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Need for Laws on Exhumation of Bodies: In Light of Article 21

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Exhumation is the legitimate removal of a corpse from its grave to determine the cause of death in criminal or civil proceedings, with the permission and supervision of the courts. At the moment, the only legislation governing this process is contained in Section 176 of the Code of Criminal Procedure. According to Article 21 of the Indian Constitution, "No person shall be deprived of his life and personal liberty," which concludes that the right to life, that is the right to live is essential to every life existing and has been interpreted in the most diverse sense. Similarly, the right to decent death is an important facet of it. In India, there is currently no comprehensive mechanism for dealing with exhumation. The Supreme Court has stated that comprehensive law on exhumation is required.

Keywords: *exhumation, article 21, life.*

INTRODUCTION

Exhumation is the process of removing a corpse from its grave. The need for exhumation arises for several reasons, such as when suspicion arises about the cause of death of a deceased person whose body has been buried. Disinterment can be performed in the following circumstances: in criminal cases where the cause of death is homicide, suspected homicide, disguised suicide, suspicious poisoning, or death as a result of criminal abortions and malpractices; in civil cases

where there are accidental death claims, workmen's compensation claims, insurance claims, and where the body is unidentified; and, inheritance claims where the identity of the dead body is disputed. The process of exhumation is performed on the orders of the magistrate in the cases mentioned above. In India as well as in England, after the burial of a dead body, there is no prescribed time limit under which exhumation can be performed. However, in countries like Scotland, exhumation can be performed until 20 years from the time of burial, and no suspected person can be prosecuted for the perpetration of the crime after the lapse of that period. In France, the time limit is 10 years, whereas in Germany it is 30 years.

These countries have a certain framework and time limit within which the procedure of disinterment can be performed. The absence of a time limit to perform the process as well as peculiar circumstances which call for the procedure of exhumation not only make it difficult to justify the commission of an offence, but it also causes harm to the public health of society and defeats morality. As when the dead body is removed from its grave, there is the possibility of transmission of diseases that can cause harm to the health of society, in addition, the element of morality speaks that the dead have been laid to rest in peace. We have divided our study into different parts, the first part deals with the legislation involved with dealing cases of exhumation then we will look into what procedures other countries follow for performing exhumation from there we will go on to discuss the right which a deceased is entitled to under the Article 21 of the constitution of India and lastly would discuss the matter in hand in light of the judgment of Hon'ble Supreme Court in *Mohd. Abdul Latif Magrey v UT of Jammu Kashmir and Ors.*¹, wherein the bench necessitated the need for an exhaustive mechanism for exhumation laws as we lack a comprehensive mechanism for it.

LEGISLATION GOVERNING EXHUMATION IN INDIA AND THE PROCEDURE SURROUNDING IT

The provisions of Section 176(3) of the Code of Criminal Procedure, 1973 as under - "*Whenever such Magistrate considers it expedient to examine the dead body of any person who has been already*

¹ *Mohd. Abdul Latif Magrey v UT of Jammu Kashmir and Ors* (2022) LiveLaw SC 756

interred, to discover the cause of his death, the Magistrate may cause the body to be disinterred and examined.”²

After receiving permission from the magistrate to carry out disinterment a team comprising a Medical Officer and a police officer accompanied by a relative of the deceased visit the place of burial. As per the police procedure at the time of burial of a dead body, the tombstone contains the personal details of the dead person in addition the police memorandum contains a detailed record of the deceased consisting of personal information such as the gender of the deceased, the dress which the deceased was wearing at the time of burial, etc. The police shall identify the grave marker also. The process of exhumation is performed only during the daytime when spectators are there then it must be kept in mind the public health of society is of paramount importance so the body shall be covered in a sheet. When the digging of the grave reaches 10-15 cm the ground details inclusive of the soil conditions, water conditions, and vegetative growth is to be dotted down the procedure is to be repeated until the digging reaches 10-15 cm and the body is seen. Once the digging reaches that part where the dead body was placed, at that time before its removal from the grave the position of the body is to be dotted down thereafter the sketch of the grave is made and pictures are taken. Afterwards, a plastic sheet or a plank is placed beneath the body and it is removed from the grave. If the body is skeletonized then things that were present in the soil are preserved and taken note of it thereafter the body is sent for post-mortem. The organs of the deceased go for chemical examination along with the earth which was taken from within, below, and above the coffin. Apart from this specific provision, no other legislation governs the procedure of disinterment. Only when there is suspicion as to the cause of death the exhumation can be performed in consonance with the provisions mentioned above.

The dead bodies are buried only where the religious belief permits the performance of last rites by the method of burial. But there are cases wherein there is no one at the moment of death of a deceased to claim the body in such scenarios the unclaimed body is handled by the concerned state's Anatomy Act and the police manual, when a dead body is received by the unclaimed

² Code of Criminal Procedure 1973, s 176(3)

police, he sends it to the nearest government hospital for the autopsy, the autopsy report or the post mortem report contains all the details regarding the cause of death. Once the autopsy is done the unidentified dead body is registered as per the provisions of Section 154³ and Section 174⁴ of CrPC by the police. When the relatives claim the unclaimed dead body the police hand over it to them to perform the last rites as per their religious beliefs once the DNA samples match and establish the relationship between the claimants and the disputed dead body⁵. Overall, the provision is silent concerning the time limit under which the procedure of exhumation can be performed.

EXHUMATION IN OTHER COUNTRIES

We will now examine the exhumation procedures adopted in various countries.

United Kingdom - The process of exhumation in the UK is conducted only when all the close relatives of the deceased are contacted and agree by signing to the proposed exhumation. Exhumation of both the burial mortal remains and the cremated mortal remains requires a Home Office License issued from the Ministry of Justice. The reasons for which exhumation can be performed for enlisted reasons such as the – removal from an original grave site to transpose it to a new grave site in the same or some other cemetery, transfer from a commercial grave to a family grave, coroner’s instructions that require advanced forensic examination of the deceased, removal for cremation and lastly, removal for burial in another cemetery.

The person seeking the exhumation needs to take assistance from the Funeral Director in furtherance to it a license needs to be obtained from the Ministry of Justice thereafter the application is to be submitted to the burial authority from the next-of-kin of the deceased to receive authorization. Furthermore, if the person is buried at the ground which is consecrated by the Canon Law of the Church of England, then a Bishop’s faculty must be attained. Lastly, the burial authority notifies the Environmental Health Officer to be present at the burial site to

³ Code of Criminal Procedure 1973, s 154

⁴ Code of Criminal Procedure 1973, s 174

⁵ *Saiyad Sasheb Ali v The State of Madhya Pradesh* Criminal Appeal 782/2013

ensure that the respect of the deceased person is maintained and public health and safety measures are properly complied with.⁶

France - In France, exhumation can be performed at the request of the family of the deceased or it can also take place at the initiative of the town hall, social security, or justice. The request such as to shift the body of the deceased from one cemetery to another or bring it closer to the grave of the family member. The procedure can be initiated by the funeral society or a close relative wherein a close relative consists of an unseparated spouse (widow /widower), children of the deceased, parents, or siblings. In the case where a conflict exists then the same shall be decided by the court. The exhumation is requested by the mayor of the town where it is requested to be performed. The exhumation can be granted irrespective of the date of the death and the date of the burial. In the case where the deceased suffered from a contagious disease and such disease caused their death then the request for exhumation can be made after the expiry of one year of death. When there is suspicion concerning the death of a person in an accident the Primary Health Insurance Fund(PMHC) can request for the exhumation to get an autopsy done of the deceased through the request made by the victim's rights holder or on its initiative their consent from the Court in whose jurisdiction the accident occurred. Any court of inquiry or judgment may at the request made by the public prosecution or parties or ex-officio request for an exhumation. The funds and the responsibility to conduct the same shall lie with from the same lies the Ministry of Justice.

Scotland - To perform exhumation of a body to move it from one place to another, the person seeking so needs to get the license through their solicitors from the sheriff and the solicitors will also confirm with the cemetery officer whether the deceased grave whose body is to be exhumed is present or not. The solicitor then requests a feasibility certificate from the administrator, once the feasibility certificate is issued it implies that the information is correct and complete. The sheriff then issues a warrant to disinter or re-inter, which means one can go ahead with the

⁶ 'Exhumation procedures and legislation' (*Calderdale Council*)

<<https://www.calderdale.gov.uk/v2/sites/default/files/exhumation%20procedures%20and%20legislation.pdf>

> accessed 11 December 2022

exhumation. After receiving the grant of the license, the commentary administrator needs to be contacted so that the moving out of the body can take place.⁷

Ireland - In Ireland, the process of exhumation takes place under specific circumstances as the state believes that the dead must be treated with respect and that the privacy of the family members and relatives should be intact and protected at all costs. The circumstances under which exhumation can be permitted are – i) in cases concerning family reasons where the family members want to transpose the mortal remains of the deceased from one cemetery to another, ii) for reasons relating to public health that is where the cemetery is moved and iii) lastly, when the minister of justice orders an exhumation for a criminal investigation.

In cases specifically, where the family arranges the exhumation for the re-burial of the deceased an application needs to be made to the local authority, after the local authority approves the license, the exhumation should be conducted within 12 months. In the presence of the Environmental Health Officer, who shall be notified of the date, time, and place five days before the date on which the exhumation is to be performed, the Environmental Health Officer ensures that due respect is meted out to the deceased and all the procedures have duly complied. The site where the disinterment is going to take place needs to be protected from public view and the workers are supposed to give due care to the neighbouring burial plots and should follow all hygiene protocols.

Burial grounds that are maintained by the state authority are governed by the Institutional Burial Act⁸, which authorizes the government to appoint the Director of Authorized Intervention assisted by the Advisory Board to look into the remains of those buried on the grounds under the control of the state. The director has the authority to – excavate the site, recover and analyze the human remains, identify the human remains through DNA matching

⁷ 'Apply for an exhumation licence' (*Mygovt.scot*, 5 November 2020) <<https://www.mygovt.scot/exhumation-licence#:~:text=The%20process%20for%20getting%20a,want%20to%20exhume%20is%20buried>> accessed 11 December 2022

⁸ Institutional Burials Bill 2022

(wherever it is necessary), return the remains to the family members, or perform the burial in line with the family's wishes⁹.

Through the above-mentioned case studies, it can thereby be concluded that in each country mentioned above, there are certain circumstances apart from the element of criminal justice in which the exhumation is performed. We can infer that in cases where the family of the deceased wishes to relocate the grave of the deceased for even personal reasons there is the presence of legislation that governs it, even in cases where the mortal remains are to be cremated.

ARTICLE 21: RIGHT OF THE DECEASED

“The dead are to rest where they have lain unless the reason of substance is brought forward for disturbing their repose.”

Article 21¹⁰ of the Constitution of India guarantees to its citizen the Right to life and personal liberty which consists of the right to live with human dignity and is even extended to the person after death as held in the case of *Parmanand Katara v Union of India* by the Hon'ble Supreme Court the “Right to life fair treatment and dignity extend not only to a living person but also to his dead body”¹¹. The Hon'ble Supreme Court in again in case of *P. Rathinam v Union of India* held 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 person¹². It was reiterated by Apex Court in the case of *Ashray Adhikar Abhiyan v Union of India* that the dignity of the dead must be maintained and respected. Moreover, it extended the right to the homeless deceased person to have a decent cremation according to the religious customs to which one belongs, it also established a corresponding duty on the State to ensure that decent cremation is served to the person.¹³

⁹ 'Exhumation of the remains of a deceased person' (*Citizens Information*, 19 July 2022)

<https://www.citizensinformation.ie/en/death/sudden_or_unexplained_death/exhumation_of_the_remains_of_a_deceased_person.html> accessed 11 December 2022

¹⁰ Constitution of India 1950, art. 21

¹¹ *Parmanand Katara v Union of India* (1989) SCR (3) 997

¹² *P. Rathinam v Union of India* (1994) SCC (3) 394

¹³ *Ashray Adhikar Abhiyan v Union of India* Writ Petition (Civil) No. 143/2001

The right similarly extends to the deceased as is bestowed upon a living person. Thus, the dead to is to be treated with dignity as if they were when treated when alive with due weightage being given to the exceptions. Wishes of the deceased should also be given consideration such as the way one needs to be cremated or buried after death and if the person wishes to give their body for research purposes or donate their organs then the relatives and law must give due care to these wishes if permissible. Since no right is absolute in its nature and is accompanied by reasonable restrictions one such restriction that arises while dealing with the cases of exhumation is that of public health and morality. As the process requires the removal of a corpse from its grave it becomes essential and indispensable that the procedure shall be performed while keeping in mind the status of decomposition that the body might have undergone and should also consider the aspect were community health, hygiene, and sanitation. As soon as a person passes away the dead body starts decomposing and once the body is buried the microorganisms and natural procedures catalyze the process of decomposition in such a scenario the decision for exhumation must be taken reasonably especially when the whole world had suffered the fatal waves of a pandemic diligent consideration shall be given to the cause of death of the deceased.

WHY IS THERE A NEED FOR LAWS ON THE EXHUMATION OF BODIES

Recently, in the case of *Mohd Abdul Latif Magrey v UT of Jammu Kashmir and Ors*¹⁴, the Hon'ble Supreme Court bench, comprising Justice J.B. Pardiwala and Justice Surya Kant, held that a comprehensive law on exhumation was required and issued a guideline to the Central Government to do the needful. As per the facts of this case, the deceased was a terrorist who was neutralized in an encounter by the state. The police department performed the last rites of the deceased following religious beliefs and practices, but the father of the deceased argued before the bench that he wanted his son's body to be exhumed so that they could perform the rituals as per their religious beliefs and transfer the body from the present graveyard to the graveyard situated in their vicinity. This appeal is after the passage of eight months since the burial of the deceased so in such cases, exhumation will pose threat to the larger public as the

¹⁴ *Mohd. Abdul Latif Magrey v UT of Jammu Kashmir and Ors* (2022) LiveLaw SC 756

body would have been in a decomposed state. Further, it was observed by the bench that once the body has been buried, it cannot be disturbed again and again especially when the last rites were performed following the religious right to decent death is an important facet of Article 21 and includes that the dead are not disturbed in the grave which has been supplemented by the religious beliefs of the deceased. The provisions under Section 176(3)¹⁵ of the Code of Criminal Procedure, 1973 are invoked in cases where there is suspicion of the cause of the death and cannot be invoked in the present case. The provisions are discretionary in nature and cannot be pleaded as a matter of right. After the burial of the body, it is under the custody of the law and it offends the basic premise of the dead body to rest in peace. Furthermore, the bench pointed out that In *Common Cause v Union of India* reported, the Hon'ble Supreme Court observed that if there is a buffer zone unoccupied by the legislature or executive which is detrimental to the public interest, the judiciary must occupy the field to sub serve the public interest¹⁶. The case on hand also falls under the aforementioned category where there is a legislative vacuum. There is no legislation in India dealing with cases where family members seek for the exhumation of the dead body to bury the same and for performing the ceremonies in the place meant for their religious faith." Also, the bench added, "The Union of India may consider enacting appropriate legislation on exhumation to tackle the situations like the one on hand".¹⁷

ANALYSIS

CONDITIONS FOR EXHUMATION

We could infer that exhumation simply refers to the removal of a deceased body from its cemetery. In the context of India, the purpose is simple and limited to determining the cause of death without considering various other aspects. The Magistrate grants authorization to undertake exhumation in line with the provisions of Section 176(3) of the CRPC; the practical method of disinterment is further guided by medical jurisprudence and is beneficial in assessing the cause of death of the person, establishing a relationship with the family when the identity of

¹⁵ Code of Criminal Procedure 1973, s 176(3)

¹⁶ *Common Cause v Union of India* (2008) 5 SCC 511

¹⁷ *Mohd. Abdul Latif Magrey v UT of Jammu Kashmir and Ors* (2022) LiveLaw SC 756

the deceased is disputed. The court orders exhumation when there is a suspicion that the death was caused by one of the following factors: poisoning, homicide, suspected homicide, disguised suicide, or criminal abortions. Further, in cases where the dead body is unidentified then in those cases when a claimant comes to claim the body then again exhumation is performed, and if proved that the body belongs to that relative is handed over to the family members to perform last rites by the religious rituals. But in cases where the state had already performed the last rites of the deceased following the religious beliefs than in such cases re-performing such rituals and shifting the grave is not favourable, however, the point that comes before us to ponder upon is that a grave is a place where the near ones and the relatives go to pay obeisance to the dead thus it must be at a place where the deceased's family can reach easily.

Also, if it is the wish of a person to get buried at a particular place the law must even consider it. At times permitting the shifting of graves of certain people may create a situation where the maintenance of law and order arises then due care must be given to this point as well. When a body is buried with the authorities of the state then the dead body falls under the authority of the state. The state must give due care in cases where the bodies are buried and keep a proper record of the dead bodies following the medical procedures before the burial so that the need for exhumation doesn't arise to inquire about the cause of the death.

ELEMENT OF PUBLIC HEALTH, AND MORALITY

The process of exhumation shall be time bound as once the body is buried it starts to putrefy after attaining a particular stage, removing it from the grave might cause the spread of some harmful diseases. The law must speak as to the time in which a dead body should be exhumed when the cause of death was due to a contagious disease. Removal from the grave can also lead to the spread of the disease, time limit shall be prescribed in such a scenario. Religious beliefs also permit the notion of resting in peace thus a body should not be disturbed unnecessarily.

The legislature shall consider all the situations in which the exhumation shall be permitted and where such permission causes harm to the public health or is against morality or disrupts the law-and-order situation then in such cases the possible measures shall be taken. These issues

must be addressed through a comprehensive mechanism addressing each issue and balancing the rights of the dead harmoniously. Therefore, it becomes necessary to have an exhaustive law on exhumation.

CONCLUSION

As the Hon'ble Supreme Court pointed out the need for legislation dealing in length with the exhumation, the legislature should lend her ear to this grave necessity that the courts are encountering and shall consider it expedient and formulate exhaustive legislation addressing the procedure for carrying exhumation. While drafting the bill, the legislature should take into account the lacuna which is surrounding the current procedure and formulate legislation that harmoniously balances the interests of the stakeholders and further makes the process time-bound, while touching upon the elements of morality, public health, and incorporating the essential elements of forensic jurisprudence with addition to the guidance from medico forensic experts.

They should exhaustively enlist the conditions under which the exhumation procedure shall be carried out. The law should also contain the situations which at present permit the exhumation to be carried out in addition to the situations where –

- The body of a relative has to be shifted from one graveyard to another burial ground, as at present no procedure extensively deals with it;
- The deceased person's last rites were not performed following the religious beliefs and the relatives seek to perform the last rites of the deceased as per the religious beliefs and for performing, the same exhumation is to be carried out;
- The death of the deceased person was caused because of a disease that might be transferrable up to a certain period post burial or where the dead body is at the stage where it has been putrefied then the removal of a corpse from the grave won't be possible and harm the public health of the community;

- The removal or shifting of a grave of a deceased can disrupt the law-and-order situation in a sensitive area and it is for the benefit and peace of the community to not allow the exhumation in this scenario
- Lastly, when a person passes away, we pray for them to rest in peace because the notion states that the dead have been laid down peacefully and not to disturb them and let them live their life after death with peace, removing unnecessarily the corpse from the grave defeats the provisions of morality.

The legislation should extensively deal with the abovementioned conditions in length, in addition to the specific procedure that shall be followed in each distinct case, with furtherance to incorporating the distinct authorities supervising and aiding the smooth and effective delivery of the procedure of exhumation. The legislature can either make the procedure under the supervision of the court or special officers depending upon the situations in each case in furtherance to the same, the aspects of forensic jurisprudence and consulting the forensic expert in such cases would also be made. The passage of legislation covering these factors will appropriately inculcate the exhumation procedure and would further assist the judiciary in adopting the hurdles-less path towards efficiently delivering justice in each case dealing with disinterment.