


Posthumous Justice: A Socio-Legal Interpretation of Rights of The Dead

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Abstract

Rights have always been regarded as a subject matter of personhood. At the same time, the understanding of personhood has extended beyond the limit of living human beings. Today, the world has witnessed the transgression of the concept to non-human and even artificial entities. The core value of such recognition is to confer rights and thereby ensure their legitimate protection. To this conundrum comes a dead body, especially that of a human being. This paper attempts to delve into the aspects of personhood, the rights of the dead and the need of positive state action for protecting a person's dignity even after the end of their natural life. The discussion examines these aspects in the wake of various actions performed on the dead, which would otherwise be deemed offensive if the person was alive.

Keywords

Personhood; Dead person; Privacy; Relational Interest; Posthumous Justice.

Introduction

Over the passage of time there has been a significant change in the realm of rights, primarily driven by the changing interface between society and scientific advancement. However, the well-founded legal notion of personhood continues to resist extending rights to the dead. This approach is particularly relevant in the era where the rights of the natural person have undergone serious manifestations.¹ Surprisingly, the evolving perspective on the rights of the living has also contributed largely in drawing the rights in similar angle upon non-living entities,² some of which are really surprising.³ If these approaches are to be rightly acknowledged, then perhaps the dead need not be viewed differently. At this juncture, it is crucial to reassess existing legal notions and the concept of posthumous rights.

The need to reconsider the rights of the dead is the demand of changing socio-legal premises. For a long time, posthumous rights were addressed by referring to posthumous interests. However, the changing socio-legal structure has compelled to have a broader discussion and wider ambit of posthumous justice. This discussion finds its relevance especially in the context of crime ‘against’ the dead. The understanding of personhood has limited the context of crime against the dead to theft⁴ and defamation.⁵ However, the legal system now recognizes a growing number of offenses against the dead. The darker aspects of organ harvesting,⁶ necrophilia, and the sale and disposal of dead bodies are among the areas which requires urgent legal attention. Another critical issue that demands strict perusal is with regard to forensic interventions on the dead, particularly autopsy. The State interest in crime detection and criminal investigation has made autopsy as an essential requirement, especially in the

¹ Right to Privacy, Autonomy, See Justice K S Puttaswamy v Union of India (2017) 10 SCC 1., Common Cause (A registered Society) v Union of India (2018) 5 SCC 1.

² Personhood to companies, See R C Cooper v Union of India [1970] AIR 564 . Pramatha Nath Mullick v Pradyumna Kumar Mullick, (1925) BOMLR 1064. M. Siddiq (D) Thr. Lrs. v Mahant Suresh Das, Civil Appeal No. 10866-10867 of 2010, see discussion in part J.

³ L. C. Pecharroman, “Rights of Nature: Rivers that Can Stand in Court.” *Resources* (2019) 7 no. 13 1-14. Mohd. Salim v State of Uttarakhand, W.P. (PIL) No. 126 of 2014.

⁴ Indian Penal Code 1860 ss. 379.

⁵ Indian Penal Code 1860 s. 499.

⁶ *Ranga Raju alias Vajapeyi v State of Karnataka*, Criminal Appeal No 1610/2017 decided on 30.05.2023.

cases of suspicious death.⁷ However, the right to refuse an autopsy has become an emerging right in few jurisdictions.⁸ This will bring in the claims of three stakeholders; the State, the next kin and the dead. These evolving premises demand to reappraise the concept of personhood of the dead and the improvement to be incorporated into the law protecting the interest of the dead. This will make some emerging notions of posthumous rights i.e., the notion of posthumous justice.

These evolving legal considerations necessitate a reappraisal of the concept of personhood for the dead and improvements in laws that protect their interests. Strengthening these legal protections will contribute to the development of emerging posthumous rights, ultimately shaping a more comprehensive framework of posthumous justice.

Personhood of the Dead

The concept of person is known to be from the Latin word *persona* which further refers to the word mask. It reflects the identity and character of an individual. Even the concept of person can be perfect and imperfect.⁹ A slave can be identified as an imperfect person. The basic classification of personhood to perfect and imperfect, is based on two legal presumptions. One considers a legal person as one who is capable of *holding a will*,¹⁰ which keeps the existence of will as the rule for personality. Secondly, a person is recognized on the basis of the capacity to hold rights and duties.¹¹ Considering the second interpretation of personhood, even non-humans can hold personality. The debate in this context seeks to adduce personhood for non-living creatures, animals, unborn persons, idols, dead person and corporations. While the context of extending personhood to the dead have been discussed extensively,

⁷ National Human Rights Commission, Advisory for Upholding the Dignity and Protecting the Rights of the Dead, F. No. R-18/18/2020-PRP&P (RU-1) dated 14.05.2021.

⁸ B.R. Hill and R. E. Anderson "The Autopsy Crisis Reexamined: The Case for a National Autopsy Policy." *The Milbank Quarterly* 69 no. 1 (1991), 57-78.

⁹ S. Ratnapala, *Jurisprudence*, 2nd edn. (Cambridge University Press, 2013).

¹⁰ P J Fitzgerald, *Salmond on Jurisprudence*: 12 Indian Reprint, (N M tripathi Private Limited, India, 2023).

¹¹ P J Fitzgerald, *Salmond on Jurisprudence*: 12 Indian Reprint, (N M tripathi Private Limited, India, 2023).

they have concluded against this notion.¹² ‘A dead person is no longer a person in the eye of law.’¹³

Since the dead are incapable of holding interest, they are deprived of rights and, consequently, are not considered persons under the law. However, advancements in science, technology and even re-arrangement of social order necessitate a reevaluation of the concept of personhood for the dead. Earlier discussions on this subject were largely confined to minor offenses, such as libel or encroachment on burial sites.¹⁴ Today, a more comprehensive analysis is required to determine whether the dead hold any legal interests and whether someone bears the responsibility of safeguarding those interests. According to Ihering, the purpose of law is to safeguard the interest of citizens. Especially in the context of a welfare state, it is important to examine the state-responsibility in protecting the interest of the dead. Sociological jurisprudence favors the existence of such interests.¹⁵ Salmond observes *right as what others are to do for me*.¹⁶ He further observes:

“Rights are concerned with interests, and indeed have been defined as interests protected by rules of rights, that is by moral or legal rules. Yet, rights and interests are not identical. Interests are things are to a man’s advantage: he has an interest in his freedom or his reputation... to say he has an interest in his reputation means that it is to his advantage to enjoy a good name; to say he has right to this is to imply that others ought not to take this from him.”¹⁷

The understanding of right in this regard is based on the obligation it imposes on others to protect them. The right against defamation, therefore, should not be restricted solely to one’s interest in his reputation but also to the obligation of others to refrain from defaming them. This raises the question of

¹² P J Fitzgerald, *Salmond on Jurisprudence*: 12 Indian Reprint, (N M tripathi Private Limited, India, 2023).

¹³ P J Fitzgerald, *Salmond on Jurisprudence*: 12 Indian Reprint, (N M tripathi Private Limited, India, 2023).

¹⁴ P J Fitzgerald, *Salmond on Jurisprudence*: 12 Indian Reprint, (N M tripathi Private Limited, India, 2023).

¹⁵ VD Mahajan, *Jurisprudence and Legal Theory*. 5th edn reprinted, (Eastern Book Company, India, 2001).

¹⁶ P J Fitzgerald, *Salmond on Jurisprudence*: 12 Indian Reprint, (N M tripathi Private Limited, India, 2023).

¹⁷ P J Fitzgerald, *Salmond on Jurisprudence*: 12 Indian Reprint, (N M tripathi Private Limited, India, 2023).

whether there is a requirement for the right holder to be alive for the obligation remain in effect. Criminalization of defamation of a dead person and trespassing on burial sites suggests that it is immaterial whether the right holder is dead or alive for the obligation to remain in existence. This leads to the conclusion that certain rights continue even after death. The next logical question is: who will claim these rights? One can undoubtedly say that during their lifetime, the right holder themselves may be the claimant. However, that is not always the case; there can be instances where one person claims the right on behalf of another. Examples include minors, individuals with unsound mind, unborn child, idols and even corporations where guardians, trustees, or directors act as representatives. Therefore, the mere fact that the right holder and the claimant are different individuals does not necessarily mean that the right ceases to exist.

Rights of the Dead

A conceptual clarification to the *rights of the dead* is quintessential for furthering the discussion herewith. The rights of the dead, like the rights of living persons, constitute a bundle of rights rather than a singular right. Examining these rights in the light of theories of rights will help understanding the significance of discussions on posthumous rights. The will theory and the interest theory of rights adequately explains the significance of rights after death. The will theory justifies the existence of right based on individual's control over their exercise.¹⁸ This does not necessarily correlate with the idea of one's ability to exercise the right but rather with the power vested in a person to ensure that his rights are adequately protected and enforced. Testimonial succession is a prime example of this, where the absence of the right holder does not hinder the enforcement; instead, the law ensures its protection and implementation. Similarly, individuals in a permanent vegetative state or those deemed legally insane retain their rights, regardless of their ability to exercise or even be aware of them. This premise establishes that the rights can be attributed to a person regardless of their knowledge about a right and upon any person who is incapable of controlling the right.¹⁹ The arms of the law must ensure their protection and enforcement. Therefore, the will theory support the argument that right can exist even if a person is incapable of exercising them

¹⁸ "Rights" Stanford Encyclopedia of Philosophy, revised on 24.03.2020, accessed on 09.01.2025, available at: <https://plato.stanford.edu/entries/rights/>.

¹⁹ Smith, Fred O. "THE CONSTITUTION AFTER DEATH." *Columbia Law Review* 120, no. 6 (2020): 1471–1548.

independently. In this way, the will theory approach extends beyond the transient boundaries of life to cater posthumous rights.

The interest theory primarily focuses on the duty imposed upon others due to the intrinsic value it creates for the well-being of another. In other words, if one is required to act in a particular manner, even against his individual character, because of the intrinsic value it contributes to another person's well-being, then that other person is said to have rights.²⁰ Interest theory has been conceived more in a narrow shell of people among the same moral community. The duty of a natural person towards animals or plants is not acknowledged but rather as a reflection of individual character and ethical considerations. All human beings, however, are undoubtedly a part of the same moral community and death remains the only certainty among all the humans. During the lifetime, individuals obligated to protect and respect the interest of others, thereby establishing the armor of rights. Some of these rights pertain to the bodily well-being of the person, such as food, water, shelter, etc., while others extend to educational and cultural rights. However, interests such as reputation, privacy, and dignity transcend the mortal body of an individual, as it is the persona that actually upholds the sanctity of these interests. Therefore, it would not be incorrect to conclude that the duty to respect these interests does not necessarily end with a person's death. Both the will theory and the interest theory sufficiently address posthumous rights, including privacy rights, rights to dignity, reputation and its various facets including concerns arising from these rights due to medico-legal interventions and acts that constitute crimes against the dead.

1. Right to Privacy

The right to privacy has been a cherished right for quite a long period in limited jurisdictions.²¹ In India, although the discussion on privacy rights has been ongoing for the past few decades,²² making the right to privacy a fundamental right is of more recent origin.²³ The most interesting aspect to analyze would be whether this right applies to the dead. The right to privacy in India originates from the right to life and personal liberty.²⁴ The rights

²⁰ Raz, J. "On the Nature of Rights." *Mind* 93, no. 370 (1984): 194–214.

²¹ Justice K. Puttaswamy v Union of India, W.P. (C) No. 494 of 2012, part K.

²² M P Sharma v Satish Chandra, (1954) SCR 1077, Kharak Singh v State of Uttar Pradesh, (1964) 1 SCR 332, Gobind v State of Madhya Pradesh, (1975) 2 SCC 148, R Rajagopal v State of Tamil Nadu, (1994) 6 SCC 632, People's Union for Civil Liberties v Union of India, (1997) 1 SCC 301, Mr X v Hospital Z, (1998) 8 SCC 296.

²³ Justice K. Puttaswamy v Union of India, W.P. (C) No. 494 of 2012, part K.

²⁴ Justice K S Puttaswamy v Union of India (2017) 10 SCC 1.

enumerated under this Article extend to all persons. Thus, if the dead are considered within the ambit of person, then undoubtedly, the right to privacy should also extend to the dead. For this purpose, it is essential to examine how the Constitution of India views the dead.

The right to privacy is a fundamental right from which some related rights have originated.²⁵ Dignity, autonomy and confidentiality are some of the significant subordinate rights derived from the right to privacy. The interest of the dead may also encompass these components. The discussion relating to the rights of the dead primarily focused on the issue of dignity. Although the right to dignity was established as the facet of Article 21 by various judicial pronouncements, there was considerable confusion as to whether this right should extend to the dead. One of the central points of the discussion on the rights of the dead was the aspect of a decent burial. The decision of the Madras High Court in *S. Sethu Raja*²⁶ holds significance in this context. The court was not hesitant in understanding and extending the right to dignity, and it held that:

“...The right to life has been held to include the right to live with human dignity. By our tradition and culture, the same human dignity (if not more), with which a living human being is expected to be treated, should also be extended to a person who is dead. The right to accord a decent burial or cremation to the dead body of a person, should be taken to be part of the right to such human dignity...”

The logic behind extending the right to dignity in the context of burial is tied to the cultural and traditional norms followed by the deceased during his lifetime. It is true that every person has expectations regarding how he should be treated by others while alive, and these expectations often extend beyond death. The decedent's wish for a decent burial and their desire for proper last rites forms a potential constitutional guarantee, as part of the right to dignity. It takes

²⁵ Common Cause (A registered Society) v Union of India (2018) 5 SCC 1.

²⁶ *S. Sethuraja v The Chief Secretary*, WP(MD) No. 3888 of 2007 decided on 28.08.2007.

precedence over the interests of the survivors,²⁷ thereby incorporating the flavours of both the will and the interest theory of rights. The decedent's desire may not be limited to burial but can include observance or non-observance of rituals, wishes regarding organ transplantation and other matters. In all such cases, the modern legal system should prioritize the wishes of the deceased over the conflicting interests of the survivors. The European Court of Human Rights in *Jaggy v Switzerland*²⁸ has declined a request placed by the applicant to conduct paternity test using the putative remains of the deceased. This was based on the fact that the deceased has declined his wish to undergo the test during his lifetime, and this was further affirmed by the family members. Unless there is a public interest involved, the court shall not interfere the wishes of the deceased during his lifetime and the family members, especially when these wishes do not conflict with one another. Similarly, the Allahabad High Court, in the case of *Ramji Singh*,²⁹ directed the State to respect the dignity of the dead person. The court's observation herein was not only confined to the disposal of the dead body with dignity but also emphasized that the preservation of the body for the purpose of forensic intervention and criminal investigations should be conducted in accordance with the law, with due respect for the dignity of the dead.³⁰

2. *Relational Interest*

Much of the discussions on the right to dignity and privacy of the dead have revolved around the notion of relational interest.³¹ This concept embarks on the understanding that if the rights of the dead exists, they should be recognized in light of the rights of the deceased's kin. The Supreme Court in the *Mohammad Latief Magry*³² dealt with

²⁷ Long v Alford 374 S.W. 3d 219, also see Cottingham v McKee 821 S.o. 2d 169 (Ala. 2001), Holland v Metalious 105 N.H.290, Rosenblum v New Mt. Sinai Cemetery Association, 481 S.W.2d 593 (Mo. App. 1972), Booth v Huff, 273 A.D.2d 576.

²⁸ (2007) 47 EHRR 30

²⁹ Ramji Singh @ Mujeeb Bhai v State of U. P. & Ors, (2009) 5 All LJ 376.

³⁰ Ramji Singh @ Mujeeb Bhai v State of U. P. & Ors, (2009) 5 All LJ 376.

³¹ Daniel Sperling, D. (2008). *Posthumous Interests: Legal and Ethical Perspectives*: Cambridge University Press.

³² Mohammad Latief Magrey v The Union Territory of Jammu and Kashmir, Civil Appeal No. 6544 of 2022, SC decided on 12. 09.2022.

the rights of the parents of the deceased (who had been killed in a police encounter) to exhume their son's body and bury him according to their religious practices. The apex court upheld the view of the High Court, allowing the family members to offer prayers and perform other related rituals connected therewith without exhuming the body. The rationale for having such an opinion was three-fold: first, there was no law governing exhumation except for Sec. 176(3) of CrPC, which deals with identifying the cause of death. Second, the State has assured under oath that the dead body had been buried with full dignity after prayers were offered. Third, the court believed that it would be improper to order for exhumation in the absence of any larger public interest or in the absence of any expressed law. The court drew concluded in line with the observation of *Cardozo*:

“The dead are to rest where they have been lain unless reason of substance is brought forward for disturbing their repose.”³³

The concept of relational interest does not find any relevance in the cases of homeless deceased. In the *Ashray Adhikar case*,³⁴ the apex court held that all the deceased, including homeless ones, have the right to a decent burial. Hereby, the court did not interfere with the affairs of the Municipal Corporation of Delhi with respect to the burial of unclaimed bodies. This was because the corporation had guidelines in place: either to cremate the body in an electric crematorium or, if the body was identified as that of a Muslim, to bury it in a burial ground. This signifies that due care is given to the religious faith and beliefs of the deceased, to the best possible extent, by the authorities in disposing the unclaimed bodies.

The concept of relational interest will no longer to be relevant once the dead has been buried. At that point, the dead body is considered to be under the custody of the State. This understanding will underpin the notion of *resting of rights* on the deceased's body by the family members once it has been laid to rest. This line of thought strongly supports all the legal provisions governing disinterment, which

³³*Yome v Gorman*, 152 N. E 126, 129 (N.Y. 1926).

³⁴*Ashray Adhikar Abbhiyan v Union of India*, (2002) 2 SCC 27.

mandates for an order of the court only under exceptional situations. The rights of family members upon the deceased body is restricted to an extent of applying for re-investigation into the cause of death of the person. It is up to the court to decide whether to grant permission for exhumation and further forensic examination on the dead based on the merits of the case. In this context, the State's role as custodian of the dead is primarily to protect the dignity of the deceased and respect the final wishes of the dead. This aligns with the idea of ensuring that the deceased *rest in peace*. Therefore, the right to privacy of the dead can be viewed as an extension of their right to dignity, aiming to prevent unwanted and unwelcoming interference from the part of others, which is being tried to be protected in these scenarios. Therefore, right to privacy can be understood as an extension of right to dignity of the dead. Any actions by the State against this right should be viewed as a reasonable restriction on the right to dignity of the dead in light of larger public concern and effective criminal justice administration. One notion behind the offence of trespassing on burial sites can also be understood through the lens of protecting the dignity and sanctity of the dead.

a. A decent note to inalienability of privacy rights posthumously

In a celebrated decision rendered by one of the Indian High Courts, the court meticulously concluded that right to privacy and dignity once enjoyed by a human being will end with his last breath.³⁵ This conception of right to privacy was taken by the court from an observation in paragraph 557 of the Puttaswamy judgment. The Puttaswamy judgment intended to hold privacy as an inseparable and inalienable right of a human being till death without leaving a room for doubt. It does not mean that posthumously the right is irrelevant. The questions of dignity, reputation and privacy are still relevant after the death of an individual. The law of defamation and the modern challenges raised by digital privacy will signify this. The extension of the above-mentioned notion in Puttaswamy judgment beyond its scope to emerge as a new concept of inalienability of the right to privacy is absurd.

³⁵ Deepa Jayakumar v A L Vijay [OSA No. 75 of 2020] decided by Madras High Court on 16.04.2021. also see Managing Director, Makkal Tholai Thodarpur Kuzhumam Ltd v Mrs. V Muthulakshmi 2007 (6) MLJ 1152, Justice K S Puttaswamy v Union of India (2017) 10 SCC 1.

Making biopics or biographies of a person in a manner devaluing his dignity and personhood is a matter of juristic interest. Any kind of invasion into the right to privacy or dignity of the dead person is questionable. For example, misappropriating medical records of the dead, manipulating the post-mortem reports to defame a person is of great concern. A post-mortem report manipulated to create an impression that the deceased was leading a low moral life is undoubtedly questionable. The fact remains that the deceased will not come out of the grave and sue the culprits, and in such circumstances, the law should give a leeway for the close relatives to contest the case. There can be more similar examples to illustrate the need for standing for the relatives for the rights of their deceased loved ones. Hence, the concept of inalienability of privacy and allied rights posthumously is not sound in law. These decisions by the Constitutional Courts will be short-lived and get repaired by the Apex Court sooner or later.

Autopsy and the Rights of the Dead

Autopsy, or post-mortem examination, has been practiced for time immemorial. It would not be prudent to restrict the scope of autopsy solely as a part of criminal investigation. It is regarded as one of the best possible ways to evaluate new treatments and diagnostics.³⁶ In this regard, the occupancy of the dead's body for the examination purpose can occur through two means. First, in cases of suspicious death and the criminal law is in motion. Indian law permits autopsy without the consent of the dead's relatives or survivors.³⁷ For instance, in cases of dowry deaths or when the cause of death is doubtful, the body shall be referred to nearest civil surgeon for autopsy. The police officer may, if he deems it expedient upon any reason, direct an autopsy. Second, the dead's body may be obtained through either by the voluntary donation by relatives, in accordance to the dead's will and wish, or by claiming unclaimed bodies from the concerned departments. In all these cases, the rights of the deceased, particularly rights to privacy are compromise.

³⁶ Sheaff, M. T & Hopster, D. J. (2005). *Post Mortem Technique Handbook*: 2nd ed, Springer.

³⁷ The Code of Criminal Procedure 1973 s. 174.

However, like any other fundamental rights, this right is not absolute and is subject to reasonable restrictions in the larger public interest.

1. Autopsy and Religious Sentiments of the Dead

Autopsy is unquestionably an invasive scientific technique used on the dead, primarily as a part of criminal investigation to ascertain the cause of death and the apparent time of death. However, performing autopsies has been rejected by a large portion of the society due to religious or cultural attitudes. This understanding has been catered by the New Jersey Code.³⁸ Medical examiner may proceed with an autopsy despite objections from the deceased's relatives or next friend on religious ground, but only after obtaining an order from the Superior Court. To obtain such an order from the court, the medical examiner must establish that there is a 'compelling public necessity' for conducting the autopsy. In Santa Clara County, the refusals to perform autopsies based on religious belief are not honored in cases of homicide or sudden and suspicious death involving infants and elderly citizens. In the United Kingdom, the coroner's decision is final when it comes to conducting autopsy. The coroner may proceed with his decision to perform autopsy when the cause of death is uncertain. However, if an invasive technique can be avoided and still the cause of death can be ascertained, the coroner is expected to use it, respecting religious sentiments.³⁹

2. Autopsy Records and Privacy Concerns

The major dispute regarding privacy in relation to autopsy reports may arise to a large extent only to medico-legal autopsies. This concern applies to both the autopsy procedures and the autopsy report itself. In

³⁸ *N. J Administrative Code* ss. 8:70- 1.6. accessed 28 September 2023 available at: <https://casetext.com/regulation/new-jersey-administrative-code/title-8-health/chapter-70-chief-state-medicalexaminerrules/subchapterautopsies/section-870-16-objections-to-autopsy-on-religious-grounds>

³⁹ Objections to post mortems and religious consideration, South Wales Central Area, accessed 28 September 2023 available at <https://www.southwalescentralcoroner.co.uk/En/WhatHappensWhenAdeathIsReportedToTheCoroner/ObjectionsToPostMortemsAndReligiousConsiderations.aspx>. Also see Autopsy Protocol, accessed 28 September 2023 available at: <https://www.in.gov/ctb/files/section501.pdf>.

terms of autopsy procedures, almost all the jurisdiction has mandatory norms for the photography or videography.⁴⁰ The object behind recording the entire procedure is for avoiding serious legal issues at later point of time. However, this is not a license for unauthorized circulation of the photos and videos of the procedure. This is a serious blow on the right to dignity and privacy of the dead.⁴¹ Although the decision in *Reid*⁴² was based on the foundation of *relational privacy interest* of the deceased's family; the court carved the foundation of formulating this principle is nothing but the interest of the dead. In this sense, the family gains the right to sue for compensations in cases of privacy violations. Thus, the constitutional right of dignity and privacy of the dead enables the family members to exercise their relational privacy interest.

As far as autopsy records are concerned, they are undoubtedly medical records but also serve as investigative records.⁴³ Being medical records, they contain intimate information and details about the medical conditions of the deceased. Therefore, unwarranted disclosure of autopsy reports constitutes an invasion of personal privacy.⁴⁴ Consequently, the circulation of autopsy report in public domain is restricted. Access to an autopsy report should only be granted when such disclosure benefits the deceased or his dependents. Similarly, access to the autopsy report is given to the accused standing trial for causing the death of such other person.⁴⁵ This reinforces the notion that an autopsy

⁴⁰Advisory for Upholding the Dignity and Protecting the Rights of the Dead, NHRC India, accessed 28 September 2023 available at <https://nhrc.nic.in/sites/default/files/NHRC%20Advisory%20for%20Upholding%20Dignity%20%26%20Protecting%20the%20Rights%20of%20Dead.pdf>, Standard Guide for Post Mortem Examination Photography, accessed 28 September 2023 available at: https://www.nist.gov/system/files/documents/2022/02/28/OSAC%202021S0013_Standard%20Guide%20for%20Post%20Mortem%20Examination%20Photography.REGISTRY.pdf

⁴¹*Reid v Pierce County*, 136 Wash. 2d 195 (1998).

⁴²136 Wash. 2d 195, (1998).

⁴³*Foe Swickard v Wayne County Medical Examiner*, 475 NW 2d 304, 438 (1991).

⁴⁴*Globe Newspaper Co. v Chief Medical Officer*, 404 Mass. 132, 533 NE 2d 1356 (1989).

⁴⁵Code of Criminal Procedure 1973 ss. 172, 208. also see *People first of Ontario v Porter*, Regional Coroner Niagara, 5 OR (3d) 609 (Ont. Ct. Gen Div. 1991).

report is not a public document, and thereby its access is highly restricted. This further endorses the existence and confirmation of the right to privacy for the dead.

The advisory issued by the National Human Rights Commission, influenced by the decision of the apex court in *Paramanand Katara*⁴⁶ and *Ashray Adhikar*⁴⁷, identifies a long list of stakeholders including citizens, hospital administration, medical practitioners, media and other government departments as the stakeholders towards upholding the dignity and other rights of the dead. Duty has been cast upon each stakeholder to ensure their part at the best interest of the dead. It compasses all the facets of dignity, including the timely conduct of autopsy, the proper handover of bodies to family members, and maintaining hygienic mortuary conditions. The advisory also affirms the privacy concerns of the dead and gives emphasis on protection of personal and genetic information. It further addresses the media and social-media, urging them not to circulate explicit photos or videos of dead bodies. Additionally, it appeals that the right to dignity and privacy of the dead should never be compromised, even if the pictures or videos are circulated after masking.

Revisiting Crime Against Dead

The simple question of whether theft can be committed against the dead initiates the discussion on crimes against the dead. This question revolves more around the concept of possession⁴⁸ rather than to the concept of the interest of the dead. Hence the philosophy concludes that the act of taking valuables from the dead body will not attract the offence of theft, but will constitute the offence of criminal misappropriation.⁴⁹ It is high time that the law has to think beyond this conventional philosophy. Today, the range of possible offences that is possibly committed on a dead body is extensive. Acts such as organ harvesting, the sale of dead bodies, or the circulation of photographs or video of the dead may constitute offences if carried

⁴⁶Pt. Paramanand Katara v Union of India, AIR 1989 SC 2039.

⁴⁷Ashray Adhikar Abhiyan v Union of India, (2002) 2 SCC 27.

⁴⁸ Indian Penal Code 1860 s. 378.

⁴⁹ Indian Penal Code 1860 s. 404.

out without statutory compliance. Additionally, there are other acts involving dead bodies that may result in a *prima facie* offence. Necrophilia can be one of such kind. Addressing these acts requires a different approach and a new philosophy within criminal law is demanded.

1. Organ Transplantation and Organ Recovery

Organ transplantation laws may permit cadaveric organ harvesting. There can be situations where an organ is taken from the dead without following the statutory requirements. For example, under Indian law on organ transplantation, a dead person can be a person in whom the permanent disappearance of life occurs; including a person whose brain stem death is caused.⁵⁰ The procedure with which the confirmation of brain stem death is made under the Act is also irrational.⁵¹ The Act permits human organs from the dead to be taken by the person lawfully in possession of the dead body. Here in the absence of consent for the removal of the organ from the dead is crucial. In case where a potential donor during his lifetime have not made any refusal for transplantation of organ will be presumed to be a consenting person for organ donation posthumously.⁵² This is a presumption adduced to a human being by law made by the State and which will be operative posthumously. Here, the state draws certain presumption that may conflict with the real interest of the dead. The normal presumption in the case of a person who did not express his wellness for organ transplantation during his lifetime should be negative. For instance, if the procedural safeguards mandated by the statute is not complied by the hospital authorities during cadaveric organ harvesting, it will constitute an offence. This indicates that the state recognizes the interests of the dead when formulating such law. There could be a potential argument that the state is protecting the interest of the dead's relatives rather than the dead themselves. However, this argument becomes futile when considering the case of

⁵⁰Transplantation of Human Organs and Tissues Act 1994 s. 2(e) (hereinafter referred to as THOTA).

⁵¹Sec. 3(6) THOTA, the committee is ultimately identified by the hospital where the patient is being treated and such a decision may be biased.

⁵²THOTA s. 3.

an unclaimed body. Moreover, the state's presumption regarding the will of the dead posthumously is flawed. If the state were not concerned with protecting the interests of the deceased, the law could have universally favored cadaveric organ harvesting, regardless of the deceased's or their next of kin's consent.

The aspect of organ and tissue recovery is viewed from two different perspectives. One notion is that the organ and the tissue belong to an individual, and their recovery should only be possible through the consent given by the individual during their lifetime or by their kith and kin or surrogate after death. This model is often referred to as *donation model*, and many countries, like India and the U.S., follows this approach. In the U.K., except in Wales, in the absence of a written will by the deceased, the nominee or heirs decide regarding organ transplantation, which also falls under the donation model.⁵³ Another premise is largely based on the foundation of larger societal interest. Under this scheme, no consent is required in any form to harvest body organ and tissue from the dead. This is referred to as *deceased organ recovery without explicit consent or authorization*.⁵⁴ Under the latter regime, the consent of the dead is presumed, and the ethical justification provided is the moral priority of the society and thereby the obligation of the state to minimize further deaths due to organ failure. Countries like Argentina and Chile in South America, as well as Wales in the U. K., have statutes recognizing *presumed consent*, allowing deceased organ and tissue recovery with explicit consent.⁵⁵ This model also blocks the surrogate's recourse to *opt out*. In another sense, the surrogate has the authority to go against the will

⁵³ Muinzer, Thomas L. "The Law of the Dead: A Critical Review of Burial Law, with a View to Its Development." *Oxford Journal of Legal Studies* 34, no. 4 (2014): 791–818.

⁵⁴ "Ethics of deceased organ donor recovery" Organ Procurement and Transplantation Network, December 2016, accessed on 09 January 2025, available at <https://optn.transplant.hrsa.gov/professionals/by-topic/ethical-considerations/ethics-of-deceased-organ-donor-recovery/>

⁵⁵ Shepherd, L., O'Carroll, R. E., & Ferguson, E. An international comparison of deceased and living organ donation/transplant rates in opt-in and opt-out systems: a panel study. (2014) *BMC medicine* 12, 131.

of the dead and opt out of the process if the law permits it. This is to protect the relational interest and avoid the situation of presumed consent. The discourse leads to three findings: First, body organs and tissues are under the absolute autonomy of the individual, and their wishes should take precedence over any other interest, including larger societal interests. Second, the surrogate or relative has a higher interest, as such person can influence the course of action by exercising opt-out option. Third, societal interest overrides all other interests, thereby obligating the state to ensure larger public health through incorporation of the principle of presumed consent. Both the second and third findings undermine the real interest of an individual regarding organ donation or harvesting.

Almost every legal system considers body organs and tissues, or simply the body as *quasi-property* of the individual. One of the fundamental reasons for viewing it as quasi-property rather than property is to impose restriction on to the modes of alienation, i.e., property can be traded. The only permissible medium for disposition is donation or gift, which lacks the complete essence of the concept of property. Another aspect of property is inheritance or succession, which empowers legal heirs or successors to decide on the property owned by the deceased. By subscribing to the principle of *relational interest* or by recognizing the *opt-out* option for surrogates or legal heirs to decide the ultimate fate of the body. This gives an impression that a person's body is also subject to succession or inheritance. This sanctifies the decision of the heirs or the surrogate (successor). Thus, the involvement of the state in these matters should be minimal. Another logical reason why body is not considered real property is that the state's interference with one's property, even in the case of public interest, is lawful only if the owner is adequately compensated. However, this approach also fails in the context of organ harvesting. However, some exceptions can be observed in the patent regime, where compulsory licensing is permitted in the interest of larger public interest and public health. In any circumstance where the state action is justified on the ground of public interest, there is an established right on the other end. Therefore, by resorting to the justification of larger public good or health, the state, in one way, endorses posthumous rights. Public interest or public health becomes

the only sound reason to restrict the posthumous rights, as is the case with many other rights, such as the right to life, freedom of speech, expression and etc.

2. *Sale of Dead Bodies*

The term "body brokers" may be relatively unfamiliar to the Indian legal system. Beyond organ donation, dead bodies are also used for advanced medical research, and the demand for such bodies is often managed by these body brokers. Various countries have established legal and ethical frameworks for the use of corpses in research,⁵⁶ along with procedures for the preservation and use of dead bodies in medical institutions. The existence of law regulating transactions involving human corpse signifies the recognition of interest of the dead. There are non-transplant tissues banks emerging which again requires for corpse as a commodity.⁵⁷ In earlier times, wills were executed to donate one's body as an anatomical gift, but judicial approaches often disputed such wills as final testamentary dispositions, which could be challenged by the family or next of kin. However, as the demand for human tissues and body parts increased, these wills were treated as full and final. Gradually, many legal systems introduced anatomical donation legislation.⁵⁸ To a certain extent, these legislations have diminished the rights of relatives and next of kin in favor of the interests of the testator. There have been numerous litigations in various legal system disputing property interest over cryo-preserved semen and egg of dead persons. Instances have occurred where the state has disputed the rights of a spouse over the

⁵⁶Body Donation Policy, American Association for Anatomy, accessed 28 September 2023, available at: <https://www.anatomy.org/AAA/AAA/AboutAAA/WhatIsAnatomy/BodyDonationPolicy.aspx#:~:text=The%20shipment%20of%20cadavers%20must,and%20local%20regulations%20and%20reuirements.,> *Anatomy Act 1984* UK, accessed 28 September 2023, available at: <https://www.legislation.gov.uk/ukpga/1984/14>.

⁵⁷"Selling body parts from the dead is becoming a business" Death Investigation Training Academy accessed on 28 September 2024, available at: <https://ditacademy.org/selling-body-parts-from-the-dead-is-becoming-a-big-business/>.

⁵⁸ Michigan Law Review. "The Sale of Human Body Parts." *Michigan Law Review*, (1974) 72 no. 6, 1182.

semen or eggs of the deceased spouse, thereby recognizing posthumous interests.⁵⁹

The involvement of economic interests and intermediaries is another critical aspect to consider in light of cadaveric transactions. Upon examination of U.S. State legislations on anatomic gift,⁶⁰ it becomes evident that most statutes either favor or remain silent on these points. In the early days of such legislation, only Massachusetts law explicitly prohibited monetary consideration in these transactions. The state's attitude towards intermediaries and financial concerns can be interpreted in two dimensions. On one hand, this approach may stem from the state's interest in regulating exploitation. On the other hand, it may aim to protect the interest of donors while encouraging donations to meet the growing demand. In both scenarios, the state demonstrates respect for the interest of the donor. In the first case, by addressing exploitation, the state ensures that private parties do not make unwarranted interventions that undermine the genuine interests of the dead. For example, individuals should not be coerced into donating their bodies after death due to financial pressures, nor should their religious choice regarding their remains be interfered with. This again underscores the recognition of posthumous interest.

3. *Necrophilia*

Any legal system evolves by identifying the deficits in its legal philosophy through experiences and strives to improve. Recently, an Indian High Court encountered the question of whether necrophilia should be included within the scope of the offence of rape.⁶¹ The court concluded that a sexual act amounting to rape on a dead body does not constitute an offence under section 375 of the Indian Penal Code (IPC). According to the dictionary meaning, necrophilia refers

⁵⁹ Krebs, J. D. "Any Man Can Be a Father, But Should a Dead Man Be a Dad." *Hofstra Law Review* (2018) 47 no. 2, 774. Kindregan, C. P. (2015) "Dead Soldiers and Their Posthumously Conceived Children." *J. Contemp. Health L. & Policy* (2015) 31, 74.

⁶⁰ Uniform Anatomical Gift Act 1960

⁶¹ Ranga Raju alias Vajapeyi v State of Karnataka, Criminal Appeal No 1610/2017 decided on 30.05.2023.

to an act of sexual intercourse with a dead body. The conclusion of the Karnataka High Court judgment conveyed that a sexual act with a dead woman does not amount to an offence of rape, as personhood cannot be attributed to the dead. In this context, it requires re-examination of the essential ingredient constituting the offence of rape. Section 375 of the IPC uses the phrase '*against her will and without her consent*'. Applying this to the act of sexual intercourse with a dead body as an act against her will is subjected to scrutiny. For instance, consider the status of sexual intercourse by a man with a woman in a vegetative state or with a mentally retarded woman. In such cases, the law presumes the act to be against her will. This approach is justifiable as it undoubtedly violates the victim's dignity and interests. A similar approach should be adopted in cases of necrophilia. Although the woman is dead, the act of sexual intercourse should be treated as being against her will and, therefore, should be criminalized. Interpreting the phrase "*without her consent*" in the context of a dead body would require assessing the capacity of the dead to consent, which would undoubtedly derail the course of judicial interpretation and discussion. In this light, the Karnataka High Court's decision in this instant case appears erroneous. Even in the absence of any specific provision, necrophilia can rightly be considered an offence under section 375 of the IPC.

Necrophilia can be considered an independent offence distinct from rape. Globally, various legal systems have enacted special legislations to address necrophilia, considering the status of rights of the dead can be analyzed. The existence of such laws highlights the need to safeguard the interest of the dead. In some jurisdictions, even attempts at necrophilia are criminalized. Rape on a dead body may occur simultaneously with the act of causing death, but this should not be conflated with necrophilia. The legal question of whether death or the act of rape occurred first in such cases is often irrelevant and unsound. Necrophilia should be understood as a situation where a person exhibits sexual attraction or acts upon a dead body, typically long after death has occurred. Thus, laws addressing necrophilia are not concerned with cases of rape accompanied by death but rather with sexual acts involving a corpse. The existence of such laws, or the demand for separate law on necrophilia, as highlighted in the

Karnataka High Court judgment, underscores the necessity of protecting the interests of the dead.

The presence or absence of a distinctive provision addressing necrophilia remains a significant concern across various legal systems, rather than merely extending the offense of rape to include instances of necrophilia. In the United States, courts have noted the absence of specific offence of necrophilia in its penal law, often resorting to less directly applicable laws to address such cases.⁶² Conversely, countries like the United Kingdom have enacted specific legal systems with statutory provisions to criminalize necrophilia, reflecting a more direct approach to this issue.⁶³ Distinction between necrophilia and rape often hinges on the concept of personhood. The reluctance to recognize the personhood and rights of the dead demands a call for having separate law addressing necrophilia. If the law can comprehend the impact of rape upon a normal living being, a lunatic, or an unsound person, it should also treat the act with the same vigor when committed against a dead body. This argument goes in align with the premise of dignity which persists beyond life. Therefore, any act of sexual assault, including rape, shall be treated with equal severity regardless of whether the victim is alive or deceased. This perspective aligns with the notion that posthumous rights are ultimately an extension of an individual's rights after death that remains a complex and evolving area of jurisprudential conundrum.

Posthumous Justice

The narrative of Joel Feinberg on posthumous interests posits that any contravention upon these interest constitutes posthumous harm. Such contravention can manifest in various forms, including the abrogation of a will, non-discharge of contractual liabilities and defamation. Over time, the nature of these harms have changed significantly. The existence of posthumous interest has been established, and safeguarding these interests will be the greater

⁶² State v Alexander Grumke 2007 WI App. 198 (Wis. Ct. App. 2007)

⁶³ Sexual Offences Act 2003 s. 70(1). Also see R v David Fuller, accessed on 9.1.2025 <https://www.judiciary.uk/wp-content/uploads/2022/12/R-v-David-Fuller-sentencing-remarks-071222.pdf>

question in ensuring posthumous justice. In the absence of claimant, these interests can create confusion. Claims may be pursued by the dead's relatives or by the state. In line with this aspect, a second narrative leads to the consideration of overriding interests concerning the dead's interests. When a third party claims the dead's interests, and as long as the law permits such interference, the outcome may not favor the dead's interests. Therefore, the rule for determining posthumous justice should be based on the extent to which the law permits third-party interferences with posthumous interests. Consequently, posthumous justice is a broader and more precise concept than posthumous rights.

The dignity of the dead is undisputed, with the Indian Supreme Court has reflected upon this principle. Dignity encompasses a range of rights, and its recognition implies the presence of human rights. Law can either confirm right to dignity to the dead or disapprove its existence. Once a legal system approves the dignity to the dead, it is obliged to safeguard these rights, even against the interest of the third parties. This obligation is integral to safeguard posthumous rights. Significantly, this aligns with the operation of criminal law, where the state acts independently of the victim's interests. The state must protect at least certain rights of the dead. If an offense against the dead is incorporated into penal law, the state is compelled to enforce it. Ultimately, the goal is to ensure justice for the dead. When the question of posthumous justice is limited to the personhood of the dead, the system may find reasons to limit or disregard the system posthumous interests.

According to Jhering, 'law is ultimately for the reconciliation of conflicting interests and not for the protection of abstract rights'⁶⁴ In this context, the legal protection of the dead's interests need not be identified with abstract rights. The presence of conflicting interests posthumously is analogous to the concept of posthumous justice. When a legal system recognizes the need to reconcile conflicts

⁶⁴ (2009). "Criminal Law — Statutory Interpretation — Wisconsin Supreme Court Applies Sexual Assault Statute to Attempted Sexual Intercourse with a Corpse. — *State v. Grunke*, 752 N.W.2d 769 (Wis. 2008)." *Harvard Law Review*. 122(6): 1780-87.

involving the interest of the dead on one hand, such system demands an emphasis for posthumous justice. In cases of necrophilia, cadaveric organ harvesting, sale of dead bodies and autopsy the interest of the dead often present conflicts between the dead's interests and other stakeholders. Every state is bound to draw reasonable boundaries that balance these conflicting interests. The enactment of state laws addressing these concerns and the very presence of these laws serves as concrete evidence of posthumous interest.

In summary, posthumous justice represents the state's responsibility to address conflicts involving posthumous interest. This approach does not require a proven theory of personhood or posthumous rights. By resolving these conflicts, the state effectively upholds the rights of the deceased. The application of posthumous justice may vary between states and individual cases. Even in the absence of specific law, the state may be compelled to address posthumous justice issues. The judiciary has recognized this responsibility, as evidenced by decisions such as the Supreme Court of India's rulings in the cases of *Paramanand Katara* and *Mohammad Latief Magrey*. Posthumous justice is a concept that aligns with the interest theory of rights, which holds that individuals in a vegetative state or the unborn possess rights. Similarly, the same analogy can be extended to posthumous rights.⁶⁵ Therefore, posthumous justice is not a vague notion justifying claims on behalf of the dead; rather, it is a strong theoretical premise that justifies the state's responsibility to protect the interest of the dead.

Conclusion

Posthumous justice represents a paradigm shift in addressing posthumous rights, offering a practical and exponential solution to resolve the emerging questions concerning the rights of the dead. It is both impractical and outdated to rely solely on the concept of personhood and the potential of holding the rights by the dead for addressing the issues relating posthumous interest. The conception of posthumous justice in that sense is novel, practical and theoretically

⁶⁵ K. R. Smolensky, "Rights of the Dead." *Hofstra Law Review* (2009) 37, 763.

sound. Cases involving posthumous interests will be frequently encountered by the courts even in the absence of specific state laws. Issues such as the refusal of autopsies, holding necrophilia as an offence amounting to rape and need for the state control over sale of dead bodies in lieu of anatomy gift may be affirmatively decided by the courts. This may provoke the state to enact or amend laws in the future, reflecting a positive evolution in the jurisprudence of posthumous justice.

In advancing the scope of posthumous justice, the state must play a leading role, acting as the representative and reconciler of conflicts on behalf of the dead. In the absence of a will, the principle of posthumous justice should preclude the involvement of third parties other than the state. The judiciary should uphold this core rule when interpreting posthumous interest. The state can justify its position through the doctrine of *parens patriae*. The constitutional premises in any democratic system that embraces the concept of a welfare state strengthens the conception of posthumous justice. Posthumous justice is also supported by the principle *perpetual minority*, wherein the dead can be treated as perpetual minors with respect to the protection of their basic rights, including reputation, dignity, privacy and property. The state is best positioned to safeguard these rights, and the concept of the best interest of the dead further justifies posthumous justice.⁶⁶ However, posthumous justice never intends for its theoretical premises to be expanded indiscriminately. The limits and boundaries of the rights of the dead will be determined by the state, based on the extent of aggression caused to posthumous interest. Thus, the state must define and design the areas of posthumous interest.

The debate on posthumous rights extends beyond the selected areas previously discussed, encompassing a vast and continually evolving domain. In the digital age, questions surrounding posthumous rights are poised to become more prominent,

⁶⁶“Best interest in case of medical intervention is based on the autonomy and decision made by a mentally competent patient. If the person is unable to decide, the decision will be taken on the basis of expert opinion by the next kin of the patient. As the dead herein is unable to decide the State will occupy the position to identify his best interest based on the will or otherwise.”

particularly concerning access to digital repositories of the dead. Technological advancements invariably raise the questions of posthumous justice. Technology on the preservation of biological samples presents challenges regarding the ownership of such preserved materials after death. Similarly, data owned by an individual during their lifetime can pose challenges and limitations for survivors seeking access after the individual's death. Addressing these challenges requires a legal framework that redefines the concept of personhood of the dead. For instance, incorporating specific clause in contracts can enable survivors to access both the biological and digital resources of the dead. Therefore, exploring the jurisprudence of posthumous rights holds not only having present significance but also huge potential in the future.

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