterstizund G Verein Vs Posner”, 176 Md. 332 (Md. 1936)

unidentified dead corpses continue to pile up, common burials and mass cremations are commonly used for the fast disposal of dead bodies while maintaining the dignity of the departed. Nevertheless, the right to a decent burial has indeed been heightened by the fact to basic humanity that, according to the National Disaster Management Guidelines, even though there are large numbers of unknown mutilated corpses to be disposed of, the government is obligated to provide all deceased persons with a dignified burial in accordance with their religious faith, cultural norms, cultural and wacko needs.

The Calcutta high court on September 16 2020 in the case of *Vineet Ruia Vs The Principal Secretary, Department of Health & Family Welfare, Govt. of West Bengal & Ors*²⁸, was of the firm view that the right to dignity and fair treatment under Article 21 of the constitution is not only available to a living person but also to his mortal remains after his demise. Disposal of a human body, whether or not the person dies of COVID-19, whether by cremation or burial, should be done with due respect and solemnity, the high court held.

In the case of *R. Sameer Ahmed Vs State of Telangana & Ors., the Telangana*²⁹ high court stated on April 27, 2020, that "human bodies are not being handled with the dignity they deserve." Due to a lack of room and suitable facilities and manpower, the dead remains are stacking up waiting to be burned." The state was asked to provide information on the number of cremations and their capacity.

IV. INTERNATIONAL GUIDLINES TO PROTECT THE RIGHTS OF DECEASED

- All international human rights rules are founded on the principle of human dignity. The following are some of the international accords and legislation that expressly address the dignity of the dead:

²⁸ WPA 5479 of 2020

²⁹ WP(PIL) NO. OF 56 AND 59 OF 2020.

- "As far as military considerations allow, each party to the war shall support the actions taken to safeguard the killed against ill treatments," says Article 16 (II paragraph) of the Geneva Convention 1949 IV.
- "It is banned to mutilate dead bodies in the event of the use of force and in the case of armed conflict," says Article 3 (a) of the 1990 Cairo Declaration on Human Rights in Islam.
- In a 2005 resolution, the United Nations Commission on Human Rights emphasised the need of dignified care of human remains, including proper management and disposal, as well as regard for the needs of families.
- The Operational Guidelines on Human Rights and Natural Disasters of the UN's Inter Agency Standing Committee propose that suitable procedures be taken "to facilitate the return of remains to the next of kin." Measures should be in place to allow for the recovery of human remains for future identification and, if necessary, reburial.'
- According to Article 130(1) of the fourth Geneva Convention, states must ensure that "graves are respected, properly maintained, and marked in such a way that they may always be recognised," according to international humanitarian law.
- **ICRC forensic Units** – In 1863, the International Committee of the Red Cross (ICRC) was founded. During an emergency, it considers humanitarian law and its implementation into humanitarian law. The ICRC's forensic sections have published specific directions for the proper handling of deceased bodies during this pandemic. These recommendations include regulations for practitioners, planners, decision-makers, and managers.
- **Preparatory Guideline for Mass Fatality Response Plan**– It explains how to figure out which department is in charge of a specific task. It also ensures that the management level personnel' roles and procedural components are in alignment. It oversees the retrieval and transfer of bodies, as well as the issuance of death certificates, the storage and viewing of bodies by relatives, and the proper cremation or burial of bodies.
- **WHO guidelines regarding dead bodies of suspected/confirmed corona patients**- Body packing, cleaning equipment management, and dos and don'ts for health care, hospitals, and patient families are among the themes covered by the World Health Organization's standards, which are intended at health care facilities and authorities in charge of mortuaries.

- The European Union has published a report on supplementary medicines. The EU intends to provide assistance to EU and UK members. This study also aids public health and dead body preparedness.³⁰

V. CONCLUSION

Both the global and public associations are contributing to the administration of this overwhelming rage. Humanity must begin again, and the Merciful Mother Earth must be restored. This is a fact that only a few individuals are aware of. Under 10% seek official assistance, half expect others to act, and the remainder behave harshly, taking advantage of every possible open door to manhandle and profit from the deceased. We need strong enactment to curb their operations.

Those who exploit under the cover of medical care or funeral services will be held accountable and penalised. Unloading bodies in rivers is a serious offence that must be investigated and prosecuted. It is now obvious that persons enjoy unique liberties even after they pass away. Their body, property, and notoriety are all things to be concerned about once they die. For the dead, all that is required is a peaceful night's sleep in their grave. This is the most important thing we should hold on to. Each person has the option of dying in a dignified manner. It makes no difference if they are denied their right due to natural or unintentional death. The state should protect humankind for all people, regardless of their economic circumstances. To further develop end-of-life care, several modifications in viewpoints, guidelines, and activities will be required. Emotions, expectations, and sentiments of patients and their families are critical.

³⁰ NHRC Advisory for Upholding Dignity & Protecting the Rights of Dead, F. No. R-18/18/2020- PRP&P (RU-1), <https://nhrc.nic.in/sites/default/files/NHRC%20Advisory%20for%20Upholding%20Dignity%20%26%20Protecting%20the%20Rights%20of%20Dead.pdf> (Jan 19, 2022)