The Disposal of COVID-19 Dead Bodies: Impact of Sri Lanka’s Response on Fundamental Rights

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Abstract

In early 2020, the Government of Sri Lanka decided that all bodies of individuals who had (or were suspected to have) died of COVID-19 should be disposed of by cremation alone. Although this decision appears to be neutral and does not give rise to de jure discrimination, as a matter of fact, it has significantly impacted the religious rights of the Muslim community in Sri Lanka. This is because they firmly believe in the need to bury the dead in a dignified and decent manner—cremation being regarded as a repugnant practice amounting to a desecration of the human body. As such, 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 as guaranteed by the 1978 Constitution of Sri Lanka. Despite there being no scientific evidence to suggest that the burial of COVID-19 victims could give rise to contamination of the surroundings and thereby cause the spread of the virus, the Government of Sri Lanka continued with the policy for almost a whole year. Thereafter, due to international pressure, the Sri Lankan Government decided to allow burials but in a very restrictive manner. The objective of this article is to consider the extent to which the aforementioned decisions of the Sri Lankan Government are consistent with the fundamental rights framework of the country’s Constitution.

Keywords: burial rites; COVID-19; fundamental rights; limitations; proportionality

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1. Introduction

The Novel Coronavirus (or COVID-19) has tremendously impacted human life in many ways. But importantly, it has tested the competence of governments around the world and their ability to deal with the crisis rationally and sensibly. While some governments have succeeded in adapting quickly by developing effective policies to deal with the pandemic, 1 others have failed to manage the crisis. In certain respects, the Sri Lankan Government belongs to the latter. The Government’s response to the disposal of bodies of persons who had (or were suspected to have) died of COVID-19 is one reason among others for this classification. 2

The objective of this article is to determine whether the Sri Lankan Government’s response concerning the disposal of bodies of COVID-19 victims is consistent with the fundamental rights framework of Sri Lanka’s 1978 Constitution (‘Constitution’). Such an inquiry is warranted in view of the Government’s decision to impose a ban on the burial of COVID-19 victims for almost a year since March 2020, which was lifted in February 2021 by permitting burials in a very restrictive manner. Some communities in Sri Lanka, including the Muslim community, strongly believe in the need to give their dead a dignified burial, which is an integral part of the freedom of religion and the freedom to manifest religion, as enshrined in Articles 10 and 14(1)(e) of the Constitution.

Part 2 of the article sets out the key events that have transpired and the decisions so far made concerning the disposal of bodies of COVID-19 victims in the country. Part 3 briefly considers the religious significance of final burial rites to the Sri Lankan Muslim community. In Part 4, the article considers the constitutionality of the Sri Lankan Government’s decisions that impose significant restrictions on burials, thereby impacting the religious beliefs and practices of the Sri Lankan Muslim community. In analysing the constitutionality of the Government’s decisions, reference is made to the Constitution’s fundamental rights provisions, related judicial decisions, and relevant scientific research.

1 Governments of some countries have adapted quickly to deal with the pandemic by implementing effective and robust policies. These policies have led to the implementation of effective and proportionate restrictions aimed at preventing the spread of the virus, such as imposing complete or partial lockdowns; restricting the movement of people within the country and by closing borders; bans or limitations on social gatherings and events; implementing work-from-home arrangements and home-based learning for schools and universities; and acquiring sufficient quantities of vaccines when they became available. Importantly, these policies have been adopted and implemented in a transparent and non-discriminatory manner upholding the rights and freedoms guaranteed by constitutional provisions. Examples of countries that have successfully responded to the pandemic include New Zealand, South Korea, and Singapore (Bremmer 2021). The early adoption of farsighted policies by their respective governments has enabled these countries to continue to deal with the COVID-19 crisis in an effective manner.

2 In the case of Sri Lanka, COVID-19 policies of the Government have been adopted and implemented in a rather haphazard and errant manner. Among other things, these poorly formulated and uncoordinated policies have resulted in the country’s borders being opened to tourists despite threats from COVID-19 variants and surges in local cases (Samath 2021), mismanagement in the rollout of vaccination (Jayasinghe 2021), the stigmatization of infected persons (Suleiman 2020), and the underutilization of the ‘Itukama’ COVID-19 fund—only 6% of it had been used as of 31 January 2021, the balance at that date amounting to approximately 1.7 billion Sri Lankan Rupees (Ameen 2021).
2. Events so far³

On 30 January 2020, the World Health Organization (WHO) declared a public health emergency of international concern with respect to a virus that was later named COVID-19. Sri Lanka detected its first confirmed COVID-19 patient in January of 2020, and more patients emerged from amongst those who had returned to the country from overseas. The first COVID-19 death was reported on 28 March 2020 (Srinivasan 2020a). Just a day earlier, Sri Lanka’s Ministry of Health published guidelines that permitted either the burial or cremation of those who had died of COVID-19 (Ministry of Health 2020a; Bazeer 2020). The guidelines were consistent with the WHO’s 2014 guidelines regarding the prevention and control of pandemic-prone acute respiratory infections (WHO 2014) and the more recent COVID-19 specific interim guidelines (WHO 2020). Notably, the 2014 and 2020 guidelines of the WHO permit either the burial or cremation of dead bodies of COVID-19 victims, subject to certain conditions.

In light of the above, it came as a surprise, if not a shock, when the body of the first Muslim COVID-19 victim, who had died on 30 March 2020, was cremated by the authorities without the family’s consent and in total violation of both the WHO guidelines and the Ministry of Health’s 27 March 2020 guidelines (Ahamed 2020). Almost immediately, the Ministry of Health retracted the guidelines and published a fresh set of guidelines, dated 31 March 2020 (Ministry of Health 2020b) (‘March 2020 MOH Guidelines’). A striking feature of the new guidelines was that they expressly provided for the cremation (and excluded the burial) of COVID-19 victims. Subsequently, on 11 April 2020, the Minister of Health promulgated certain new regulations (‘April 2020 Regulations’), purporting to exercise powers vested under sections 2 and 3 of the Quarantine and Prevention of Diseases Ordinance 1897, to give effect to the March 2020 MOH Guidelines. In particular, the April 2020 Regulations amended certain previous regulations made under the Ordinance by adding the following text:

the corpse of a person who has died or is suspected to have died of Coronavirus Disease 2019 (COVID-19) shall be cremated (Ministry of Health 2020c).

Pursuant to the aforementioned March 2020 MOH Guidelines and the April 2020 Regulations, the bodies of individuals who had (or were suspected to have) died of COVID-19 were disposed of by cremation. In some cases where families had objected, bodies were stored in mortuaries or cold-storage containers. Particularly during the second wave of the pandemic in Sri Lanka,⁴ a significant number of COVID-19–related deaths occurred in localities with a higher percentage of the Muslim population. To date, close to 50 per cent of all COVID-19–related deaths have been from the Muslim community (Slater and Fonseka 2021).⁵ The Government’s move to cremate the bodies of COVID-19 victims and the relatively higher percentage of COVID-19 deaths seen among the Muslim community have collectively caused significant grief and anguish among Sri Lankan Muslims.

Under these circumstances, several petitions were filed in the Supreme Court, the country’s highest court with the jurisdiction to hear fundamental rights cases, on the basis that the

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³ This article reflects events and developments as at 5 March 2021.

⁴ The second wave of the pandemic began in October 2020 (Srinivasan 2020b) and continued till a third wave of infections surged in April 2021 (Kumarasinghe 2021).

⁵ The Health Promotion Board of Sri Lanka provides live updates about COVID-19 cases and deaths on its official website (Health Promotion Board 2020). At the time of writing, close to 500 COVID-19–related deaths had been reported.
Government’s cremation-only policy amounted to a violation of fundamental rights. But all petitions were dismissed by the Court without going into the merits and without providing any reasons for its decision (Sooriyagaoda 2020). The Supreme Court’s approach came as a surprise as just days before its decision, the Human Rights Commission of Sri Lanka had determined that ‘the mandatory requirement for cremation imposed under the Gazette is not a valid restriction of the freedom to manifest religion or belief’ (HRCSL 2020). Notably, the Court’s decision was not unanimous (Sooriyagaoda 2020), and its outcome deprived the parties (and indeed the Court) of the opportunity to scrutinize the legal and scientific basis for the Government’s decision to adopt its cremation-only policy. At the time of the Supreme Court’s ruling, a technical committee appointed by the Minister of Health had recommended the cremation of all bodies of COVID-19 victims (Jayamanne and Razeek 2020). To date, no report of this technical committee has been made public. Nor was the composition of the technical committee known to the public until recently, when the Minister of Health disclosed it in Parliament in response to a question posed by an opposition member (Kirinde 2021). Coincidentally, Professor Meththika Vithanage, a member of the technical committee, had published her views independently (Vithanage 2020), which, arguably, shed light on the thinking process behind the technical committee’s recommendation. The scientific basis for the Sri Lankan Government’s policy is considered later in detail. But at this point, it would suffice to note that Professor Vithanage’s stance is problematic at best—which in turn casts significant doubt on the validity of the technical committee’s approach.

The cremation-only policy was continued for almost a year. In February 2021, in the wake of a new United Nations Human Rights Council Resolution being tabled against Sri Lanka (Mitra 2021) and immediately after an official visit of Pakistan’s Prime Minister (Nazeer 2021), the Government published new regulations on 25 February 2021 (‘February 2021 Regulations’) that reversed its previous cremation-only policy (Ministry of Health 2021a). However, these regulations provided the following:

In the case of burial, the corpse of such person shall be buried in accordance with the directions issued by the Director General of Health Services at a cemetery or place approved by the proper authority under the supervision of such authority (Ministry of Health 2021a).

On 3 March 2021, the Government announced that it would permit burials of COVID-19 victims in Iranathivu, a remote island off the northwest coast of the country. A direction to that effect was issued by the Director General of Health on 3 March 2021 (Ministry of Health 2021b) (‘March 2021 MOH Direction’). But on 5 March 2021, reflecting a sudden shift from its plan to use Iranathivu,⁶ the Government officially ended its cremation-only policy by burying two COVID-19 victims in Oddamavadi, an area located on the eastern coast of Sri Lanka (Ranawana 2021).

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⁶ The shift in the Government’s decision is likely to have been influenced by protests on the part of Iranathivu residents (objecting to their tiny islet being used as a graveyard for the pandemic) and the Muslim community (wanting to ensure their loved ones were buried in the mainland) (Ali 2021). At the time of writing, it was unclear whether the Government had abandoned its plan to use Iranathivu altogether.
3. Funeral rites in Islam during a pandemic

Contagious diseases, including the plague, have been recorded in early Islamic history. Several recorded observations of Prophet Muhammad (peace be upon him), who Muslims believe to be the messenger of God, exemplify this fact (Ahmad and Ahad 2020). An oft-cited example, is the following observation of the Prophet recorded in the *Sahih Al-Bukhari* (hadith 5728):

*If you hear of an outbreak of plague in a land, do not enter it; but if the plague breaks out in a place while you are in it, do not leave that place (Khan 1997).*

This prophetic guidance suggests that every Muslim is obligated to do his or her part to ensure the containment of contagious diseases and plagues. Logically, this guidance also should apply to the disposal of bodies of COVID-19 victims. In normal circumstances, Muslims perform four essential rituals to carry out the funeral rites of those who have died (Tritton 1938):

1. Washing of the body;
2. Shrouding;
3. Prayer;
4. Burial.

During pandemics, the first two rituals may be disregarded in the event those rituals could endanger the lives of body handlers and the rest of the community. Although the third requirement of prayer is usually carried out in close proximity to the dead body (or *Janazah*), during pandemics there is flexibility with regard to this requirement—the prayer can take place in *absentia*. However, the final ritual of burial must still be carried out, as far as practically possible, but in accordance with international and/or national standards imposed to contain the spread of disease.

Muslims believe that after death, the soul is removed from the physical body. While the soul is returned to its creator, the physical remains must return to the soil. In this regard, the *Qur’an*, the holy book followed by those professing the Islamic faith, in *Sura Taba* (Ch.20:55) provides ‘from the earth We created you, and into it We will return you, and from it We will extract you another time’ (Pickthall 2001). As such, the act of burying the dead gives effect to the word of God and is key to protecting the dignity of the dead. It is forbidden to sit on a tomb or to walk on it. Such acts constitute a major sin in Islam. It has been recorded in the *Sunan Abu Daud* (hadith 3207) that the Prophet (peace be upon him) once said, ‘[b]reaking the bones of a dead person is like breaking them when he is alive’ (Mahdi al-Sharif 2008). In essence, showing disrespect to the dead is akin to causing harm to a living human, and hence, a major sin.

Therefore, Muslims firmly believe in the need to bury their dead. The burial of the deceased is a collective obligation and disregarding this requirement is a collective sin (Al-Dawoody 2017). As such, unless exceptional circumstances exist that warrant disregarding the requirement for burial, it is the collective obligation on the part of every Muslim in the community to ensure the proper burial of those who have died. If carrying out burials individually is not practical, it is permissible to do so in mass graves. Whereas cremating the dead bodies of Muslims is regarded as a grave violation of the dignity of the human body and should be avoided unless there is no other way to dispose of bodies infected with a contagious disease. A decision not to bury and, indeed, a decision to cremate must be backed
by strong evidence indicating that cremation is the only means to dispose of such bodies safely.

4. The constitutionality of the Sri Lankan Government’s response

As noted above, for Muslims, burying their dead has been prescribed as mandatory—cremation being regarded as prohibited and a desecration of the deceased (D’Avanzo 2008: 329). Thus, the April 2020 Regulations, by altogether banning the burial of bodies of COVID-19 victims, directly contradict a fundamental belief and practice of Sri Lankan Muslims in dealing with their dead. Although the cremation-only policy has now been retracted by the February 2021 Regulations, the Government has limited the burial of COVID-19 victims to the islet of Iranathivu (in its March 2020 MOH Direction) and to Oddamavadi, which is still a significant restriction on the exercise of burial rites. In light of this, serious questions arise about the constitutional validity of the Sri Lankan Government’s decisions that pertain to the management of COVID-19 dead bodies.

4.1 Whether funeral rites warrant protection as a fundamental right to religion

Naturally, the analysis must begin with a reference to the provisions of Sri Lanka’s Constitution that seek to protect fundamental rights, including religious freedoms and beliefs. The Constitution’s fundamental rights chapter gives effect to numerous human rights recognized and protected under international law. Notably, these rights include an individual’s right to religion and the freedom to manifest a religion or belief.7 Article 10 of the Constitution provides the following:

Every person is entitled to freedom of thought, conscience and religion, including the freedom to have or to adopt a religion or belief of his choice.

Article 14(1)(e) of the Constitution provides:

Every citizen is entitled to the freedom, either by himself or in association with others, and either in public or in private, to manifest his religion or belief in worship, observance, practice and teaching.

Accordingly, the Constitution guarantees to every individual the freedom of religion, including the freedom to have or adopt a religion or belief of choice, and to every citizen the freedom to manifest a religion or belief.

Considering the scope of religious freedoms, the Supreme Court of Sri Lanka has held that:

A consideration of the provisions in the Constitution of Sri Lanka, which assure to the people of Sri Lanka the freedom to have and adopt a religion or belief of their choice together with the freedom

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7 See the Universal Declaration of Human Rights, Article 18 (‘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’). See also the International Convention on Civil and Political Rights, Article 18 (‘Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching’).
to manifest such religion or belief [...] makes it clear [...] that the determination of what is a “religious” belief or practice does not depend upon a judicial perception of the particular belief or practice; that a religious belief need not be logical, acceptable, consistent or comprehensible in order to be protected; that unless where the claim is so bizarre, so clearly non-religious in motivation, it is not within the judicial function and judicial competence to inquire whether the person seeking protection has correctly perceived the commands of his particular faith; that the courts are not the arbiters of scriptural interpretation, and should not undertake to dissect religious beliefs (Perera v. Weerasuriya 1985: 191–2).8

Thus, the Constitution protects religious beliefs and practices unless they are bizarre or clearly non-religious in motivation. Importantly, religious beliefs need not be logical, acceptable, consistent, or comprehensible to be protected. Although there is no direct judicial authority on this point in Sri Lanka, funeral rites have been accepted as constituting a part of religious rights and freedoms in other jurisdictions. For instance, several decisions of the European Court of Human Rights indicate that the failure to return dead bodies to relatives for burial or disclose where they were buried could constitute a violation of the various fundamental rights protected under the European Convention on Human Rights (Council of Europe/European Court of Human Rights 2020: 34–35). Therefore, by analogy, it may be argued that beliefs and practices regarding the treatment of the dead are within the scope of religious rights and freedoms guaranteed under the Constitution’s fundamental rights chapter.

Indeed, the belief that Sri Lankan Muslims hold on the need to bury the dead and the longstanding practice of burials dating back centuries is ‘rooted in religion’ and not merely a cultural or social practice of a particular community that is excluded from the scope of Articles 10 and 14(1)(e) (Jeevakaran v. Wickremenayake 1997: 356–7). Thus, there is a strong argument in favour of regarding funeral rites of the Sri Lankan Muslim community as part and parcel of the fundamental rights set out in Articles 10 and 14(1)(e) of the Constitution.

4.2 Whether the restrictions on burials are permitted restrictions

The fundamental rights guaranteed under the Constitution, except for the freedom of thought, conscience and religion (Article10) and the freedom from torture (Article11), are subject to restrictions that may be imposed under Article 15 of the Constitution. In this regard, it is important to note the distinction between Article 10 and Article 14(1)(e). The rights enshrined in Article 10 (freedom of religion/freedom to have or adopt a religion or belief of choice) are absolute, in that no restrictions can be imposed on the exercise of the rights derived from that provision. In contrast, the rights set out in Article 14(1)(e) (freedom to manifest a religion or belief) may be subject to the restrictions set out in Article 15(7). This distinction is logical because the right set out in Article 10 guarantees every individual the freedom to believe in whatever he wants, which is an internal process, whereas, Article 14(1)(e) deals with the external manifestation of that belief. For that reason, the

8 The rights guaranteed under Articles 10 and 14(1)(e) of the Constitution apply in respect of the freedom to adopt a religion or belief and to manifest a religion or belief. These constitutional provisions are modelled on Article 18 of the Universal Declaration of Human Rights, which extends to include even non-religious beliefs (Boyle and Shah 2014: 220). Thus, even if burial rituals are not regarded as constituting a right to religion or religious belief, it still comes within the broader formulation of ‘belief’ as set out in Articles 10 and 14(1)(e) of the Constitution.
Government may impose restrictions on the external manifestation of one’s religion or belief in certain limited circumstances, so that certain conduct in society can be regulated to achieve specified policy objectives. Accordingly, Article 15(7) provides that the exercise and operation of all fundamental rights declared and recognized by Articles 12, 13(1), 13(2) and 14 of the Constitution, which include the rights guaranteed under Article 14(1)(e) dealing with the freedom to manifest a religion or belief, shall be subject to:

such restrictions as may be prescribed by law in the interests of national security, public order and the protection of public health or morality, or for the purpose of securing due recognition and respect for the rights and freedoms of others, or of meeting the just requirements of the general welfare of a democratic society.

It is within this framework that the constitutionality of the Government’s April 2020 Regulations, which mandated the cremation of COVID-19 dead bodies, and the subsequent February 2021 Regulations and directions/guidelines, which permit burials in a restricted manner, have to be considered. The regulations and directions/guidelines prima facie interfere with burial rites and hence, are an encroachment of the fundamental rights set out in Article 14(1)(e) (the right to manifest one’s religion/belief).

4.2.1 Prescribed by law
For a restriction of a fundamental right to be permitted under Article 15(7) of the Constitution, it must be a restriction ‘prescribed by law’. The Constitution defines ‘law’ in Article 170 as ‘any Act of Parliament and any law enacted by any legislature at any time prior to the commencement of the Constitution and includes an Order in Council’. Interestingly, regulations made under statutes, which are essentially classed as subsidiary legislation, are not included within the meaning of ‘law’. However, Article 15(7) goes on to provide that ‘[f]or the purposes of this paragraph “law” includes regulations made under the law for the time being relating to public security’. In this regard, the Supreme Court has held:

“Law” is restrictively defined in Article 170 to mean Acts of Parliament and laws enacted by any previous legislature, and to include Orders-in-Council. That definition would have excluded all regulations and subordinate legislation. The effect of the word ‘includes’ [in Article 15(7)] was therefore only to expand the definition in Article 170 by bringing in regulations under the law relating to public security. While at first sight ‘public security’ may seem to cover much the same ground as ‘national security and public order’, it is clear that ‘the law relating to public security’ has been used in a narrow sense, as meaning the Public Security Ordinance and any enactment which takes its place, which contain the safeguards of Parliamentary control... Article 15 does not permit restrictions on fundamental rights other than by plenary legislation – which is subject to pre-enactment review for constitutionality. It does not permit restrictions by executive action (i.e. by regulations), the sole exception permitted by Article 15(1) and 15(7) being emergency regulations under the Public Security Ordinance because those are subject to constitutional controls and limitations (Thavaneethan v. Dayananda Dissanayake 2003: 98–9).

A key point to note here is that regulations made under a statute cannot be the basis for restricting a fundamental right unless such regulations relate to public security. This means that regulations that are aimed at protecting public health do not come within the confines of ‘law’ for the purposes of Article 15(7). The logical conclusion of this is that regulations made under the Quarantine and Prevention of Diseases Ordinance 1897 cannot be regarded as ‘law’ capable of limiting a fundamental right. In other words, if regulations under that
Ordinance have the effect of restricting a fundamental right, such a restriction cannot be regarded as one that is ‘prescribed by law’ for the purposes of Article 15(7) of the Constitution.

However, section 12 of the Quarantine and Prevention of Diseases Ordinance 1897 provides that ‘[a]ll regulations made under this Ordinance shall be published in the Gazette, and shall from the date of such publication have the same force as if they had been enacted in this Ordinance’. As such, one might posit that regulations made under the Ordinance should be regarded as having the same force as primary legislation. Does this mean that regulations under the Quarantine and Prevention of Diseases Ordinance 1897 can be regarded as ‘law’ for the purposes of Article 15(7)?

The courts of Sri Lanka have not directly addressed the question posed above. However, the following points are worth noting here. First, when one focuses closely on the definition of ‘law’ as set out in Article 170 of the Constitution, it broadly covers two categories, namely, ‘Acts of Parliament’ and ‘any law enacted by any legislature at any time prior to the commencement of the Constitution’. The Quarantine and Prevention of Diseases Ordinance 1897 comes within the second category, as it is a law enacted by a legislature prior to the operation of the 1978 Constitution. On the other hand, both the April 2020 and February 2021 Regulations, being regulations made after the commencement of the 1978 Constitution, cannot be regarded as Acts of Parliament. Nor can they be regarded as law enacted by any legislature, as these regulations were made by the executive arm of government.

Second, in Ram Banda v. RVDB 1971, albeit in a different context, the Supreme Court held that regulations made by a Minister under a statute are subject to judicial review even where the empowering statute provides that regulations shall have the same effect as if they had been enacted as part of the statute. In this case, the statute in question was the Industrial Disputes Act 1951, which provided as follows:

No regulation made under subsection (1) of this section or under subsection (2) of section 31A shall have effect until it is approved by Parliament and notification of such approval is published in the Gazette. Every regulation so approved shall be as valid and effectual as though it were herein enacted (Industrial Disputes Act 1951, section 39(2)).

Importantly, in this regard, Weeramanty J. observed:

I cannot subscribe to the view that the mere passage of a regulation through Parliament gives it the imprimitur of the legislature in such a way as to remove it from the purview of the courts through the operation of section 39(2) (Ram Banda v. RVDB 1971: 38).

Although a later decision of the Supreme Court overruled the decision in Ram Banda v. RVDB 1971, H. N. G. Fernando C.J. was careful to state that:

there is no necessity in this case to review the correctness of the opinion expressed in the judgment in Ram Banda’s case that ‘it is within, the competence of the Court to subject regulations to the ultra vires test’, despite the provisions of sub-section (2) of s.39 of the Act, and despite the fact that those regulations were approved by Parliament. (RVDB v. Sheriff 1971: 510)

The judicial decisions cited above indicate that even in circumstances where an empowering statute provides that regulations have the same effect as though they had been enacted as part of the statute itself, such regulations are not excluded from judicial review. This is so even where they had been placed before Parliament for approval. Thus, logic dictates
that regulations, such as the regulations made under the Quarantine and Prevention of Diseases Ordinance 1897, which did not even go through a process of Parliamentary approval (no such requirement is prescribed in the statute), cannot be regarded as having the same status as primary legislation or ‘law’ as defined in the Constitution.

Lastly, in Thavaneethan v. Dayananda Dissanayake 2003, the Supreme Court made it explicitly clear that regulations, other than those made under the law relating to public security, cannot restrict the operation of a fundamental right. This is because the Constitution itself provides for safeguards in respect of regulations concerning public security, so that they can be subject to suitable checks and balances before they come into effect. On the other hand, before ‘Acts of Parliament’ or ‘any law enacted by any legislature’ become law, their validity can be challenged through pre-enactment judicial review. As such, statutes are subject to suitable checks and balances before they come into force. In stark contrast, the April 2020 and February 2021 Regulations were not subject to any review process (unlike in the case of primary legislation) before they came into effect. While these regulations can be reviewed by way of the Court of Appeal’s writ jurisdiction or the fundamental rights jurisdiction of the Supreme Court, this comes only after the regulations come into full effect. Whereas the intent of restricting the meaning of ‘law’ in Article 15(7) of the Constitution to statutes (Acts of Parliament and legislation), except in the case of regulations concerning public security, is so that any restriction imposed on a fundamental right by statute could be reviewed before enactment.

In the circumstances, it is doubtful that the framers of the 1978 Constitution would have ever intended for regulations made under an old law to be regarded as ‘law’ by virtue of a strange provision in the empowering statute. If this interpretation is right, then the April 2020 and February 2021 Regulations are not restrictions to fundamental rights that are ‘prescribed by law’ and therefore not permitted under Article 15(7) of the Constitution.

4.2.2 Legitimate aim recognized by the Constitution

Assuming that the restrictions imposed by the April 2020 and February 2021 Regulations on burial rites can be regarded as ‘prescribed by law’ for the purposes of Article 15(7), there is a need to consider whether the restrictions are for a legitimate aim recognized by the Constitution (Sunila Abeysekera v. Ariya Rubasinghe 2000: 361). As noted before, the fundamental rights guaranteed by the Constitution may be restricted on certain specified grounds, which include public health.

In this regard, it must be noted that the April 2020 and February 2021 Regulations were regulations made in terms of sections 2 and 3 of the Quarantine and Prevention of Diseases Ordinance 1897. The Ordinance was enacted ‘to make provision for preventing the introduction into Sri Lanka of the plague and all contagious or infectious diseases and for preventing the spread of such diseases in and outside Sri Lanka’. It must also be noted that the April 2020 and February 2021 Regulations were promulgated in the midst of the COVID-19 pandemic, and their objective is to prevent the spread of a contagious virus. They do so by seeking to regulate the disposal of COVID-19 dead bodies. It cannot be disputed that preventing the spread of a contagious disease comes within the realms of protecting public health. Thus, it must be concluded that the regulations restrict the exercise of a fundamental right (that is, the right to bury the dead pursuant to one’s religious belief) for a legitimate aim recognized by the Constitution—namely, the protection of public health.

Importantly, however, the Supreme Court has held that:
Restrictions placed arbitrarily by those in authority for subjective reasons or on account of personal selectivity or idiosyncrasies [...] cannot be considered as either restrictions “prescribed by law” or restrictions having a “legitimate aim recognized by the Constitution” (Perera v. Balapatabendi 2005: 196).

In other words, the state must establish that any restriction imposed (in this case, by the April 2020 and February 2021 Regulations, read with the relevant Health Ministry directions and guidelines) on the exercise of a fundamental right (in this case, the right to manifest a religion or belief) is a justifiable encumbrance on the fundamental right. That is, the state must establish that the imposed restriction on burials must be in the interest of public health, which is a legitimate aim recognized by the Constitution (Perera v. AG 1992: 217–8).

4.2.3 Necessity

Establishing that a restriction on a fundamental right is in the interest of a legitimate aim recognized by the Constitution, in essence, requires the state to establish that the restriction is ‘necessary in a democratic state’ to achieve that stated aim (Sunila Abeysekera v. Ariya Rubasinghe 2000: 369). Although Article 15(7) does not expressly refer to such a requirement, the courts have introduced it in interpreting the phrase ‘in the interest of’ that appears therein. For instance, in the context of balancing the freedom of expression and national security, the Supreme Court has held:

Article 15(7) conditions the curtailment of the fundamental rights in the interests of national security, public order etc. In order that a law may be in the interest of national security, public order, there must be a proximate and reasonable nexus between say, (in the case of freedom of speech and expression) the nature of the speech prohibited and national security or public order [...]. A restriction can be said to be in the interests of security or public order only if the connection between the restriction and the security or public order is proximate and direct. Indirect or far-fetched or unreal connection between the restriction and security/public order would not fall within the purview of the expression in the interests of security/public order. (Perera v. AG 1992: 215)

In other words, the state must establish the necessity for the restriction imposed on the exercise of a fundamental right, which depends on the establishment of a proximate and reasonable nexus between the restriction and the constitutionally recognized object to be achieved by imposing the restriction. As regards the April 2020 and February 2021 Regulations, it is clear that their objective is to protect public health by containing the spread of COVID-19. However, it is for the state to establish that there is a proximate and reasonable nexus between that object (to prevent the spread of the virus) and the restriction imposed therein (the restrictions on the burial of COVID-19 victims). This needs to be established through proper scientific evidence.

Often, when fundamental rights and the public interest collide, the balancing exercise requires a thorough and detailed reference to all relevant scientific evidence so that a deciding authority can ensure that a factual basis exists before a right is restricted. Courts around the world have embraced this approach. For instance, the Singapore High Court, in describing its approach of balancing free speech rights (protected under Article14(1) of the Singapore Constitution) against competing public interests, has observed:

The touchstone of constitutionality in Singapore in relation to the curtailment of a right stipulated by Art 14 of the Constitution is whether the impugned legislation can be fairly considered “necessary or expedient” for any of the purposes specified in Art 14(2) of the Constitution. All that needs to be established is a nexus between the object of the impugned law and one of the
permissible subjects stipulated in Art 14(2) of the Constitution. In relation to any restriction impugned for unconstitutionality on this test, the Government must satisfy the court that there is a factual basis on which Parliament has considered it ‘necessary or expedient’ to do so (Chee Siok Chin v. Minister of Home Affairs 2005: para 49).

In weighing the scales, what is relevant is the most up-to-date evidence. More importantly, the deciding authority must engage in detail with that evidence (R v. Secretary of State for Health 2016: paras 29 and 405).

Thus, a reference has to be made to the scientific basis for the Government’s policy (as reflected in the April 2020/February 2021 Regulations) of imposing restrictions on the burial of COVID-19 victims to consider whether there is a proximate and reasonable nexus between the restrictions and the object they hope to achieve.

4.2.4 Scientific basis
As noted earlier on in this article, the Sri Lankan Government has claimed that its decision to mandatorily cremate the dead bodies of COVID-19 victims was based on the recommendations of a technical committee appointed by the Ministry of Health. However, to date, the Government has not published the technical committee’s recommendations. As such members of the public are unaware of the actual basis for the Government’s stance on the disposal of COVID-19 bodies. However, Professor Meththika Vithanage, a member of the technical committee, had published her views independently in an article on 7 April 2020 (Vithanage 2020). Although there is no real possibility of verifying whether Professor Vithanage’s views provided the basis for the technical committee’s recommendations, it is reasonable to assume that they would have at least been influential. After all, Professor Vithanage’s views are consistent with the Government’s overall approach to the disposal of COVID-19 dead bodies. Thus, Professor Vithanage’s published views warrant scrutiny, as it is likely to be the basis upon which the Government had reached its decisions concerning the disposal of COVID-19 bodies.

In her article, Professor Vithanage claims that the WHO guidelines:

suit temperate countries mainly, not tropical high-temperature high rainfall countries where we experience high decomposition rates and highly variable water table. This is where the local hydro-geological knowledge is essential to protect groundwater as well as forthcoming infection occurrence. Given the vulnerability of our groundwater aquifers, and lack of understanding about the behavior of COVID-19 virus, there can be a risk from dead bodies, septic waste or sanitary waste (Vithanage 2020).

Then, she goes on to conclude, ‘[h]ence, it is advisable to have careful measures in destroying the infected dead bodies, septic, and sanitary waste in proper conditions without provisioning chances for any future disease outbreak’ (Vithanage 2020). The claim is that burying bodies infected by COVID-19 could contaminate groundwater and become a source from which the virus could spread. However, her conclusion is problematic for the following reasons.

First, Professor Vithanage begins by stating, ‘[b]urial in any means causes soil contamination and then leads to groundwater pollution via the discharge of inorganic nutrients, nitrate, phosphate, ammonia, chlorides etc. and various microorganisms ’ (Vithanage 2020). However, it is common knowledge that viruses, such as COVID-19, are not regarded as organisms to begin with (Claverie and Abergel 2012: 189). This distinction is an important one, as viruses cannot survive without a host, and evidence suggests that ‘coronaviruses are
more rapidly inactivated in water and wastewater at ambient temperatures’ (Gundy et al. 2009). Therefore, Professor Vithanage’s statement reproduced above is seemingly non-aligned with her central thesis.

The issue of microbial/viral contamination of groundwater is not new. Interestingly, the first source Professor Vithanage cites in support of her views concludes that ‘[t]here are indications that the inactivation rate of viruses is the single most important factor governing virus transport and fate in the subsurface’ (Azadpour-Keeley and Ward 2005: 41). However, when the above finding is considered in light of a more recent peer-reviewed paper, it appears that the risk of the COVID-19 virus contaminating groundwater and remaining infectious is extremely remote in light of the climatic conditions in Sri Lanka:

The data available suggest that: i) CoV seems to have a low stability in the environment and is very sensitive to oxidants, like chlorine; ii) CoV appears to be inactivated significantly faster in water than non-enveloped human enteric viruses with known waterborne transmission; iii) temperature is an important factor influencing viral survival (the titer of infectious virus declines more rapidly at 23°C–25°C than at 4°C); iv) there is no current evidence that human coronaviruses are present in surface or ground waters or are transmitted through contaminated drinking-water (La Rosa et al. 2020).

Professor Vithanage also cites a peer-reviewed article dealing with the ‘Effects of Climate and Sewer Condition on Virus Transport to Groundwater’ (Gotkowitz et al. 2016). It appears that by doing so, she has attempted to draw a parallel between sewer systems and burial grounds—to claim that conditions at burial grounds could result in contamination of groundwater. While this analogy may be reasonable, what must be noted is that the same study makes the following finding:

Unexpectedly, a severe regional drought occurred during the initial months of this project, resulting in reduced infiltration through the vadose zone, an increase in soil temperature, and low water table elevation. We suggest that these conditions inhibited virus transport from sewers to the water table, resulting in a low virus detection rate, 3.7 per cent, compared to a 2008 study at some of the same sites and wells (Gotkowitz et al. 2016: 8502).

This finding is significant, as it opens up the possibility of using land in the dry zone of Sri Lanka, where the soil temperature is higher and the water table is lower, to bury COVID-19 victims.

Second, Professor Vithanage cites a peer-reviewed paper on the ‘Impact of cemeteries on groundwater contamination by bacteria and viruses’ (Żychowski and Bryndal 2015). However, this paper does not claim that the bodies of victims infected with a virus should not be buried. It merely makes a number of recommendations on the location and nature of cemeteries and recommends precautions that those who handle dead bodies should take. As such, this reference does not support her claim that dead bodies of COVID-19 victims should not be buried.

Professor Vithanage also cites a report of the WHO’s regional office for Europe, which deals with the impact of cemeteries on the environment and public health. However, the report merely provides recommendations pertaining to factors that must be taken into account in determining places to be used as cemeteries—and in no particular sense suggests that bodies of those who die of viral infections should not be buried. The WHO’s report goes on to state that ‘viruses are fixed to soil particles more easily than bacteria, and they
are not carried into groundwaters in large numbers’ (WHO 1998: 8), which significantly dilutes her claim about viral contamination of groundwater.

Professor Vithanage cites two further studies that seek to link cemeteries as a source of groundwater contamination. In the first study, the authors observe that ‘the most critical parameters when assessing the pollution potential of a burial ground are inhumation depth, geological formation, depth of the water table, density of inhumations, soil type and climate’ (Oliveira et al. 2013). Again, this paper makes recommendations of factors that authorities must consider before selecting areas to be designated as cemeteries. Nothing in this paper suggests that bodies of those who die of viral infections such as COVID-19 ought not to be buried. The second study focuses solely on cemeteries as a source of bacterial contamination of groundwater (Abia et al. 2019). Therefore, this study does not help Professor Vithanage’s claim as regards the COVID-19 virus.

Finally, Professor Vithanage cites a study titled ‘Infectious disease risks from dead bodies following natural disasters’ (Morgan 2004). However, in this study, the author observes:

Disposal of bodies should respect local custom and practice where possible. When there are large numbers of victims, burial is likely to be the most appropriate method of disposal. There is little evidence of microbiological contamination of groundwater from burial (Morgan 2004).

It is unclear how Morgan’s study supports Professor Vithanage’s claim.

The several points set out above demonstrate grave errors and contradictions in Professor Vithanage’s claim against the burial of COVID-19 victims in view of the potential risk of groundwater contamination. Indeed, if Professor Vithanage’s claim forms the basis for, or could have influenced, the Sri Lankan Government’s policy on the disposal of COVID-19 dead bodies, then the policy is extremely difficult to justify.

Therefore, it is not surprising that the Ministry of Health appointed a new committee of experts comprising virologists, microbiologists and immunologists, headed by Professor Jennifer Perera, to determine the appropriate policy to manage the disposal of COVID-19 dead bodies. The newly appointed committee handed over its recommendations to the Ministry on 28 December 2020 (Ranasinghe 2021). The committee had recommended that the original policy on the disposal of COVID-19 dead bodies should be revised to include both cremation and burial while adhering to specified safety precautions (Perera et al. 2020).9 Notably, the expert committee’s recommendations provided that:

SARS-CoV-2 virus infection is not a water-borne disease. Contamination of water by residual virus in the corpse leaking into the water table through layers of soil to reach levels of infectious dose is very remote as any residual infectious virus continues to die. Furthermore, any residual infectious virus that reaches the water table gets diluted in the large volume of water. Therefore, the amount of virus in water is insufficient to lead to infection either by ingestion, contact with mucous membranes, or through contaminated hands as the minimal infectious dose of the virus is quite high. For the same reasons, there also has been no evidence of transmission through water contamination from burial by SARS or influenza. However, water contamination of the body could be avoided to a large extent by wrapping the body using virus impervious material such as use of non-biodegradable body bags (Perera et al. 2020: para (g)).

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9 The report of the expert committee headed by Professor Jennifer Perera was not made public by the Government. However, a leaked copy of the report was circulated in the media.
What is crucial to note here is that nothing stated above is new knowledge. In fact, some of the sources cited by Professor Vithanage in her article published in April 2020 (before the Government decided to adopt its cremation-only policy) support the above finding of the expert committee appointed in December 2020. In other words, the Government’s decision, as reflected in its April 2020 Regulations, to adopt a policy to cremate all COVID-19 dead bodies could not have been supported by scientific evidence known at that time. The policy was based on mere conjecture, which could have been easily dismissed if the body of scientific literature had been consulted and properly evaluated.

4.2.5 Proportionality
The Sri Lankan Supreme Court has held that a restriction on fundamental rights that does not have a reasonable or proximate nexus to the object sought to be achieved by imposing the restriction should be regarded as ‘unconstitutionally over-broad’ (Perera v. AG 1992: 230). Therefore, in determining the constitutionality of a restriction imposed on fundamental rights, it becomes necessary to consider whether the restriction is a proportionate one. A restriction that is not proportionate to the legitimate aim pursued cannot be regarded as necessary in the interest of one or more of the stated objectives in Article 15(7) (Sunila Abeyesekera v. Ariya Rubasinghe 2000: 375).

The doctrine of proportionality is a well-known tool that is employed in balancing competing rights and interests. It has been noted that ‘the doctrine of proportionality, provides that a court of review may intervene if it considers that harms attendant upon a particular exercise of power are disproportionate to the benefits sought to be achieved’ (Wickremasinghe v. De Silva 2001: 340; Jayasundera v. AG 2009: 38). Importantly, albeit in the context of free speech rights, the Supreme Court has observed:

“Necessity” and, hence, the legality of restrictions imposed under Article 15(7) on freedom of expression, depend upon a showing that the restrictions are required by a compelling governmental interest. If there are various options to achieve this objective, that which least restricts the right protected must be selected. Even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental liberties of citizens when that end can be narrowly achieved (Sunila Abeyesekera v. Ariya Rubasinghe 2000: 375–6).

In other words, if less restrictive but equally practical and effective mechanisms exist that could achieve the objectives underlying any restriction of a fundamental right, then the least restrictive measure must be adopted. Only then could the restriction be regarded as a lawful restriction of the fundamental right in question. Thus, as regards the April 2020 Regulations, which mandated the cremation of bodies infected by COVID-19, the question must be posed whether cremation was the only means of ensuring that the virus did not spread from infected dead bodies.

Based on the analysis above of the scientific literature, it should be patently clear that the April 2020 Regulations, which imposed a complete ban on the burial of COVID-19 dead bodies, cannot be regarded as having a proximate and reasonable nexus to the object of preventing the spread of the virus. At the time the decision was made, there was no evidence that the burial of COVID-19 victims would result in the contamination of groundwater or the surroundings. On the contrary, the body of scientific evidence should have pointed the authorities in favour of permitting burials with suitable safeguards. As such, the measure imposing a cremation-only policy was no doubt disproportionately overbroad
to the objective of protecting public health. For that reason, the April 2020 Regulations could not have been a permitted restriction to the rights enshrined in Article 14(1)(e) of the Constitution.

As regards the February 2021 Regulations, read with the Ministry of Health’s subsequent directions, according to which the Government approved COVID-19 burials in Iranathivu and Oddamavadi, the question must be posed whether limiting burials to those locations is the only means of ensuring the safe burial of COVID-19 victims. The Government has not published its reasons for choosing Iranathivu, although it is very likely that the island was chosen in view of its location outside of the mainland. On the other hand, Oddamavadi was chosen because its location is ‘somewhat hilly’ with ‘no issues with regard to water contamination’ (Jayamanne 2021). But is the choice to limit COVID-19 burials to Iranathivu and Oddamavadi a proportionate response?

In this regard, it must be emphasized that the expert committee headed by Professor Perera had expressly confirmed that the COVID-19 virus ‘is not a water-borne disease. Contamination of water by residual virus in the corpse leaking into the water table through layers of soil to reach levels of infectious dose is very remote as any residual infectious virus continues to die’ (Perera et al. 2020). Also, a recent guidance document of the International Federation of Red Cross and Red Crescent Societies (IFRC), International Committee of the Red Cross (ICRC) and the WHO (published in July 2020) provides that:

A person who has died from COVID-19 may be buried in an existing public cemetery or community burial ground. However, where mortality is expected to be high, local authorities and affected communities may assign specific areas in which to bury those who die (IFRC, ICRC and WHO 2020: 9).

In other words, according to experts, bodies of COVID-19 victims can be buried in existing cemeteries and burial grounds unless higher mortality rates require specific areas to be designated for burial. Indeed, the report of the expert committee headed by Professor Perera sets out, among other things, the following precautionary measures as regards the burial of COVID-19 victims:

[...] 6. The cremation or burial should be carried out within 24 hours, once the order for disposal of the body is given. 7. The body should be laid inside a double layered body bag, prior to placing in the coffin. The body bags should be of 300mm thickness, padded with absorbent material, leak proof and non-biodegradable. [...] 15. The bottom of the grave should be 1.5m from the ground surface and 1.2m above the water table. The distance between burial site and field drains should be 10 m minimum. The distance between burial site and drinking wells, boreholes, and wells should be 250 m minimum. The distance between burial site and springs and water courses should be 30 m minimum as per current recommendations by global experts.

The burial sites chosen in Iranathivu and Oddamavadi are likely to fulfil the criteria set out in item 15 above (this is an assumption that we are compelled to make). However, a few points warrant consideration here in assessing the proportionality of the Government’s choice.
First, the burial of COVID-19 victims can take place in existing public cemeteries or community burial grounds. There is no requirement to assign/designate specific areas to bury COVID-19 victims unless mortality rates are high. However, the Government’s decision to designate Iranathivu and Oddamavadi as burial grounds was not for that reason. Instead, it was on the basis that the sites would not give rise to water contamination issues. Second, it is unlikely that Iranathivu and Oddamavadi are the only sites in the entire country where burials can take place without risk of water contamination if such a threat even exists. According to a memorandum, which was submitted to the Minister of Health in April 2020, the All Ceylon Jammiyyathul Ulama (ACJU), Colombo District Masjid Federation (CDMF) and District Masjid Federations (DMF) had identified burial grounds in every district of the country in which COVID-19 victims could be safely buried with no risk of contamination (Dawood et al. 2020). This demonstrates a real possibility of utilising existing burial grounds to dispose of the bodies of COVID-19 victims, which the Government should have explored. Third, Iranathivu and Oddamavadi are not easily accessible, as they are located close to 300 km from areas where most COVID-19 deaths are reported in the country. This is likely to give rise to practical challenges in the transportation of COVID-19 bodies from those parts of the country, giving rise to a greater risk of transmission of the virus from bodies and those who handle them during transport. Lastly, the decision to designate burial sites that are distant, remote and difficult to access (when sites that are equally suitable but more easily accessible are likely to be available) must be weighed against its impact on the grieving families. After all, families of those who are buried in these designated sites will be significantly inconvenienced and even at a later date, will find it challenging to visit the graves of their loved ones to pay their last respects and for emotional/psychosocial healing.

Accordingly, the Government’s decision to designate Iranathivu and Oddamavadi as specific sites for the burial of COVID-19 victims, at least on the basis upon which the choice was made, is likely to be disproportionately overbroad to the objective of protecting public health. For that reason, it is doubtful that the February 2021 Regulations, read with the subsequent Health Ministry directions, could be regarded as a permitted restriction to the rights enshrined in Article 14(1)(e) of the Constitution. In sum, although the Sri Lankan Government has chosen to retract its almost year-long ban on COVID-19 burials, its current approach is no less inconsistent with the Constitution’s fundamental rights framework.

5. Conclusion

The COVID-19 health crisis is a real and serious threat to public health. The international community, governments and citizens all have a collective role to play to defeat this natural enemy. However, we must do so without losing our humanity. This particularly applies in respect of decisions made as regards the disposal of bodies of COVID-19 victims. The analysis undertaken above suggests that there is significant doubt as to whether the practice of cremating (and excluding the burial of) bodies of COVID-19 victims is consistent with the fundamental rights framework of the Sri Lankan Constitution on both legal and scientific principles. Thus, for the period in which the Sri Lankan Government had adopted its cremation-only policy, it could not have amounted to a restriction permitted under Article 15(7) of the Constitution on the right to manifest one’s religion or belief guaranteed under Article 14(1)(e). Indeed, the outright dismissal of the petitions filed in the country’s Supreme Court that challenged the constitutionality of the Government’s policy was a
grave denial of justice to the Sri Lankan Muslim community. This is particularly so, as the Supreme Court’s dismissal came after a decision of the Bombay High Court in neighbouring India that expressly rejected the claim that COVID-19 could spread as a result of burying infected bodies (Gokhale 2020). Although the Government has now retracted its cremation-only policy and has permitted the burial of COVID-19 victims, its choice to restrict such burials to Iranathivu and Oddamavadi cannot be regarded as a restriction that falls within the boundaries of Article 15(7) of the Constitution. If the Sri Lankan Government is to bring its policy within the boundaries of a permitted restriction under Article 15(7) of the Constitution, it must approve the burial of COVID-19 victims in sites that are more accessible while adhering to the requirements set out by the experts.

While we must strive to achieve the greater public good of suppressing the virus, we must not unduly disregard the rights of citizens, including those belonging to minority communities. It is crucial for those with the authority to decide on matters such as this to do so objectively and scientifically and, more importantly, to be transparent and make genuine efforts to engage with the community when such decisions are made. It is necessary to encourage open dialogue between the Government and the community so that practical solutions, if not compromises, may be reached on matters of national and public interest. Government policies, particularly when they have the effect of restricting a fundamental right, must be based on a proper scientific basis. Such policies should not be based on mere speculation or conjecture. Nor should they be adopted to promote political agendas.

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