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## ***ABOUT US***

WHITE BLACK LEGAL is an open access, peer-reviewed and refereed journal providededicated to express views on topical legal issues, thereby generating a cross current of ideas on emerging matters. This platform shall also ignite the initiative and desire of young law students to contribute in the field of law. The erudite response of legal luminaries shall be solicited to enable readers to explore challenges that lie before law makers, lawyers and the society at large, in the event of the ever changing social, economic and technological scenario.

With this thought, we hereby present to you

# **RIGHT TO DECENT BURIAL AS A FUNDAMENTAL RIGHT: SPECIAL REFERENCE TO COVID-19 PANDEMIC**

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## **Abstract**

Regardless of cultural differences and the many religions/Rituals practiced by individuals across the globe, honouring a deceased person with respect is a well-known ritual all over the world. And since the emotion of reverence is so fundamental, people have a tendency to regard even the dead corpses of their adversaries with such reverence. The purpose of this article is to discuss the rights of a deceased person in relation to his or her burial or cremation. Due to the growing pandemic, many horrific examples in India have recently surfaced, raising the question of whether even the dead have rights. The right to a respectful burial or cremation is examined in both Indian and international legal systems, as well as in epidemic scenarios. This article examines the concerns of a deceased person's claim to a decent burial or cremation in India, drawing on a number of case studies and the psychologic effect they have on their communities. The benefits and disadvantages of the regulations and standards pertaining to dead body management during a pandemic, as established by the World Health Organization (WHO) and the Indian government for the benefit of society as a whole, will be explored as well.

**Keywords:** Deceased person, burial, cremation, fundamental right

## **Introduction**

Throughout history, there has been a universal belief in the sacredness of allowing corpses to rest undisturbed and unharmed, ensuring they are treated with respect. Even within the Christian community, tomb inscriptions such as "RIP" (Rest in Peace) reflect this sentiment. William Henry



Francis Bsevi, in his book "Burial of the Dead," emphasizes that across diverse cultures and rituals, the treatment of the deceased with reverence is a common practice. This notion of respect extends to the gentle handling of even the bodies of adversaries, illustrating its deep-rooted significance.

In India, a country with a secular government and constitutional monarchy, every religion underscores the importance of dignified treatment for the deceased. The right to life, enshrined in the constitution, is fundamental to human existence, encompassing all elements that contribute to a meaningful and complete life. Article 21, with its broad interpretation, provides protection for various rights, emphasizing the essential and inescapable necessities for individuals.

In essence, the concept of the right to life encompasses the fundamental and indispensable requirements for human existence, serving as the foundation for numerous other rights under the Constitution.

## Meaning of Decent Burial

A dignified burial entail treating the deceased with reverence and acknowledging their individuality in death. It involves handling and laying the body to rest in accordance with cultural and religious customs, ensuring it is done with respect and without causing undue distress. This practice recognizes the inherent value of a person, even in their absence, and helps provide closure to grieving loved ones.

The Supreme Court in **Parmanand Katara, Advocate v. Union of India & Anr**<sup>1</sup> affirmed that the right to dignity and fair treatment under Article 21 of the Indian Constitution applies not only to the living but also to their bodies after death. The term "person" in Article 21 is interpreted to include a deceased individual to some extent, and their rights, including the right to human dignity, extend to the respectful treatment of their body in accordance with their tradition, culture, and religion.<sup>2</sup>

Same way in the case of **Common Cause (A Registered Society) v Union of India**<sup>3</sup>, it was argued that the right to live with human dignity persists even beyond death. Therefore, the same dignity afforded to a living person should also be extended to the deceased through proper funeral procedures.

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<sup>1</sup> 1989 AIR 2039, 1989 SCR (3) 997

<sup>2</sup> <https://sabrangindia.in/article/do-dead-have-rights-india>

<sup>3</sup> Common Cause (A Regd. Society) vs Union of India on 9 March, 2018



## Jurisprudential view

In the field of law, the debate over whether rights extend beyond death sparks a fascinating intellectual discourse. While legal systems primarily focus on the living, the concept of a "respectful burial" remains on the fringes, characterized by intricate ethical and practical complexities.

One argument revolves around the notion of human dignity, which is a cornerstone of many legal doctrines. This argument suggests that the inherent value of individuals should not cease upon death. According to this perspective, respect for personal autonomy persists beyond life, allowing individuals to dictate, through cultural traditions or expressed preferences, the manner of their final rites. Thus, denying someone a dignified burial is seen as a violation of this inherent dignity and can cause emotional distress to their surviving relatives.

Moreover, legal theory acknowledges the interconnectedness of various rights. For instance, the freedom of religion may intersect with the right to conduct burial practices in accordance with specific beliefs. Similarly, the principle of equality necessitates that no community should be deprived of access to dignified burial sites or procedures due to societal biases.

However, navigating this complex terrain presents challenges. Balancing individual preferences with public health considerations or environmental regulations requires delicate negotiation. Additionally, clashes between cultural practices and established legal frameworks may arise, necessitating careful deliberation and, if needed, nuanced legal adjustments.<sup>4</sup>

The legal landscape regarding post-mortem rights is still evolving. Landmark cases like *Olga Tellis v. Bombay Municipal Corporation in India*<sup>5</sup>, upholding the right to a designated burial ground, showcase a growing sensitivity to these intricate issues. International instruments like the Universal Declaration of Human Rights, emphasizing respect for the deceased, also provide valuable guiding principles.

Acknowledging the entitlement to a dignified burial goes beyond mere legal intricacies. It involves

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<sup>4</sup> Kirsten Rabe Smolensky, *Rights of the Dead*, Hofstraw Law Review, Vol.37, Issue 3, 2009

<sup>5</sup> 1985 (3) SCC 545

recognizing the enduring strands of human dignity, honoring various cultural manifestations, and providing solace to mourning families. This intricate fabric is comprised of ethical deliberations, pragmatic considerations, and a profound reverence for the sanctity of life, even as it approaches its conclusion.

## **Constitutional Perspective**

### **Article 21 of the Indian Constitution<sup>6</sup>:**

The sanctity of life, as outlined in Article 21 of the Indian Constitution, extends to encompass the right to a dignified farewell that surpasses mere bodily functions ceasing. Although not explicitly articulated, this entitlement to a respectful burial is fundamental to the principles of human dignity and individual autonomy.

Article 21 guarantees not only the right to life but also includes liberty and dignity. This entails not only preserving physical life but also the freedom to live independently and with dignity. In death, these principles manifest in the entitlement to be treated with respect and to undergo a final journey that aligns with personal beliefs and cultural practices. Denying a proper burial can inflict significant emotional distress on families, violating their well-being and religious or cultural beliefs. Disrespecting the deceased disregards their uniqueness, contradicting the essence of Article 21.

Several rulings by the Supreme Court of India, such as *Bodh Raj v. State of Himachal Pradesh* and *Olga Tellis v. Bombay Municipal Corporation*<sup>7</sup>, have recognized the right to a decent burial. However, challenges persist, including insufficient burial sites and discrimination against certain groups.

Addressing these challenges requires a holistic approach involving raising awareness among authorities, promoting tolerance for diverse traditions, and ensuring adequate facilities for all communities.

Upholding the right to a decent burial is not solely a legal duty but a moral imperative. It

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<sup>6</sup> Article 21, The Constitution of India 1950

<sup>7</sup> 1985 (3) SCC 545

acknowledges the inherent dignity of every individual, even in death, and cultivates a society founded on respect and empathy. This brief discourse only scratches the surface of this intricate issue, emphasizing the significance of honoring the deceased with dignity and reverence under Article 21.

### **Article 25 of the Indian Constitution<sup>8</sup>**

Article 25 safeguards the right to conduct burial or cremation rituals in accordance with religious customs and convictions. This encompasses the freedom to select particular ceremonies, prayers, symbols, and traditions associated with the deceased's faith. Any denial or intrusion upon these religiously significant funeral rites, whether by state intervention or societal pressures, can be contested under Article 25.

Numerous communities possess longstanding cultural customs related to death and burial, often intertwined with religious principles. Article 25 safeguards these traditional practices as long as they do not infringe upon public order, morality, or other fundamental rights. This may encompass specific burial procedures, the choice of burial sites, mourning customs, or offerings of food, all of which contribute to a dignified and respectful farewell for the departed.

Additionally, Article 25 prohibits discrimination based on religion concerning matters related to death and burial. This ensures that individuals from all religious backgrounds have access to burial sites, can carry out their preferred rituals, and receive respectful treatment regardless of their religious affiliations.

In *Ashray Adhikar Abhiyan Vs. Union of India*<sup>9</sup> the Supreme Court had upheld the right of a homeless deceased to have a decent burial as per their religious belief and the corresponding obligation of the State towards such people.

## **Rights of a deceased person and Criminal Law**

The term "person" in the Indian Penal Code encompasses not only individuals but also includes any company or association, whether incorporated or not. The deceased retains certain rights that remain intact even after death. Despite the absence of life, the combination of life and body constitutes a

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<sup>8</sup> Article 25, The Constitution of India 1950

<sup>9</sup> 2002 (2) SCC 27

human being. The right to a respectful burial is stipulated within the Indian Penal Code. Any intrusion into a burial site, disrespect shown to a corpse, or disruption of funeral proceedings constitutes a cognizable offense.

In cases where a patient passes away during surgery and the doctor, without the consent of the deceased's heirs, removes the deceased's liver for transplantation into another patient, the doctor can be held liable for the offense. Defamation against a deceased person is also recognized under the law if the allegation would have harmed the individual's reputation had they been alive, and if it is intended to inflict emotional distress upon their family or close relatives. This precedent was upheld by the court in the case of *Mrs. Pat Sharpe v. Dwijendra Nath Bose*.<sup>10</sup>

Body disposal comprises the provision of adequate burial facilities, the right to be buried in dignity, and the right not to be taken from the grave for any purpose other than those permitted by law, such as a criminal investigation or the community's general welfare.

Although the Supreme Court of India ruled in the seminal case of *Navtej Singh Johar v. Union of India*<sup>11</sup> that Section 377's application to consensual homosexual intercourse was unconstitutional, the Section remains in force and is used to prosecute those who engage in sexual relations with or attraction to corpses.

**Section 297**<sup>12</sup> of the IPC, as mentioned above, deals with the offence of trespassing on burial grounds etc., states that if any person offers any indignity to any human corpse, or causes disturbance to any persons assembled for the performance of funeral ceremonies, shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both.

**Section 404**<sup>13</sup> of the IPC dishonest misappropriation of dead man's property is an offence.

**Section 503**<sup>14</sup> of the IPC defines criminal intimidation, includes threatening a person with injury to reputation of a dead person dear to him, as an offence.

**Section 499**<sup>15</sup> which deals with the defamation either libel or slander against a dead person is an offence of criminal defamation.

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<sup>10</sup> 1964 CriLJ 367

<sup>11</sup> *Navtej Singh Johar vs Union Of India Ministry Of Law And ...* on 6 September, 2018

<sup>12</sup> Section 297 of the Indian Penal Code 1860

<sup>13</sup> Section 404 of the Indian Penal Code 1860

<sup>14</sup> Section 503 of the Indian Penal Code 1860

<sup>15</sup> Section 499 of the Indian Penal Code 1860



## **International Covenants on Decent Burial**

Article 130 of the fourth Geneva Convention (international humanitarian law):

Article 130 of the Fourth Geneva Convention addresses the treatment of deceased internees in times of armed conflict. It requires their "honorable burial," with consideration given to their religious practices whenever feasible. The preference is for individual graves, although collective burials are permissible under specific circumstances. Cremation may be permitted for reasons of hygiene, religious beliefs, or at the request of the deceased, with thorough documentation and the retention of ashes for potential retrieval by family members.

Crucially, the convention mandates the maintenance and marking of graves, along with the sharing of relevant information about them with appropriate authorities for future identification and communication. This article underscores the importance of treating the deceased with dignity and respect, even in times of war, and recognizes the significance of cultural and religious factors in their final rites.

Resolution of UN Commission on Human Rights:

In 2005, the UN Commission on Human Rights, in Resolution 2005/26, emphasized the critical importance of treating human remains with dignity. It stressed the need for proper handling, including identification, disposal, and adherence to diverse cultural and religious practices related to death. This resolution highlighted the significance of respecting human dignity even after death, while recognizing the mourning families' needs and traditions.

According to the UN's Inter-Agency Standing Committee's Operational Guidelines on Human Rights and Natural Disasters, measures should be taken "to facilitate the repatriation of remains to their next of kin." Additionally, procedures should allow for the recovery of human remains for potential future identification and, if required, reinterment.'

## **Right to Decent Burial and Covid-19**

Since the onset of the COVID-19 pandemic, there has been a rise in instances where the Right to Burial has been severely violated. Authorities have mishandled and inadequately disposed of bodies, leading to a situation where people are hesitant to claim bodies or perform final rites. Despite

guidelines issued by the WHO and the Government of India for the safe disposal of COVID-19-infected remains, these directives have been either ignored or not fully implemented. Moreover, due to the lack of scientific evidence demonstrating the transmission of the new coronavirus through cadavers or deceased bodies, the Corporation and other relevant authorities have been granted the authority to designate burial sites and cemeteries.<sup>16</sup>

Amidst the pandemic, the Ministry of Health & Family Welfare issued a document titled 'Guidelines on Dead Body Management', outlining proper and respectful procedures for disposing of the bodies of suspected or confirmed COVID-19 patients. These guidelines were explicit, emphasizing that corpses should be cremated or buried in accordance with religious practices, which are considered integral to faith and protected by Article 25 of the Constitution. For instance, Hindu culture mandates cremation, while Muslim and Christian traditions call for burial. Guideline 11 point 4 acknowledged the importance of adhering to religious rituals for the deceased's last rites to preserve longstanding traditions amidst the pandemic.

However, despite the existence of clear legal guidelines and judicial precedents supporting the rights of the deceased, these rights were grossly violated during the COVID-19 pandemic. Bodies were indiscriminately disposed of in mass burial pits, and scavenging animals were observed feeding on them. Controversies also arose regarding the disposal of bodies without consideration for religious customs.

This disregard for the rights of the deceased, despite a robust legal framework, highlights the urgent need for awareness of their rights, including the right to a dignified funeral. The pandemic exacerbated the violation of these rights, underscoring the importance of upholding and respecting the rights of the deceased in all circumstances.

### **Pradeep Gandhi v. Maharashtra<sup>17</sup>**

The Bombay High Court recently addressed a lawsuit challenging the BMC's directive on designated burial sites for COVID-19 patient remains, ultimately rejecting the petition. The court emphasized

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<sup>16</sup> <https://www.thehindu.com/news/national/tamil-nadu/right-to-decent-burial-is-part-of-fundamental-right-to-life-says-hc/article31392061.ece>

<sup>17</sup> Pradeep Gandhi vs The State of Maharashtra on 4 May, 2020

that the right to a dignified burial, which aligns with an individual's dignity, is recognized as part of the constitutionally protected right to life under Article 21. It asserted that individuals who pass away during this crisis due to suspected or confirmed COVID-19 infection should be entitled to the same facilities as they would under normal circumstances.

Similarly, while acknowledging that the Fundamental Right to Life under the Constitution encompasses the Right to a Dignified Burial or Cremation, the Madras High Court advised residents against petitioning the High Court directly regarding the disposal of COVID-19 victims' bodies, urging them to approach the State of Maharashtra first.

Various authorities, including the World Health Organization (WHO), the National Disaster Management Authority (NDMA), the Government of India, and several state governments, have issued guidelines emphasizing the importance of adhering to COVID-19 protocols while ensuring the dignity of the deceased, including proper burial according to religious customs and practices.

The Hindu ritual of Asthi Visarjan, involving the immersion of a deceased person's ashes collected from the Last Rites, holds significant importance. However, during the COVID-19 pandemic, there has been a misunderstanding where "Asthi Visarjan," referring to ashes immersion, has been misconstrued as referring to bodies. This has led to the presentation of bodies, rather than ashes, to the Ganga. Numerous bodies have been found floating in the river, some in close proximity to each other, with reports of crows and dogs scavenging on the remains. The situation has prompted the National Human Rights Commission (NHRC) to take action in response to complaints about bodies floating down the Ganga in various parts of Uttar Pradesh and Bihar, thereby advocating for the protection of the fundamental rights of the deceased to a dignified burial.

It is important to understand that not only the "Right to a Dignified Burial," but also "as per religious rules" is a basic right. The Supreme Court reinforced this in **Ashray Adhikar Abhiyan v. Union of India**<sup>18</sup>, in which the Supreme Court emphasized that the dignity of the dead should be preserved and honored. It also gave homeless persons the right to proper cremation in accordance with their religious beliefs.

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<sup>18</sup> AIR 2002 SC 554

## Conclusion

Apart from a few rights that are already established, the law does not specifically outline rights for the deceased. The Indian Succession Act of 1923 includes provisions for the transfer of a person's will to another individual after their death. Individuals retain rights to their bodies after death, meaning that organ usage or transplantation is prohibited unless consent was obtained while they were alive, in accordance with the Human Organs Act of 1994.

The Indian Constitution mandates that the state must authorize the removal of a corpse if it poses a hazard to the safety of other living beings, ensuring proper disposal. Additionally, if a corpse remains unclaimed, the state is responsible for reclaiming it and conducting thorough investigations by police and medical personnel to determine if the death was not caused by natural causes.

The state is obligated to uphold both the welfare of the state and the protection of the rights of individuals, as defined by Article 21 of the Indian Constitution. This includes ensuring a dignified burial or cremation, aligned with the religious beliefs of the deceased.

Various factors contribute to the increase in such crimes in India, which are detailed below. Given the significance of this issue, especially during the epidemic, it is unacceptable to witness individuals disrespectfully discarding corpses into waterways. The public must collaborate with the government by providing assistance, while the government must take necessary measures to prevent improper disposal of remains in waterways by providing essential facilities and infrastructure.

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