

Death and Desire: Necrophilia and the Need for Legal Intervention in India

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I. Introduction

*“I would love your eyes sunken in, your lips silenced, your sex frozen, if only you were dead; unfortunately, you have the bad taste to be alive.”*³¹² Necrophilia, characterized by the pursuit of sexual satisfaction through engaging in sexual acts with corpses, has undergone a significant transformation in societal perception.³¹³ Initially, it was subject to literary romanticization, portraying a disturbing manifestation of abnormal and perverse sensuality.³¹⁴ However, over time, it has evolved into a societal taboo, generating widespread repulsion and condemnation. In his influential work ‘Psychopathia Sexualis,’ Richard von Krafft-Ebing characterized necrophilia as a manifestation of sadism.³¹⁵ Meanwhile, Abraham A. Brill, in one of the earliest comprehensive studies on necrophilia conducted in 1941, portrayed necrophiles as mentally deficient and psychotic individuals who could not establish a consenting partnership.³¹⁶ It was legal theorist John Troyer who highlighted the issue of concern in his seminal 2008 journal article, asserting that *‘the dead body is a quasi-subject before the law.’*³¹⁷ The ambiguous legal status of human corpses in cases of necrophilia exacerbates the sexual aberrance associated with necrophiliacs and their actions. Recognizing the urgent need to expand the scope of criminal jurisprudence to encompass the rights of deceased individuals within the existing legal framework, this paper emphasizes on establishing the legal personhood of corpse to remedy the legal void.

This article initiates by examining the distinction between necrophilia and accidental necrophilic acts to establish the degree of culpability attributed to the offender. Subsequently, it delves into the complexities associated with classifying necrophilia within existing legal provisions, particularly those pertaining to unnatural offenses and the offense of rape. It explores the challenges related to determining the legal status of a deceased individual and the ability to provide consent in such circumstances. Furthermore, the article critically assesses the ineffectiveness of current provisions within the Penal Code in addressing the issue of necrophilia. Lastly, it puts forth a proposal for the implementation of additional policies as a means to address this escalating concern.

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³¹² Catharine A. MacKinnon, *Reflections on Sex Equality Under Law*, 100 YALE L.J. 1281, 1300 (1991).

³¹³ Anand Kumar Vasudevan et al., *Necrophilia: A Study of the Psychoanalysis in the Characteristics of the Offenders Who Sexually Molest the Dead*, MEDICO-LEGAL UPDATE, Jul.-Dec. 2019 at 12, 20.

³¹⁴ Adam Briedik, *Post-modernism, Paraphilia, Sadism, Necrophilia, and Sexually Motivated Homicide: An Interdisciplinary Reading of Dennis Cooper’s “Frisk” (1991)*, INTERNATIONAL JOURNAL OF ENGLISH LITERATURE AND SOCIAL SCIENCES (2023) https://ijels.com/upload_document/issue_files/59IJELS-10420237-Post-modernism.pdf.

³¹⁵ Richard von Krafft-Ebing, *Psychopathia Sexualis*, CG CHADDOCK, TRANS. PHILADELPHIA, PA: DAVIS (1886).

³¹⁶ Abraham A. Brill, *Necrophilia*, JOURNAL OF CRIMINAL PSYCHOPATHOLOGY, 2 (1941) 433-443.

³¹⁷ John Troyer, *Abuse of a corpse: A brief history and re-theorization of necrophilia laws in the U.S.A.*, MORTALITY, 2008 at 132-152.

II. Exploring Necrophilia vis-à-vis Necrophilic Acts

Historically, sailors transporting deceased individuals across nations were accused of necrophilia due to extended journeys, isolation, lack of witnesses, and the absence of social norms.³¹⁸ Today, gravediggers and mortuary attendants implicated in necrophilia cases may engage in such acts due to loneliness and convenient access to corpses, with individuals potentially gravitating towards these professions due to the unrestricted availability of bodies. This section undertakes a comprehensive classification, identifying two distinct categories. The first category involves cases where necrophilia is conceptualized as a manifestation of underlying psychological issues. The second category encompasses instances where the criminal act originates as a rape, subsequently resulting in manslaughter, either intentionally or unintentionally, and ultimately culminating in post-mortem sexual intercourse. Furthermore, this section elucidates the differential culpability associated with these categories, shedding light on the potential exploitation of the ‘necrophilia defense’ claim by the perpetrators.

A. *Classifying the Offence*

1. *Offence Postmortem*

Necrophilia, often understood as a sexual attraction towards corpses, is characterized by the DSM-V as an “*other specified paraphilic disorder, involving recurrent and intense sexual interest in corpses.*”³¹⁹ According to this classification, necrophilia involves the presence of repetitive and intense sexual fascination with corpses.³²⁰ It largely consists of individuals who engage in fantasies involving post-mortem sexual acts rather than actively participating in sexual intercourse with deceased bodies.³²¹ Conversely, those who practically act on their necrophilic desires may employ methods such as theft from morgues, grave exhumation, or preservation of their deceased partners. Nevertheless, instances exist where necrophilia is preceded by homicide, leading to charges of both culpable homicide amounting to murder and necrophilia.³²² Its categorization as a mental illness warrants consideration for treatment rather than imprisonment. However, jurisprudence across nations has emphasized the importance of imprisoning necrophiliacs to maintain societal order.

The classification of necrophilic acts as rape poses a challenge regarding comprehension. B. Kemal Pasha, J. addressed this issue in the case of **State of Kerala v. Govindswamy**,³²³ wherein it was

318 *Last Rights: The Dead, the Missing and the Bereaved at Europe's International Borders*, OHCHR (2017), https://www.ohchr.org/sites/default/files/Documents/Issues/Migration/36_42/TheLastRightsProject.pdf.

319 American Psychiatric Association, (2013) *Diagnostic and statistical manual of mental disorders* (5th ed.). ARLINGTON, VA: AMERICAN PSYCHIATRIC PUBLISHING, Mar 25, 2017.

320 Anil Aggarwal, *A new classification of necrophilia*, JOURNAL OF FORENSIC AND LEGAL MEDICINE, 316-320 (2009).

321 Khadija Khan, *What is necrophilia and is it an offence in India?*, INDIAN EXPRESS (Jun. 5, 2023, 10:05AM), <https://indianexpress.com/article/explained/explained-law/what-is-necrophilia-and-is-it-an-offence-in-india-8644222/>

322 Stephen J. Morse, *Culpability and control*, UNIVERSITY OF PENNSYLVANIA LAW REVIEW, Vol. 142, No. 5 (May, 1994) 1587-1660.

323 *State of Kerala v. Govindswamy*, ALL SC 2016.

observed that the accused engaged in necrophilic behavior by sexually assaulting a girl who had fallen from a train. In another instance in **Mumbai**,³²⁴ during an investigation of a rape and murder case, the police discovered that the perpetrator engaged in unnatural sexual acts with the deceased after strangling her with her jeans. Moreover, the **Andhra Pradesh**³²⁵ police, while examining a series of murder cases, identified the perpetrator as an infatuated necrophile who had killed numerous girls. In several instances, the accused themselves confessed to engaging in acts of necrophilia following the murder of their victims.³²⁶ A similar incident occurred involving a minor girl in **Assam**.³²⁷

The incarceration of individuals engaged in necrophilia can be justified based on their inherent risk to society and the well-established probability of recidivism.³²⁸ Judicial perspectives from both Canada and the United States support this argument. In Canada, the case of **R. v. J.-L.J.**³²⁹ acknowledged that the level of detail required to establish a ‘standard profile’ may vary depending on the conclusiveness of individual elements. This suggests that in cases involving necrophilia, specific evidence can be crucial in demonstrating an offender’s alignment with the characteristics of individuals who would commit such a crime. Similarly, in **R. v. Malbœuf**,³³⁰ expert evidence was admitted to establish the distinctive psychological trait of necrophilia as a necessary factor for committing the offense. This demonstrates the importance of psychological analysis in identifying and understanding individuals prone to necrophilic behaviors.

In the United States, several cases illustrate the significant public risk associated with necrophilia. In **Grennier v. Frank**,³³¹ Richard Grennier, convicted of multiple crimes including first-degree murder, was consistently denied parole due to concerns about his sexual disorders and perceived public risk, with his necrophilic tendencies contributing to his classification as a ‘sex offender.’ In **Stevens v. McBride**,³³² the prosecution inadvertently influenced the jury against Stevens by introducing evidence of his future dangerousness, a factor prohibited under Indiana law as an aggravating circumstance. This highlights recognizing the potential danger necrophilic individuals may pose to society. Lastly, in **Ross v. State**,³³³ Eddie Lee Ross was convicted of murder and rape, including necrophilic acts following the killing. Ross’s death sentence was upheld, underscoring the severity of

324 *Palghar stunned by necrophilia, a man raped woman's corpse*, THE TRIBUNE (Jul. 04, 2020, 01:50 PM), <https://www.tribuncindia.com/news/nation/palghar-stunned-by-necrophilia-a-man-raped-womans-corpse-108480>.

325 *Nayem, the gangster who knew too much, shot dead*, THE TIMES OF INDIA (Jun. 2, 2023, 10:10 PM), <https://timesofindia.indiatimes.com/city/hyderabad/nayem-the-gangster-who-knew-too-much-shot-dead/articleshow/53609263.cms>.

326 *Youth gets life in jail for killing teen, sexually abusing her body*, THE INDIAN EXPRESS (Dec. 10, 2010, 02:42 PM), <http://archive.indianexpress.com/news/youth-gets-life-in-jail-for-killing-teen-sexually-abusing-her-body/722762/>.

327 *Assam man arrested for necrophilia*, THE NEW INDIAN EXPRESS (May. 22, 2022, 06:04 PM), <https://www.newindianexpress.com/nation/2020/may/22/assam-man-arrested-for-necrophilia-2146703.html>.

328 Shirley S. Abrahamson, *Some enlightenment on crime*, MICHIGAN LAW REVIEW (1985).

329 R v. J.L.J., MANU/SCCN/0047/2000.

330R v. Malboeuf, [1997] O.J. No. 1398 (QL) (C.A.).

331Grennier v. Frank, MANU/FEVT/0355/2006.

332 Stevens v. McBride, MANU/FEVT/0115/2007.

333Ross v. State, 254 Ga. 22.

offenses related to necrophilia and the need for appropriate legal measures to protect society. Collectively, these cases from both Canada and the United States provide a basis for justifying the imprisonment of individuals engaged in necrophilia.

2. *Offence Perimortem*

While the traditional analysis may overlook certain factors, recent studies have introduced the concept of Post Mortem Sexual Interference Offenders (PMSIOs), constituting a distinct category of offenders. Carter has defined PMSIOs as “*homicide offenders whose offense contained at least one of the following characteristics: the perpetrator disclosed post-mortem sexual assault, there was evidence of post-mortem sexual behavior from a pathologist, the perpetrator admitted to post-mortem sexual behavior, there was evidence of sex with an unconscious or dead victim, or the perpetrator disclosed post-conviction that they sexually assaulted the victim after killing them.*”³³⁴ It is important to note that PMSIOs represent a heterogeneous group of offenders who engage in post-mortem sexual activities without necessarily having a persistent sexual attraction to corpses, distinguishing them from ‘true’ necrophilia.³³⁵ The concept of PMSIOs aims to differentiate between individuals who commit sexual acts after death and those diagnosed with necrophilic paraphilia according to the criteria established in the DSM V.³³⁶

An illustrative example that highlights this distinction involves a scenario in which a violent rape leads to the death of a living female, and subsequent sexual penetration occurs after her demise. In such cases, it can be observed that the perpetrator did not possess the intention or desire to engage in sexual acts with a corpse but rather incidentally did so following the victim’s death. The transition from antemortem to post-mortem engagement, typically characterized as manslaughter or culpable homicide not amounting to murder, introduces forensic ambiguity and culpability challenges.³³⁷ The term ‘necrophilia’, therefore, is inappropriate for such scenarios since the accused lacks a precise diagnosis of the disorder under the DSM criteria. Otherwise, this discrepancy has led to conflicting definitions, categorizations, and legal ramifications when dealing with such offenses.³³⁸ The terminology of PMSIOs highlights cases that do not neatly fit into the diagnostic framework of necrophilia.

The jurisprudence surrounding necrophilic acts presents a complex and evolving landscape, leading to challenges in the legal treatment of such cases. In the case of **Marong v. R.**³³⁹ in New Zealand,

334 Tamsin Higgs et al., *Toward Identification of the Sexual Killer: A Comparison of Sexual Killers Engaging in Post-Mortem Sexual Interference and Non-Homicide Sexual Aggressors*, SEXUAL ABUSE: A JOURNAL OF RESEARCH AND TREATMENT (2015).

335 *Sexual Homicide and Paraphilias: The Correctional Service of Canada’s Experts Forum 2007*, CORRECTIONAL SERVICE CANADA, <https://www.csc-ccc.gc.ca/research/shp2007-paraphil11-eng.shtml>.

336 Tamsin Higgs et al., *Toward Identification of the Sexual Killer: A Comparison of Sexual Killers Engaging in Post-Mortem Sexual Interference and Non-Homicide Sexual Aggressors*, SEXUAL ABUSE: A JOURNAL OF RESEARCH AND TREATMENT (2015).

337 Serafettin Demirci & Kamil Hakan Dogan, *Death Scene Investigation from the Viewpoint of Forensic Medicine Expert*, FORENSIC MEDICINE (2010), <https://www.intechopen.com/chapters/19160>.

338 Tyler T. Ochoa & Christine Jones, *Defiling the Dead: Necrophilia and the Law*, 18 WHITTIER L. REV. 539 (1997).

339 *Marong v. R.*, SC-36-2020.

the court relied on a post-mortem examination to establish intercourse and rejected the defendant's claim of consensual sex with the victim before her death. A minimum period of imprisonment of 17 years or more was imposed, highlighting the seriousness with which the court viewed the offense. Similarly, in **R v. Courts**³⁴⁰, the Wales Court of Appeal addressed a case where an act of sex resulted in rape due to death occurring during the act. Although the defendant was ultimately convicted of murder rather than rape, the court acknowledged the need for a minimum term for necrophilia. The absence of specific anti-necrophilia laws in some jurisdictions raises a paradox for prosecutors, as they navigate the challenge of pursuing rape charges to protect sexual autonomy.³⁴¹

Contrasting approaches can be observed within different states. For example, in **Lipham v. State**³⁴², the Georgia Supreme Court upheld a conviction for rape and murder in a perimortem rape case. The defendant attempted to raise a 'necrophilia defense', arguing that engaging in sexual acts with the victim after her death would only constitute necrophilia. However, the court rejected this argument, affirming the rape conviction and emphasizing that the rape statute applies when deadly force is used to achieve sexual intercourse. This differentiation between perimortem rape and necrophilia highlights the court's distinction between engaging in sexual intercourse with a live victim using violence versus engaging in sexual acts with a corpse encountered after death.³⁴³ On the other hand, **Comm v. Waters**³⁴⁴ dealt with a case in Massachusetts where an individual was convicted of aggravated rape for engaging in sexual intercourse with a deceased victim. While Massachusetts law does not prohibit sexual intercourse with a dead body, the evidence warranted a finding of sexual intercourse without consent.³⁴⁵ Therefore, the court concluded that the victim's death preceding or following the sexual attack was not a determining factor.

These cases reflect the intricate legal interpretation and categorization of post-mortem sexual acts, with varying definitions and legal consequences across jurisdictions. The treatment of such acts remains a subject of ongoing debate, raising important questions regarding the rights and interests of victims and the application of consent laws concerning corpses. The complexities surrounding these legal issues necessitate continued examination and thoughtful consideration within the legal framework.

B. Determining Proportionate Punishment

In cases where both murder and necrophilia happened, forensic sciences often face challenges in

³⁴⁰ R v. Courts, UKCR-0023-2005.

³⁴¹ *Supra*, note 17 at 5.

³⁴² Lipham v. State, 364 S.E.2d 840, 842-43.

³⁴³ Kim D. Ricardo, *Necrophilia: A New Social-Harm Taxonomy of U.S. Laws*, 27 WM. & MARY J. WOMEN & L. 351 (2021), <https://scholarship.law.wm.edu/wmjowl/vol27/iss2/4>.

³⁴⁴ Comm v. Waters, 420 Mass. 276 (1995).

³⁴⁵ Massachusetts law about sex, <https://www.mass.gov/info-details/massachusetts-law-about-sex>.

determining the sequence of events, such as whether the rape occurred before or after the murder, which is crucial in determining appropriate penalties.³⁴⁶ Convictions in such cases heavily rely on the confession of the accused. Still, this approach faces difficulties due to legal considerations, such as **Section 27 of the Indian Evidence Act**,³⁴⁷ which dismisses any information extracted from the accused in police custody. Consequently, the penalty for necrophilia combined with murder may be less severe than the penalty for rape combined with murder, creating a potential incentive for perpetrators to claim postmortem rape to exploit loopholes in the justice system, ultimately affecting victims' rights.

Traditionally, jurisdictions with conservative and traditionalist tendencies have exhibited a predilection for enacting legislative provisions that uphold and reinforce the prevailing social order.³⁴⁸ On the other hand, jurisdictions with more liberal inclinations generally have a lesser propensity to adopt comparable measures. Notably, both South Africa³⁴⁹ and New Zealand³⁵⁰ have acknowledged necrophilia as a criminal offense within their legal frameworks, underscoring their commitment to address and prohibit such acts. In the United Kingdom, the deliberate act of engaging in sexual penetration with a deceased individual is criminalized under Section 70 of the Sexual Offences Act of 2003.³⁵¹ In Canada, necrophilia is addressed under Section 182 of the Criminal Code of Canada, 1985, rendering it punishable by law.³⁵²

Similarly, the United States categorizes necrophilia as a felony offense, albeit with variations in the severity of penalties across different states. Instances have been reported where individuals facing charges related to rape and murder have resorted to claiming reduced punishment under laws on necrophilia.³⁵³ In **Lipham v. State**,³⁵⁴ the Georgia Supreme Court stated that *“there is nothing in this code section which precludes a finding of rape if the victim is not alive at the moment of penetration. . . if the element of force is satisfied when the victim has used less than deadly force to overcome resistance and allow the defendant to have carnal knowledge. In that case, the element of force is surely no less satisfied when the defendant has used deadly force to accomplish their aim.”*

Kelly³⁵⁵ and **Thompson**³⁵⁶ have examined the question of whether a defendant can be charged with attempted rape, depending on whether they believed the victim to be alive at the time they initially

346 Ramesh Sharma, *Having sex with dead body not an offence in India: Why a high court wants a law against necrophilia*, INDIA TODAY, <https://www.indiatoday.in/law/story/having-sex-with-dead-body-not-an-offence-in-india-why-a-high-court-wants-a-law-against-necrophilia-2388582-2023-06-04>.

347 Indian Evidence Act, 1872, §27, No. 1, Acts of Parliament, 1872 (India).

348 *Social justice in an Open World*, UN-DEPT. OF ECONOMICS AND SOCIAL AFFAIRS, <https://www.un.org/esa/socdev/documents/ifsd/SocialJustice.pdf>.

349 Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, §14, No. 32, Acts of Parliament, 2007 (South Africa).

350 Crimes Act, 1961, §150, No. 43, Acts of Parliament, 1961 (New Zealand).

351 Sexual Offences Act, 2003, §70, c. 42, Acts of Parliament, 1961 (Canada).

352 Criminal Code of Canada, 1985, §182, C-46, Acts of Parliament, 1961 (Canada).

353 Stephen J. Morse, *Culpability and control*, UNIVERSITY OF PENNSYLVANIA LAW REVIEW, Vol. 142, No. 5 (May, 1994) 1587-1660.

354 *Supra*, note 31 at 7.

355 *People v. Kelly*, 1 Cal. 4th 495.

356 *People v. Thompson*, 12 Cal. App. 4th.

attempted to engage in sexual intercourse. **People v. Hunter**³⁵⁷ addressed this matter, noting that “murdering a person to sexually assault that person’s dead body” could support a conviction of first-degree premeditated murder and that a felony murder conviction may also be sustained if the victim dies while attempting to perpetrate the underlying crime.

Recognizing the fundamental significance of upholding the dignity of deceased bodies, Justice Prafulla Chandra Pant, Acting Chairperson of the National Human Rights Commission (NHRC), has proposed advocating for legislation to safeguard the rights of the deceased.³⁵⁸ Regardless of the circumstances surrounding an individual’s death, be it natural or unnatural, it becomes the State’s responsibility to protect the deceased’s rights and prevent any form of mistreatment or criminal acts perpetrated against their bodies.³⁵⁹ In light of the legal complexities surrounding necrophilia juxtaposed with murder and rape, it becomes imperative to establish precise definitions and delineate distinct criminal liability. Such measures are vital not only for the administration of justice but also for preserving victims’ rights in these grave matters, which brings us to the next section of this article.

III. Shortcomings of Existing Provisions in Addressing Necrophilia

To extend the reach of criminal jurisprudence to deceased individuals, it is essential to establish their legal personhood within the legal framework. The Supreme Court of India has previously acknowledged that the right to dignity, as guaranteed by Article 21 of the Constitution, encompasses both living and deceased individuals.³⁶⁰ Judicial interpretation has further elucidated that the term ‘person’ in Article 21³⁶¹ encompasses the entitlement of a corpse to be treated with dignity, comparable to the treatment accorded to a living person.³⁶² Furthermore, the definition of a ‘person’ provided by Section 3(42)³⁶³ of the General Clauses Act, 1977 encompasses living individuals, corporate entities, and groups of individuals, irrespective of their incorporation status.³⁶⁴ The IPC, under Section 10,³⁶⁵ defines ‘man’ and ‘woman’ as individuals belonging to the male or female gender without any age restrictions. Although deceased bodies lack vital signs, they retain their legal status as ‘humans’ even after death.³⁶⁶ This recognition underscores the notion that the concept of personhood transcends the boundaries of life, affirming the entitlement of deceased individuals to be treated with dignity under the auspices of the law. The issue at hand pertains to the appropriate

357 *People v. Hunter*, 530 NW2d 174.

358 NHRC issues Advisory to the Centre and States to ensure dignity and the rights of the dead (14.05.2021), NHRC, <https://nhrc.nic.in/media/press-release/nhrc-issues-advisory-centre-and-states-ensure-dignity-and-rights-dead-14052021>.

359 *Advisory for upholding the dignity and protecting the rights of the dead*, NHRC, <https://nhrc.nic.in/sites/default/files/NHRC%20Advisory%20for%20Upholding%20Dignity%20%26%20Protecting%20the%20Rights%20of%20Dead.pdf>.

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

361 INDIA CONST. art. 21.

362 P. Rathinam v. Union of India, 1994 SCC (3) 394.

363 General Clauses Act, 1977, § 3(42), No. 20, Acts of Parliament, 1977 (India).

364 Nikitha Akkara, *Rights of the Deceased: Article 21, 1(2)* JURISPÉRITUS (2018).

365 The Indian Penal Code, 1860, § 10, No. 45, Acts of Parliament, 1860 (India).

366 Nivedita Tiwari, *Legal Status of a Person after Death*, JLRJS (Jul. 10, 2023, 9:29 AM), <https://jlrs.com/legal-status-of-a-person-after-death/>.

placement of necrophilia within the penal code. There are arguments advocating for its classification under unnatural crimes or rape, accompanied by corresponding penalties or the inclusion of provisions similar to those found in other legislations. However, this approach raises concerns, as elaborated upon below.

A. *Placing Necrophilia under Unnatural Offences*

In the recent judgment by the Karnataka High Court,³⁶⁷ arguments have been put forth suggesting that Section 377³⁶⁸ of the IPC could potentially apply to acts of necrophilia. This section encompasses voluntary carnal intercourse against the order of nature, provided that certain conditions are fulfilled. To establish culpability, three essential elements must be satisfied: [i] voluntary engagement in intercourse, [ii] violation of the natural order, and [iii] involvement of a man, woman, or animal. To address the issue, it is often proposed that specific terms be added to Section 377 to include acts of necrophilia. However, this proposal is erroneous for three reasons.

1. *Element of 'Voluntariness'*

*"The notion of consent . . . the law's line between intercourse and rape, is so passive that a dead [woman] could satisfy it."*³⁶⁹

The concept of 'voluntariness' presents a significant challenge under the debate on the applicability of Section 377 in cases of necrophilia.³⁷⁰ While engaging in sexual intercourse with a corpse is considered unnatural and falls within the purview of an unnatural offense, one of the key elements of this section is the requirement of 'voluntariness.'³⁷¹ Since consent cannot be obtained from a corpse, the absence of consent renders the intercourse involuntary, thereby dissuading the application of this section.³⁷²

Section 377 has undergone modifications, wherein consensual sexual activity between adults is no longer punishable under the law. In this regard, the judiciary has introduced the element of consent as grounds for exemption from criminal prosecution under Section 377.³⁷³ Considering that a corpse cannot provide consent, the crucial element of voluntariness is absent in cases of necrophilia. Although necrophilia can be categorized as unnatural, the element of voluntariness or consent cannot be fulfilled.

³⁶⁷ Rangaraju @ Vajapeyi v. State Of Karnataka, Criminal Appeal No.1610/2017

³⁶⁸ The Indian Penal Code, 1860, § 377, No. 45, Acts of Parliament, 1860 (India).

³⁶⁹ *Supra*, note 1 at 3.

³⁷⁰ Mohd Ayan & Shabih Fatima, *Section 377, IPC & the Curious Case of Necrophilia in India*, CRIMINAL LAW RESEARCH & REVIEW (Jul. 11, 2023, 03:29 PM), <https://crlreview.in/2021/05/27/section-377-ipc-necrophilia-in-india/>.

³⁷¹ *Necrophilia: is it an Offence? – Rostrum's Law Review*, ROSTRUM'S LAW REVIEW (Jul. 13, 2023, 9:50 AM), <https://journal.rostrumlegal.com/necrophilia-is-it-an-offence/>.

³⁷² *Supra*, note 10 at 4.

³⁷³ Navtej Singh Johar and others v. Union of India, (2017) 10 SCC 1.

To this, the Karnataka High Court states, “A careful reading of Sections 375 and 377 of the IPC makes it clear that a dead body cannot be called a human or person. Therefore, the provisions of Section 375 or 377 would not be attracted.”³⁷⁴ The rationale behind this perspective lies in the fact that rape inherently involves an act committed against a living person, predicated on the absence of consent and the violation of an individual’s will. As a deceased body cannot provide consent, express dissent, or experience fear of immediate bodily harm, it cannot be subjected to rape. The absence of emotions and the inability to experience outrage render rape inapplicable to a deceased individual. It is important to note that non-consensual sexual activity among adults, as well as sexual activity with minors or animals, continues to be a punishable offense.

2. ‘Dead’ as a Person

Section 377 refers to intercourse with a man, woman, or animal.³⁷⁵ However, a dead body is called a dead ‘body’ precisely because it is no longer a ‘person.’³⁷⁶ Although deceased individuals are still human, they are legally considered quasi-subjects or non-persons.³⁷⁷ The legal status of a dead body, as discussed above, further complicates the notion of necrophilia, especially when considering the sacredness attributed to a corpse by many families. Despite the person’s demise, they remain a cherished individual. A dead body assumes the status of ‘property’ for the next of kin, making necrophilia an act of vandalism rather than a sexual assault against a person.³⁷⁸ Therefore, due to the absence of voluntariness and the legal status of a dead body, it is not appropriate to interpret Section 377 as applicable to acts of necrophilia. Alternative legal mechanisms should be explored to address this sexual violation.

3. Ambiguity of Scope

The language employed in Section 377, specifically the phrase “*against the order of nature*,” provides a minimal indication that it is directed towards specific sexual orientations. To enforce Section 377, it becomes imperative to distinguish between what is natural and what is considered unnatural. Furthermore, determining whether necrophilia is against the order of nature assumes significance. It can be explained away by portraying examples from Indian history of its normality, for instance, by the necrophilic custom wherein if an engaged female died before marriage, her fiancé had to deflower her before she could be cremated.³⁷⁹

³⁷⁴ *Supra*, note 56 at 10.

³⁷⁵ *Section 377 and the Dignity of Indian Homosexuals*, ECONOMIC AND POLITICAL WEEKLY (Jul. 10, 2023, 9:29 AM) (Jul. 07, 2023, 11:29 AM), <https://www.epw.in/journal/2006/46/special-articles/section-377-and-dignity-indian-homosexuals.html>.

³⁷⁶ Meenakshy Sasikumar, *Karnataka High Court Ruling: Why Is Indian Law So Ambiguous About Necrophilia?*, THE QUINT (Jul. 09, 2023, 5:20 AM), <https://www.thequint.com/news/law/karnataka-high-court-necrophilia-ruling-dignity-of-dead-rape-unnatural-offences>.

³⁷⁷ *Supra*, note 6 at 3.

³⁷⁸ *Supra*, note 64 at 12.

³⁷⁹ A. Aggarwal, *Forensic and Medico-Legal Aspects*, 6 CRC PRESS, NEW YORK (2011).

The commentary associated with Section 377 suggests that the law intends to punish acts such as sodomy, buggery, and bestiality.³⁸⁰ In other words, the law targets sexual practices rather than the sexual subjects who come to embody socially constructed perversities, such as homosexuality.³⁸¹ Over time, states have become arenas where new ideas and ‘truths’ on sexuality are disseminated.³⁸² There exists an inherent inconsistency between perceiving Section 377 as a mechanism for state power and arguing that it predominantly regulates same-sex sexual subjects.³⁸³ The Indian judiciary has grappled with determining what constitutes ‘carnal intercourse against the order of nature’ since 1860.³⁸⁴

Contemporary judgments in India have further broadened the scope of the law to incorporate other sexual acts, beginning with inclusion of ‘buggery’, as an unnatural sexual act against the will of God and man, thus, criminalizing anal penetration, bestiality and homosexuality, in a broader sense.³⁸⁵ The absence of a distinction based on consent in the offense has equated homosexual sex with rape and portrayed homosexuality as a form of sexual deviance.³⁸⁶ A principle that unifies all these sexual acts can be found as early as 1935 in the **Khanu v. Emperor**,³⁸⁷ wherein the court declared that “*the natural object of sexual intercourse is the conception of human beings, which is impossible in the case of coitus per os (oral intercourse)*.” To this day, we see extant changes post Naz Foundation judgement in the ambit of 377 which, though related to decriminalization of consent-based sexual acts between same sex couple.

B. *Placing Necrophilia under Rape Laws*

The concept of consent is crucial in determining the legality and ethicality of sexual acts.³⁸⁸ Certain groups of individuals are considered incapable of giving consent, including minors under seventeen years of age, individuals with mental disabilities or incapacities, those who are physically helpless, and individuals under custody, supervision, or medical care.³⁸⁹ It raises the question of why a similar argument cannot be made for the deceased.

Internationally, while some states use the term “necrophilia” in their statutes, others have laws that indirectly address such acts. For instance, the **Criminal Code of Canada** makes necrophilia illegal under Section 182,³⁹⁰ which prohibits indecent or improper behavior or offering any indignity to a

380 Shivam Goel, *Coitus Per OS and 'Against the Order of Nature': Section 377 of the Indian Penal Code, 1860*, SSRN (2018), <https://doi.org/10.2139/ssrn.3270242>.

381 Kanad Bagchi, *Transformative Constitutionalism, Constitutional Morality and Equality: The Indian Supreme Court on Section 377*, 51 VERFASSUNG IN RECHT UND ÜBERSEE 367 (2018), <https://doi.org/10.5771/0506-7286-2018-3-367>.

382 *Id* at 10.

383 Abir Mondal, *Section 377: A legal & political outlook of India*, 2 RUNAS. JOURNAL OF EDUCATION AND CULTURE (2021), <https://doi.org/10.46652/runas.v2i3.30>.

384 *Supra*, note 69 at 12.

385 *Supra*, note 70 at 12.

386 John Sebastian, *The opposite of unnatural intercourse: understanding Section 377 through Section 375*, 1 INDIAN LAW REVIEW 232 (2017), <https://doi.org/10.1080/24730580.2018.1453748>.

387 *Khanu v. Emperor*, AIR 1925 sind. 286.

388 Alan Wertheimer, *What Is Consent? And Is It Important?*, 3 BUFFALO CRIMINAL LAW REVIEW 557 (2000), <https://doi.org/10.1525/nclr.2000.3.2.557>.

389 *Supra*, note 32 at 7.

390 Criminal Code, 1985, § 182, C-45, Acts of Parliament, 1985 (Canada).

dead body or its remains. Similarly, the **French Penal Code** does not mention necrophilia, but its interpretation of Article 225-17³⁹¹ encompasses such acts.³⁹² In contrast, certain jurisdictions, such as Louisiana, North Carolina, Oklahoma, and Kansas, do not criminalize engaging in sexual acts with corpses, making necrophilia legal.³⁹³ In **Gibson v. Jackson**,³⁹⁴ the court stated that for the petitioner to be guilty of rape, the victim must have been a living human being, and therefore, engaging in sexual penetrative acts with a dead body does not constitute rape.

A similar interpretation was seen in **Rangaraju**,³⁹⁵ where the prosecution opposed the plea, arguing that rape with dead bodies is punishable under Section 376³⁹⁶ of the IPC as per the amendments made in 1983. However, the Karnataka High Court overturned the charge of rape under Section 376 and upheld the charge of murder under Section 302.³⁹⁷ The court decided on Section 46³⁹⁸ of the IPC, which states that a dead body cannot consent or protest against rape or any associated bodily harm.³⁹⁹ As a dead body cannot experience outrage, it does not fulfill the requirements for rape charges. The court further emphasized that sexual intercourse with a dead body is considered necrophilia, and rape laws exclusively apply to living female human beings. While the murder conviction was upheld, the court acquitted the defendant of rape, as no provision in the IPC punishes the rape of a dead body.

Instances similar to the **Rangaraju** are not uncommon in India, where offenders are erroneously made liable under Section 376, read with Section 302, since the legislative framework lacks a distinct provision for necrophilia. This pattern is not limited to a single precedent, as Indian courts have similarly disposed of numerous cases.⁴⁰⁰ In **Krishna Rajgaur v. The State of Assam**,⁴⁰¹ the court confirmed a death sentence for offenses under Sections 302, 363, and 201⁴⁰² of the IPC. However, the accused was never charged with rape regardless of committing sexual activity on a deceased seven-year-old following her murder and subsequent engagement in necrophilia, resulting in the alteration of the sentence to life imprisonment due to a lack of opportunity to present a defense against the rape charge.

391 Penal Code, 1810, art. 225-17, Acts of Parliament, 1810 (France).

392 F. Bellivier, *Human remains in French law: The snare of personification*, CAMBRIDGE UNIVERSITY PRESS, 135-151 (2014).

393 *Supra*, note 32 at 7.

394 *Gibson v. Jackson*, 443 F. Supp. 239 (M.D. Ga. 1977).

395 *Supra*, note 65 at 12.

396 The Indian Penal Code, 1860, § 376, No. 45, Acts of Parliament, 1860 (India).

397 The Indian Penal Code, 1860, § 302, No. 45, Acts of Parliament, 1860 (India).

398 The Indian Penal Code, 1860, § 46, No. 45, Acts of Parliament, 1860 (India).

399 *Supra*, note 65 at 12.

400 *Supra*, note 27 at 7.

401 *Krishna Rajgaur v. The State of Assam*, 2021 SCC OnLine Gau 945.

402 The Indian Penal Code, 1860, § 302, 363, and 201, No. 45, Acts of Parliament, 1860 (India).

IV. Addressing the legal void

The existing legal framework in India regarding corpses is limited to Section 297⁴⁰³ IPC, which addresses trespassing on burial grounds.

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 sepulchre, or any place set apart from the performance of funeral rites or as a depository for the remains of the dead, or 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.

To be punished under this section for necrophilia, a person must have trespassed into a burial ground to offer an indignity to the corpses, including engaging in sexual intercourse with them.⁴⁰⁴ This narrow scope of Section 297 creates a gap in the Indian legal system, as it excludes individuals who commit necrophilia without trespassing into a burial ground. In view of most scholarship, this punishment is insufficient for unnatural offenses involving offering an indignity to a human corpse through sexual intercourse.⁴⁰⁵ It seems that the drafters of the IPC did not intend for necrophilia to be punished under Section 297; otherwise, they would have mentioned it in the Code and prescribed a more appropriate punishment.

The limitations of the existing legal framework become evident through the examination of prominent cases, such as the **Nithari**⁴⁰⁶ case where, despite engaging in acts of necrophilia, Mohinder Singh, the house owner, was acquitted due to insufficiency of evidence, while Surendra Koli, his servant, faced charges encompassing kidnapping, rape, murder, and desecration of the bodies of women and girls postmortem. Similar instances have been recorded in other contexts, such as a 2017 case in **Mumbai**⁴⁰⁷ where a psychotherapist lured, assaulted and committed necrophilia on a young girl. Similarly, a laborer from **Gurugram**⁴⁰⁸ confessed to participating in necrophilic acts with his rape victims in 2018, and a serial killer in **West Bengal**⁴⁰⁹ was apprehended in 2019 for murdering women and engaging in sexual acts with their deceased bodies. These cases exemplify situations

403 The Indian Penal Code, 1860, § 297, No. 45, Acts of Parliament, 1860 (India).

404 Nico Swartz, *The Judicial Implications of Necrophilia*, 5 ADVANCES IN RESEARCH 1 (2015), <https://doi.org/10.9734/air/2015/14731>.

405 *Supra*, note 59 at 11.

406 *Surendra Koli v. State of Uttar Pradesh. & Others*, AIR (2014) 16 SCC 494.

407 *Physiotherapist case: Accused performed necrophilia*, THE ASIAN AGE (Jul. 14, 2023, 5:25 AM), <https://www.asianage.com/metros/mumbai/040217/physio-case-accused-performed-necrophilia.html>.

408 *Gurugram rape accused admits to necrophilia*, TRIBUNE INDIA (Jul. 04, 2023, 6:20 AM), <https://www.tribuneindia.com/news/archive/haryana/gurugram-rape-accused-admits-to-necrophilia-687352>.

409 *Serial killer who had sex with women after killing them arrested in West Bengal*, INDIA TODAY (Jul. 11, 2023, 8:27 AM), <https://www.indiatoday.in/crime/story/west-bengal-burdwan-serial-killer-1542256-2019-06-04>.

where the existing legal framework fails to address and penalize necrophilic acts adequately.

To address this gap in the law, this article proposes the introduction of a new provision, such as Section 297A, specifically targeting necrophilia, as follows:

Section 297A: Offenses Related to Necrophilia

(1) Any person who engages in sexual acts or any form of sexual intercourse with a corpse, whether within or outside a burial ground, shall be deemed to have committed the offense of necrophilia.

(2) The offense of necrophilia shall be punishable with imprisonment for a term not less than three years but may extend to ten years, and shall also be liable to a fine.

(3) If a person previously convicted of necrophilia under this section is found guilty of committing the offense again, he/she shall be deemed a reoffender.

(4) Reoffenders of necrophilia shall be subject to enhanced punishment. The punishment for a reoffender shall be imprisonment for a term not less than five years but may extend to fifteen years, and shall also be liable to a fine.

(5) For the purposes of this section, "reoffender" refers to a person who has been previously convicted of necrophilia under section 297A of the Indian Penal Code.

(6) The provisions of this section shall be in addition to and not in derogation of any other provision of law relating to offenses against the human body or sexual offenses.

(7) The burden of proof shall lie with the prosecution to establish beyond reasonable doubt that the accused engaged in sexual acts or intercourse with a corpse.

(8) This section shall be non-bailable, and the accused shall not be released on bail unless there are exceptional circumstances warranting such release, as determined by the court.

(9) The provisions of this section shall apply to both males and females, irrespective of their age or mental capacity.

(10) The provisions of this section shall apply regardless of whether the corpse is within a burial ground, a morgue, or any other location where a dead body is kept.

(11) Nothing in this section shall prevent the application of any other provision of law that may be relevant to the offense committed, including provisions related to rape, unnatural offenses, or any other sexual offense.

Note: This provision is a draft and should be reviewed, revised, and enacted by the competent legislative authority before being incorporated into the Indian Penal Code.

This provision outlines the offense of necrophilia and prescribes punishments, including imprisonment and fines. It also addresses the issue of reoffending, enhances punishment for re-offenders, and ensures that the burden of proof lies with the prosecution. Additionally, it clarifies that this provision does not override other relevant laws relating to offenses against the human body or sexual offenses. Implementing such a provision is crucial to combat necrophilia, protect the dignity of the deceased, and fill the existing gap in the legal framework.

V. The Way Ahead

Moving forward, it is imperative for the Indian legislature to strike a delicate balance between safeguarding the sanctity of the dead and preserving the rights of the living individuals, incapable of knowing the nature of the act, involved in necrophilic acts. While acknowledging the universally taboo nature of necrophilia, it is crucial to address the contemporary relevance of this issue in the Indian context. Currently, India's laws pertaining to necrophilia are weak and ambiguous, leading to doubts and debates regarding its criminalization under Sections 297 and 377 of IPC. To address this pressing issue, introducing a novel provision such as Section 297A addressing necrophilia within the IPC becomes necessary. Such a provision would provide much-needed clarity on the criminalization of necrophilia, preventing catastrophic incidents and ensuring the protection of the dignity and sanctity of the deceased. Recognizing the urgency of the situation, India must implement strict laws to address and combat necrophilia. Inaction in this matter can have severe and disruptive consequences. By prioritizing prevention over remedy, society can be safeguarded against the manifestation of necrophilia. However, it is essential to approach the formulation and implementation of such laws with caution. The legislative measures should carefully consider the rights and perspectives of all stakeholders involved, including legal experts, medical professionals, and representatives from civil society. Striking a balance between criminalizing necrophilia and ensuring that the rights and interests of individuals are upheld is vital.