

'NECROPHILIA' IN LIGHT OF THE RECENT KARNATAKA HIGH COURT JUDGEMENT BY DR. DYAN

MCGUIRE REPORT

Necrophilia as a subject is still under a certain shadow in the Constitution of India and the Indian jurisprudence, which has only darkened in light of the recent Karnataka High Court judgement in the case of *Rangaraju Vajapeyi v State of Karnataka*, holding that intercourse with a dead woman cannot count as rape under either §§375, 376 (Rape) and §377 (unnatural offences) Indian Penal Code ('IPC'), which do not apply to necrophilia. The High Court, however directed the government to legislate on necrophilia, a grey area in the Constitution consulting the laws of various legislatures, apart from the USA. This was because there is no federal law in the USA, only state laws pertaining to necrophilia.

However, certain important points must be noted from the laws of the USA, in order to prevent any mistakes or loopholes from creeping into our legislation.

An insightful session was given by Dr. Dyan McGuire, Director of Criminology and Criminal Justice and serves as an Associate Professor of Criminology and Criminal Justice in the School of Social Work at Saint Louis University. The session was marked by an exploration of Necrophilia from both Global and Indian perspectives, with special reference to the US Laws and keen attention to the Indian Legislatures need to venture onto this taboo realm.

The topics covered in its ambit:

1. Terminology
2. World Organizations on the issue
3. Taboo topics and US Standpoint
4. Quantifications
5. Typologies of Necrophilia
6. Criminal Sanctions across various states of US
7. Potential defence against Necrophilia
8. Indian Standpoint in relation to case of *Rangaraju Vajpeyi v. State of Karnataka*
9. Ma'am's personal outlook in relation to Indian Jurisprudence and Legislation
10. The Question Hour

USA Jurisdiction and the threshold for Depraved Crimes

Professor McGuire focused on the larger theme of necrophilia, in legal terms, elaborating it on the basis of the jurisdiction of the United States of America ('USA') where despite there being no federal law on the same, there exists a legislation on necrophilia in nearly every state of the USA. Further, these states may differ in punishment and approach to Necrophilia where majority of the states classify it as an offence warranting the death penalty. This legislation was clarified and amended in the state of Georgia, where the danger of death penalty being arbitrary was challenged in the case of *Furman* and later reinstated in the case of *Gregg* which stressed on there being no reasonable doubt of the crime. Death penalty could only be granted in cases where the murder of first degree was outrageously or wantonly vile, horrible, or inhuman, involving torture or depravity of mind.

The threshold for heinous and depraved crimes is taken keeping in consideration certain factors, such as whether the defendant 'relished' the murder, whether the defendant inflicted gratuitous violence on the victim, whether the defendant mutilated the victim, the senselessness of the crime and the victim's helplessness as held in the case of *State v Gallegos*.¹

Types of Necrophilia, the Actus Reus Element and the response of the People and the State

Professor McGuire focused on the three basic types of necrophilia, namely, homicidal, regular, and platonic necrophilia. She also elaborated on pseudonecrophilia where a transient sexual attraction existed in the accused towards corpses. Homicidal Necrophilia involved murder to obtain a corpse for sexual purposes while Regular Necrophilia involved the use of already dead bodies. Both these acts involved a mens rea and could potentially be made punishable. However, Platonic Necrophilia involved fantasizing about involving corpses or gaining sexual pleasure from them but not acting on the same desires. This could not be made punishable as it had only actus reus which had not developed into a mens rea yet. Professor McGuire also elaborated on the method Aggarwal proposed for the classification of necrophiliacs – namely, role players, romantics, the ones simply fantasizing about necrophilia, fetishistic necrophiliacs, necromutilomaniacs, opportunistic necrophiles, regular necrophiles and exclusive necrophiles. However, from a legal perspective purely, not all of these are punishable or can be classified as homicidal offences. Only forms of role play which are criminal are the ones done without the consent of the person.

The response of the people prompted the various states in the USA to take cognizance of the cases of necrophilia and adopt criminal provisions. This can be elaborated with the help of the disturbing story of Charles Smith, who stabbed his stepdaughter fifteen times, *believed* her to be dead and raped her.

¹ State v Gallegos 870 P.2D 1097 (Ariz Sup Ct., 1994).

However, during trial, the medical examiner could not possibly confirm beyond reasonable doubt that the girl was dead or alive when he raped her, resulting in all rape charges being dropped against Smith. This resulted in the government of Rhode Island swiftly passing a law providing that, any act of first-degree assault upon a dead body would count as a crime of necrophilia, with a punishment of up to ten years. The actus reus of the first-degree assault would be penetrative sex without the consent of another person.

“Dead or Alive?” – The Ongoing Criminal Assault Rule.

The cases we are most concerned with are the Necrophilic Homicides, commonly known as the Hedonistic Lust Serial Killers, usually perceived to be male while the female involvement is restricted to teams. Sadists and other thrill killers may *accidentally* have sex with the body post-mortem, however, this defense has not been accepted by most U.S. courts. The Wisconsin Comprehensive Sexual Assault Law says that the section applies whether a victim is dead or alive at the time of sexual contact or intercourse and most courts have adopted the ‘ongoing criminal assault’ rule whether, if the rape begins before the death of the victim, even then, the defendant is guilty of rape, even if the defendant has killed the victim during the assault or before it was concluded. This ‘live only’ requirement has been removed as a requirement to prevent rapists from killing their victims, as told in the case of *State v McLaughlin*.² This is something that India could potentially include in framing any laws on necrophilia as well to prevent criminals from finding a loophole in the same.

Explicit mention of the word Necrophilia and Other Approaches to the Crime

A parallel can be drawn between §377 IPC and the Crimes Against Nature Laws (CAN Laws) of the USA can be drawn as they are based on the rationale of societal revulsion. The case of *Lawrence v Texas* (2003) however invalidated the use of these laws against homosexuals and today, CAN laws are used to prosecute necrophilia, bestiality, and pedophilia at times.

The rationale behind necrophilia laws can be found in the laws against abuse or desecration of a corpse, to prevent an outrage by families or society in general. However, most statutes do not specifically prohibit sex with a corpse, they classify acts of necrophilia as abuse or desecration. They prohibit the mutilation or unauthorized dissection of the corpses, specifically applying to the necromutilomaniacs. Some states also qualify these under Sex Crimes, as the deceased cannot consent to sex and it’s a violation of the deceased’s sexual autonomy. While the term necrophilia is not used, the element of the crime requires sex with the corpse or other contact for purposes of sexual gratification. Some states

² State v McLaughlin 265 S.W.3d 257 (MO 2008).

also require registrations as a sex offender. However, some states only treat it as a sexual assault of a 4th degree and not as a forcible sex offense. The states of Louisiana, Missouri, Nebraska and New Mexico do not criminalize necrophilia and only treat it as a civil offence. However, statutory silence does not signify endorsement and states often adopt necrophilia laws only when a high-profile case comes to light such as a little girl was sexually assaulted by the driver of the morgue vehicle where the prosecutors were forced to move under the Health and Safety code, promoting a move to criminalize necrophilia.

Potential Defenses

There are certain defenses that have been allowed to necrophiliacs in certain states, with their basis on insanity as a defense. The M'Naughten Rules, where at the time of the act, a defect of reason, such that the nature and quality of the crime was not known to the perpetrator, or that his act was wrong, falls under the most common definition of insanity. Further, tests such as the irresistible impulse test, substantial capacity test (lacking capacity to know the wrongfulness of the conduct) and lastly, the Durham Rule (unlawful act was the product of mental disease or defect). §84 of the IPC is a parallel to the M'Naughten Rule. However, most necrophiliacs cannot qualify to this defense due to the lengths that they go to conceal their crimes, making it very difficult to prove that they did not know the nature of their acts. This mainly applies to psychotic necrophiles or romantic necrophiliacs.

Recommendations of the Indian Courts

With the case of *Rangaraju*, the court mandated the installation of CCTV Cameras in mortuaries run by the government and private hospitals within six months. Further, it mandated a clean hygienic environment, a mechanism to guard information related to the deceased, especially in socially criticized cases, ensuring privacy of the premises from the public, removal of any infrastructural barriers in accordance with Indian Public Health Standard Guidelines and sensitization of the staff.

Ma'am's personal outlook in relation to Indian Jurisprudence and Legislation

She is of the view that globally not much of an input is there on the matter at hand due to lack of dedicated legislation on same. The matter mostly pertains to be slightly recorded under Paraphilia Referring to the gendered nature of the term, she highlighted 'male morticians' likelihood of engaging in the same with incident of brothels from New York possibly catering sex with fresh corpses as well.

Though not much into tracking by FBI under Uniform Crime Report, she is of the verdict according to a study by Stein and colleagues, which had 211 samples, of which 8% held Necrophilia a part and parcel of the homicide.

Thus in her view point keeping in mind the Indian Scenario Section 377, IPC to be hereby amend in good faith by including dead bodies in its ambit besides adopting new provisions to criminalize necrophilia and sadism with recommended punishment of up to 10 yrs. Install CCTV cameras in mortgages a private hospital within six months of receiving such order besides maintaining privacy, hygiene and sensitization of staff

Questions Presented:

1. Can consent be contractually given to necrophilia after death by a person while alive?

Appreciating the value of this question ma'am said she is of the opinion that jurisdiction is equivalent to one like sex offence with consent as a defence but she also expressed a doubtful of it's likely consequence, as in case of Pre-mortem consent would be a defence if was an abuse or a desecration.

2. Is the concept of *Aghori Baba* covered under necrophilia and are there any defenses available to them?

There in Hawaii exists a corpse statute in realization of such acts, which should also find place in Indian Jurisprudence to act a check. Express exemption can be a sole solution as corpse abuse needs an immediate appreciation by Indian Legislature.

3. What is the reasoning behind the low involvement of women in the commission of necrophilia?

She referred to general/phenomenal low inclination of women towards such violent crimes as Necrophilia.