FUNDAMENTAL RIGHT TO DECENT BURIAL AND RIGHT TO REPUTATION OF DECEASED: A LEGAL STUDY DURING COVID-19 PANDEMIC

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ABSTRACT

Humans are born with several rights. Some rights are human right which is exit from its inception and some are legal rights provided by the legislature. These legal rights are protected by the imposing duties to the person. The question is that what will happen or what are the rights after the death of the person because such legal rights are enacted for the living being. In India there is no specific legislation for the rights of dead person and management of the dead bodies. However the Indian judiciary in many cases acknowledged the right to burial or crimination is a fundamental right under Article 21 of the Indian Constitution. There are various global instruments also which admitted the right to decent burial. In the horrific visual of Covid-19 pandemic, there is serious issue raise regarding the management of dead bodies and right to reputation of dead person. In this article examine national as well as international laws in the context of right of the dead person in the time of Covid-19 pandemic.

Key Words: Right to burial, Right to reputation, Human rights and Covid-19 pandemic
1. Introduction

The personality of human being may be said to commence with his birth and cease with his death. Sir John William Salmond points three things in respect of which anxieties of living men extend beyond the period of their death that is dead men’s body, his reputation and his estate. Although the dead man’s corpus is the property of no one but the law seeks to ensure its decent burial or cremation. International Humanitarian Law which has been developed to regulate and humanize armed conflicts. It contains a number of clear and concrete obligations incumbent to belligerent parties on the management of dead bodies, which provide the legal framework for humanitarian forensic action. Humanitarian organizations, such as the International Committee of the Red Cross (ICRC), can offer their forensic expertise to belligerent parties in order to support them in fulfilling their humanitarian obligations with regard to the management of dead bodies. It is the legal obligation under the international humanitarian law to search for and collect the dead body. Further it is also recognized that when armed forces or armed groups cannot collect the dead themselves for any reason, they may authorize the civilian population or humanitarian organizations to search for and collect the dead. When reading the Geneva Conventions which contain detailed prescriptions regarding burials and management of graves we will find that Human remains must be disposed of in a respectful manner. It is a customary rule of IHL applicable in both international and non-international armed conflicts that “the dead must be disposed of in a respectful manner and their graves respected and properly maintained”. In the year 1995, the Colombian supreme tribunal with jurisdiction over administrative issues held that mass graves must be avoided and that the deceased must be buried individually subject to all requirements of the law. In Barake case also known as Jenin mortal remain case, the Israeli High Court of Justice reiterated that Israel has the duty under IHL to bury Palestinian dead bodies and it

\* Fitzerald, P.J. :Salmond on Jurisprudence, (12th ed.), p.301
\* R.v.Stewart (1840) 12 AD and E 1773.
\* R. v Prience, (1884) 12 QBD 247
\* Article 3 of the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field.(1929)
\* Rule 115 of the Customary IHL
\* Colombia, Council of State, Administrative Case N°10941, Judgment, 6 September 1995.
highlighted that such burials “should be performed with respect, according to religious custom, in a timely manner.” Convention on Human Rights, “Everyone has the right to respect for his private and family life, his home and his correspondence” and damage to the reputation of a deceased member of a person’s family might affect one’s private life and identity, provided that there is a sufficiently close link between them. Cairo declaration on Human Rights in Islam provides in the event of the use of force and in case of armed conflict- it is prohibited to mutilate dead bodies. United Nation Commission on Human Rights in a resolution adopted in 2005, on human rights and forensic science, the UN commission on Human Rights underlined “The importance of dignified handling of human remains including their proper management and disposal as well as of respect for the needs of families. The Parliament of the United Kingdom enacted an act in order to handle the COVID-19 pandemic. The person who commit sexual act with a dead body is punishable under the United Kingdom. In New Zealand when a person who treat to the dead bodies with indignity is punishable for two years imprisonment. To enable persons to establish crematoria and to provide for the regulation of the burning of human bodies New Zealand enacted the specific act in order to make provision for the burial of deceased persons.

Therefore, we find that on one hand where there are various international provisions for the dead person’s burial and on the other hand while dealing with coronavirus pandemic which slowly turning into a horror story there is challenge not only for the human being for their survival and right to life but there is very dangerous situation in front of us while dealing with the patents who are died during this coronavirus pandemic. In the article the author realizing the current position regarding the right to have an decent funeral has been violated especially during this Covid-19 period and what are the legal provision for the dead persons in national and international law.

2. Current Scenario of Deceased Person During The Coronavirus Pandemic

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9 Israel, High Court of Justice, Barake case (2002).
10 Article 8 of The European Convention on Human Rights
11 Article 3(a) of the Cairo declaration on Human Rights 1990
12 The Coronavirus Act 2020
13 Section 70 of the United Kingdom’s Sexual Offence Act,2003
14 Crime Act, 1961
15 Burial and Cremation Act, 1965
The novel coronavirus has affected mankind in a way unparalleled in human history. This new coronavirus is named as “COVID-19” by the World Health Organization and the International Committee on Taxonomy of Viruses called it Severe Acute Respiratory Syndrome coronavirus 2 also known as (SARS-CoV-2).\(^\text{16}\) The COVID-19 pandemic has now increased to a global health crisis across the sphere and become challenge for India’s economic, medical and public health infrastructure. While taking into consideration the current scenario of covid-19, there are a number of death reports in a very single day. This became a burden for the government and medical officials to provide a fair and decent funeral. The coronavirus not only open materialize a health and economic crisis, it is also put crisis upon faith in the final journey of humans. This situation creates the new debate in front of us that is the right to decent funeral has denied. During this massive surge in COVID cases many dead bodies have now decomposed after they were left abandoned for a very long period of time. There are numerous incident reported during this pandemic where several dead bodies were found floating in the river Ganga. There is a horrific visual when several dead bodies have been recovered from Ganga River, in Bihar's Buxar district.\(^\text{17}\)

After bodies were found floating in the river Ganga in Bihar similar sightings are now being reported in Uttar Pradesh’s Unnao district.\(^\text{18}\) Keeping in view these situations regarding the mismanagement and mishandling of Covid-19 affected dead bodies the National Human Rights Commission, also known as NHRC, issues Advisory to the Centre and States to ensure dignity and the rights of the dead person.\(^\text{19}\) The Commission has said that it is a well- accepted legal position that the right to life, fair treatment and dignity, derived from the Article 21 of the Constitution of India, extends not only to the living persons but also to their dead bodies. Further, the Commission has observed that though there is no law to protect the rights of the dead in the country and it is the duty of the State to protect the rights of the deceased and crime over the dead body.

\(^{16}\) H. Wang, “Phase-adjusted estimation of the number of coronavirus disease 2019 cases in Wuhan, China Cell Discov, 6 (2020), p. 10
\(^{19}\)https://nhrc.nic.in/sites/default/files/NHRC%20Advisory%20for%20Upholding%20Dignity%20%20of%20Dead.pdf
There is another dreadful picture available where the judiciary took suo motu cognizance of the Hathras incident when a 19 year old girl was allegedly gang-raped in a field and Uttar Pradesh authorities cremated her body at midnight which was the victim’s right to dignity violated upon death because the victim was a Hindu and as per the Hindu customs, a body cannot be cremated after sunset and before daybreak. Keeping this the High Court relied on the Right to dignity of a deceased person.

3. Judicial Articulation and Constitutional Provision for the Right of Deceased:

The Constitution of India is a subject of paramount importance as it sets out the framework under which the nation is governed. The Constitution of India is a living document, an instrument which makes the government system work. The Constitutional law of country consists of both legal as well as non-legal norms. Article 21 of the Indian Constitution, reads as, “No person shall be deprived of his life and personal liberty, except by the procedure established by law”. This Article of Constitution of India, also known as the heart of the Indian Constitution, within its wide ambit, covers various rights like as right to shelter, right to livelihood, right to medical care, right to privacy, right to reputation, right to pollution free environment and right to sleep etc. This is not the exhaustive list of right under Article 21 of the Constitution as the society progress various right which are associated with the life emerged. Article 21 is not mere related to living human being’s rights but also with the dead person. Hon’ble Supreme Court in the case of Ram Sharan Autyanupra vs. Union of India submits that the right to accord a decent burial or cremation of a dead body should be taken to be part of the right to such human dignity.

21 M. P. Jain, Indian Constitutional Law 3(2016)
24 Parmanand Katara v Union of India AIR 1986 SC 2039
25 Justice K.S. Puttaswamy (Rtd.) and Anr. V. Union of India and Ors. AIR 2017 SC 4161
26 Subramanian Swamy Vs. Union of India, (2016) 7 SCC
28 Ramila Maidan v. Home Secretary, Union of India (2012) 5 SCC1
29 AIR 1989 SC 549
The Indian judiciary in many cases have observed and interpreted that right to have a decent burial is also included in Article 21 of the Constitution. It is observed\textsuperscript{30} by the court that right to dignity which is available under Article 21 of the Constitution not only to a living man but also to his body after his death and the word “Person” in such Article includes a dead person and right to life with dignity should be extended in such manner that his body is given respect, which he would have deserved, had he been alive, subject to his tradition, culture and the religion which he professed.\textsuperscript{31} In another landmark case the Supreme Court held that the dead body of a homeless person who died on the street is entitled to a decent burial according to the religious faith to which he belonged.\textsuperscript{32}

During the coronavirus pandemic the Indian Judiciary addressed the issue of burial and cremations of a Covid-19 patient’s dead body.\textsuperscript{33} It is also admitted by the Judiciary that “right to die with dignity”\textsuperscript{34} as the right to live with dignity includes autonomy in relation to the process of dying and choosing to not undergo pain and suffering.

In the case of \textit{Anandhi Simon vs. The State of Tamil Nadu and Ors Madras}\textsuperscript{35} High Court clear that the law has recognized the fundamental right of a dead person to have a decent burial. The Covid-19 guidelines for Dead body management issued by Government of India, Ministry of Health and Family Welfare, Directorate General of Health Services also does not empower the statutory authorities to dispose of Dead bodies of Covid-19 victims according to their whims and fancies. In the case of Right to Decent & Dignified Last Rites/Cremations vs. State of U.P. and Ors\textsuperscript{36} Allahabad High Court, Lucknow bench expanded fundamental right to life to live with dignity and to exist with dignity even after death as well as right to decent burial/cremation appears to have been infringed hurting the sentiments of not only the family members but of all persons and relatives assembled on the spot. In the case of \textit{Vineet Ruia vs. The Principal Secretary, Ministry of Health and Family Welfare and Ors}\textsuperscript{37} the high court of Calcutta held that Traditions.

\textsuperscript{30} Supra note 13  
\textsuperscript{31} Ramji Singh @ Mujeeb Bhai v. State of Uttar Pradesh & Ors. (2009) 5 ALL LJ 376  
\textsuperscript{32} Ashray Adhikar Abhiyan v. Union of India & Ors (2002) 2 SCC 27  
\textsuperscript{33} Pradeep Gandhy v. State of Maharashtra (2020) SCC  
\textsuperscript{34} Common Cause (A Regd. Society) v.Union of India & Anr (2018)  
\textsuperscript{35} MANU/TN/2334/2021  
\textsuperscript{36} MANU/UP/2496/2020  
\textsuperscript{37} MANU/WB/0659/2020
and cultural aspects are inherent to the last rites of a person's dead body. Right to a decent funeral can also be traced in Article 25 of the Constitution of India which provides for freedom of conscience and free profession, practice and propagation of religion subject to public order, morality and health and to the other fundamental rights under Part III of the Constitution.

4. Right of deceased person under the Criminal Law:

Criminal Law is the mirror of public opinion and the Indian Penal Code, 1860 is the statutory law which governing the principal of criminal law. The Indian Penal Code defines word “person” as it include any company or association of body of persons whether incorporated or not.\footnote{Section 11, Indian Penal Code 1860.} An unborn child within the womb of mother is a person if its body is developed sufficiently to make it possible to call it a child.\footnote{Jabbar v. State, AIR 1966 ALL 590.} It is punishable whoever by secretly burying or otherwise disposing of the dead body of a child whether such child dies before or after or during its birth with intention to conceal or endeavors to conceal the birth of such child.\footnote{Section 318 of Indian Penal Code, 1860.} The deceased has some rights which cannot be separated. Even if the body is denuded of the life, life and body together forms a human being. When we deals with the testamentary succession the Indian succession Act, 1923\footnote{Act No. 39 OF 1925} provides for execution of the will of a person, after he has died. In order to provide for the regulation of removal, storage and transplantation of human organs for therapeutic purposes and for the prevention of commercial dealings there is specific act known as the Transplantation of Human Organs Act, 1994. In this act it is provide that a person has a right of protection of his dead body, to be mutilated, wasted or its organs to be taken out, except by the consent of the person, when he was alive or on the consent off his kith and kin or the state if the body is unclaimed.

The right to decent burial comes under the Indian Penal Code. When anyone trespasses on a place of sepulcher, indignity to a corpse or disturbance to person assembled for funeral ceremonies, is committed the cognizable offence.\footnote{Section 297 of Indian Penal Code, 1860.} Where a patient dies while under operation by a doctor who after the death removes the liver of the deceased for transplantation to another patient without the knowledge and consent of the deceased’s heir, the doctor would be liable for the offence of
indignity to human corpse. Recently the Madras High Court in a case of a doctor, who got died due to COVID-19 infection, where a large mob assembled and opposed the burial of the body had observed that “the scope and ambit of Article 21 includes the right to have a decent burial”, the court also invoked and highlighted Section 297 of IPC.\(^{43}\)

There is special kind of the protection to the property during the interval which elapses between the time when the possessor of the property dies and the time when it comes into the possession of authorized person to take charge of it.\(^{44}\) There is defamation also against the deceased person, if the imputation would harm the reputation of deceased person if living, and is intended to be hurtful to the feeling of his family or other near relatives.\(^{45}\) In the landmark case\(^{46}\) the Honorable 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 defamation.”

Whenever any person threatens to cause injury to the reputation of another person or dead person by any means he will be guilty of Criminal intimidation\(^ {47}\) under the Indian Penal Code.

5. Guidelines regarding funeral, cremation of dead bodies during coronavirus pandemic

Working with 194 Member States, across six regions, and from more than 150 offices, World Health Organization staffs are united in a shared commitment to achieve better health for everyone, everywhere. It is the primary role to direct and coordinate international health within the United Nations system. During the pandemic the World Health Organization released guidance\(^ {48}\) for everyone who managed the health care facilities and the religious and public health authorities who came into contact with the suspected, confirmed or dead COVID-19 patients. These are the


\(^{44}\)Section 404 of Indian Penal Code 1860.

\(^{45}\)Section 499 of the Indian Penal Code 1860.

\(^{46}\)Mrs Pat Sharpe v. Dwijendra Nath Bose, 1964 CriLJ 367

\(^{47}\)Section 503 of Indian Penal Code 1860.

most relevant provision of the guidelines which were given by WHO with regards to Funeral as following:

1. People who have died from COVID-19 can be buried or cremated as per their religious norms and traditions.
2. The family members and friends may view the dead body once it is ready for funeral. However, they should not touch, or kiss or come into close contact with the body. After viewing the body, they must wash their hands thoroughly using soap and water.
3. People who are involved in the task of placing the body in the grave or cremating it should wear gloves and a mask. Also, once the funeral or cremation is over, they must dispose of their gloves (properly) and wash their hands thoroughly using soap and water.

Taking into the consideration of the guidance issued by the WHO the Government of India Ministry of Health & Family Welfare Directorate General of Health Services also issue the guidance to avoiding any type of direct contact with the body fluids of the deceased person, while the procedure of disposing of the body is taking place, or while moving the corpse from the isolation room or area of the health care facility.

**6. Conclusion and Suggestions:**

The right to decent funeral is a part of fundamental right to life under Article 21 of the Constitution of India. It is the duty of every citizen to hand out a decent funeral or cremation to a patient who was infected with COVID-19 virus. There are various international instruments and conventions which also deal with the decent funeral or cremation of dead person. Due to chaotic situation the right to decent funeral has denied during this unprecedented crisis. As there is no specific legislation to deal with burial and crimination act, therefore there is need to enact such law proper and decent funeral.

Therefore, it is needed to make stronger the guidelines that is issued by the WHO and local health authorities for the management of dead body. There are some suggestions which are given by the National Human Right Commission for different stakeholders in the society including, among

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others, governments, police, administration, local bodies, hospitals, medical practitioners, prison administrations, civil society, media and families for extending dignity to the dead as following:

1. Enact specific legislation to protect the rights of the dead
2. Each State must maintain a district wise digital dataset of death cases
3. Death of a person must be simultaneously updated in all public documents
4. The unclaimed bodies must be stored under safe conditions
5. The Hospital administration should be explicitly prohibited from deliberately retaining any dead body on the count of pending bill payment
6. The local authorities should ensure that the transportation facilities are available to transport the body of the deceased