

# **Funerary rites and rights of the dead: Jurisprudence on Covid-19 deaths in Kenya, India and Sri Lanka**

Conrad Nyamutata

Senior lecturer in international law, De Montfort University Law School, Leicester, UK.  
conrad.nyamutata@dmu.ac.uk

## **Abstract**

Pandemics are associated with exponential mortality rates, creating heavy burdens on communities. The high death rates affect how societies traditionally conduct funerary practices as governments impose regulations on the preparation of bodies and the conduct of the funerals to stem the transmission of the disease. In societies associated with deeply entrenched customary funerary practices, such limitative measures attract defiance. The tensions between public health objectives and funerary traditions have played out in a number of societies during the pandemic, resulting in litigation. At the core of the disputes is whether the right to manifest religion or belief can be upheld and relatedly, whether the decedents have rights to dignified burials. During the Covid-19 pandemic, some courts had to grapple with these difficult questions. In this paper, I take a jurisprudential excursion on some disputes in Kenya, India and Sri Lanka to assess the adjudication of conflicts which arose from Covid-19 pandemic deaths.

**Keywords:** Covid-19, funerary rites, human rights, Africa, Asia, Kenya, India, Sri Lanka

## **1. Introduction**

Disease outbreaks with high mortality rates create a heavy burden on societies, increasing the number of fatalities to be dealt with over a short period of time. Furthermore, such high numbers of deaths raise issues about how the bodies should be prepared and how funerals might be conducted without furthering transmission of the disease,<sup>1</sup> or should be permitted at all. Death has always been associated with rituals. Anthropological research shows that, in Europe, people

---

<sup>1</sup> S. Ripoll 'Death and Funerary Practices in the Context of Epidemics: Upholding the Rights of Religious Minorities' (2020) CREID Working Paper Volume 2020 (03)

have been burying their dead dating back to approximately 130,000 years ago.<sup>2</sup> In non-Western societies, the events associated with death are perceived as the key cultural events. In places like Africa and Asia, funerals are ritualistic; they are much more elaborate affairs accompanied by cultural and religious rites.<sup>3</sup> Death rituals and the mourning practices of Africans, for instance, are varied because of the existence of so many religious and cultural practices.<sup>4</sup> When death occurs in most African societies, divination as to the etiology of disease and death is sought from dead ancestors. Metaphysical causes are associated with the spiritual realm such as witchcraft and punishment from God or ancestral spirits, for breaking taboos and various forms of transgressions,<sup>5</sup> rather than medical or physical reasons.<sup>6</sup> Mourning and funeral rites are important sites of sociality for the processing of loss, ritual cleansing and renewal.<sup>7</sup>

As of 13 April 2022, there had been 499 119 316 confirmed cases of Covid-19, including 6 185 242 deaths, reported to WHO.<sup>8</sup> Europe (1 961 790) and the Americas (2 710 584) accounted for the highest numbers of fatalities. With poor health facilities, countries in the Global South incurred increased deaths amid an unequal distribution of vaccines. Africa, as a region, had been spared the worst ravages of the virus in the first and second wave, but experienced a growing number of infections and deaths during the third wave. Of total figures, 8 670 466 infections and 171 000 deaths were reported in Africa.<sup>9</sup> Higher death rates were also recorded in Asia. With the emergence of the Delta variant, Southeast Asia registered more than 781 000 Covid-19 deaths. India had the highest number of confirmed fatalities in the Asia Pacific region, with over 521 736 deaths.<sup>10</sup> Sri Lanka, as a country of interest for this paper, experienced more than 660

---

<sup>2</sup> M.D Russell 'Mortuary practices at the Krapina Neandertal site,' *American Journal of Physical Anthropology* 72 (1987) 381–397.

<sup>3</sup> A.E Omonisi 'How COVID-19 pandemic is changing the Africa's elaborate burial rites, mourning and grieving,' *Pan Afr Med J.* 35 (Suppl 2) (2020) 81.

<sup>4</sup> B. Koenig and P. Marshall 'Death (Cultural Perspectives)' In: S G Post (eds) *Encyclopedia of Bioethics*. 3rd ed. Vol. 2. (New York, USA: Thomson Gale; 2004) 546–58

<sup>5</sup> J. Kinsman "'A time of fear": local, national, and international responses to a large Ebola outbreak in Uganda,' *Global Health* 8 (15) (2012) 1.

<sup>6</sup> F. Eyetsemitan 'Cultural Interpretation of Dying and Death in a non-western Society: The Case of Nigeria,' *Online Readings in Psychology and Culture* 3(2) (2002) 1

<sup>7</sup> H. Canham 'Thanatopolitics and Fugitive Mourning in Pandemic Death,' *African Safety Promotion: A Journal of Injury and Violence Prevention* 19 (1) (2021) at 1

<sup>8</sup> WHO Coronavirus (COVID-19) Dashboard 13 April 2022 <https://covid19.who.int/table>

<sup>9</sup> Ibid

<sup>10</sup> Ibid

000 infections and nearly 16 500 deaths at the time of writing.<sup>11</sup> In late 2021, South African scientists brought attention to a new highly transmissible but less virulent variant, Omicron.<sup>12</sup>

These high mortalities, within a relatively short period of time, created a heavy burden on societies. The scale of the crisis becomes clearer when, assuming the affected societies wished to conduct customary final rites for their dead, one considers that more than 6 million funerals would have to be conducted. However, genuine fears existed that such gatherings would be the *loci* for further contagion. Amid the spate of these fatalities, governments across the globe imposed, among other rules, restrictions on public gatherings and travel as well as attendance of funerals. In European countries, funeral venue managers were instructed to impose caps on numbers to ensure social distancing can be maintained.<sup>13</sup> Similarly, in Africa, governments introduced restrictions. In Ghana, for example, the President, Nana Akufo-Addo, issued directives that all funeral services must not exceed two hours and only family members were allowed to attend.<sup>14</sup> Likewise, the South African government directed that attendance of a funerals and cremations would be limited to 50 persons or less and if the venue was too small to hold the prescribed number of persons observing a distance of at least one-and-a-half metres from each other, then not more than 50 percent of the capacity of the venue may be used, subject to strict adherence to all health protocols and all persons maintaining a distance of one and a half metres from each other.<sup>15</sup> The duration of a funeral or cremation service was restricted to a maximum of two hours.<sup>16</sup> Similar rules were imposed by governments across the continent.

However, the curtailments struck at the heart of established grieving cultural norms, with associated adverse effects. While I have discussed the impact on communities, individuals were also affected by the pandemic. About 4 in 10 adults in the US, for example, reported symptoms of anxiety or depressive disorder during the pandemic. A KFF Health Tracking Poll from July 2020 found that many adults were reporting specific negative impacts on their mental health and

---

<sup>11</sup> Ibid

<sup>12</sup> T. Lister and D. McKenzie, 2021 'How South African scientists discovered Omicron and set off a global chain reaction' CNN, 2 December.

<sup>13</sup> See 'Answer given by Mr Breton on behalf of the European Commission: Question reference: E-003018/2020 (Subject: Regulating funeral services in the EU during the COVID-19 crisis)' European Parliament, 17 July 2020; Retrieved 5 January 2022. [https://www.europarl.europa.eu/doceo/document/E-9-2020-003018-ASW\\_EN.html](https://www.europarl.europa.eu/doceo/document/E-9-2020-003018-ASW_EN.html)

<sup>14</sup> M. Oduor, 2021 'Covid-19: Ghanaians issued two hours to finalise ceremonies, funerals,' *Africa News* 26 July.

<sup>15</sup> See Gazette 44911, section 35. (1) Disaster Management Act: Regulations: Alert level 3 during Coronavirus COVID-19 lockdown 30 July 2021; Gazette 44895 of 25 July 2021 as amended by Gazette 44911 of 30 July 2021.

<sup>16</sup> See 'Disaster Management Act: Regulations: Alert level 3 during Coronavirus COVID-19 lockdown 35 (5)'

well-being, such as difficulty sleeping (36%) or eating (32%), increases in alcohol consumption or substance use (12%), and worsening chronic conditions (12%), due to worry and stress over the coronavirus.<sup>17</sup> In the UK, an Institute of Fiscal Studies research, taking account of pre-pandemic trajectories, concluded that mental health had worsened substantially (by 8.1% on average) as a result of the pandemic.<sup>18</sup> Another study found ‘increased psychological morbidity was evident in this UK sample and found to be more common in younger people, women and in individuals who identified as being in recognised COVID-19 risk groups.’<sup>19</sup> The Covid-19 pandemic had alarming implications for individual and collective health and emotional and social functioning.<sup>20</sup>

The restrictions on funerals only exacerbated the impact on mental health among the bereaved. The handling and memorialisation of dead bodies are often most distressing in those cases where they are considered not to happen properly.<sup>21</sup> According to Doka, ‘disenfranchised grief’ is the process in which the loss is felt as not being ‘openly acknowledged, socially validated, or publicly mourned.’<sup>22</sup> Covid-19 regulations meant the bereaved were deprived of the ability to perform established funerary formalities. The Covid-19 pandemic and the dramatic rise in deaths meant that mourning, rites, sociality and potential renewal were fundamentally disrupted.<sup>23</sup> While the likely impact of the restrictions on mental health and bereavement is unknown, research has generally concluded that the benefit of after-death rituals, including funerals, depended on the ability of the bereaved ‘to shape those rituals and say goodbye in a way which is meaningful for them.’<sup>24</sup> The disenfranchisement of grief fomented widespread resentment. In the UK, a striking image of the Queen, sitting lonesome, at the funeral of her

---

<sup>17</sup> N. Panchal, R. Kamal and C. Cox et al ‘The Implications of COVID-19 for Mental Health and Substance Use’ (KFF, 2021)

<sup>18</sup> J. Banks and X. Xu ‘The mental health effects of the first two months of lockdown and social distancing during the Covid-19 pandemic in the UK’ IFS Working Paper W20/16

<sup>19</sup> R. Jia, K. Ayling and T. Chalder et al ‘Mental health in the UK during the COVID-19 pandemic: cross-sectional analyses from a community cohort study’ *BMJ Open* (2020) at 1

<sup>20</sup> B. Pfefferbaum ‘Mental Health and the Covid-19 Pandemic,’ *New England Journal of Medicine* 383 (2020) 510-512

<sup>21</sup> C. Verdery *The political lives of dead bodies: reburial and postsocialist change*. (New York: Columbia University Press, 2000); M. Engelke ‘The anthropology of death revisited,’ *Annu Rev Anthropol* 48 (2019) 29–44.

<sup>22</sup> K.J Doka *Disenfranchised Grief: Recognizing Hidden Sorrow* (Lexington, MA: Lexington Books, 1989) at xv.

<sup>23</sup> H. Canham ‘Thanatopolitics and Fugitive Mourning in Pandemic Death’ (n 7)

<sup>24</sup> A. Burrell and L E. Selman ‘How do Funeral Practices Impact Bereaved Relatives’ Mental Health, Grief and Bereavement? A Mixed Methods Review with Implications for COVID-19’ *OMEGA—Journal of Death and Dying*, 1–39 (2020) at 1-2

husband, became the symbolic representation of disenfranchised grief, triggering calls for the lifting of the restrictions.<sup>25</sup>

In some parts of the world, the tension between traditional funerary practice and the law manifested through defiance. In South Africa, burials were allowed but some families flagrantly ignored the established regulations and protocols. As already noted, funerals have been characterized by close contact in gatherings. However, social distancing – the most widely recommended measure - was not necessarily followed. For instance, food and water were shared, and people sat close to each other exchanging pleasantries.<sup>26</sup> A cultural practice such as the washing of hands in one basin after the funeral was still practiced. Furthermore, covering of the mouth using mask was not strictly applied. Singing, which is common at funerals, posed the threat of spreading of droplets containing the virus.<sup>27</sup> Similar disregard for the limitations was observed elsewhere on the continent.<sup>28</sup>

As in most parts of Africa, funerals in Asia are also marked by elaborate quintessence. In attempt to curb rising infection, the Indian central government also introduced new guidelines prohibiting bathing or embalming the corpse of a Covid-19 victim and banned relatives from kissing or hugging the body to avoid any risk of transmitting the virus; embalming of dead body was not be allowed.<sup>29</sup> Therefore, burials were also allowed under strict regulations. The government of Sri Lanka introduced similar regulations. The regulations aligned with the WHO guidance on ‘Infection Prevention and Control for the safe management of a dead body in the context of COVID-19.’<sup>30</sup> The WHO guidelines allowed washing the body but wearing gloves.<sup>31</sup>

---

<sup>25</sup> J. Bowden, 2021 ‘UK government pressured to ease COVID-19 funeral restrictions after photo of queen sitting alone goes viral’ *The Hill*, 19 April.

<sup>26</sup> I. Festus Jaja, M, Umunna Anyanwu & C. Iwu Jaja ‘Social distancing: how religion, culture and burial ceremony undermine the effort to curb COVID-19 in South Africa,’ *Emerging Microbes & Infections* 9 (1) (2020) 1077-1079,

<sup>27</sup> Ibid

<sup>28</sup> See e.g, R. Sachiti 2021 ‘Zimbabwe: Covid-19 Community Deaths Increase - Funerals, Defiance’ *The Herald*, 22 July; R Maclean 2020 ‘Covid-19 Outbreak in Nigeria Is Just One of Africa’s Alarming Hot Spots’ *The New York Times*, 23 July.

<sup>29</sup> See ‘COVID-19: Guidelines on dead body management’ Government of India Ministry of Health & Family Welfare Directorate General of Health Services (EMR Division) 15.03.2020, at 5 and 6

<sup>30</sup> WHO, ‘Infection Prevention and Control for the safe management of a dead body in the context of COVID-19 Interim guidance’ 24 March 2020, [https://apps.who.int/iris/bitstream/handle/10665/331538/WHO-COVID-19-IPC\\_DBMgmt-2020.1-eng.pdf](https://apps.who.int/iris/bitstream/handle/10665/331538/WHO-COVID-19-IPC_DBMgmt-2020.1-eng.pdf)

<sup>31</sup> Ibid, pp.2-3.

Perhaps, WHO was also observing the right ‘to express or practice one’s belief’, which is recognized in international human rights law.

However, against the backdrop of unrelenting mortalities, both the Sri Lankan and Indian governments later imposed mandatory cremations, provoking an outcry among communities unaccustomed to incinerations of the decedents. In India, the majority of population is Hindu, who favour cremation as a way of disposing of the body. In Hinduism, cremation is traditionally the most important part of the funeral rites because Hindus believe the body must be destroyed to force the soul to separate from it.<sup>32</sup> But the Muslim population in India, which is close to 15%, favors burying its dead.<sup>33</sup> The Muslims in Sri Lanka and Bangladesh follow similar funerary practices, as opposed to cremations.

Apart from the ritualistic fastidiousness, and as observed from the commonplace disobedience of the rules, the approaches to death and funerals in Africa and Asia have been communalistic. Funerary events in Africa, for example, have often been perceived to be a realm of social life that is more ‘traditional’ than others.<sup>34</sup> Religious traditions, kin groups, and social relationships in general play a stronger role in funerals than in the West, where such events are ordinarily handled in more intimate and smaller circles.<sup>35</sup> Contrastingly, in Africa, entire neighborhoods and villages are drawn to them, and family members and friends who have migrated to other areas and countries are lured back.<sup>36</sup> The aspiration for dignity is performed as pageantry and excess at funerals.<sup>37</sup>

---

<sup>32</sup> See ‘India coronavirus: Round-the-clock mass cremations’ BBC 28 April 2021 <https://www.bbc.co.uk/news/in-pictures-56913348>

<sup>33</sup> For burial rites in India, see P. Laungani (Honorary Senior Research Fellow and President) ‘Hindu deaths in India’—Part 1, *International Journal of Health Promotion and Education*, 39 (3) (2001) 88-96, DOI: 10.1080/14635240.2001.1080617; D. Arnold ‘Burning Issues: Cremation and Incineration in Modern India’ *Brennende Fragen: Feuerbestattung und Einäscherung im modernen Indien*. NTM. 2016;24(4):393-419. doi:10.1007/s00048-017-0158-7; N. Mikles ‘Indians are forced to change rituals for their dead as COVID-19 rages through cities and villages’, *The Conversation* x4 May 2021 <https://theconversation.com/indians-are-forced-to-change-rituals-for-their-dead-as-covid-19-rages-through-cities-and-villages-160076>

<sup>34</sup> M. Jindra and J. Noret ‘Funerals in Africa: An introduction’ in M Jindra and J Noret *Funerals in Africa: Explorations of a Social Phenomenon* (Berghahn Books, 2011) at.6

<sup>35</sup> *Ibid* p.5

<sup>36</sup> *Ibid*

<sup>37</sup> *Ibid*

Therefore, the two features of funerary practice – sociality and ritualism – described as the ‘erotics of mourning,’<sup>38</sup> were deemed to create fertile conditions for the spreading of infection. The human contact – including with the dead - associated with such ceremonies, runs antithetical to the public health objectives of containment during the spread of highly infectious viruses. It is the reason that such gatherings earned the epithet ‘super-spreaders’<sup>39</sup> even during previous pandemics. During the Covid-19 pandemic, the term ‘super-spreader’ re-entered our consciousness, denoting events, settings and individuals with potential of transmitting the virus; it is connected to the scientific nature of the virus and the way it manifests in some humans.<sup>40</sup>

The tension between public health science and ‘erotics of mourning’ is vexing. Biomedicine perceives death as mostly an individual matter, rather than a social and communal affair.<sup>41</sup> The management of disease outbreaks privileges scientifically-based methods of combatting the spread of highly infectious diseases, with very little considerations of the impact on traditional and religious practices.<sup>42</sup> Ripoll argues that these paradigms are essentially ‘secular’ in that they imply that nothing of importance occurs to the person beyond death, and at the moment of death, the person as a subject becomes an object, a body.<sup>43</sup> The transcendence to a non-physical world is unrecognised. The scientific paradigm couches after-death care such as preparing the dead person for burial or cremation, transporting them, and commemorating them through ceremonies, as a locus for contagion requiring regulation and policing.<sup>44</sup>

Culture and religion thus become residual, a world of meaning and practices outside the ‘real world’ of disease to be either overcome, subverted, or harnessed. Conflict or tensions with religious communities often emerge when their public health needs are pitted against other needs. In the case of the care of the dead, conflict emerges as the symbolic, social, and emotional aspects

---

<sup>38</sup> J. D Williams, ‘Jean Toomer’s “Cane” and the erotics of mourning’ *The Southern Literary Journal* 40 (2) (2008) 87–101.

<sup>39</sup> G. Wong, W. Liu and Y. Liu, et al, ‘MERS, SARS, and Ebola: The Role of Super-Spreaders in Infectious Disease,’ *Cell Host & Microbe*, 18 (4) (2015) 398-401.

<sup>40</sup> E. Cave ‘COVID-19 Super-spreaders: Definitional Quandaries and Implications,’ *Asian Bioeth Review* 12(2) (2020) 235–242.

<sup>41</sup> S. Ripoll ‘Death and Funerary Practices in the Context of Epidemics: Upholding the Rights of Religious Minorities,’ 3 CREID Working Paper (2020)

<sup>42</sup> C. O Airhihenbuwa, *Health and culture: beyond the western paradigm* (Thousand Oaks, CA: Sage, 1995) at 152

<sup>43</sup> Ripoll ‘Death and Funerary Practices in the Context of Epidemics: Upholding the Rights of Religious Minorities’ (n 41)

<sup>44</sup> C Lynteris and N Evans *Histories of Post-Mortem Contagion: Infectious Corpses and Contested Burials* (Cham: Springer International Publishing, 2018)

of mortuary and funerary practices which included caring for the dead, may be jeopardised by response guidelines on ‘safe burials’.<sup>45</sup>

The marginalisation of deeply-entrenched social norms of grieving by governments would, inevitably, generate tension. To be sure, the WHO guidelines on Covid-19 did not entirely proscribe cultural practices. The guidelines sought to strike a difficult and delicate balance between observing burial rites, under strict conditions, and virus containment. To begin with, WHO initial guidelines asserted that, at the time, ‘there was no evidence of persons having become infected from exposure to the bodies of persons who died from COVID-19’<sup>46</sup>, hence the permission to wash bodies wearing gloves.<sup>47</sup> In both the previous and updated September 2020 guidelines, WHO recognised that ‘cremation was a cultural choice’.<sup>48</sup> However, as the deaths soared, some governments chose to depart from the guidance, electing to impose stricter regulations, including compulsory and indiscriminate cremations.

These draconian approaches provoked the human rights discourse on status of cultural rights. The WHO guidelines and human rights law became veritable reference points for bereaved families and relatives insisting on burial rites. The nexus between responses to Covid-19 and human rights, both civil and political rights as well as social and economic rights, has been discussed generally.<sup>49</sup> However, there has been little discussion on rights associated with burial rites and the rights of the decedents during the Covid-19 pandemic. Furthermore, emergent jurisprudence on funerary rites, public health and human rights during the pandemic has been unexplored. A number of cases on this tension were adjudicated. A cross-cultural analysis of the jurisprudence in Africa and Asia, two quintessentially cultural geographical spaces, is quite

---

<sup>45</sup> Ripoll ‘Death and Funerary Practices in the Context of Epidemics: Upholding the Rights of Religious Minorities’ (n 41)

<sup>46</sup> WHO, ‘Infection Prevention and Control for the safe management of a dead body in the context of COVID-19 Interim guidance’ (n 30) at.1

<sup>47</sup>Ibid, pp.2-3

<sup>48</sup> WHO, ‘Infection Prevention and Control for the safe management of a dead body in the context of COVID-19 Interim guidance’ WHO/2019-nCoV/IPC\_DBMgmt/2020.1 4 September, 2020, at 1

<sup>49</sup> A. Lebreton ‘COVID-19 pandemic and derogation to human rights’ *Journal of Law and the Biosciences* 7(1) (2020) 1–15; S. Joseph, ‘International Human Rights Law and the Response to the covid-19 Pandemic,’ *Journal of International Humanitarian Legal Studies* 11(2) (2020) 249-269. L. Forman & J. C. Kohler ‘Global health and human rights in the time of COVID-19: Response, restrictions, and legitimacy,’ *Journal of Human Rights* 19(5) (2020) 547-556; S. Sekalala, L. Forman and R. Habibi, et al ‘Health and human rights are inextricably linked in the COVID-19 response,’ *BMJ Global Health* 5(2020); H. Wong & E. Wong ‘What COVID-19 revealed about health, human rights, and the WHO,’ *Journal of Human Rights* 19(5) (2020) 568-581; P. J. Hotez, J. A. Huete-Perez and M. E. Bottazzi ‘COVID-19 in the Americas and the erosion of human rights for the poor,’ *PLoS Negl Trop Dis* 14 (12) (2020).



insightful. In this paper, I discuss the cases on Covid-19 deaths brought before the courts in Kenya, India and Sri Lanka. The discussion is particularly significant in determining appropriate approaches to cultural practice and public health measures in future pandemics. What is apparent from the excursion is that jurisprudence largely recognizes the rights of the bereaved and the dead even in the worst of times. Therefore, future state responses and policy would have to accommodate funerary rites during highly infectious and fatal disease outbreaks.

The paper unfolds as follows. The first section discusses the corpus of human rights associated with funerary rites. It also interrogates the status of the dead within the context of human rights. The subsequent parts are devoted to the discussion of jurisprudence on Covid-19 deaths and funerary rites, starting with seminal litigation on a suspected Covid-19 death adjudicated in Kenya. In the final section, the paper then shifts to the conflicts and litigation on Covid-19 deaths cases in Asia, with references to India and Sri Lanka.

## **2. Human rights and funerary rites**

The right to express or practice one's belief is recognized in international human rights law. Article 18 of Universal Declaration on Human Rights (UDHR) states that: 'Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.'<sup>50</sup> Article 18 of the ICCPR<sup>51</sup> adopts language nearly identical.<sup>52</sup> Article 27 of the ICCPR further says that: 'In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.' As such, the right is also considered a collective right. It allows people to manifest burial rites 'in community with others', usually in 'public.' The Human Rights Committee General Comment No 22 elaborates by pointing out that the freedom to manifest religion or belief in worship,

---

<sup>50</sup> See Article 18, UDHR.

<sup>51</sup> See 'International Covenant on Civil and Political Rights' Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966 entry into force 23 March 1976, in accordance with Article 49

<sup>52</sup> See Article 18 'International Covenant on Civil on Civil and Political Rights (ICCPR)'; see also e.g. Article 9, European Convention on Human Rights.

observance, practice and teaching encompasses a broad range of acts. The concept of worship extends to ritual and ceremonial acts giving direct expression to belief, as well as various practices integral to such acts.<sup>53</sup>

However, this freedom is not absolute: 'Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.'<sup>54</sup> Nonetheless, such restriction should not be discriminatory. If there is a less restrictive alternative, the greater interference will not be permitted. Article 21 of the ICCPR also recognizes the right to 'peaceful assembly;' no restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in democratic society in the interests of national security, public order, the protection of public health or morals or the rights or freedom of others.<sup>55</sup>

I have argued elsewhere that during pandemics, civil liberties become subordinate to public health measures.<sup>56</sup> The realm of death also falls under the set of economic, social and cultural rights (ESCR). Observers suggest that the whole category has generally been neglected in comparison to civil and political rights, especially 'cultural rights.'<sup>57</sup> The Committee on Economic, Social and Cultural Rights noted that the pandemic had 'deep negative impacts on the enjoyment of ESCRs, especially the right to health of the most vulnerable groups.'<sup>58</sup> The Committee, however, made scant reference to the effect of the pandemic on 'cultural and community events such as religious services, weddings or funerals.'<sup>59</sup> It noted, nonetheless, that government edicts impact on ESCR during pandemics.<sup>60</sup>

---

<sup>53</sup> UN Human Rights Committee (HRC), *CCPR General Comment No. 22: Article 18 (Freedom of Thought, Conscience or Religion)*, 30 July 1993, CCPR/C/21/Rev.1/Add.4, para 4

<sup>54</sup> ICCPR Article 18 (3)

<sup>55</sup> ICCPR Article 21

<sup>56</sup> C. Nyamutata, 'Do Civil Liberties Really Matter During Pandemics?', *International Human Rights Law Review* (2020) 62-98.

<sup>57</sup> See 'Submission of the International Commission of Jurists for the Day of Discussion on the Right to Participate in Cultural Rights Convened by the Committee on Economic, Social and Cultural Rights' U.N. Doc. E / C.12 / 40 / 7, at 1 (9 May, 2008). Retrieved 10 January 2022. <http://www2.ohchr.org/english/bodies/cescr/docs/discussion/InternationalCommissionJurists.pdf>

<sup>58</sup> See 'Statement on the Covid-19 Pandemic and Economic, Social and Cultural Rights,' *International Human Rights Law Review* 9(1) (2020) at 135 para 2

<sup>59</sup> *Ibid*, para 1

<sup>60</sup> See 'Statement on the Covid-19 Pandemic and Economic, Social and Cultural Rights,' (n 58) at 135

The 1992 Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities affirms to participate effectively in cultural, religious, social, economic and public life without discrimination.<sup>61</sup> It, thus, protects the identity and existence of minorities as well as exercise of their rights.<sup>62</sup> The Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief also posits that: ‘No one shall be subject to discrimination by any State, institution, group of persons, or person on the grounds of religion or belief.’<sup>63</sup> Specifically, Article 4:1 imposes a duty on all States to ‘take effective measures to prevent and eliminate discrimination on the grounds of religion or belief in the recognition, exercise and enjoyment of human rights and fundamental freedoms in all fields of civil, economic, political, social and cultural life.’<sup>64</sup> Furthermore, Article 4:2 states that: ‘All States shall make all efforts to enact or rescind legislation where necessary to prohibit any such discrimination, and to take all appropriate measures to combat intolerance on the grounds of religion or belief in this matter.’<sup>65</sup>

Recommendation 17 of the of the Sixth Session on the Forum on Minority Issues at its sixth session: Guaranteeing the rights of religious minorities, posits that:

‘States should ensure that there is no discriminatory treatment in regard to the legal and administrative recognition of all religious and belief groups. Any registration and administrative procedures, including those relating to the property and the functioning of places of worship and other religious-based institutions, should be conducted according to non-discrimination standards. International standards do not allow non-recognition of religious or belief groups to result in denial of their rights. Such standards require an inclusive approach to be taken.’<sup>66</sup>

### **3. Do the dead have rights?**

As has been demonstrated above, the right to manifest religion is undergirded by an established bulwark of first and second generation of rights, which, in human rights discourse, are

---

<sup>61</sup> Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities Adopted by General Assembly Resolution 47/135 of 18 December 1992 See Articles 2.1 and 2.2

<sup>62</sup> Ibid.

<sup>63</sup> Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief Proclaimed by General Assembly resolution 36/55 of 25 November 1981 A/RES/36/55, Article 2:1

<sup>64</sup> Ibid, Article 4:1

<sup>65</sup> Ibid, Article 4:2

<sup>66</sup> Recommendations of the Forum on Minority Issues at its sixth session: Guaranteeing the rights of religious minorities (26 and 27 November 2013) A/HRC/25/66 22 January 2014, Recommendation 17

‘indivisible.’ What we can discern from the corpus is that, when it comes to human rights, the living can manifest their beliefs or religion. It is, thus, plausible to assert that rights of the living to manifest their religion or beliefs are much clearer. Human rights law accords the grieving the right to manifest their beliefs or religion although this is not absolute. In cases of litigation during pandemics, the task of the courts is only to strike a balance with public health objectives.

Less clear is whether the dead have rights. This is a particularly more vexing question. The courts in Africa, India and Sri Lanka grappled with this conundrum during the Covid-19 pandemic. It has been argued that while legal rules affecting the dead often have a practical aspect, one of the primary, and yet unrecognised forces driving the creation of these legal rules are cultural norms, including dignity and respect for decedents' wishes.<sup>67</sup> Yet many legal rules suggest that decedents do not have rights principally because they lack any agency.<sup>68</sup> Theories of human rights, while conflicting, attempt to offer some explanations on the ‘rights’ status of the dead. ‘Will Theorists’, on the one hand, argue that legal rights exist only where one is sentient and has the agency to make choices.<sup>69</sup> The Will Theory underscores the significance of powers that give rights-holders the ability to exercise their will. A person may demand the performance of duties owed to him or her, make claims against others, and enforce them legally.<sup>70</sup> ‘Interest Theorists’, on the other hand, however, disagree; they contend that the decedents have interests that can be helped or harmed after death.<sup>71</sup> In essence, the Interest Theory stresses the importance of upholding the welfare or interests of the right-holder.<sup>72</sup> Interest Theorists would, thus, content that the dead do have rights; the function of a right is to further their interests.

For instance, Smolensky asserts that the dead can, and in fact should, be characterized as legal right-holders.<sup>73</sup> A dead person can be defamed, and the fact that they are oblivious to the harm does not mean that a harm to their interest, namely his reputation, has not occurred.<sup>74</sup> According to this contention, knowledge of a legal harm is not a legal requirement to establishing harm. A

---

<sup>67</sup> K. R. Smolensky, ‘Rights of the Dead,’ *Hofstra Law Review* 37(3) (2009) at 764

<sup>68</sup> *Ibid*

<sup>69</sup> M. H. Kramer, ‘Do Animals and Dead People Have Legal Rights?’ *CAN. J.L. & Juris.* 14 (2001) 29 at,30

<sup>70</sup> H LA Hart, 1982. *Legal Rights. In Essays on Bentham: Studies in Jurisprudence and Social Philosophy.* Ed. H. L. A. Hart. (New York: Clarendon, 1982) 183

<sup>71</sup> J Feinberg, ‘Harm and Self-Interest’ (1980) in *Rights, Justice, And The Bounds of Liberty: Essays in Social Philosophy* (1980) 45, 59-68 (cited in *ibid* K R Smolensky, (2009).

<sup>72</sup> *Ibid*

<sup>73</sup> *Ibid*

<sup>74</sup> Joel Feinberg, (n 71) at pp. 65-66, cited in Smolensky ‘Rights of the Dead,’ (n 66)

living person's legal interest can be harmed even if they never discover it.<sup>75</sup> Smolensky concludes that the Interest Theory approach is, therefore, superior to other philosophical theories of 'rights' because it acknowledges that the dead can have interests which transcend death.<sup>76</sup> Taken in the context of the Covid-19 fatalities, the deceased are rights-holders entitled to posthumous legal rights.

#### **4. Covid-19 deaths jurisprudence**

The issue of posthumous legal rights emerged prominently in litigation and jurisprudence in Africa and Asia during the Covid-19 pandemic following high mortality rates, funerary rites and rules demanding strict and expeditious burials. In the following, I traverse some of the jurisprudence of the courts in Africa and Asia on Covid-19 deaths. The focus on Africa and Asia is particularly relevant because of the associated culturally-entrenched practices, and secondly, and perhaps inevitably, the litigation available so far emerged from these two cultural spaces. In Africa, the prominent case was litigated in Kenya while the other cases were decided in India and Sri Lanka. At the core was whether the bereaved and the dead had rights, particularly the latter, in line with the 'Interests Theory.' India, in particular, has rich and past jurisprudence on the 'rights' of the dead generally.

##### ***4.1 Kenya***

Like other governments across the globe, Kenya introduced a raft of regulations and restrictions during Covid-19 pandemic.<sup>77</sup> Apart from the lockdowns, the government introduced subsidiary legislation to control funerary practices. Kenya's Ministry of Health had developed guidelines in line with the WHO Guidelines released on 24th March, 2020. As noted earlier, the guidance sought to strike a balance between permitting limited cultural practice and public health measures; the guidelines, overall, recognised the dignity of the dead, their cultural and religious traditions, and that their families should be respected at all times. The Kenya Government

---

<sup>75</sup> Smolensky 'Rights of the Dead,' (n 67), citing Feinberg's examples.

<sup>76</sup> Smolensky 'Rights of the Dead,' (n 67)

<sup>77</sup> See 'Covid-19 Protocols and Guidelines', Ministry of Health (Kenya) <https://www.health.go.ke/#1621662557097-37ed30fd-e577>

Guidelines stipulated that where a person infected with Covid-19 died, the body shall be interred or cremated within 48 hours from time of death.<sup>78</sup> According to the Public Health (Prevention, Control and Suppression of COVID-19) Rules, 2020, a burial or cremation ceremony may only take place between 0900 hours — 1500 hours.<sup>79</sup> Notably, however, the rules did not include an edict on cremation.

Article 24 (1) of the Constitution of Kenya allows for limitation of rights but requires that there be reasonable and justifiable reasons for the limitation to a right. The Article provides that a right or fundamental freedom in the Bill of Rights shall not be limited except by law, and only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.<sup>80</sup> This would align with non-absolute nature of rights discussed earlier. Kenya is a particularly diverse country; its religious landscape is the product of its complex history and dynamic present.<sup>81</sup> Thus, restrictive regulations would inevitably collide with certain cultural sensibilities. Cultures and belief systems in Kenya vary widely even as they interconnect or overlap. The majority of Kenya's population is Christian—over 80 percent. The Roman Catholic and Anglican Churches are the most established.<sup>82</sup> Ethnicity is relevant for an understanding of religious demography because of considerable overlap and interconnections. Kenya's population comprises 42 African ethnic groups and significant minorities of Arab, South Asian, and European descent.<sup>83</sup> The largest groups include the Kikuyu (20 percent of the total population), the Luhya (14 percent), the Kalenjin (13 percent), and the Luo (10 percent). The Covid-19 pandemic occurred against the background of a diverse tapestry and an eclectic mix of cultural beliefs.

---

<sup>78</sup> See Ministry of Health: Kenya interim guidelines on handling of human remains infected with Covid- 19 in Kenya, 2 April 2020. Retrieved 15 January 2022. <https://www.health.go.ke/wp-content/uploads/2020/06/Interim-Guidance-on-Handling-of-Human-Remains-Infected-with-COVID-19.pdf>

<sup>79</sup> See, Special Issue 649; Kenya Gazette Supplement No. 39 3rd April, 2020 (Legislative Supplement No. 26) Legal Notice No 49; The Public Health Act (Cap. 242) The Public Health (Prevention, Control and Suppression of COVID-19) Rules, 2020 section 8 (1) (b)

<sup>80</sup> Article 24 (1) The Constitution of Kenya, 27 August 2010  
[https://www.constituteproject.org/constitution/Kenya\\_2010.pdf](https://www.constituteproject.org/constitution/Kenya_2010.pdf)

<sup>81</sup> See 'Faith and Development in Focus: Kenya' Berkley Center for Religion, Peace, and World Affairs, Georgetown University, 2017

<sup>82</sup> Ibid

<sup>83</sup> Ibid

Historically, pandemics have been attributed to both religious and naturalistic causes.<sup>84</sup> In the face of cataclysm, destabilization, and uncertainty, religion becomes more important and offers hope and support.<sup>85</sup> In parts of the world, attitudes towards the Covid-19 virus were influenced by cultural and religious beliefs. One of the main avenues that contributed to outbreaks and community transmissions of Covid-19 was religion itself, ‘particularly religious communities and their spaces, and religious beliefs/disbeliefs of Covid-19 itself.’<sup>86</sup> One research found that in 107 countries, the Covid-19 crisis had resulted in a massive rise in the intensity of prayer.<sup>87</sup> Some turned to ‘faith healing’ eschewing conventional medicine. Managing rumors, dispelling misinformation and conspiracy theories, and mitigating fear and stigma directed toward persons and places affected are also essential to pandemic preparedness and control.<sup>88</sup> The messaging of Covid-19 harms was countered by conspiracy theories. For example, in May 2021 in Kenya, false claims about COVID-19 vaccines affecting the menstrual cycle began to circulate online.<sup>89</sup> High levels of trust in a president can support effective responses to crises; however, sometimes leaders have instilled lesser trust among citizens than religious and traditional leaders. According to an Afrobarometer survey of 2019, the trust in the Kenyan president was 62 percent against 68 percent in traditional and religious leaders.<sup>90</sup> Thus in countries where there is deficit in trust in political leaders, traditional and religious leaders, attuned to or persuaded to embrace public health measures and conventional medicine, might be a valuable resource when responding to crises. In Kenya, places of worship are reported as one of the most trusted sources of information.<sup>91</sup> Kenya’s religious leaders have long been important ‘political actors.’ While their

---

<sup>84</sup> S. Dein ‘Covid-19 and the Apocalypse: Religious and Secular Perspectives,’ *Journal of religion and health* 60 (1) (2021) 5-15.

<sup>85</sup> J. Bentzen ‘Acts of God? Religiosity and natural disasters across subnational world districts,’ *The Economic Journal* 129 (2019) 2295–321.

<sup>86</sup> M. Lee, H. Lim, and M. S. Xavier *et al.* “A Divine Infection”: A Systematic Review on the Roles of Religious Communities During the Early Stage of COVID-19, *J Relig Health* 61 (2022) 866–919

<sup>87</sup> J. Bentzen, ‘In crisis, we pray: Religiosity and the COVID-19 pandemic,’ *Journal of Economic Behavior & Organization*, 192 (2021) 541-583

<sup>88</sup> B. Person, F. Sy and K. Holton *et al* ‘National Center for Infectious Diseases, SCOT, 2004. Fear and stigma: the epidemic within the SARS outbreak,’ *Emerg Infect Dis* 10 (2004) 358–363.

<sup>89</sup> T. Nguyen and S. Cecchini ‘Countering COVID-19 Misinformation in Africa,’ *ThinkGlobalHealth* 23 July, 2021 <https://www.thinkglobalhealth.org/article/countering-covid-19-misinformation-africa>

<sup>90</sup> E. Gyimah-Boadi Chapter 6 Good Governance: Strengthening trust between people and their Leaders: Institutional resources for overcoming Africa’s COVID-19 crisis and enhancing prospects for post-pandemic reconstruction, *Foresight for Africa* (Brookings Institution, 2021)

<sup>91</sup> See ‘WHO, faith partners and national governments –supporting national responses to COVID-19’ 10 November 2021. Retrieved 20 January 2022. <https://www.who.int/news/item/10-11-2021-who-faith-partners-and-national-governments-supporting-national-responses-to-covid-19>

political roles are widely debated, there are no specific restrictions applied to religious leader engagement in politics.<sup>92</sup> Governments later recognized the need to engage religious and traditional leaders in the messaging around the Covid-19 pandemic. In December 2021, inter-religious leaders signed a declaration committing to promote vaccination under the umbrella of the Inter-Religious Council of Kenya (IRCK.)<sup>93</sup> On the other hand, ethnic groups were insistent on communal funerals and cultural practice. As the following landmark case illustrates, striking the balance public health and cultural rights is palpably nettlesome, particularly in matters of death.

#### 4.1.1 Onyango case

Despite the concerted efforts to control the pandemic, some citizens insisted on observing cultural practice. The case of James Oyugi Onyango (hereinafter “*Onyango case*”),<sup>94</sup> whose body was buried by County Government of Siaya officials in the early hours of April 12, 2020 in a shallow grave and without a coffin, after suspected Covid-19 infection, shines is striking and shines a light on tensions which arise between public health authorities, on the one hand, and culturally-compliant societies, on the other. Onyango’s family approached the court seeking orders to have his body exhumed and accorded a decent burial in conformity with their cultural and religious rites. Before his death, Onyango had been involved in a road accident, had chest pains, high blood pressure and blood sugar levels for some days. Relatives were, however, told he had, in fact, died of Covid-19 and had to follow the new burial protocols. The relatives protested that they had not been shown the results of the samples. The Petitioners doubted that the deceased could have died of Covid-19.

In the affidavits, the relatives stated that, despite protestations that the burial in the middle of night was on such short notice and contrary to Luo customary traditions, and also that a grave had not been dug, the Ministry of Health officers (MOH), accompanied by police officers, had insisted that the burial had to be conducted at that time.<sup>95</sup> According to the submissions,

---

<sup>92</sup> See *Faith and Development in Focus: Kenya Berkley Center for Religion, Peace, and World Affairs*, (Georgetown University, 2017)

<sup>93</sup> See ‘Religious leaders join COVID-19 vaccination drive’ Kenya Ministry of Health, 8 December 2021. Retrieved 20 January 2022. <https://www.health.go.ke/religious-leaders-join-covid-19-vaccination-drive/>

<sup>94</sup> *Joan Akoth Ajuang & another v Michael Owuor Osodo the Chief Ukwala Location & 3 others; Law Society of Kenya & another* [2020] eKLR (hereinafter ‘*Onyango case*’)

<sup>95</sup> *Onyango case*, para 19.



Onyango was then buried by the MOH officers in a bag under the watch of police officers. The relatives argued that the burial of Onyango without a coffin was a taboo in the Luo community. If a person was buried in the undignified manner, they asserted, it was likely that the deceased's spirit would haunt them.<sup>96</sup> The relatives claimed Onyango's body was disposed of like a stray dog. This was also contrary to the deceased's constitutional right to human dignity and his right to be buried in accordance with Luo cultural customs. Neither the Petitioners nor the family members were issued with a burial permit law in complete contravention of Section 21 of the Births and Deaths Registration Act Cap 149 of Laws of Kenya, the deceased was buried without the requisite burial permit and that in addition, an autopsy and or biopsy was not conducted on the deceased's body to ascertain the cause of death of the deceased.<sup>97</sup>

The decision by the government authorities, they contended, violated Articles 27, 32 and 44 of the Constitution and was an affront to the deceased's right to human dignity even in death.<sup>98</sup> Article 27 is on equality and freedom from discrimination; Article 32 on freedom of conscience, religion, belief and opinion and Article 44 on language and culture.<sup>99</sup> The relatives stated that the manner of Onyango's burial caused untold anguish and pain since they were denied the right to bury their loved one in a decent and respectable manner.<sup>100</sup> The petitioners were demanding exhumation for proper burial in line with cultural tradition. The WHO Guidance of March 2020 advised burial during the day, allowed body-viewing, and that authorities should 'manage each situation on a case-by-case basis, balancing the rights of the family, the need to investigate the cause of death, and the risks of exposure to infection'.<sup>101</sup> The allusion to family's cultural rights was an indication that WHO recognized rights to manifest one's religion or belief.

Although not explained in the affidavits, research reveals that the Luo, indeed, take death as a crisis in life – a rite of passage. When people die, they are not separated from their clan; they are only transformed from a physical being into a spiritual one of the same clan.<sup>102</sup> The passage into

---

<sup>96</sup> Ibid para 64

<sup>97</sup> Ibid, para 22

<sup>98</sup> Ibid, para 23

<sup>99</sup> See Articles 27, 32, 44 Constitution of Kenya, 2010.

<sup>100</sup> *Onyango* case, para 25

<sup>101</sup> WHO, 'Infection Prevention and Control for the safe management of a dead body in the context of COVID-19 Interim guidance' (n 30) at 1

<sup>102</sup> A. B. C. Ocholla-Ayayo, 'Death and Burial: An Anthropological Perspective'. In Ojwang, J. B. and Mugambi, J. N. K. (eds.), *The S. M. Otiemo Case: Death and Burial in Modern Kenya*, (Nairobi University Press, 1989) pp.30-51

the spiritual is expressed as an element in the life cycle of the individual, accomplished through a series of funerary customs.<sup>103</sup> The Luo are generally known in Kenya as a people who are seriously concerned with their burial place, far more than any other ethnic group.<sup>104</sup> One of these acts, according to Nyamongo, is lighting a funeral fire, *magenga*.<sup>105</sup> The fire is left to burn for six to seven days. Meanwhile, the body of the deceased lies in state for four days in the case of a man (three days for a woman). The burial takes place soon afterwards. After the burial a cock is slaughtered for the in-laws of the deceased at the funeral fire. Relatives stay within the deceased's compound during the mourning hours, which is called *padho*, meaning 'sitting without doing anything.'<sup>106</sup> The next morning neighbors and relatives bring cattle for slaughtering.<sup>107</sup> Without detailing each process, it is sufficient to say the funerary rituals are elaborate. Shiino enumerates at least 14 ritualistic processes followed by the Luo when a person dies.<sup>108</sup> It is not clear if the petitioners were agitating to perform a full repertoire of the ceremony. As can be noticed, funerals in most cultures in Africa are communalistic and ritualistic. It is, thus, understandable why authorities would have felt uneasy about congregation and the elaborate 'erotics of mourning' amidst a ravenous pandemic.

A County official, opposing the petition, accused Onyango's relatives of failing to cooperate with the authorities. Most of the family members were placed under quarantine before Onyango's death; however, the sister and son to the deceased respectively, who had been in primary contact with the Onyango, went into hiding.<sup>109</sup> The official further submitted that the Petitioners' request for Onyango to be exhumed was not only illegal under Rule 8 of the Public Health (Covid -19 Restriction of Movement of persons and related Measures) Rules, 2020, but would also pose danger to the health and lives of the people handling the decomposed body and or executing the Court Order. Along the same line, a Ministry of Health official deposed that in instances where a person had died of highly contagious diseases such as Covid-19, it would be highly prejudicial to the general public living within the immediate location where the deceased

---

<sup>103</sup>I. K. Nyamongo 'Burying the dead, culture and economics: an assessment of two Kenyan cases,' *International Social Sciences Journal* 160 (1999) 255-261.

<sup>104</sup> W. Shiino 'Death and Rituals Among the Luo in South Nyanza,' *African Study Monographs* 19 (3) (1997) at 213

<sup>105</sup> Nyamongo (n 103); R. Kisiara, 'Some Sociopolitical Aspects of Luo Funerals,' *Anthropos* 1(3) (1998) 127-36.

<sup>106</sup> Shiino (n 104)

<sup>107</sup> Nyamongo n 101

<sup>108</sup> Shiino, (n104) at .214

<sup>109</sup> *Onyango* case, para 41

had been interred, to exhume the body as it would unnecessarily expose them to the risk of contracting the disease. Therefore, granting the order sought by the petitioners would negate the various efforts and measures put in place by the Government to fight and prevent the spread of the virus. Public interest militated against the issuance of the orders sought.<sup>110</sup>

#### 4.1.2 Determination of case

When distilled, the grievances of the Onyango family comport snugly with the notion of ‘disenfranchised grief.’ The family incurred loss but could not openly acknowledge it, publicly mourn, or be socially supported. When considered against the corpus of human rights on ‘manifesting one’s religion or belief’ and the Constitution of Kenya, one can conclude that Covid-19 regulations contravened the right. The family of Onyango were prevented from performing the Luo cultural birth rites. However, such right was not absolute.

Another dimension to the case is on the ‘rights of the dead.’ Were Onyango’s rights as a dead man violated? In order to answer this question, the court traversed a range of previous cases, centering on the treatment of decedents, including a French court case in which it was ruled that the refrigerated bodies of a married couple must be removed from basement storage in their château and buried properly or cremated;<sup>111</sup> the European Court of Human Rights ruled in *Elberte v Latvia* [2015] ECHR 211<sup>112</sup> that the removal of body tissue from the applicant’s deceased husband for use by a pharmaceutical company in Germany pursuant to a state-approved agreement without her knowledge or consent violated the European Convention on Human Rights.

However, the more closely similar cases to the *Onyango* case were drawn from the Indian jurisprudence. For example, in *Pt. Parmanand Katara Vs. Union of India*, the court concluded that that right to dignity and fair treatment was not only available to a living man but also to his body after his death.<sup>113</sup> Similar conclusions were reached in *S. Sethu Raja vs The Chief*

---

<sup>110</sup> Ibid para 34

<sup>111</sup> Judge rules mummified remains of couple be buried BBC 3 February 2017 <https://www.bbc.co.uk/news/uk-scotland-edinburgh-east-fife-38854745>

<sup>112</sup> *Elberte v Latvia* [2015] ECHR 211. The Court found that Latvia violated Article 8 (right for respect to private and family life) and Article 3 (prohibition of inhuman or degrading treatment) and “in particular that Latvian law regarding the operation of the consent requirement on tissue removal lacked clarity and did not have adequate legal safeguards against arbitrariness.”

<sup>113</sup> *Pt. Parmanand Katara Vs. Union of India* (1995 (3) SCC 248)

*Secretary*.<sup>114</sup> A noticeable feature of the jurisprudence is the enunciated continuum between life and death. For instance, the Bombay High Court held that the right to a decent burial is recognised as a facet of the right to life. There was, thus, no reason as to why an individual who died of suspected or confirmed Covid-19 infection would not be entitled to the facilities he/she would have otherwise been entitled to but for the crisis.<sup>115</sup> I discuss the jurisprudence on the ‘rights of the dead’ in India in more detail later.

The Court in Kenya noted that domestic law did not guarantee specific rights to the dead but provided for the protection of the dignity of every person. Article 28 of the Constitution<sup>116</sup> provides that every person has inherent dignity and the right to have that dignity respected and protected. The Court then sought to provide an analysis that rendered a continuum in treatment in life and death. The judge noted: ‘Whereas there are no proprietary rights in a dead body, one does not cease being a human once dead, only the state of life is altered.’<sup>117</sup> In many Kenyan cultures which are varied, the burial ceremony is a vital component of honouring the dead, the court noted. It is one of the traditional celebrations accorded to the dead by giving them a dignified send off, albeit solemnly. Ultimately, the court concluded:

I have no doubt in my mind that the dead have limited legal rights. Chief among them is the right to remain silent. From the time of the ancient Egyptians, the conviction has been that corpses have the right to rest undisturbed and unmolested. However, the dead do have rights attributable to those they leave behind and further there is a legitimate expectation that the dead be interred in a respectful and dignified manner.<sup>118</sup>

I therefore conclude that indeed the dead have rights.<sup>119</sup>

While the conclusion that the dead have rights is sustainable, the assertion that they have the right to remain silent appears melodramatic. The right to remain silent presupposes agency just as, for example, suspects choose not cooperate with law enforcement by pleading the Fifth. It appears rather sensational to ascribe such choice to a decedent. The court then goes on to state that, ‘while deceased victims are no longer around to experience the assault of human rights violations, the impacts of actions taken against them can affect the human rights of their loved ones, for, our

---

<sup>114</sup> *S. Sethu Raja vs The Chief Secretary* [W.P.(MD)No.3888 of 2007 decided on 28 August, 2007]

<sup>115</sup> *Pradeep Gandhi vs. State of Maharashtra* 2020 SCC OnLine Bom 662, para 38

<sup>116</sup> Kenya Constitution, 2010, Article 28: Human dignity Every person has inherent dignity and the right to have that dignity respected and protected.

<sup>117</sup> *Onyango* case, para 173

<sup>118</sup> *Ibid*, para 184

<sup>119</sup> *ibid*, para 185

personhood remains entangled amongst the rights of those we shared our lives with.<sup>120</sup> The Court noted that the deceased was buried in the dead of the night in direct neglect of the deceased's custom or religious beliefs and practices which are guaranteed under the Kenyan Constitution.<sup>121</sup> As noted earlier, the right to manifest one's belief or religion by the bereaved is much less controversial. However, the idea of reposing rights in the dead is remarkable.

Onyango's relatives also claimed 'discrimination' after some deceased had been accorded decent burial. The Court concurred that indeed there was discrimination evident in the treatment of the deceased. However, the Court would not grant the Petitioners' request for exhumation. Permission to do this would have meant a mortician would do much more than take some tissue or a biopsy from the body of the deceased for an examination to determine the actual cause of death. An overhaul of the deceased's body would have been done to determine any other cause of death in the event that Covid -19 is ruled out.

Exhumation of the deceased's body would entail digging up the grave, removing the body; which would be taken to the mortuary for the post-mortem procedure by a pathologist, who would then take samples of body tissues or fluid for forensic examination just in case the initial diagnosis was erroneous, before that body was placed in a coffin and returned to the grave or a new grave for interment.<sup>122</sup>

From my analysis of the material placed before this court, it was indeed unfortunate that the deceased James Oyugi Onyango was not accorded a proper, decent and dignified burial. However, I am unable to find that the actions of the Respondents were deliberate or that they were wholly intended to stigmatize the Petitioners and or disrespecting the dead. In my humble view, the circumstances prevailing were beyond the capacity of the public health officials at Siaya.<sup>123</sup>... In my humble view, there is scientific uncertainty as to whether dead bodies can transmit Covid 19, and if there was certainty, then the question is, why would there be such elaborate, carefully crafted Guidelines and Protocols developed by WHO on handling the bodies of such the deceased persons from the time of death until burial?<sup>124</sup>...Accordingly, it is my most considered view that this is not a clear case where the body of the deceased James Oyugi Onyango ought to be exhumed, an autopsy carried out or a biopsy be taken therefrom and in the interest of public health, and public good, this court declines to grant or issue an order for exhumation and or a biopsy and an autopsy on the said

---

<sup>120</sup> Ibid, para 212

<sup>121</sup> Ibid, para 200

<sup>122</sup> Ibid, para 268

<sup>123</sup> Ibid, para 274

<sup>124</sup> Ibid, para 277

body of the deceased James Oyugi Onyango, who died suspected of Covid 19 infection in order to ascertain the cause of death.<sup>125</sup>

However, the court ordered, among other actions, that the County Government of Siaya through its Department of Health shall within three days of the date of the Judgment and at their own cost[in the event that the grave of Onyango had not been cemented], proceed to the deceased's grave and, observing all MOH Guidelines, construct and or cement the said grave using high quality material, to protect the grave from being depleted by weather conditions or possible digging and or exposure of the said body by wild animals. It also ordered that in all its future endeavours, the state must comply with the Public Health and WHO Protocols on the management and disposal of bodies of persons suspected to have succumbed to highly infectious diseases such as the Covid-19; and that it pays the costs of the petition to the Petitioners. Yet, the court seemed sceptical about WHO's suggestions on the lack of evidence that the Covid-19 infection may spread to living human beings from the cadaver of any suspected/confirmed infected decedent.

The *Onyango* case showed the difficulties in balancing public health measures, rights to manifest one's beliefs and the rights of the dead. The case demonstrated that during pandemics, public health officials are required to accommodate these rights. Notably, however, the court failed to summon the broader sets of human rights, relying principally on the Kenya Constitution. While the court would not grant an order for exhumation – perhaps appropriately so - the *Onyango* case reaffirmed the importance of rights to manifest one's beliefs or religion. Furthermore, the court recognized the 'right of the dead,' to be understood in this case, to a dignified burial. While allowing full rituals could pose risks of infection, the lesson from *Onyango* for future management of deaths during pandemics is that public health authorities would have to accommodate burial rites, within reason and under strict conditions.

## **5. Covid-19 and rights of the dead in India and Sri Lanka**

On the 'right of the dead,' the *Onyango* case made prolific reference to Indian caselaw. This is because India has rich jurisprudence on the dignity for the dead.<sup>126</sup> Because of the massive

---

<sup>125</sup> Ibid, para 279

<sup>126</sup> See for example: *Pt. Parmanand Katara v. Union of India & Ors*; *Marimuthu v. State by The Inspector of Police Pennadam Police Station, Vallalar Division, Cuddalore*; *Ramji Singh and Mujeeb Bhai v. State of U.P. & Ors*; *Court S.Sethu Raja v The Chief Secretary*; *Ashray Adhikar Abhiyan v. Union of India*; *Vikash Chandra Guddu Baba v. The Union of India & Ors*; *Jamuna Das Paras Ram v State of Madhya Pradesh*.

mortalities and differing human disposal practices, the question on such right arose during the Covid-19 pandemic. While the issue of cremation edicts did not emerge in *Onyango*, in India and Sri Lanka, government authorities sparked anger by ordering wholesale compulsory cremations, regardless of faith. Studies show that cremations are a deep-rooted funerary practice with specific social meanings.<sup>127</sup> In Western societies, cremation constitutes the disposal of a decedent to ashes. However, in other societies the process is elaborately ritualistic.<sup>128</sup> In Hinduism, cremation is traditionally the most important part of the funeral rites because Hindus believe the body must be destroyed to force the soul to separate from it.<sup>129</sup> For centuries, Hindus gathered to burn corpses on funeral pyres along the Ganges River. On the other hand, the Muslim population, which is close to 15% of the Indian population, favors burying its dead.<sup>130</sup> In India and Sri Lanka, governments ordered compulsory cremations of Covid-19 decedents, regardless of faith. The orders for mandatory cremations sparked a furore among the Muslim population. In the following I discuss, first, the jurisprudence on the rights of the dead in India. I then look at the decisions on burial rites in Sri Lanka both within the context of differing human disposal traditions.

### ***5.1 India***

Religious pluralism has long been a core value in India. Hindus make up 79.8% of the population, and Muslims account for 14.2%; Christians, Sikhs, Buddhists and Jains account for most of the remaining 6%.<sup>131</sup> The Covid-19 pandemic needs to be understood against the backdrop of this rich diversity. India recorded some of the highest figures of Covid-19 deaths. As pandemic ravaged India, WHO India and UNICEF organised a virtual meeting of the faith-based organizations and the state government officials in Mumbai under the ambit of the ‘larger risk communications and community engagement strategy’. The objective of the meeting was to

---

<sup>127</sup> S. Ward and N. Tayles ‘Cremation in Mainland Southeast Asia: An Overview’ Chapter: 12, In M. Oxenham and H. R. Buckle (eds) *The Routledge Handbook of Bioarchaeology in Southeast Asia and the Pacific Islands* (Routledge, 2015) 239 - 256

<sup>128</sup> Ibid, 239

<sup>129</sup> See ‘India coronavirus: Round-the-clock mass cremations’ BBC, 28 April 2021 <https://www.bbc.co.uk/news/in-pictures-56913348>

<sup>130</sup> For burial rites in India, see n 32

<sup>131</sup> S. Kramer ‘Key findings about the religious composition of India’ *Pew Research Centre*, 21 September 2021

connect the humanitarian organizations on a common platform for better synergy with government efforts for a collective fight against Covid-19.<sup>132</sup>

However, traditional and cultural practices form a central part the funerary rites of a person's dead body in India. As noted, the majority Hindu favours cremation as a way of disposing of the body. Cremation is traditionally the most important part of the funeral rites<sup>133</sup> while the Muslim population favours burying its dead.<sup>134</sup> The Covid-19 crisis produced an unprecedented cultural cataclysm that forced the Indian society to reimagine its funerary practices.

The right to a decent funeral is embedded in Article 25 of India's Constitution; it provides for freedom of conscience and free profession, practice and propagation of religion subject to public order, morality and health and to the other fundamental rights under Part III of the Constitution.<sup>135</sup> Like in international human rights law, the constitutional right is subject to limitations associated with public order, morality and health and to other provisions.<sup>136</sup> Over the years, India has developed a rich corpus of jurisprudence favourable to the right to manifest one's religion or beliefs associated with death burial rites. The case law affirms the rights of the dead as is also the case in some Asian countries. The right was also recognised in Bangladesh when a hospital refused to hand over the dead body of a newborn child to his parents due to inability to pay hospital bill.<sup>137</sup> The court pronounced that a dead body of a human being deserves a respected burial and it must not be held as a mere product for recovering the outstanding dues of a dead patient.<sup>138</sup> However, it is India that has a cornucopia of clearer case law on the rights of the dead.

For instance, in *Pt. Parmanand Katara v. Union of India & Ors.*,<sup>139</sup> the judiciary concluded that the right to dignity and fair treatment under Article 21 of the Constitution was not only available to a living person but also to their body after death. The Petitioner had challenged the method of

---

<sup>132</sup> See WHO 'Faith-based organizations across India step up the fight against COVID-19' 22 May 2020. Retrieved 22 January 2022. <https://www.who.int/india/news/detail/22-05-2020-faith-based-organizations-across-india-step-up-the-fight-against-covid19>

<sup>133</sup> See BBC, 2021 'India coronavirus: Round-the-clock mass cremations' BBC, 28 April.

<sup>134</sup> For burial rites in India, see n 32

<sup>135</sup> Article 25: The Constitution of India [India], 26 January 1950,

<sup>136</sup> Article 25(1)

<sup>137</sup> *Human Rights and Peace for Bangladesh v. Bangladesh* Writ Petition No. 7786 of 2012

<sup>138</sup> *Ibid* p.6

<sup>139</sup> *Pt. Parmanand Katara vs. Union of India & Ors.*, (1995) 3 SCC 248



execution of a death sentence by hanging under the Punjab Jail Manual as inhuman and violative of Article 21. Under the Jail Manual, the body of a condemned convict would be kept suspended for a period of half-an-hour after hanging, and according to the Petitioner, the method was violative of the right to dignity. The High Court concurred that suspending the executed body for such a period of time did amount to a violation of his right to dignity.

The theme of ‘dignity for the dead’ reverberated repetitiously in subsequent cases. In *Marimuthu v. State by The Inspector of Police Pennadam Police Station, Vallalar Division, Cuddalore*,<sup>140</sup> the Madras High Court, placing reliance on *Pt. Parmanand Katara*, observed that right to dignity and fair treatment, which is guaranteed under Article 21, should also be accorded to the dead. ‘That is the “right to life” extends even to the body of a person after death till it is disposed of according to the culture and tradition. In this case according to the tradition and culture of the dead person, the dead person should be given a decent burial or should be cremated without delay’<sup>141</sup>

This interpretation, as also adopted in *Onyango*, does not bifurcate life and death but posits a continuum. It also comports with the articulations of ‘Interests Theorists’ that the dead have rights. The continuum was also recognized in *Ramji Singh and Mujeeb Bhai v. State of U.P. & Ors*<sup>142</sup> when a Division Bench of the Allahabad High Court held that the word and expression ‘person’ in Article 21 of the Constitution included a dead person in a limited sense and that the ‘right to life with dignity’ should be extended in such a manner a dead body was accorded respect, which the person would have deserved had they been alive, subject to his tradition, culture and the religion which he professed.<sup>143</sup>

The issue of burial rites also emerged in *Ashray Adhikar Abhiyan Vs. Union of India*<sup>144</sup> when the court affirmed the right of a deceased to a decent burial in line with his or her religious belief, even when the person was a vagrant. As such the right does not just relate to the ‘mistreatment’ of a body such as the post-execution hanging in *Pt. Parmanand Katara v. Union of India &*

---

<sup>140</sup> *Marimuthu v State by The Inspector of Police Pennadam Police Station, Vallalar Division, Cuddalore* (Criminal Appeal No.618 of 1995) 3 SCC 248. 7 August, 2002.

<sup>141</sup> *Ibid* para 21

<sup>142</sup> 2009 SCC OnLine AII 310=(2009) 5 AII LJ 376,

<sup>143</sup> *Ibid* para 17

<sup>144</sup> AIR 2002 SC 554,

Ors.,<sup>145</sup> but ordinary deaths. The right to a dignified burial was also observed in *S. Sethu Raja v. The Chief Secretary*,<sup>146</sup> *Vikash Chandra Guddu Baba v. The Union of India & Ors.*<sup>147</sup>, *Common Cause v. Union of India*:<sup>148</sup> and *Jamuna Das Paras Ram v. State of Madhya Pradesh*.<sup>149</sup> In all the cases, the courts acknowledged the constitutional right to die with dignity as inseparable and inextricable facet of the right to life with dignity. In *Suo Motto vs The State of Tamil Nādu*<sup>150</sup>, the High Court of Madras, after opposition of burial of medical doctor suspected of dying of Covid-19, mentioned that anyone who interfered in the decent burial process should be liable under Section 297 of the Indian Penal Code<sup>27</sup>, relating to insulting the religion of a person, and committing trespass in any place of worship...or any place set apart from the performance of funeral rites or offers any indignity to a human corpse or causes disturbance to any persons assembled for the performance of funeral ceremonies.’<sup>151</sup>

### 5.1.2 Covid and cremations

The case law above concluded unequivocally that the dead have rights. As noted in *Suo Motto*, the previous decisions provided *ratio decidendi* for fatalities arising from Covid-19 pandemic deaths. As in *Onyango*, the courts sought to balance burial rites and public health imperatives. However, unlike *Onyango*, the disputes in India also arose from decrees for mandatory cremations. For instance, Municipal Commissioner of the Municipal Corporation for Greater Mumbai issued a Circular on March 30, 2020 stating that: ‘All the dead bodies of COVID-19 patients should be cremated at the nearest crematorium irrespective of religion. The rituals involving touching the body should be avoided... The funeral should not involve more than 5 people.’<sup>152</sup> The circular justified the edict stating that existing burial grounds were in highly dense locality with high chances of contamination of dense community and residential areas nearby.<sup>153</sup> However, it was amended on the same day, stating burials could be sanctioned if burial grounds were large enough to prevent transmission of the virus. Yet another circular was released on 9 April 2020 providing names and contact details of officials who could assist with

---

<sup>145</sup> *Pt. Parmanand Katara vs. Union of India & Ors.*, (1995) 3 SCC 248

<sup>146</sup> [WP(MD) No.3888 of 2007],

<sup>147</sup> 2008 SCC OnLine Pat 905 (2008) 2 PLJR 127

<sup>148</sup> 2018 SCC OnLine SC 208

<sup>149</sup> AIR 1963 MP 106

<sup>150</sup> WP No 7492 of 2020

<sup>151</sup> *Ibid* Para 10

<sup>152</sup> Municipal Corporation of Greater Mumbai No. MGC/A/2942: 30.03.2020 Disposal of dead bodies of Covid-19.

<sup>153</sup> *Ibid*, para 3.

Muslim burials.<sup>154</sup> A compromise seemed to have been reached but some people disagreed with the reneging on the original ban on burials.

On April 13, 2020, a Writ Petition<sup>155</sup> was presented before the Court by four Petitioners, seeking that the Respondents (State of Maharashtra and the Corporation) be restrained from allowing burial of the cadaver of any COVID-19 infected individual in the relevant burial grounds<sup>156</sup>. The petitioners were challenging the circular on the ground that burial of Covid-19 dead bodies could lead to further spreading of the disease. In this case, *Pradeep Gandhi vs. State of Maharashtra*<sup>157</sup>, the Division Bench of the Bombay High Court addressed the issue of burial and last rites of a Covid-19 decedent, arising from the conflict. Ultimately, the Court dismissed the petition, upheld the amended circular, acknowledging the right to burial as part of the right to freedom of religion. The Court observed: ‘We find little reason to deprive the dead of the last right, i.e., a decent burial according to his/her religious rites, on the face of there being no evidence, at least at this stage, that Covid-19 infection may spread to living human beings from the cadaver of any suspected/confirmed Covid-19 infected individual.’<sup>158</sup>

The order declining interim relief was appealed before the Supreme Court. The legal representative for the petitioners cited the example of Sri Lanka which had banned burials.<sup>159</sup> I discuss the situation of Sri Lanka later. The legal representative argued the petitioners were not seeking a ban on Muslim burials but identifying *kabrasthans* (graveyards) far away from populated localities. The representative also cited a ‘medical authority’ who claimed in an article that dead bodies could spread Covid-19.

However, the court turned to the WHO interim guidance of March 24, 2020<sup>160</sup>, which stated that Covid-19 was not an airborne disease. The guidance stated further: ‘Otherwise, cadavers do not

---

<sup>154</sup> Municipal Corporation of Greater Mumbai No. AMC/WS/5921/VIP: 09.04.2020 Respectful Disposal of dead bodies of COVID-19 Ref: Circular No. MGC/A/2942 of 30.03.2020

<sup>155</sup> Writ Petition No. LD-VC-46 of 2020 (Pradeep Gandhi & Ors. Vs. State of Maharashtra & Ors.)

<sup>156</sup> Interim relief was claimed in the following terms: ‘(c) Pending the hearing and final disposal of this petition this Hon’ble Court be pleased to direct the Respondents to restrain from burial of dead bodies of deceased who are infected with Covid-19 in Muslim Cemetery situated at H/W Ward Konkani Muslim Cemetery No.80, Khoja Sunnat Jamat Kabrastan Bandra West and Khojalsna Ashari jammam Kabrastan Bandra West.’

<sup>157</sup> *Pradeep Gandhi vs. State of Maharashtra* 2020 SCC OnLine Bom 662

<sup>158</sup> *Ibid*, para 38

<sup>159</sup> *Pradeep Gandhi vs. State of Maharashtra* 2020 SCC OnLine Bom 662 para 12

<sup>160</sup> WHO, ‘Infection Prevention and Control for the safe management of a dead body in the context of COVID-19 Interim guidance’ (n 30)

transmit disease. It is a common myth that persons who have died of a communicable disease should be cremated, but this is not true. Cremation is a matter of cultural choice and available resources... To date there is no evidence of persons having become infected from exposure to the bodies of persons who died from Covid-19.’<sup>161</sup> The guideline went on to state that: ‘The dignity of the dead, their cultural and religious traditions, and their families should be respected and protected throughout; Hasty disposal of a dead from Covid-19 should be avoided.’<sup>162</sup> People who have died from Covid-19 can be buried or cremated. The Government of India had, in fact, issued similar guidance earlier.<sup>163</sup> The court noted that the new circular dated April 9, 2020 was a timely move to restore sanity. Adverting to *Pt. Parmanand Katara vs. Union of India* too, the court concluded that that the right to a decent burial, commensurate with the dignity of the individual, was recognised as a facet of the right to life guaranteed by Article 21 of the Constitution.

There is, thus, no reason as to why an individual who dies during this period of crisis because of suspected/confirmed Covid-19 infection would not be entitled to the facilities he/she would have otherwise been entitled to but for the crisis. Should the extant guidelines for disposal of the cadaver of an individual infected by Covid-19 be adhered to and the cadaver properly handled and placed in unique covers to contain any spread, and we find little reason to deprive the dead of the last right, i.e., a decent burial according to his/her religious rites.<sup>164</sup>

In *Vineet Ruia v The Principal Secretary, Department of Health & Family Welfare, Govt. of West Bengal & Ors*<sup>165</sup> the petitioner was aggrieved with, among other concerns, that: ‘The human remains/dead bodies of persons inflicted with Covid-19 are being disposed of by the administration unceremoniously and in an undignified manner without showing even a semblance of respect to the mortal remains’<sup>166</sup> and that ‘are not being permitted to have a last look at or to pay last respect to the mortal remains of the dead person and to perform the last rites.’

The court pronounced that the disposal of a human body, whether or not the person dies of Covid-19, whether by cremation or burial, should be done with due respect and solemnity:

---

<sup>161</sup> See ‘Infection Prevention and Control for the safe management of a dead body in the context of COVID-19’ WHO March 24, 2020

<sup>162</sup> *ibid*

<sup>163</sup> See GoI guidelines, March 15, 2020,

<sup>164</sup> *Pradeep Gandhi vs. State of Maharashtra*, para 38

<sup>165</sup> WPA 5479 of 2020 With I.A. No. CAN/1/2020 (Old No. CAN 4144 of 2020)

<sup>166</sup> *Ibid*, paras 1 (i) and (ii).

We unhesitatingly hold that the mortal remains of a deceased person must be treated with care, respect and dignity and have to be disposed of by burial or burning, according to the religion, in so far as the same is ascertainable, that the deceased person practised. It makes no difference if the deceased the person was infected with Covid-19. Of course, all requisite safety and precautionary measures must be taken by the persons who carry out the funeral.<sup>167</sup>

Thus far, I have traversed some of the jurisprudence from Kenya and India. The latter had established and settled funerary jurisprudence which was applied to Covid-19 deaths. It is clear that the judicial pronouncements in *Onyango* and the Indian caselaw establish a consistent interpretation on the rights to manifest one's religion or belief, but more significantly, the rights of the dead; that the dead 'enjoy' limited rights associated with dignified burial. India's copious jurisprudence establishes a continuum between the right to life and death without interruption in human rights benefit. This, as observed previously, has also been recognised by other judiciaries in Asia, for example, Bangladesh.<sup>168</sup>

However, it is unclear how far the rights of the dead extend. Are the rights limited to the immediate aftermath of death? Could, for instance, the law on desecration of graves or remains<sup>169</sup> long after death be still interpreted as violation of their rights? 'Interests Theorists' would probably affirm the rights extend beyond just a dignified burial. In continuing to examine funerary practices in Asia, I now turn briefly to the approaches to Covid-19 deaths in Sri Lanka which courted international attention.

## ***5.2 Sri Lanka***

Sri Lanka is no less religiously diverse. The Sinhalese make up 74.9% of the population and are predominantly Buddhist, or belong to the minority Christian community. Tamils comprise approximately 15.3% of the population and are mainly Hindus, with some belonging to Christian churches.<sup>170</sup> The Muslim community, form the third largest ethnic group at 9.2% of the

---

<sup>167</sup>Ibid, para 18

<sup>168</sup>See *Human Rights and Peace for Bangladesh v. Bangladesh*, Writ Petition No. 7786 of 2012: 'A dead body of a human being deserves a respected burial and it must not be held as a mere product for recovering the outstanding dues of a dead patient', at 6.

<sup>169</sup> See eg Section 25, UK Burial Act 1857; See also NY Penal Law § 145.27: Aggravated Cemetery Desecration in the First Degree; Stoneville, North Carolina Code of Ordinances: Chapter 92: Cemeteries § 92.05 Defacing or Desecrating Grave Sites.

<sup>170</sup> See OHCHR 'Preliminary findings of Country Visit to Sri Lanka by the Special Rapporteur on freedom of religion or belief' 26 August 2019

population. Buddhism is the largest religion of Sri Lanka with 70.2% of the population practicing the religion; then, there are Hindus with 12.6%; Muslims with 9.7% and Christians with 7.4%. Most Muslims are Sunni while the Christians are mainly Roman Catholic.<sup>171</sup> The Covid-19 pandemic appeared to exacerbate pre-existing social crevices, particularly anti-Muslim hatred.<sup>172</sup> A community-level prevention model was established in 2020 by the Health Promotion Bureau (HPB) which incorporated mobilisation of the clergy to support the prevention and response schemes to COVID-19 with non-governmental stakeholders.<sup>173</sup> This model was part of a more extensive community engagement network established by the HPB in cooperation with the country offices for WHO and UNICEF. Building trust, empowering behavioural traits applicable to minimise risks from COVID-19, leadership and coordination, message dissemination, addressing stigma and discrimination, supporting testing procedures, contact tracing activities and vaccination, building community resilience, spiritual and psychosocial support, and welfare provision were some of the useful factors that were identified in the model.<sup>174</sup>

Initially, just like in India, the Sri Lankan Ministry of Health published guidelines in March 2020, which permitted either the burial or cremation of those who had died of Covid-19.<sup>175</sup> Unlike the WHO guidelines, the rules, however, stated that the body should never be washed under any circumstance. In April 2020, the regulations were amended. Under section 2 and 3 of the Quarantine and Prevention of Diseases Ordinance No: 3 of 1987, it became mandatory to cremate bodies of Covid-19 victims irrespective of their faith,<sup>176</sup> The Provisional Clinical Practice Guidelines on Covid-19 stated that a body related to death either confirmed or suspected of Covid-19 should be cremated within 24 hours (preferably with 12 hours).<sup>177</sup>

---

<sup>171</sup> Ibid

<sup>172</sup> A. Razak and M. Saleem, 'COVID-19: The Crossroads for Sinhala–Muslim Relations in Sri Lanka,' *Journal of Asian and African Studies* 57(3) (2022) 529-542.

<sup>173</sup> M. Wijesinghe, V. Ariyaratne, B. Gunawardana et al. 'Role of Religious Leaders in COVID-19 Prevention: A Community-Level Prevention Model in Sri Lanka' *J Relig Health*. 61(1) (2022) 687-702.

<sup>174</sup> Ibid

<sup>175</sup> See 'Disposal of bodies of deceased persons who were infected with and suspected of being infected with COVID-19.' Centre for Policy Alternatives, 5 April, 2020. Retrieved 25 January 2022. <https://www.cpalanka.org/disposal-of-bodies-of-deceased-persons-who-were-infected-with-and-suspected-of-being-infected-with-covid-19/>

<sup>176</sup> D. Shamila, K.I Deen and R. Haniffa, et al 'Memorandum on the Disposal of Bodies of COVID-19 Victims' (April 13, 2020). Retrieved 26 January 2022. Available at SSRN: <https://ssrn.com/abstract=3739723> or <http://dx.doi.org/10.2139/ssrn.3739723>

<sup>177</sup> See 'Provisional Guidelines for Clinical Management of COVID-19, Ministry of Health,' Sri Lanka (March 2020) p.53. Retrieved 26 January 2022. [https://www.epid.gov.lk/web/images/pdf/Circulars/Corona\\_virus/covid-](https://www.epid.gov.lk/web/images/pdf/Circulars/Corona_virus/covid-)

The edict was roundly condemned.<sup>178</sup> It was noted that the Sri Lankan Government's decision to adopt a cremation-only policy interfered with the right of all Sri Lankan Muslims to manifest their religion or belief, and against discrimination, as guaranteed by Constitution.<sup>179</sup> At least 160 medical doctors signed a letter to the President, urging him to follow the WHO guidelines on disposal of bodies of Covid-19 victims.<sup>180</sup> Protests erupted when parents of a 20-day-old baby were forced to cremate the infant upon release of the body from the hospital. Both parents were not shown the result of the Covid-19 test. Like the family of the baby, some families were refusing to collect bodies because of fears of similar compulsory cremations. Some of the cremations were conducted by Sri Lankan authorities without consultation with families. Twelve petitioners had challenged the official gazette, claiming it impinged on the fundamental rights of the Muslim minority.<sup>181</sup> However, the petition was dismissed out of hand.

The Covid-19 public health challenges fueled ethno-religious tensions, linked to antipathy towards Muslims from extremist Sinhala factions.<sup>182</sup> In January 2021, four UN Special Rapporteurs (SRs) on freedom of religion or belief; on rights to freedom of peaceful assembly and association; on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, and minority issues expressing concern on the violation on the violation of the rights of Muslims through forced cremations during the Covid-19 pandemic.<sup>183</sup>

---

[19\\_cpg\\_version\\_5.pdf](#); see also Ministry of Health (MOH) Circular no EPID/400/2019 n-cov 1 April 2020 repeating the new guidelines imposing cremation.

<sup>178</sup> Amnesty International 'Sri Lanka: Religious minorities must have their final rites respected' 3 April 2020. Retrieved 5 February 2022. <https://www.amnesty.org/en/latest/news/2020/04/sri-lanka-religious-minorities-must-have-their-final-rites-respected/>; *Colombo Gazette* 2020 'Sri Lanka Human Rights Commission observes mandating cremation unacceptable' 26 November; International Bar Association's Human Rights Institute (IBAHRI) condemns forced cremations of Muslim Covid-19 victims, 8 January 2021. Retrieved 26 January 2022.

<https://www.ibanet.org/article/78B53E89-FB34-4AB7-BF71-5737DC298226>

<sup>179</sup> See 'Constitution of the Democratic Socialist Republic of Sri Lanka' (As amended up to 29th October 2020) Revised Edition – 2021 Chapter III (10): Every person of conscience and religion, including the freedom to have or to adopt a religion or belief of his choice and 12 (2) No citizen shall be discriminated against on the grounds of race, religion, language, caste, sex, political opinion, place of birth or any one of such grounds:

<sup>180</sup> See 'Disposal of bodies of deceased persons who were infected with and suspected of being infected with COVID-19' (n 175)

<sup>181</sup> *The Hindustan Times* 2020 'Sri Lanka's highest court rejects petitions from Muslims against Covid-19 cremations' 1 December.

<sup>182</sup> See 'Implications of COVID-19 on Ethno-Religious Tensions in Sri Lanka' Berkley Centre, 26 May 2020

<sup>183</sup> Mandates of the Special Rapporteur on freedom of religion or belief; the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health; the Special Rapporteur on minority issues; and the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, AL LKA 2/2020, 8 April, 2020; See also 'Sri Lanka: Compulsory cremation of COVID-19 bodies cannot continue, say UN experts' UN, Office for the Higher Commissioner for Human Rights 25 January 2021

The SRs had written to the government earlier in April 2020 without eliciting any response. In the January letter, the SRs provided details of cases of cremations in which results of the Covid-19 tests were unclear. As of December 2020, 19 bodies were unclaimed for fear of forced cremations. The letter also detailed the provisions of international human rights law violated by mandatory cremations. The Organisation of Islamic Cooperation also raised the forced cremation policy at the Human Rights Council in Geneva in February 2021.<sup>184</sup> In a subsequent report before the Human Rights Council, the Commissioner pointed out that: ‘Although the Government told OHCHR that the policy was driven by public health concerns and scientific advice, the High Commissioner notes that WHO guidance stresses that ‘cremation is a matter of cultural choice’.<sup>185</sup> The Sri Lankan Prime Minister eventually relented, giving permission for Muslims who die of Covid-19 to be buried following the outcry and interventions.<sup>186</sup>

As has been illustrated in this paper, the *Onyango* case, and the India and Sri Lankan cases evince the abiding tensions between biomedical and cultural approaches to funerary practices during a pandemic. In *Onyango*, we noticed that governments can bend the rules under pressure from high mortality rates. In the cases of India and Sri Lanka, while appearing to accept WHO Guidelines, the public authorities in those countries also elected to impose more stringent measures. Often, the victims are minority groups. While the court in Sri Lanka gave a short shrift to a challenge against mandatory cremations, it is clear that collective rights, even for minority groups, can be realised, outside judicial systems, through international pressure and the recognition of minority rights.

## 6. Conclusion

Pandemics are associated with exponential mortality rates, creating heavy burdens on communities. The high death rates affect the customary ‘erotics of mourning’ as governments impose regulations on cultural gatherings and preparation of bodies to stem transmission. Highly

---

<sup>184</sup> See ‘OIC raises Sri Lanka cremation issue at UNHRC; urges GoSL for swift action’ *EconomyNext* 24 February 2021.

<sup>185</sup> See ‘Promoting reconciliation, accountability and human rights in Sri Lanka Report of the United Nations High Commissioner for Human Rights; Human Rights Council Forty-sixth session 22 February–19 March 2021 A/HRC/46/20 Advance Edited Version 9 February 2021

<sup>186</sup> *Al Jazeera* 2021 ‘Sri Lanka to allow COVID burials for Muslims after outcry,’ 10 February; see also OIC Welcomes Sri Lankan Government’s Decision Permitting Burial of Muslim Coronavirus Victims, Organisation of Islamic Cooperation, 27 February 2021. Retrieved 5 February 2022 [https://www.oic-oci.org/topic/?t\\_id=25900&t\\_ref=16292&lan=en](https://www.oic-oci.org/topic/?t_id=25900&t_ref=16292&lan=en)



restrictive measures have been deemed to ‘disenfranchise grief.’ In societies associated with deep customary funerary practices, the regulations then attract defiance. These tensions between public health objectives and funerary traditions played out in a number of societies during the Covid-19 pandemic resulting in adjudication. However, little had, so far, gone into the cross-cultural analysis of the jurisprudence of Covid-19 deaths. At the centre of the legal disputes was whether the living still had rights to manifest their religion or beliefs, as recognised by international human rights law, during a pandemic, and related to this, whether the dead had rights. In this paper, I discussed cases brought before the courts in Kenya, India and Sri Lanka, places with entrenched and traditionally elaborate funerary practices. The interpretations of the law are insightful. What is evident is that funerary rites are difficult to suppress. The jurisprudence recognises the rights of the living and the dead even in the worst of times. The bereaved can still manifest their religion or beliefs, with restrictions, while the courts have also recognised the dead have rights. Rather interestingly, the interpretations suggest that the ‘right to life’ extends to the ‘dead’ person. The discussion on the jurisprudence is particularly significant in determining approaches to funerary practice and public health measures in future pandemics. The decisions eschew complete bans to funerary formalities even during highly infectious pandemics. Therefore, future state responses and policy would have to deliberately accommodate funerary rites during fatal disease outbreaks.