

LEGAL STATUS OF DEAD PERSONS

Kritanjali Sarda

School of Law, Christ University, Bengaluru

A person is any being whom the law regards as capable of rights and duties, irrespective of whether such a being is a human being or not.¹ A person may be natural or artificial. A human being is a natural person. However, dead men are usually not regarded as persons in the eyes of law; they are 'things'. Personality is said to begin with birth and ends with death. *Actio personalis moritur cum persona*- action dies with the death of a man. Dead men are immune from duties as no sanction can be imposed against them and thus they are not the subject of rights either.

The law however takes care of the wishes of the dead without conferring any rights on them. The law interferes with respect to a dead person in three main areas- corpse of the dead person, reputation and estate of the dead person.

The Indian Penal Code (IPC) provides that any imputation against a deceased person if it harms his reputation if living and is intended to be hurtful to the feelings of his family or other near relatives is an offence.² This is based on the Latin maxim *De mortuis nil nisi bonum* which when freely translated in English means 'Of the dead, speak no evil'. Here also the law protects the living descendants who would suffer by an attack upon their deceased ancestor. A man has extensive power to regulate by will the disposition and enjoyment of the property which he leaves, subject to the restriction imposed by law. Even here, testamentary disposition protects the interests of the living persons. A will can be made for the purpose of creating a charitable or public trust; however, a will made for creating a private trust (example, maintenance of his own grave) is invalid. In absence of a will (when a person dies intestate), the estate of the deceased will devolve as per the operation of law. The Indian Succession Act, 1923 provides for execution of the will of a person, after he has died.

As far as a dead man's body is concerned, the law seeks to ensure a decent burial for all dead men in accordance with the religious beliefs that the man kept or professed (extended meaning of Article 21 of the Constitution of India) and desecration of graves is a criminal offence. This is provided in the IPC under section 297- "Trespassing on burial places, etc.—Whoever, with the intention of wounding the feelings of any person, or of insulting the religion of any person, or with the knowledge that the feelings of any person are likely to be wounded, or that the religion of any person is likely to be insulted thereby, commits any trespass in any place of worship or on any place of sepulcher, or any place set apart from the performance of funeral rites or as a depository for the remains of the dead, or

¹ John W Salmond, Jurisprudence, 4th ed. Page 272

² Indian penal Code, 1860 IPC Section 499.

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.”³ However, the dead man’s corpse is the property of no one. This gives rise to questions such as- to what extent and who has a right over the dead body? , if the dead body is a property then to what extent can a living person use the body or any part thereof for his own benefit? This paper seeks to bring to light the ambiguity of law in India in relation to such questions in regards to necrophilia and post mortem sperm retrieval (PMSR).

A human corpse presents a number of difficulties, one of which involves difficulties associated with its legal status. In the case of *Williams v. Williams*⁴, it was held that a person cannot during his lifetime make a will disposing off his body. However, this has been overcome and is now regulated by the statute- Transplantation of Human Organs Act, 1994.

Necrophilia is a pathological fascination with dead bodies, which often takes the form of a desire to engage with them in sexual activities. Necrophilia can be of various types. ‘Necro’ means 'dead' and ‘philia’ means 'love' in Greek. Necrophilia can be of a romantic nature⁵ and not always sexual (sex with body) or sadistic. A romantic necrophiliac refers to people who don't believe a loved one is dead. In such cases, they tend to mummify the body and keep it and speak to it as though it were still alive. Necrophilia is generally categorised into ten classifications⁶ ranging from 'role players' to homicidal necrophiles, who will kill and make sure that their victim is dead, before raping the body.

India has been witnessing a rising number of cases of necrophilia in the past decade, yet it does not have any law which specifically deals with this crime. In December 2006, skulls and bones of a number of missing children belonging to migrant workers were discovered in the village of Nithari. The Delhi police arrested a rich and politically connected businessman, Moninder Singh Pandher, and his cook and aide Surendra Kohli, on the suspicion of the murder of a 19-year-old girl. A massive investigation followed, which the media called the 'Noida serial murder investigation.' In March 2007, Kohli at a Delhi court admitted to raping, killing and having sex with dead bodies of children and women. He gave a clean chit to his employer Pandher, perhaps under pressure. Subsequently, a case was registered against Kohli under various sections of the IPC, including rape, murder, kidnapping and criminal conspiracy. However, the CBI had a tough time charging Pandher and Kohli with necrophilia, as there are no well-defined laws in the country

³ Indian penal Code, 1860 IPC Section 297.

⁴ *Williams v. Williams*, 20 Ch. D. 659, 659 (1881).

⁵ Robinson street case. <http://www.thehindu.com/todays-paper/tp-national/charge-sheet-filed-in-robinson-street-case/article7950396.ece>

⁶ Dr Anil Aggarwal, a New Classification of Necrophilia, 16, *Journal of Forensic and Legal Medicine*, 316 (2009).

dealing with the crime.⁷ An alleged serial killer in Delhi's Begumpur was arrested for killing over a dozen children and having sex with their bodies in the past seven years. A chilling reminder to the Nithari case, the incident can be rooted back to a psychological disorder called necrophilia.⁸

In India necrophiliacs are charged under Section 297 (trespassing of burial places) and Section 377 (unnatural sex) of the IPC. However, in many cases the accused kills the victim first and then commits the crime which rules out the possibility of Section 297 as conviction under this Section involves committing indignity to a human corpse after trespassing on a burial place. Hence, for the person to be punished for necrophilia under this section, the pre-condition is, the person must have trespassed the burial ground first and then had sexual intercourse with the corpse after digging it out of the grave, or otherwise. This keeps the people who commit necrophilia otherwise than trespassing into a burial ground out of the clutches of the Indian law. Sex with a corpse is unnatural and thus necrophilia is dealt under Section 377. However, one of the elements of this Section is 'voluntariness' and there is no way that consent can be taken from a corpse. Also, this Section provides that intercourse should be done with a man, woman or an animal, thus a dead body which is not recognized as a legal person is technically excluded from the purview of this section.

Dead bodies are not persons in the eyes of law. They are quasi subjects before the law. A dead body's legal status often makes necrophilia all the more difficult to fathom when we think about it in relation to the sacredness that many families view the corpse as holding i.e. the person may be dead but still remains a loved one. In the eyes of law, the dead body is kind of a 'property' for the next of kin to ensure a decent burial. This is a very disturbing concept as in such a view; necrophilia becomes an act of vandalism and not a sexual attack against a person.

New Zealand, has a section under its Crimes Act 1961, where a two year prison sentence is served for anyone who "improperly or indecently interferes with or offers any indignity to any dead human body or human remains, whether buried or not." Section 14 of South Africa's law deals directly with 'committing a sexual act with a corpse' while Section 70 of the Sexual Offences Act 2003, covers this in the UK. While the US lacks a federal law, each state has its own laws with varying degrees of punishment. Thus even in India there is a need to enact a comprehensive legislation to deal with the crime of necrophilia or add a Section to the IPC which explicitly makes necrophilia as an offence.

⁷ Nitin B. , Violating the dead: Is it time India had a law dealing with Necrophilia?, The News Minute (November 2, 2015, 15:45) <http://www.thenewsminute.com/article/violating-dead-it-time-india-had-law-dealing-necrophilia-35631>

⁸Pallavi Sengupta, Delhi serial killer held for murdering children, necrophilia, oneindia (July 21, 2015, 18:05) <http://www.oneindia.com/india/delhi-serial-killer-held-for-murdering-children-necrophilia-1811462.html>

In July 2016, for the first time AIIMS in Delhi received a request from a woman to retrieve the sperm of her dead husband so that she could be artificially inseminated with it. This request was turned down by the hospital authorities due to lack of guidelines in India regarding post mortem sperm retrieval (PMSR). AIIMS doctors have now sought clarity on PMSR to handle such cases in the future.⁹

PMSR was first reported in 1980. Various methods for retrieving spermatozoa have been described including, surgical excision of the epididymis, irrigation or aspiration of the vas deferens and rectal probe electro ejaculation. The sperm must be removed and process must be initiated within 24 to 36 hours of the death as the sperm is unlikely to remain viable after that period.

Australia has seen a series of cases in regards to PMSR. The Australian High Court decision in *Doodeward v. Spence*¹⁰ reveals the conditions under which a *proprietary* right may arise in bodily tissue. The *Doodeward* principle was said to establish that “if a person by the lawful exercise of work or skill so dealt with a human body or part of a human body in his lawful possession that it has acquired some attributes differentiating it from a mere corpse awaiting burial, he acquires a right to retain possession of it.” In *Re Edwards*¹¹, the *Doodeward* principle was affirmed and it was held that, in this instance, the extraction procedure could give rise to a subsequent proprietary right in the sperm subjected to “lawful exercise of work or skill”. In *RE H, AE*¹², H, AE died as the result of injuries sustained in a motor vehicle accident. This application was made at the time the deceased’s body was in the custody of the Coroner of South Australia. “The applicant sought to recover spermatozoa from the deceased so as to leave open the possibility of conceiving children by him. The applicant and the deceased intended to have children. The deceased left a will naming the applicant as his executor and making provision for children. The medical practitioners required certainty as to their authority to harvest tissue and spermatozoa. The Coroner declined to make any order or direction to assist harvesting tissue and spermatozoa. The applicant then applied to this Court seeking an order authorising a medical practitioner to take samples of tissue and spermatozoa to be preserved.” The Court authorized the removing and preservation of spermatozoa in this case but as to the use of it the Court remained silent.

There are various legal and ethical issues which concern this process. The main questions which are raised are- who possesses the sperm of the deceased person (issues relate to whom does the body of the deceased person belong to), is consent of the deceased person necessary to authorize this process and legal status of the child born through such a process which

⁹ [Dr Soham D Bhaduri](http://www.indiamedicaltimes.com/2016/07/25/opinion-india-needs-to-take-a-stand-on-post-mortem-sperm-retrieval/), Opinion: India needs to take a stand on post-mortem sperm retrieval, India Medical Times (July 25, 2016) <http://www.indiamedicaltimes.com/2016/07/25/opinion-india-needs-to-take-a-stand-on-post-mortem-sperm-retrieval/>

¹⁰ *Doodeward v. Spence*, (1908) 6 CLR 406; [1908] HCA 45.

¹¹ *Re Edwards*, (2011) 4 ASTLR 39.

¹² *RE H,AE*, [2012] SASC 146

consequently determine its inheritance rights. Thus this again brings us back to the basic question as to what is the status of a dead person in the eyes of law.

In most jurisdictions it is required that the explicit written consent of the deceased prior to his death is necessary for authorising PMSR. However, this seems to be impractical as in most cases of PMSR, the wife seeks this process due to the death of the husband in sudden circumstances and the desire of the wife to conceive a child who is genetically related to her husband. Implied consent of the deceased is thus allowed in certain jurisdictions. This is however extremely difficult to know because the consent of the deceased to ART or to have a child while he is alive cannot be presumed to be his consent to the PMSR.

The body of the deceased is generally presumed to belong to his spouse first and the next of his kin, to ensure decent burial. The question as to who possesses the sperm is thus controversial. In most cases it is held that it belongs to the spouse of the deceased, however consent of the next of kin should also be ensured for the process so as to ensure the 'best interest of the child'.

In general, the legal rights of the next of kin include: the right to immediately possess the remains for burial, the right to oppose disinterment, the right to oppose autopsy or organ donation, and the right to seek damages for mutilation of the body. Who counts as next of kin? As a general matter, both common law and state statutes give first preference to spouses in determining what will happen to the deceased. If there is no spouse, decision-making authority goes by the same consanguinity rules that apply to inheritance.

India thus needs to enact a legislation to deal with post mortem sperm retrieval which explicitly provides for the conditions under which this process may be used, who can authorize this process and the legal status of the child born through such a process.

In the case of *Mujeeb Bhai v. State of U.P. & Ors.*¹³, the Allahabad High Court observed that the Supreme Court has interpreted Article 21 of the Constitution of India to include a wide variety of rights. The definition clause in Article 366 does not define a person and Section 3 (42) of the General Clauses Act defines a person to include any company or association or body of individuals, whether incorporated or not. The Indian Penal Code defines a person in Section 11 to include any company or association or body of persons whether incorporated or not. The expression person, however, cannot be detached from its context. "The law has not so far defined a person to include a dead person. It, however, has some rights, which cannot be detached from it, even if the body is denuded of the life, which together forms a human being. The word person may not be construed narrowly so as to exclude the dead body of a human being, who was the person, when alive, which is not claimed and which is required to be cremated or buried with dignity in accordance with the religious beliefs of the person, if such beliefs can be found by establishing his identity. An unclaimed dead body has to be claimed by the State both for the purposes of

¹³*Mujeeb Bhai v. State of U.P. & Ors.*¹³, Civil Misc. Writ Petition No.38985 of 2004, High Court of Judicature at Allahabad <http://elegalix.allahabadhighcourt.in/elegalix/WebShowJudgment.do>

investigation of the crime, if it was committed on the human being, who did not die naturally for scientific investigation or for research and medical education... **We thus find that the word and expression 'person' in Art.21, would include a dead person in a limited sense and that his rights to his life which includes his right to live with human dignity, to have an extended meaning to treat his dead body with respect, which he would have deserved, had he been alive subject to his tradition, culture and the religion, which he professed.**" In *Pt. Parmanand Katara, Advocate v. Union of India & Anr.*¹⁴, the Supreme Court held in a matter relating to method of execution of death sentence of hanging under Punjab Jail Manual as inhuman and violative of Art.21 of the Constitution of India as follows: - **"We agree with the petitioner that right to dignity and fair treatment under Art.21 of the Constitution of India is not only available to a living man but also to his body after his death."**

These cases highlight that the word 'person' in Article 21 includes a dead person in a limited sense. Hence also in cases of necrophilia and PMSR, the Court should regard a dead body as 'person' in the eyes of law having rights conferred to them in a limited sense. This recognition of the legal personality of a dead person is also essential to protect the interests of the society as a whole.

¹⁴ *Pt. Parmanand Katara, Advocate v. Union of India & Anr.*, (1995) 3 SCC 248